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## Proof of Fault in Media Defamation Litigation

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### Recommended Citation

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# VANDERBILT LAW REVIEW

VOLUME 38

MARCH 1985

NUMBER 2

## Proof of Fault in Media Defamation Litigation

*Lackland H. Bloom, Jr.\**

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## I. INTRODUCTION

At common law, defamation was a strict liability tort. A defendant could be held liable for publishing a false and defamatory statement absent any evidence that the defendant suspected the statement's falsity or even its defamatory potential, and despite the fact that the defendant used reasonable care in attempting to ascertain the truth.<sup>1</sup> The plaintiff only had to prove fault by the publisher when the plaintiff was attempting to overcome a qualified privilege<sup>2</sup> or establish the liability of a secondary publisher such as a news vendor.<sup>3</sup> Since the United States Supreme Court's decision in *New York Times v. Sullivan*,<sup>4</sup> however, proof of fault has become a central element in many defamation cases. In the landmark *Sullivan* case, the Court held that the first amendment requires a plaintiff who is a public official to establish by clear and convincing evidence that the defendant published the defamatory statement with "actual malice." The *Sullivan* Court defined actual malice as knowledge of the falsity of the statement or reckless disregard for its truth.<sup>5</sup>

In *St. Amant v. Thompson*<sup>6</sup> the Court indicated that the focus of the actual malice standard was subjective in nature and that, in order to establish "reckless disregard for the truth," the plaintiff must show that the defendant published the defamatory statement

1. W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS § 113, at 804 (5th ed. 1984); L. ELDRIDGE, THE LAW OF DEFAMATION § 5, at 14-15 (1978).

2. See L. ELDRIDGE, *supra* note 1, § 93, at 508-09. To defeat a qualified privilege, the plaintiff might have had to establish that the defendant's publication went beyond the scope of the privilege, or was made with reckless disregard for the truth, or with ill will, or with negligence, depending upon the particular privilege and jurisdiction.

3. *Id.* § 45, at 234-35.

4. 376 U.S. 254 (1964).

5. *Id.* at 279-80. The Court's unfortunate characterization of its standard of proof as "actual malice" resulted in much unnecessary confusion with the traditional common-law concept of malice as ill will. See, e.g., *Henry v. Collins*, 380 U.S. 356, 357 (1965). Because the term is still used with sufficient frequency, however, "actual malice" will be employed in the course of this Article as a convenient shorthand reference to the *Sullivan* standard of fault.

6. 390 U.S. 727, 731 (1968).

in spite of serious doubts as to its truth. The focus on the defendant's fault became even more pronounced in 1967 when the Court extended the actual malice standard from public officials to public figures in *Curtis Publishing Co. v. Butts*.<sup>7</sup> Finally in 1974, in *Gertz v. Robert Welch, Inc.*,<sup>8</sup> the Court held that a state may not permit a plaintiff who is neither a public official nor a public figure<sup>9</sup> to recover in a defamation action against the press<sup>10</sup> absent proof that the defendant was at fault.<sup>11</sup> Although *Gertz* did not explicitly indicate, lower courts and commentators have assumed that, at the very least, the fault requirement pertains to the defendant's failure to discover the falsity of the statement,<sup>12</sup> although it may extend

7. 388 U.S. 130 (1967). The companion case of *Associated Press v. Walker* addressed the same issue. *Id.*

8. 418 U.S. 323 (1974).

9. In *Gertz* the Court explained that private figures are entitled to greater protection against defamatory falsehoods than public figures because they have not voluntarily entered the public eye and because generally they do not have as much access to the media for purposes of responding to the charge. *Id.* at 342-45.

While *Gertz* suggested that a person may become a public figure for all purposes as a result of power and influence or become a public figure involuntarily, the Court acknowledged that typically a person would become a public figure for a limited purpose by thrusting himself into the vortex of a specific public controversy to influence its resolution. *Id.* at 344-45; see also *id.* at 351-52 (Court's application of its public figure analysis to the facts). For further elaboration on the public figure/private figure distinction, see *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 165-68 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 134-36 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 454-56 (1976). See also *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980) (thoughtful attempt to elaborate on and clarify public figure analysis).

10. By its terms the *Gertz* analysis was limited to the press as defendants. There has been much debate over whether the Court's modifications of defamation law apply to nonmedia defendants as well. The better and majority view would have courts apply the same standard because the threat to first amendment values exists in the private context as well. See *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976), for a useful discussion of this controversy. The issue is presently under consideration by the United States Supreme Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 143 Vt. 66, 461 A.2d 414, cert. granted, 104 S. Ct. 389 (1983).

11. In the interim between *Butts* and *Gertz* the plurality opinion of Justice Brennan in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), held that the first amendment required extension of the actual malice standard beyond public figures to publications concerning matters of public interest. *Id.* at 43-44. The *Gertz* Court explicitly rejected this position, but did indicate that states were free to adopt the *Rosenbloom* plurality approach as a matter of state law. 418 U.S. at 346-47. A few states have adopted the *Rosenbloom* approach. See *infra* note 14 and accompanying text.

*Gertz* also modified the law of damages as traditionally applied in the area of defamation by holding that the plaintiff could only recover for actual proven injuries and the Court suggested that punitive damages would not be recoverable on a plaintiff's showing of mere negligence. 418 U.S. at 349-350.

12. See *Wilson v. Scripps-Howard Broadcasting*, 642 F.2d 371, 375 (6th Cir.), cert. dismissed, 454 U.S. 962 (1981); RESTATEMENT (SECOND) OF TORTS § 580B comment c (1976).

to the failure to appreciate the defamatory nature of the statement as well.<sup>13</sup> Likewise, *Gertz* did not specify the degree of fault that must be shown although most states have assumed that, at a minimum, a state must require the plaintiff to prove that the defendant was negligent.<sup>14</sup> Since *Gertz* proof of fault has become a significant issue in virtually any defamation case against the press once a prima facie case is otherwise established.

In both *New York Times v. Sullivan*<sup>15</sup> and *Gertz v. Robert Welch, Inc.*<sup>16</sup> the Court injected the element of fault into defamation law in order to protect first amendment values. Concluding that a certain amount of error is inevitable in reporting and publishing, the Court determined that when the allegedly defamatory statements concerned a public official or public figure, constitutional protection was necessary to ensure the press sufficient "breathing space" and thereby diminish the potential for self-censorship that might result from fear of liability or, arguably, from the threat of sustained litigation. When the defamatory statements concerned a private individual, the Court concluded in *Gertz* that the state's interest in protecting reputation was entitled to greater deference and, hence, the application of the "actual malice" stan-

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13. The *Gertz* majority noted: "Our inquiry would involve considerations somewhat different . . . if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." 418 U.S. at 348.

14. See *Gazette, Inc. v. Harris*, \_\_\_ Va. \_\_\_, 325 S.E.2d 713, 726 n.3 (1985) (recent compilation of the states opting for a negligence standard). A few states have adopted the *Rosenbloom* plurality approach of requiring proof of actual malice with respect to defamatory statements regarding matters of public interest. See, e.g., *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 679, 321 N.E.2d 580, 586 (1974), *cert. denied*, 424 U.S. 913 (1976). Initially, Colorado adopted the *Rosenbloom* public interest approach but held that the concept of "reckless disregard for the truth" would be measured by an objective common-law standard instead of the subjective focus of *St. Amant*. *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 97-99, 538 P.2d 450, 456-57, *cert. denied*, 423 U.S. 1025 (1975). Recently, however, Colorado replaced the objective standard with the subjective *St. Amant* approach, thereby returning to the *Rosenbloom* plurality approach. *Diversified Management v. Denver Post*, 653 P.2d 1103, 1106 (Colo. 1982).

New York applies its own unique standard of fault in cases concerning private individuals when the content of the published matter is "arguably within the sphere of legitimate public concern." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975). The New York courts require plaintiffs to prove that the "publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Id.* Basically, this is a gross negligence test, somewhat similar to that propounded by Justice Harlan as the proper standard for public figure cases in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). See *infra* notes 348-55 and accompanying text.

15. 376 U.S. 254, 278-79 (1964).

16. 418 U.S. 323, 340-41 (1974).

dard was not warranted. The media's need for "strategic" protection, however, required the elimination of strict liability even in an action by a private plaintiff.<sup>17</sup>

From the outset the reaction to the requirement of an element of fault in the law of defamation has been mixed. On the one hand, some judges and commentators have argued that anything short of an absolute privilege is insufficiently protective of the press<sup>18</sup> while others have maintained that the subjective actual malice test places an all but insurmountable barrier in the path of the defamation plaintiff.<sup>19</sup> Few critics have questioned the wisdom of applying the actual malice standard to public officials although some have argued that the standard is too stringent when applied to public figures.<sup>20</sup> Likewise, one Supreme Court Justice contended that the introduction of the negligence concept into defamation law should be considered a major setback for plaintiffs<sup>21</sup> while other justices and some critics have maintained that the negligence standard is actually a blow to the press and first amendment values.<sup>22</sup> This latter thesis is based on the proposition that a negligence standard will provide insufficient clarity and certainty to avoid self-censorship by the press because there are no developed legal standards of due care in journalism, and negligence analysis, by its very nature, is ad hoc and factually oriented, thereby maximizing the unreviewable discretion of the jury.<sup>23</sup> If the press must fear ad hoc, arbi-

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17. *Id.* at 348-55.

18. See *New York Times v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring); *id.* at 299 (Goldberg, J., concurring); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 537 (1970); see also Policy Statement of the American Civil Liberties Union on Defamation Liability (1982), discussed in Cranberg, *ACLU: Second Thoughts on Libel*, COLUM. J. REV., Jan.-Feb. 1983, at 42.

19. See, e.g., L. ELDREDGE, *supra* note 1, § 51, at 270-71.

20. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154-55 (1967) (Harlan, J.); Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905 (1984); cf. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RESEARCH J. 521, 581-82 (affording greater protection for reputation of public figures than for that of public officials is not inconsistent with the checking value theory of the first amendment).

21. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 375-76 (1974) (White, J., dissenting).

22. See *id.* at 360 (Douglas, J., dissenting); *id.* at 366-69 (Brennan, J., dissenting); Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 425, 460, 464 (1975); Frakt, *Defamation Since Gertz v. Robert Welch, Inc.*; *The Emerging Common Law*, 10 RUT. CAM. L.J. 519, 549 (1979); Franklin, *What Does Negligence Mean in Defamation Cases?*, 6 COM./ENT. L.J. 259, 276-81 (1984) [hereinafter cited as Franklin, *Negligence*]; Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 301-02.

23. See *Gertz*, 418 U.S. at 360 (Douglas, J., dissenting); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-13, at 642-46 (1977); Ashdown, *Gertz and Firestone: A Study in*

trary, irrational, and quite possibly punitive jury verdicts, the very threat of protracted litigation along with frequent substantial damage awards will be sufficient to chill aggressive reporting and thereby impede the flow of information to the public.<sup>24</sup>

Others have disagreed with the above analysis, however, and have contended that injection of the negligence standard into defamation litigation, along with the *Gertz* Court's adjustments to recoverable damages,<sup>25</sup> constitutes a reasonably good accommodation of the first amendment free press values with the state interest in protecting reputation.<sup>26</sup> Thus, in the immediate wake of *Gertz*, one commentator argued that the negligence standard would function effectively in the journalism context, that some guidance already existed based on professional standards, and that further guidelines could be developed on a case by case basis so long as the courts made an effort to articulate their reasoning clearly when ruling on summary judgment or reviewing the sufficiency of the evidence on the negligence issue.<sup>27</sup>

Twenty years have passed since *Sullivan* and ten since *Gertz*. There has been a great deal of defamation litigation during this period with no sign of abatement.<sup>28</sup> Several recent cases concerning the proof of fault issue, including litigation brought by William Tavoulareas,<sup>29</sup> General Westmoreland,<sup>30</sup> and General Sharon<sup>31</sup>

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*Constitutional Policymaking*, 61 MINN. L. REV. 645, 673 (1977).

24. Anderson, *supra* note 22, at 430-41; Ashdown, *supra* note 23, at 673.

25. See *supra* note 11.

26. Several state court decisions have applauded the *Gertz* reasoning on the proof of fault issue. See, e.g., *Gazette, Inc. v. Harris*, \_\_\_ Va. \_\_\_, 325 S.E.2d 713, 724-26 (1985); *Miami Herald v. Ane*, 458 So. 2d 239, 242 (Fla. 1984); *Troman v. Wood*, 62 Ill. 2d 184, 192-99, 340 N.E.2d 292, 296-99 (1976); *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 448-49, 546 P.2d 81, 86-87 (1976); *Denny v. Mertz*, 106 Wisc. 2d 636, 651-54, 318 N.W.2d 141, 148-50, *cert. denied*, 459 U.S. 883 (1982). See generally Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 250-68 (1976) (arguing that a simple negligence standard is both appropriate and practical).

27. Robertson, *supra* note 26, at 250-68.

28. See, e.g., Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. BAR FOUND. RESEARCH J. 795 [hereinafter cited as Franklin, *Litigation*]; Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. BAR FOUND. RESEARCH J. 455 [hereinafter cited as Franklin, *Winners*]; Henry, *Journalism Under Fire*, TIME, Dec. 12, 1983, at 76; Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 1-4 (1983); Kaiser, *When Reporters Go Too Far*, NEWSWEEK, Oct. 25, 1982, at 94; Lauter, *Libel Suits: New Wave is Predicted*, NAT'L L.J., June 21, 1982, at 1; Tybor, *The Libel War Escalates*, NAT'L L.J., Apr. 21, 1980, at 1; Carley, *As TV News Gets More Aggressive, It Draws More Suits*, WALL ST. J., Jan. 21, 1983, at 1, col. 1.

29. *Tavoulareas v. Washington Post Co.*, 759 F.2d 90 (D.C. Cir. 1985). For a discussion of *Tavoulareas*, see Hanson, *What Went Wrong at the Washington Post*, COLUM. J. REV., Jan.-Feb. 1983, at 31; Pack, *Inside the Washington Post*, WASHINGTONIAN, Dec. 1982, at 144;



have received widespread publicity. The time is ripe to examine this growing body of case law to determine how the courts are handling the issue of proof of media defendants' fault.<sup>32</sup>

Part II of this Article analyzes the relatively large body of precedent addressing the issue of proof of actual malice. For ease of analysis, the various factors that courts have relied on in finding or rejecting an inference of actual malice will be considered and evaluated individually. Part II concludes with an attempt to discern some common factual patterns emerging from the case law and an evaluation of the development of the precedent to date. Part III of this Article employs factor by factor analysis to the case law addressing proof of negligence as well as those cases addressing proof of gross irresponsibility under the New York standard.<sup>33</sup> In addition, because negligence analysis presupposes that the factfinder will take into account the defendant's efforts to conform to a reasonable care standard, reference is made to the journalism profession's practices and customs pertaining to discovery and publication of accurate information as these practices relate to developing case law issues. Part III also concludes with an attempt to discern common factual patterns in the case law and an evaluation of the present state of the law.

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Brill, *Inside the Jury Room at the Washington Post Libel Trial*, AM. LAW., Sept. 1981, at 1,32.

30. See *Westmoreland v. Columbia Broadcasting Sys.*, 596 F. Supp. 1170 (S.D.N.Y. 1984); see also Press, *Westmoreland Takes on CBS*, NEWSWEEK, Oct. 22, 1984, at 60; Bruck, *The Soldier Takes the Stand*, AM. LAW., Jan.-Feb. 1985, at 13; Bruck, *The Mea Culpa Defense*, AM. LAW., Sept. 23, 1983, at 82. General Westmoreland decided to drop his suit prior to submission to the jury. N.Y. Times, Feb. 18, 1985, at 1, col 6.

31. See *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984); see also Kaplan, *The Judge's Postmortem of the Sharon Libel Case*, NAT'L L.J., Mar. 18, 1985, at 1; Brill, *Say It Ain't So Henry*, AM. LAW., Jan.-Feb. 1985, at 1. The jury found that the statement in issue was false and defamatory but that it was not published with actual malice. N.Y. Times, Jan. 25, 1985, at 1, col.2.

32. This Article makes no attempt to analyze the distinct problem of proving fault of a nonmedia defendant in defamation litigation. For preliminary surveys of the treatment of proof of media fault following *New York Times v. Sullivan* and *Gertz v. Robert Welch, Inc.*, see R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 210-26, 252-60 (1980); Frakt, *supra* note 22, at 537-49, 554-60; Spencer, *Establishment of Fault in Post-Gertz Libel Cases*, 21 ST. LOUIS U.L.J. 374 (1977); see also Franklin, *Negligence, supra* note 22, (recent discussion of proof of negligence).

33. See *supra* note 14.

## II. ACTUAL MALICE

A. *Clear and Convincing Evidence*

Proof of actual malice may be distinguished from proof of negligence in that actual malice must be established by "clear and convincing evidence" while negligence need not be. Arguably, when the Supreme Court spoke of "convincing clarity" in *New York Times v. Sullivan*,<sup>34</sup> it was merely emphasizing that the appellate courts must review the records carefully in public official defamation cases, given the threat to first amendment values. Most courts now, however, also require the plaintiff to prove, to the initial factfinder, the existence of actual malice by "clear and convincing evidence" to justify a verdict.<sup>35</sup> In other words, "clear and convincing evidence" is an increased burden of proof that the plaintiff must satisfy. Presumably, this burden falls somewhere between proof by a preponderance of the evidence and proof beyond a reasonable doubt.<sup>36</sup> An instruction on clear and convincing evidence may mean very little to a jury.<sup>37</sup> The difference the heightened burden of proof makes to a judge sitting as factfinder or to an appellate court is difficult to determine. There are many cases in which a decision against the plaintiff seems to have been influenced by this standard, in that the court indicated that the plaintiff perhaps came close to establishing a jury issue on actual malice but certainly not to a clear and convincing degree,<sup>38</sup> or at least that the convincing clarity standard significantly increases the plain-

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34. 376 U.S. 254, 285-86 (1964).

35. See R. SACK, *supra* note 32, at 225.

36. *Id.* at 225-26.

37. *Id.* at 225.

38. See, e.g., *Long v. Arcell*, 618 F.2d 1145, 1148 (5th Cir. 1980) (affirming j.n.o.v. for defendant because credibility conflict could support verdict for plaintiff by preponderance but not by clear and convincing evidence), *cert. denied*, 449 U.S. 1083 (1981); *Buckley v. Littell*, 539 F.2d 882, 895 (2d Cir. 1976) (district court's interpretation of allegedly libelous document was permissible but not by "clear and convincing evidence"), *cert. denied*, 429 U.S. 1062 (1977); *Firestone v. Time, Inc.*, 460 F.2d 712, 721 (5th Cir.) (reversing verdict for defendant when record failed to show proof of reckless disregard by "clear and convincing proof greater than a preponderance"), *cert. denied*, 409 U.S. 875 (1972); *Miss America Pageant, Inc. v. Penthouse Int'l, Ltd.*, 524 F. Supp. 1280, 1287 (D.N.J. 1981) (editor's questioning may suggest an awareness that story contained false statements about plaintiff but not clear and convincing proof); *Lexington Herald Leader v. Grave*, 9 Media L. Rep. (BNA) 1065, 1071 (Ky. 1982) (reversing verdict for plaintiff when plaintiff's "evidence lacks the convincing clarity which the constitutional standard requires"), *cert. denied*, 104 S. Ct. 2342 (1984).

tiff's burden.<sup>39</sup> The Supreme Court recently reendorsed "clear and convincing" evidence as the constitutionally mandated standard of appellate review of the record in public figure defamation cases in *Bose v. Consumers Union of the United States, Inc.*<sup>40</sup> However uncertain its operation, the clear and convincing standard does appear to provide the defendant with a significant advantage in a fair number of cases.

### B. Knowledge of Falsity

*New York Times v. Sullivan* defined actual malice as "knowledge that [a statement] was false or reckless disregard for whether it was false or not."<sup>41</sup> The clearest showing of fault under the *New York Times* standard would be proof that the publisher knew that a defamatory statement was false but published it despite such knowledge and without qualification. A court, however, seldom is able or willing to find knowledge of falsity to a clear and convincing degree. Doubtlessly, this failure reflects the fact that it is quite unusual for the press to publish a statement with knowledge of its falsity.<sup>42</sup> Moreover, it is difficult for a plaintiff to establish clearly the state of the defendant's knowledge with respect to the truth of the statement except in those rare instances in which there has been some objective contemporaneous indication. Finally, in even the most egregious cases, it is simply easier for the court to conclude that the evidence clearly supports a finding of reckless disregard for the truth than to label the defendant an outright liar.

If any record is capable of supporting an inference that the

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39. See *Tucci v. Guy Gannett Publishing Co.*, 464 A.2d 161, 166 (Me. 1983) ("Plaintiff's burden is a heavy one; actual malice must be proved with 'convincing clarity.'"); *Whitmore v. Kansas City Star Co.*, 499 S.W.2d 45, 51 (Mo. App. 1973) (plaintiff did not come close to meeting "weighty burden of 'clear and convincing' proof"); *Fremont Energy v. Seattle Post-Intelligence*, 9 Media L. Rep. (BNA) 1569, 1574 (W.D. Wash. 1982) ("no evidence that comes even near to showing with convincing clarity" that article was published with serious doubts as to the truth); *McMurray v. Howard Publications, Inc.*, 612 P.2d 14, 18 (Wyo. 1980) ("A subjective awareness of probable falsity cannot be demonstrated under the standard of 'clear and convincing' evidence by showing that the publisher and the plaintiff disagreed with respect to their perceptions of events which they both observed.").

40. 104 S. Ct. 1949, 1965 (1984). In *Tavoulareas v. Washington Post Co.*, the majority argued that *Bose* requires an appellate court to apply the clear and convincing evidence standard only to the ultimate conclusion of "actual malice" rather than to each preliminary finding of fact. 759 F.2d 90, 107-09 (D.C. Cir. 1985). Judge Wright disagreed in dissent. *Id.* at 146-50.

41. 376 U.S. 254, 280-81 (1964).

42. See F. BASKETTE, J. SISSORS & B. BROOKS, *THE ART OF EDITING* 134 (3d ed. 1977) ("Few libels are deliberate. Nearly all result from erroneous reporting, misunderstanding of the law or careless editing.").

defendant published the defamatory statements with knowledge of their falsity, it is the record established in *Carson v. Allied News Co.*<sup>43</sup> In *Carson* the Court of Appeals for the Seventh Circuit concluded that there was sufficient evidence of actual malice to withstand summary judgment for the defendant when the plaintiff showed that the defendant tabloid had completely fabricated defamatory quotations and had printed defamatory allegations that were flatly contradicted by a prior publication which had served as the sole source for defendant's article.<sup>44</sup> Even on this record, however, the *Carson* court seemed hesitant to conclude that the evidence established knowledge of falsity as opposed to reckless disregard for the truth.<sup>45</sup> On remand the district court granted summary judgment for the *plaintiff* in heavy reliance on the Seventh Circuit's conclusions.<sup>46</sup> Cases of this nature<sup>47</sup> are among the

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43. 529 F.2d 206 (7th Cir. 1976).

44. *Id.* at 212-13.

45. *Id.* at 213.

46. 482 F. Supp. 406, 408 (N.D. Ill. 1979). Although the district court concluded that "[t]he pretrial affidavits, depositions and other documentary evidence clearly show that defendants maliciously fabricated the libelous matter stated in the National Insider article," the court characterized the defendants' conduct as "reckless disregard of whether the inaccurate matters published were false or not." *Id.*

47. See *Buckley v. Littell*, 539 F.2d 882, 896 (2d Cir. 1976) (affirming verdict for plaintiff when defendant admitted that he did not believe that plaintiff had engaged in the type of conduct that he had alleged in his book), *cert. denied*, 429 U.S. 1062 (1977); *Goldwater v. Ginzburg*, 414 F.2d 324, 339 (2d Cir. 1969) (affirming verdict for plaintiff when among other things, defendant wrote that plaintiff, presidential candidate, was mentally ill, with knowledge that statement was false), *cert. denied*, 396 U.S. 1049 (1970); *Phoenix Newspapers, Inc. v. Church*, 24 Ariz. App. 287, 300, 537 P.2d 1345, 1358 (1975) (affirming verdict for plaintiff when defendant knowingly misrepresented attorney general's proposal for "people's councils" as a communist technique), *cert. denied*, 425 U.S. 908 (1976); *Burnett v. National Enquirer*, 144 Cal. App. 3d 991, 999, 193 Cal. Rptr. 206, 209-210 (1983) (affirming verdict for plaintiff when defendant published highly defamatory statements despite complete inability to verify), *appeal dismissed*, 104 S. Ct. 1260 (1984); *Rinaldi v. Viking Penguin, Inc.*, 52 N.Y.2d 422, 437-38, 420 N.E.2d 377, 383, 438 N.Y.S.2d 496, 502 (1981) (affirming denial of summary judgment for defendant when defendant editor discovered that serious allegations in hardback book were false but failed to correct prior to publication of paperback edition); *Schermerhorn v. Rosenberg*, 73 A.D.2d 276, 285, 426 N.Y.S.2d 274, 282 (1980) (jury could find that reporter wrote false and defamatory headline stating that plaintiff legislator said development corporation could do without support of blacks despite knowledge that plaintiff made no such statement); *Sprouse v. Clay Communications, Inc.*, 211 S.E.2d 674, 690 (W. Va.) (affirming verdict for plaintiff when defendant wrote headlines implying that the plaintiff candidate had engaged in unethical real estate transactions with knowledge that implication was false), *cert. denied*, 423 U.S. 882 (1975).

The unusual case of *Davis v. Shucat*, 510 F.2d 731 (D.C. Cir. 1975), should also be noted. In a slander action, the *Davis* court found that there was sufficient evidence for the jury to conclude that defendant, a self-proclaimed "investigative reporter," stated that the plaintiff had been convicted of a felony, with knowledge that the statement was false, during the course of a telephone conversation with a potential source in an effort to "get a re-

least controversial defamation decisions because publishing defamatory statements with knowledge of their falsity is inconsistent with the primary values that the first amendment implements<sup>48</sup> as well as with the recognized standards of the journalism profession.<sup>49</sup>

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sponse." The court was unwilling to find that this practice was an essential element of the investigative reporter's craft. *Id.* at 733-34.

Finally, unique problems are posed when the actual malice standard is applied to defamation claims arising from fictional works. In the controversial case of *Bindrum v. Mitchell*, a California court of appeals concluded that the knowledge of falsity aspect of the *New York Times* standard was easily met when a purportedly fictional character was allegedly modeled after the plaintiff. 92 Cal. App. 3d 61, 72-73, 155 Cal. Rptr. 29, 35, *cert. denied*, 444 U.S. 984 (1979). The court reasoned that, almost as a matter of definition, the author must have realized that his work of fiction did not accurately reflect reality and thus, to the extent that a character was partially patterned after the plaintiff, the author deliberately published false statements about the plaintiff because the character was also given features that the plaintiff did not share. *Id.* As the dissent and many of the commentators have pointed out, this analysis can place authors in a precarious position because almost as a matter of necessity, fictional characters are partially based on actual individuals encountered by the author. *See id.* at 84-87, 155 Cal. Rptr. at 43-44 (Files, J., dissenting). Arguably, the issue should be that of identifiability, not a strict application of the actual malice standard. If the actual malice standard is to be used, perhaps the relevant question should be whether the author created the fictional character with knowledge or reckless disregard: (1) that the informed reader would perceive the character to be a representation of the plaintiff and (2) that the character possesses attributes of a disreputable nature that the plaintiff does not share. *See generally* Franklin & Trager, *Literature & Libel*, 4 COMM./ENT. L.J. 205 (1982); Silver, *Libel, the "Higher Truths" of Art, and the First Amendment*, 126 U. PA. L. REV. 1065 (1978); Smolla, *supra* note 28, at 86-89; Note, "*Clear & Convincing*" Libel: Fiction and the Law of Defamation, 92 YALE L.J. 520 (1983).

Defamatory jokes raise similar problems. *See, e.g.,* Embrey v. Holly, 48 Md. App. 571, 592-93, 429 A.2d 251, 265 (1981), *aff'd*, 293 Md. 128, 442 A.2d 966 (1982) (affirming verdict for plaintiff when radio announcer knew that defamatory statement made in jest was false and realized that many listeners would assume that it was true).

48. The Gertz Court noted that there is no first amendment value in either the intentional lie or the careless error resulting in a false statement of fact. The careless error, however, may be entitled to some protection to avoid an undue chilling effect. 418 U.S. 323, 340 (1974). In certain contexts, however, scholars have defended protection for deliberately false speech on the ground that it will aid in illuminating the truth. J.S. MILL, ON LIBERTY 21 (London 1859); *see* T. EMERSON, *supra* note 18, at 530. To a certain extent, this "illumination" view assumes that the truth will catch up with and vanquish the lie in the information market place, at least in the long run. *See* Wellington, *On Freedom of Speech*, 88 YALE L.J. 1105, 1130 (1978). Given the influence of the printed word, defamation litigation may be a useful means for helping to ensure that the lie is effectively challenged in the short run as well. *See* Keeton v. Hustler Magazine, 104 S. Ct. 1473, 1479 (1984) ("False statements of fact harm both the subject of the falsehood and the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens." (emphasis in original)).

49. *See infra* note 365.

*C. Reckless Disregard for the Truth*

Because the plaintiff rarely will be able to prove that the defendant published the defamatory statement with knowledge of its falsity, most actual malice cases will turn on proof of "reckless disregard for the truth." In *New York Times v. Sullivan* the Court did not define reckless disregard but did seem to indicate that the inquiry was subjective in nature when it observed that there was no showing that the defendants whose names appeared on the allegedly defamatory advertisement were aware that any statements in the ad were false.<sup>50</sup> A year after *Sullivan* in *Garrison v. Louisiana*,<sup>51</sup> the Court confirmed the subjective nature of the *mens rea* inquiry when it concluded that "only those false statements made with the high degree of awareness of their probable falsity . . . may be the subject of either civil or criminal sanctions."<sup>52</sup> The Court addressed the nature of the reckless disregard standard again in *St. Amant v. Thompson*.<sup>53</sup> The *St. Amant* Court, in the course of reversing a jury verdict against a defendant who had read an allegedly defamatory statement on a television program, observed that "[r]eckless disregard' . . . cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication."<sup>54</sup> The Court then discussed *Sullivan* and *Garrison* and concluded that these cases stood for the proposition that in order to support a finding of reckless disregard, "[t]here must be sufficient evidence . . . that the defendant in fact entertained serious doubts as to the truth of his publication."<sup>55</sup> The Court recognized that such an approach might place a "premium on ignorance,"<sup>56</sup> but pointed out that a defendant could not escape liability simply by testifying that he believed the statement to be true, at least when there was sufficient circum-

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50. 376 U.S. 254, 286-87 (1964). Regarding the *New York Times* itself, the Court noted that, at most, the newspaper was negligent in failing to verify the advertisement. *Id.*

51. 379 U.S. 64 (1964).

52. *Id.* at 74.

53. 390 U.S. 727 (1968).

54. *Id.* at 730.

55. *Id.* at 731. See Kalur, *Exploration of the "Outer Limits": The Misdirected Evolution of Reckless Disregard*, 61 DEN. L.J. 43 (1983) for the argument that the Court erred in adopting a subjective standard and that the Court should replace the *St. Amant* standard with an objective "reckless disregard" standard. Arguably, an objective standard would strike a fairer balance between the plaintiff's right to reputation and freedom of the press. It might also simplify problems of proof. Because there is no reason to believe that the Supreme Court would consider such a policy change favorably, this Article addresses the issue of proof of fault under the law as it stands.

56. 390 U.S. at 731.

stantial evidence to contradict such self-serving testimony.<sup>57</sup> For instance, the Court noted that “[p]rofessions of good faith will be unlikely to prove persuasive . . . where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call.”<sup>58</sup>

*St. Amant* made at least three important points for proof of reckless disregard of the truth. First, the primary focus of the standard is subjective. Second, there is no litmus test to determine whether the defendant published with the requisite state of mind. Last, courts frequently will be required to consider objective circumstantial evidence to determine whether subjective doubt as to the truth of the statement may be inferred.<sup>59</sup>

The Supreme Court reemphasized the case by case nature of this inquiry recently in *Bose Corp. v. Consumers Union of the United States, Inc.*, when it pointed out:

The common law heritage of the [actual malice] rule itself assigns an especially broad role to the judge in applying it to specific factual situations . . . . [T]he content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common law adjudication . . . .<sup>60</sup>

For the most part, lower courts have analyzed the reckless disregard issue with these principles in mind. In determining whether an allegedly libelous statement was published with reckless disregard for the truth, courts have considered a variety of factors.

### 1. III Will

Following *Sullivan* the Court clearly established that actual malice was quite different from common-law malice and, hence,

57. *Id.* at 732.

58. *Id.*

59. As the Michigan Supreme Court recently noted, “given the very subjective nature of the test for actual malice, circumstantial evidence may be the only kind available on the issue.” *Steadman v. Lapensohn*, 408 Mich. 50, 55, 288 N.W.2d 580, 583 (1980); see also *Sharon v. Time, Inc.*, 599 F. Supp. 538, 564 (S.D.N.Y. 1984). See Kalur, *supra* note 55, at 60-64 for the argument that objective evidence of recklessness logically does not prove anything about the defendant’s state of mind. Even so, courts have been unwilling to permit the defendant to erect a shield of immunity when scienter is at issue merely by swearing that he proceeded in good faith. Moreover, in the extreme case, proof that the defendant published an article despite a bevy of objective indications of falsity may tend to show that he *must* have doubted the article’s truth. Circumstantial evidence cannot prove to a certainty that the defendant must have doubted the truth—presumably, nothing short of truth serum could. Yet even in an actual malice case, the plaintiff’s burden is not unduly heavy. “Clear and convincing” evidence is not an easy standard to satisfy but it does not require the plaintiff to reveal the defendant’s actual state of mind to a certainty.

60. 104 S. Ct. 1949, 1960 (1984).

the *New York Times* standard could not be satisfied merely by proving that the defendant published the defamatory statements with spite, hostility, ill will, or the intention to harm the plaintiff.<sup>61</sup> Because the fact that the defendant may have disliked the plaintiff does not show that he was aware that the defamatory statement was probably false, a few courts have posited that the defendant's ill will is completely irrelevant to the issue of reckless disregard.<sup>62</sup> Most courts that have considered the question, however, have concluded that proof of the defendant's hostility to plaintiff in a given case may be one of several factors supporting an inference of reckless disregard.<sup>63</sup> The relevance of ill will evidence perhaps was explained best in *Indiana Newspapers, Inc. v. Fields*,<sup>64</sup> an opinion affirming a jury verdict for plaintiff by an equally divided court in which Justice DeBruler noted:

Appellant's estimate of the probability of falsity of its publications was not derived with mathematical exactness from purely objective factors. It was certainly influenced by various considerations one of which might very well have been appellant's hatred for appellee. Ill will evidence might also tend to

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61. *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

62. *See, e.g., Lancaster v. Daily Banner-News Publishing Co.*, 274 Ark. 145, 153-54, 622 S.W.2d 671, 675-76 (1981) (affirming summary judgment for defendant when plaintiff testified that defendant editor held a grudge against him); *McHale v. Lake Charles Am. Press*, 390 So. 2d 556, 566 (La. Ct. App. 1980) (declining to consider evidence of ill will when there was other evidence of reckless disregard), *cert. denied*, 452 U.S. 941 (1981); *Shutt v. Harte-Hanks*, 7 Media L. Rep. (BNA) 2559, 2562 (E.D. Mich. 1981) (granting summary judgment for defendant despite evidence that defendant disliked plaintiff because ill will is irrelevant to actual malice); *Ferguson v. Dayton Newspapers, Inc.*, 7 Media L. Rep. (BNA) 2502, 2505-06 (Ohio Ct. App. 1981) (affirming summary judgment for defendant despite evidence of ill will toward plaintiff); *cf. McQuoid v. Springfield Newspapers, Inc.*, 502 F. Supp. 1050, 1057 (W.D. Mo. 1980) (rejecting claim for punitive damages when reporter admitted he did not like plaintiff but put personal feelings aside in writing story).

63. *See, e.g., Goldwater v. Ginzburg*, 414 F.2d 324, 329, 340 (2d Cir. 1969) (affirming verdict for plaintiff when, among other things, author wrote letter to potential source requesting information for article about "your old enemy"), *cert. denied*, 396 U.S. 1049 (1970); *Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 561-63, 372 N.E.2d 1211, 1220-22 (1978) (reversing summary judgment for defendant when there was evidence that reporter deliberately attempted to elicit false and defamatory information regarding plaintiff); *Hellman v. McCarthy*, 10 MEDIA L. REP. (BNA) 1789, 1794 (N.Y. Sup. Ct. 1984) (denying summary judgment for defendant when evidence showed author had made defamatory charges on prior occasion); *Weaver v. Pryor Jeffersonian*, 569 P.2d 967, 970, 974 (Okla. 1977) (reversing summary judgment for defendant when, among other things, there was evidence of hostility between defendant publisher and plaintiff's attorney, a rival publisher); *Stevens v. Sun Publishing Co.*, 270 S.C. 65, 71, 240 S.E.2d 812, 815 (affirming verdict for plaintiff when, among other things, reporter admitted to a witness that the newspaper did not like plaintiff and was going to print something "juicy" about him), *cert. denied*, 436 U.S. 945 (1978).

64. 254 Ind. 219, 259 N.E.2d 651, *cert. denied*, 400 U.S. 930 (1970).



prove that appellant published in spite of its estimate of a probability of falsity.<sup>65</sup>

For the most part, evidence of ill will is a minor factor that may provide some illumination on the defendant's state of mind or perhaps tip the balance in a close case. A finding of reckless disregard should not be based solely or even substantially upon proof of defendant's ill will toward the plaintiff.<sup>66</sup> While proof of ill will can assist in establishing that defendant proceeded to publish despite serious doubts as to the truth, this proof frequently will be of no probative value whatsoever. Its utility will depend upon the particular facts before the court. In *Goldwater v. Ginzburg*, for instance, the defendant informed a potential source that he was preparing to write an article attacking the plaintiff and that he would appreciate any negative information that the source could produce.<sup>67</sup> In the context of *Goldwater*, in which there was extensive evidence that the defendant had published a large amount of defamatory information about the plaintiff in a highly misleading manner, ill will evidence tended to show that defendant's defamatory statements were more probably the result of design than of carelessness. Likewise, in *Cochran v. Indianapolis Newspaper, Inc.*,<sup>68</sup> the fact that defendant reporters had indicated a willingness to delib-

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65. *Id.* at 251, 259 N.E.2d at 664. Justice DeBruler concluded that there was sufficient proof of reckless disregard even absent the ill will evidence. *Id.*; see also *Tavoulaareas v. Washington Post Co.*, 759 F.2d 90, 118 (D.C. Cir. 1985) ("it is beyond question that one who is seeking to harm the subject of a story—whether motivated by simple ill will . . . or partisan political considerations . . . or otherwise laudable concern for the safety of the nation . . . or a mere desire to attract attention and boost circulation—is more likely to publish recklessly than one without such motive."); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 584 (S.D.N.Y. 1984) (denying summary judgment for defendant with the observation that "[e]vidence of bias cannot establish actual malice. . . . [b]ut it may provide a motive for defaming someone or explain apparently illogical leaps to unsupported conclusions."); *Miller v. Argus Publishing Co.*, 79 Wash. 2d 816, 831, 490 P.2d 101, 111 (1971) (court noting that evidence that the defendant newspaper had frequently supported candidates opposed to those supported by plaintiff tended to indicate "an atmosphere infected with a disposition to ignore known falsehoods or serious doubts as to the truth of that which is published"); *Smolla, supra* note 28, at 80 ("evidence of ill will . . . may be highly probative of whether the speaker knew the communication was false or was so blinded by spite as to act recklessly" (emphasis in original)).

66. *Herbert v. Lando* 596 F. Supp. 1178, 1225 (S.D.N.Y. 1984) (granting partial summary judgment for defendant TV producer despite the fact that he came to dislike plaintiff intensely during the course of producing documentary); *Postill v. Booth Newspapers, Inc.*, 118 Mich. App. 608, 626, 325 N.W.2d 511, 519 (1982) (reversing verdict for plaintiff despite evidence of reporter's political animosity toward plaintiff); *Sills v. New York Times*, 8 Media L. Rep. (BNA) 1460, 1462 (N.Y. Sup. Ct.) (evidence of ill will does not itself establish reckless disregard), *aff'd mem.*, 90 A.D.2d 1004 (1982).

67. 414 F.2d 324, 328-29, 337, 340 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

68. 175 Ind. App. 548, 562, 372 N.E.2d 1211, 1221 (1978).

erately elicit and publish false and defamatory information about plaintiff suggested that the defendants may well have had reason to doubt another false and defamatory charge that they did publish, given that they were unable to cite any source of factual support. These are extreme cases, however, and as is to be expected, they are rare.

Cases in which there is evidence that a reporter or an editor was allegedly "out to get" the plaintiff can be more troublesome.<sup>69</sup> Typically, the plaintiff will be a public official or candidate who alleges that the newspaper used its power and influence to have him removed from office or defeated at the polls. It is scarcely irresponsible journalism for a newspaper to maintain an editorial opinion on a public issue. If, after investigation of the facts, a member of the press concludes that a public official is unworthy of office or that one candidate is not as qualified as another, the newspaper arguably is under a professional obligation to convey that opinion to its readers.<sup>70</sup> It is a different matter entirely, however, if a newspaper or broadcaster engages in a vendetta against an individual in utter disregard of the facts.<sup>71</sup> Consequently, evidence of a press de-

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69. See, e.g., *Tavoulaareas v. Washington Post Co.*, 759 F.2d 90, 118-120 (D.C. Cir. 1985) (reversing judgment n.o.v. for defendant when, among other things, there was evidence of a plan by reporters "to get" plaintiff); *Cape Publications, Inc. v. Adams*, 336 So. 2d 1197, 1199-1200 (Fla. Dist. Ct. App. 1976) (affirming verdict for plaintiff when among other things, there was testimony that reporter was "going to get" plaintiff and "put him in jail"), *cert. denied*, 348 So. 2d 945 (Fla.), *cert. denied*, 434 U.S. 943 (1977); *Tagawa v. Maui Publishing Co.*, 50 Hawaii 648, 651-56, 448 P.2d 337, 340-42 (1968) (affirming summary judgment for defendant when plaintiff testified that a reporter had told him "you know I can blast you"), *cert. denied*, 396 U.S. 822 (1969); *Indianapolis Newspapers, Inc. v. Fields*, 254 Ind. 219, 249, 259 N.E.2d 651, 663-64 (affirming by an equally divided court a verdict for plaintiff when defendant reporter threatened "to get" plaintiff and to keep him on the front page if he remained uncooperative), *cert. denied*, 400 U.S. 930 (1970); *Sills v. New York Times*, 8 Media L. Rep. (BNA) 1460, 1461 (N.Y. Sup. Ct.) (denying summary judgment for defendant when reporter allegedly told plaintiff public official "I will get you"), *aff'd mem.*, 90 A.D.2d 1004 (1982).

70. See, e.g., AMERICAN SOCIETY OF NEWSPAPER EDITORS, STATEMENT OF PRINCIPLES art. v (1975) ("To be impartial does not require the press to be unquestioning or to refrain from editorial expression. Sound practice however, demands, a clear distinction for the reader between news reports and opinion."); SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS, ACCURACY & OBJECTIVITY No. 7 (1973) ("Journalists recognize their responsibility for offering informed analysis, comment, and editorial opinion on public events and issues."); ASSOCIATED PRESS MANAGING EDITORS, CODE OF ETHICS, RESPONSIBILITY (1975) ("The newspaper should be a constructive critic of all segments of society. It should vigorously expose wrongdoing or misuse of power, public or private. Editorially it should advocate needed reform or innovations in the public interest.").

71. See SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS, ACCURACY & OBJECTIVITY No. 6 (1973) ("Partisanship in editorial comment which knowingly departs from the truth violates the spirit of American journalism.").

defendant's intent to harm the plaintiff should be considered, if at all, with caution. A plaintiff's mere perception that the press was out to get him should be of no evidentiary significance.<sup>72</sup> A person who has been criticized in the press quite commonly perceives that the editor or reporter must have acted out of spite or an intention to harm. Ordinarily, this perception will be erroneous. Moreover, the plaintiff's perception says nothing probative of the defendant's state of mind. Objective proof that the defendant bore a grudge against the plaintiff can be considered by the factfinder, but only after the judge has clearly explained that ill will is relevant only to the extent that it tends to show that the defendant published the false and defamatory statement despite serious doubts as to truth. The factfinder must be informed that the mere fact that a newspaper did not like plaintiff or affirmatively desired to harm him is irrelevant to its legal culpability. Given the potential for undue prejudice and confusion when ill will evidence is presented to the jury, a case can be made for exclusion. Total exclusion, however, might prove unfair to plaintiffs. Given the heavy burden of the clear and convincing evidence standard, plaintiffs should be permitted to "pile on" proof even if portions of it are marginally probative.

## 2. Failure to Investigate or Verify

In *St. Amant v. Thompson* the Court stated that "failure to investigate does not in itself establish bad faith,"<sup>73</sup> or, more precisely, serious doubt as to the truth. *Sullivan* also is authority for this proposition in that the newspaper's editors could have discovered the falsity of some of the allegations in the advertisement by checking newspaper files—yet the Court noted that this failure was insufficient proof of reckless disregard.<sup>74</sup> Consequently, the defendant will prevail if the plaintiff attempts to predicate a finding of reckless disregard on little more than an investigative failure,<sup>75</sup>

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72. See *Casper v. Washington Post Co.*, 549 F. Supp. 376, 378 (E.D. Pa. 1982) ("A newspaper and its reporters do not lose their First Amendment protections merely because plaintiffs sincerely believe that they are biased.").

73. 390 U.S. 727, 733 (1968).

74. 376 U.S. 254, 287-88 (1964); see also *Beckley Newspaper Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967) (reversing verdict for plaintiff when defendant arguably failed to investigate charges).

75. See, e.g., *Hardin v. Santa Fe Reporter*, 745 F.2d 1323, 1325 (10th Cir. 1984) (affirming dismissal of complaint when reporter failed to discover unreliability of source); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.) (reversing verdict for plaintiff when publisher did not independently investigate incidents described by author), *cert. denied*,

such as when an editor fails to verify a letter from a reader prior to publication.<sup>76</sup> The investigative-failure principle extends even to the case in which a headline writer fails to read the underlying article.<sup>77</sup>

The Supreme Court has indicated, however, that failure to investigate can be probative of reckless disregard of the truth in certain circumstances. In *St. Amant* the Court explained that the de-

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434 U.S. 834 (1977); *Casano v. WDSU-TV, Inc.*, 464 F.2d 3, 4-5 (5th Cir. 1972) (affirming directed verdict for defendant when reporter may have failed to use due care in investigating relationship between plaintiff and organized crime); *Baldine v. Sharon Herald Co.*, 391 F.2d 703, 707 (3d Cir. 1968) (affirming judgment n.o.v. for defendant when publisher failed to verify accuracy of political advertisement); *Reveley v. Berg Publications*, 601 F. Supp. 44, 46 (W.D. Tex. 1984) (granting summary judgment for defendant when writer relied on recollection of unverified statements in earlier article); *Robertson-Taylor Co. v. Sansing*, 10 MEDIA L. REP. (BNA) 2495, 2496 (D.D.C. 1984) (granting motion to dismiss when plaintiff alleged mere failure to investigate); *National Rifle Ass'n v. Dayton Newspapers, Inc.*, 555 F. Supp. 1299, 1317-19 (S.D. Ohio 1983) (granting summary judgment for defendant when newspaper failed to verify charges set forth in editorial that it relied on); *Fremont Energy Corp. v. Seattle Post-Intelligencer*, 9 Media L. Rep. (BNA) 1569, 1574 (W.D. Wash. 1982) (granting summary judgment for defendant when reporter failed to corroborate whether convicted individuals were officers of plaintiff); *Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 605 (D.D.C. 1977) (granting summary judgment for defendant when writer relied on "vague recollections" and "overly broad generalizations"), *aff'd mem.*, 578 F.2d 442 (D.C. Cir. 1978); *Woods v. Hearst Corp.*, 2 Media L. Rep. (BNA) 1548, 1550 (D. Md. 1977) (granting summary judgment for defendant when reporter failed to verify allegations); *Alpine Constr. Co. v. Demaris*, 358 F. Supp. 422, 424 (N.D. Ill. 1973) (granting summary judgment for defendant when author failed to discover that article he relied on had been retracted); *Tagawa v. Maui Publishing Co.*, 50 Hawaii 648, 654, 448 P.2d 337, 341 (1968) (affirming summary judgment for defendant when reporter could have learned story was false by making a simple phone call to an obvious source), *cert. denied*, 396 U.S. 822 (1969); *Capital-Gazette Newspapers, Inc. v. Stack*, 293 Md. 528, 445 A.2d 1038 (affirming directed verdict for defendant when editor failed to contact all principals in event, despite apparent discrepancies), *cert. denied*, 459 U.S. 989 (1982); *Hackworth v. Larson*, 83 S.D. 674, 684-87, 165 N.W.2d 705, 710-11 (1969) (affirming summary judgment for defendant when reporter failed to verify information regarding plaintiff's resignation); *Mellor v. Scott Publishing Co.*, 10 Wash. App. 645, 659-60, 519 P.2d 1010, 1019 (1974) (affirming summary judgment for defendant when defendant failed to investigate truth of statements made at public meeting); *O'Brien v. Tribune Publishing Co.*, 7 Wash. App. 107, 124, 499 P.2d 24, 34 (1972) (granting partial summary judgment for defendant when editor conducted careless investigation and relied heavily on memory and clippings furnished by candidate).

76. See *Moriarty v. Lippe*, 162 Conn. 371, 380-81, 294 A.2d 326, 331-32 (1972) (reversing verdict for plaintiff); *Retty v. Sattin*, 11 MEDIA L. REP. (BNA) 1097, 1098 (Fla. Cir. Ct. 1984) (granting summary judgment for defendant); *Nash v. Keene Publishing*, 10 MEDIA L. REP. (BNA) 2281, 2285 (N.H. Super. Ct. 1984) (granting summary judgment for defendant when editor only made slight effort to verify letter); *Pasculli v. Jersey Journal*, 7 Media L. Rep. (BNA) 2574 (N.J. Super. Ct. App. Div. 1981) (granting summary judgment for defendant), *cert. denied*, 89 N.J. 424, 446 A.2d 152 (1982); *Safarets, Inc. v. Gannett Co.*, 80 Misc. 2d 109, 361 N.Y.S.2d 276 (Sup. Ct.) (granting summary judgment for defendant), *aff'd*, 49 A.D.2d 666, 373 N.Y.S.2d 858 (1975); *El Paso Times, Inc. v. Trexler*, 447 S.W.2d 403, 406 (Tex. 1969) (affirming summary judgment for defendant).

77. *Shutt v. Harte-Hanks*, 7 Media L. Rep. (BNA) 2559, 2562 (E.D. Mich. 1981).

defendant could not necessarily defeat the plaintiff's attempt to prove actual malice simply by testifying that he published the article in good faith, because there could be situations in which the circumstances would tend to contradict this assertion.<sup>78</sup> The Court gave as examples a story based on an anonymous telephone call or other situations in which "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."<sup>79</sup> In other words, the publication of defamatory matter under circumstances which would strongly indicate that such information might be untrue, without further verification, can support a conclusion, by clear and convincing evidence, that the defendant must have recognized its potential inaccuracy. For this proposition, the *St. Amant* Court<sup>80</sup> cited Chief Justice Warren's concurring opinion in *Curtis Publishing Co. v. Butts*, in which the Chief Justice explicitly based a finding of reckless disregard on the defendant's failure to investigate the charges despite a denial by the plaintiff. In line with *St. Amant*, lower courts frequently have recognized that, in a particular factual context, a failure to investigate may indeed provide some evidence of a defendant's predisposition to publish defamatory matter despite serious doubts as to the truth.<sup>81</sup> Under

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78. 390 U.S. 727, 731-32 (1968).

79. *Id.* at 732.

80. *Id.* at 732 n.3 (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162, 169-70 (1967) (Warren, J., concurring)).

Writing for the Court in *Butts*, Justice Harlan also would have affirmed the judgment for the plaintiff relying in part on the defendants' investigative failures. Harlan affirmed the judgment, however, applying an objective and purportedly less stringent "gross irresponsibility" standard. *Butts*, 388 U.S. at 157-58. To a certain extent, Justice Harlan's analysis remains relevant to the application of the actual malice standard in that Justice Warren seemed to incorporate by reference Justice Harlan's more extensive development of the record into his own opinion. *Id.* at 169 (Warren, J., concurring).

81. See, e.g., *Alioto v. Cowles Communications, Inc.*, 430 F. Supp. 1363, 1370-71 (N.D. Cal. 1977) (granting verdict for plaintiff when, among other things, reporter failed to investigate), *aff'd*, 623 F.2d 616, 620 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); *Fulton v. Advertiser Co.*, 388 So. 2d 533, 539-40 (Ala. 1980) (denying summary judgment for defendant when reporter failed to investigate charges made at press conference), *cert. denied*, 449 U.S. 1125, 1131 (1981); *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315, 319 (Colo. 1981) (reinstating verdict for plaintiff when, among other things, reporter failed to investigate charges of corruption against public officials); *McHale v. Lake Charles Am. Press*, 390 So. 2d 556, 565-66 (La. Ct. App. 1980) (affirming verdict for plaintiff when, among other things, publisher failed to verify questionable allegations by consulting advertisements run in its own newspaper), *cert. denied*, 452 U.S. 941 (1981); *Ammerman v. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 254, 572 P.2d 1258, 1262 (Ct. App.) (use of investigative failure to establish reckless disregard depends on state of the record), *cert. denied*, 91 N.M. 249, 572 P.2d 1257 (1977), *cert. denied*, 435 U.S. 906 (1978); *Stevens v. Sun Publishing Co.*, 270 S.C. 65, 71, 240 S.E.2d 812, 815 (affirming verdict for plaintiff when, among other things, publisher failed to verify, despite knowledge that sources were biased against plain-

what circumstances does the defendant's failure to investigate suggest that it published defamatory material with reckless disregard as to truth? While there can be no definitive answer, there are several relatively obvious factors that should be considered.

(a) *Lead Time*

A failure to investigate may be probative of reckless disregard only to the extent that there was time for the defendant to have investigated. Almost by definition, news remains news for only a short period of time. Consequently, when faced with deadline pressure, a failure to investigate or to verify may say very little about the publisher's concern for the truth of the matter.<sup>82</sup> On the other hand, it does not necessarily follow that a failure to investigate an item that is not "hot news" sheds any light on the publisher's doubts as to its truth.<sup>83</sup> The amount of lead time, therefore, may

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tiff), *cert. denied*, 436 U.S. 945 (1978); *see also* *Sills v. New York Times*, 8 Media L. Rep. (BNA) 1460, 1462-64 (N.Y. Sup. Ct.) (denying summary judgment for defendant and attempting to devise guidelines for the use of investigative failure as evidence of reckless disregard), *aff'd mem.*, 90 A.D.2d 1004 (1982).

82. *See* *Trapp v. Southeastern Newspapers Corp.*, 10 MEDIA L. REP. (BNA) 1985, 1995-96 (S.D. Ga. 1984) (granting summary judgment for defendant when reporter rushed "hot news" story into print without adequate investigation); *Bryant Associated Press*, 595 F. Supp. 814, 818 (D.V.I. 1984) (granting summary judgment for defendant when wire service editor made a mistake working against a deadline); *Bellamy v. Arno Press*, 8 Media L. Rep. (BNA) 1420, 1422 (E.D.N.C. 1982) (granting summary judgment for defendant when copy editor made inadvertent error in preparing headline under deadline pressure); *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 953-54, 960-61 (D.D.C. 1976) (granting summary judgment for defendant when editor failed to verify details following denial of charges hours before deadline); *Buchanan v. Associated Press*, 398 F. Supp. 1196, 1204 (D.D.C. 1975) (granting summary judgment for defendant when reporters failed to verify court proceedings while operating under "severe time restraints"); *McFarland v. Hearst Corp.*, 332 F. Supp. 746, 749 (D. Md. 1971) (granting summary judgment for defendant when reporter failed to resort to extensive verification prior to publication of "hot news" concerning judicial proceeding); *Perkins v. Mississippi Publishers Corp.*, 241 So. 2d 139, 143 (Miss. 1970) (affirming judgment n.o.v. for defendant when newspaper published photographs of recently arrested klan member without verification); *Glover v. Herald Co.*, 549 S.W.2d 858, 860 (Mo.) (reversing verdict for plaintiff when rewrite man misread his notes while "working on a deadline"), *cert. denied*, 434 U.S. 965 (1977); *cf.* *National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 396 N.E.2d 996, 1003 (1979) (reversing denial of summary judgment for defendant when talk show host commented on charge by caller shortly after it was made), *cert. denied*, 446 U.S. 935 (1980).

83. *See* *Ryan v. Brooks*, 634 F.2d 726, 733 (4th Cir. 1980) (reversing verdict for plaintiff when author failed to verify single sentence in lengthy book despite absence of deadline pressure); *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1227, 1229 (3d Cir. 1978) (affirming summary judgment for defendant when reporter failed to verify, despite time and resources to do so, in view of reliance on trustworthy source); *Torres v. Playboy Enters., Inc.*, 7 Media L. Rep. (BNA) 1182, 1186 (S.D. Tex. 1980) (granting summary judgment for defendant when editor failed to further verify article that was not "hot" news but when "deadlines were structured

be relevant to the question of reckless disregard in that it may remove one explanation for a failure to investigate in a context in which some investigation would seem to have been in order.<sup>84</sup>

*Curtis Publishing Co. v. Butts* and the companion case of *Associated Press v. Walker*<sup>85</sup> presented the Supreme Court with bookend examples of the significance of lead time in the reckless disregard calculus. In *Walker* the reporter was attempting to report a fast breaking news story under emergency circumstances; indeed, he was attempting to cover a riot.<sup>86</sup> In *Butts*, on the other hand, the reporter was working on a feature story with no immedi-

and tight"); *Belli v. Curtis Publishing*, 25 Cal. App. 3d 384, 400, 102 Cal. Rptr. 122, 133 (1972) (affirming summary judgment for defendant when editor failed to verify allegations in article despite the absence of deadline pressure); *Nash v. Keene Publishing*, 10 M&DIA L. REP. (BNA) 2281, 2285 (N.H. Super. Ct. 1984) (granting summary judgment for defendant despite fact that letter to editor was not "hot news").

84. See *Tavoulaareas v. Washington Post Co.*, 759 F.2d 90, 131 (D.C. Cir. 1985) (reversing judgment n.o.v. for defendant when, among other things, "[t]here was no significant deadline pressure"); *Hunt v. Liberty Lobby*, 720 F.2d 631, 645 (11th Cir. 1983) (finding sufficient evidence of reckless disregard when, among other things, editor failed to investigate charges by arguably biased author despite absence of deadline pressure, but reversing on other grounds); *Carson v. Allied News Co.*, 529 F.2d 206, 211 (7th Cir. 1976) (reversing summary judgment for defendant when publisher failed to verify defamatory allegations despite adequate time for investigation); *Goldwater v. Ginzburg*, 414 F.2d 324, 339 (2d Cir. 1969) (affirming verdict for plaintiff when, among other things, editor failed to verify serious charges despite absence of deadline pressure), *cert. denied*, 396 U.S. 1049 (1970); *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1361-62 (Colo. 1983) (affirming verdict for plaintiff when, among other things, reporter failed to verify allegations by obviously biased source despite lack of deadline pressure); *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315, 319 (Colo. 1981) (reinstating verdict for plaintiff when, among other things, reporter failed to investigate allegations despite adequate time to do so); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 869, 330 N.E.2d 161, 174 (1975) (denying verdict for plaintiff when editor failed to corroborate surprising charges in article by inexperienced reporter despite fact that publication of story was delayed for a day); *Nevada Indep. Broadcasting Corp. v. Allen*, 99 Nev. 404, 415, 664 P.2d 337, 345 (1983) (affirming verdict for plaintiff when interviewer failed to investigate charges prior to program); *Stevens v. Sun Publishing Co.*, 270 S.C. 65, 72, 240 S.E.2d 812, 815, (affirming verdict for plaintiff when article that was not "hot news" and was based on biased sources was published after denial without further verification), *cert. denied*, 436 U.S. 945 (1978); *Miller v. Argus Publishing Co.*, 79 Wash. 2d 816, 832, 490 P.2d 101, 111 (1971) (sufficient evidence of reckless disregard when defendant failed to verify serious charges by unreliable source despite lack of deadline pressure but reversing verdict for plaintiff on other grounds); *O'Brien v. Tribune Publishing Co.*, 7 Wash. App. 107, 122, 499 P.2d 24, 33 (1972) (reversing summary judgment for defendant when item was not "hot news" and defendant was advised that it was false prior to publication); *cf. Mahnke v. Northwest Publications, Inc.*, 280 Minn. 328, 340, 160 N.W.2d 1, 9 (1968) (affirming verdict for plaintiff when editor failed to verify serious allegations by arguably unreliable source despite lapse of six days—arguably applying objective reckless disregard standard).

85. The Supreme Court considered these two libel cases together on appeal.

86. 388 U.S. 130, 140-41, 158-59 (1967).

ate deadline pressure.<sup>87</sup> Applying an objective gross negligence standard, Justice Harlan considered the difference in lead time between the two cases to be of some significance, in the course of affirming a judgment for the plaintiff in *Butts* and reversing a judgment for the plaintiff in *Walker*.<sup>88</sup> Because Chief Justice Warren incorporated Justice Harlan's discussion of the record into his own analysis employing an actual malice standard,<sup>89</sup> *Butts* and *Walker* may be read as an indication that lead time should be considered a relevant factor in present reckless disregard analysis.

The significance accorded to lead time depends largely on the existence of other factors such as the improbability of the defamatory allegations or the reliability of the source. This is no more than recognition that investigation and verification can be time consuming and costly and that while accuracy is the paramount goal, some accommodation must be made between deadline pressure and the probabilities of error. A failure to investigate, even when there is sufficient time, should not bolster an inference of serious doubt as to the truth of the matter if there is little reason to believe that the effort would increase the accuracy of the material.

The degree of deadline pressure often will be dictated by the nature of the subject itself. An editor should not be able to bootstrap what would otherwise be a typical feature story into a "hot news" item simply by deciding to publish it immediately.<sup>90</sup> On the

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87. *Id.* at 157-58.

88. *Id.* at 156-59.

89. *Id.* at 169.

90. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 538 (7th Cir. 1982) (affirming punitive damage award when, among other things, editor shortened editorial process on feature story from several weeks to a few hours in order to place article in current issue), *cert. denied*, 459 U.S. 1226 (1983). On a somewhat related issue, two courts have reached opposite conclusions on whether conducting a radio talk show without a tape delay device is evidence that the station published defamatory comments by callers with a reckless disregard for the truth. In *Snowden v. Pearl River Broadcasting Corp.*, 251 So. 2d 405, 410-11 (La. Ct. App.), *application denied*, 259 La. 887, 253 So. 2d 217 (1971), the court affirmed a judgment for plaintiff reasoning that the failure to use a tape delay device constituted an open invitation to listeners to make false and defamatory comments. In *Adams v. Frontier Broadcasting Co.*, 555 P.2d 556, 564-67 (Wyo. 1976), however, the court affirmed a summary judgment for defendant on similar facts, reasoning that the station had simply deprived itself of the ability to investigate the truth of any allegations made and that such a failure to investigate did not constitute reckless disregard. The *Adams* approach is more sensible. While the failure to utilize a tape delay device may constitute a negligent broadcasting practice, it is difficult to understand how the defendant can be considered to have harbored serious doubts of the truth of allegations until it has heard them and had a moment to reflect on them, absent an established pattern of false or defamatory comments from listeners.



other hand, a publisher may find that a story, which might well have been developed more leisurely, has been transformed suddenly into a "hot news" item because a competitor is preparing to "break" the same story.<sup>91</sup> The need for prompt publication is basically a journalistic judgment and the courts should defer largely to the media on the matter.<sup>92</sup> Finally, the very decision to publish a story while it is timely cannot give rise to an inference of reckless disregard even though this decision foreseeably may increase the adverse effect on the plaintiff's reputation.<sup>93</sup>

(b) *Seriousness of the Charge*

In *Washington Post Co. v. Keogh*<sup>94</sup> the Court of Appeals for the District of Columbia Circuit recognized that a serious allega-

91. See *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 952, 959 (D.D.C. 1976) (author released expose to several other newspapers for publication). Recently, in *Tavoulaareas v. Washington Post* the court stated that

The dissent asserts that the defendants were under substantial time pressure to produce the story because a congressional committee would soon release some information and there was a possibility that the rival *New York Times* might come out with the story. . . . But this sort of self-generated time pressure—the fear that someone else will preempt the 'scoop'—almost always exists. To hold that it was exculpatory would exalt the time pressure excuse into an absolute defense in every case. It would also reward the least responsible journalists, permitting them regularly to scoop their more careful colleagues, making the scoop itself the justification for their recklessness and generally debasing the journalistic coinage.

759 F.2d 90, 131 n.50 (D.C. Cir. 1985) (emphasis in original). The court is correct when the fear of a scoop by a competitor is based on nothing more than speculation. When the newspaper is aware that a competitor is actively pursuing the same story or when the story is so obviously newsworthy and timely that competitors must be developing it, then the reasoning of *Martin Marietta* should control.

92. See *Lexington Herald Leader v. Graves*, 9 Media L. Rep. (BNA) 1065, 1071-73 (Ky. 1982) (reversing verdict for plaintiff when editor concluded that story was "hot news" and needed to be published promptly even though reporter disagreed), *cert. denied*, 104 S. Ct. 2342 (1984).

93. *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1351 (S.D.N.Y. 1977) (granting summary judgment for defendant when magazine published critical story about company immediately prior to the company's public securities offering).

94. 365 F.2d 965, 970 (D.C. Cir. 1966) (reversing denial of summary judgment for defendant), *cert. denied*, 385 U.S. 1011 (1967); see also *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1223 (3d Cir. 1978) (affirming summary judgment for defendant when television station broadcast charges that public official had accepted bribes); *Murray v. Bailey*, 11 Med. L. Rep. (BNA) 1369, 1371 (N.D. Cal. 1985) (granting summary judgment for defendant with the observation that the "heat of the report" does not give rise to a duty to investigate); *Tilton v. Cowles Publishing Co.*, 76 Wash. 2d 707, 459 P.2d 8, 17 (1969) (reversing verdict for plaintiff when charges suggested that public officials' jobs were in jeopardy), *cert. denied*, 399 U.S. 927 (1970); cf. *Rodriguez v. Nishiki*, 65 Hawaii 430, 441, 653 P.2d 1145, 1152 (1983) (reversing summary judgment for plaintiff because defamatory character of allegations regarding connection between plaintiff and organized crime was not sufficient evidence of reckless disregard as a matter of law); *Nader v. de Toledano*, 408 A.2d 31, 56 (D.C. 1979)

tion alone does not suggest that the defendant published it despite serious doubts as to its truth. Indeed, as the court further found, in certain contexts such as press coverage of public officials when there is a particularly strong public need for information, there may be good reason to avoid deterring the publication of serious charges.<sup>95</sup> Arguably, the seriousness of the charge still may be relevant to proof of reckless disregard in certain circumstances.<sup>96</sup> A serious allegation may suggest that the publisher should have conducted a more thorough investigation. A factfinder might infer that the publisher failed to investigate the serious charge because the publisher was already aware that the charges possibly were false, and simply did not care,<sup>97</sup> or because the publisher suspected

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(seriousness of allegations does not by itself show reckless disregard), *cert. denied*, 444 U.S. 1078 (1980).

95. See *Washington Post Co. v. Keogh*, 365 F.2d 965, 970 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967); see also *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 380-81, 366 N.E.2d 1299, 1306-07, 397 N.Y.S.2d 943, 950-51, *cert. denied*, 434 U.S. 969 (1977).

96. See, e.g., *Tavoulares v. Washington Post Co.*, 759 F.2d 90, 131 (D.C. Cir. 1985) (reversing judgment n.o.v. when, among other things, charges were serious and likely to harm plaintiff). *Gertz v. Robert Welsh, Inc.*, 680 F.2d 527, 539 (7th Cir. 1982) (affirming punitive damage award for plaintiff when editor "made virtually no effort to check the validity of statements that were defamatory per se"), *cert. denied*, 459 U.S. 1226 (1983); *Cape Publications, Inc. v. Adams*, 336 So. 2d 1197, 1199-1200 (Fla. Dist. App.) (affirming verdict for plaintiff when, among other things, editorial staff published allegations of bribery with little support and with knowledge of seriousness), *cert. denied*, 348 So. 2d 945 (Fla. 1976), *cert. denied*, 434 U.S. 943 (1977); *Durso v. Lyle Stuart, Inc.*, 33 Ill. App. 3d 300, 305, 337 N.E.2d 443, 447 (1975) (evidence of reckless disregard when author conducted only cursory investigation while writing expose linking political figure to organized crime); *Meadows v. Taft Broadcasting Co.*, 98 A.D.2d 959, 960, 470 N.Y.S.2d 205, 208 (1983) (affirming denial of summary judgment for defendant when reporter implied plaintiff may have murdered a person to prevent her from testifying); cf. *Widener v. Pacific Gas & Elec. Co.*, 75 Cal. App. 3d 415, 435, 142 Cal. Rptr. 304, 315 (1977) (reversing judgment n.o.v. for defendant when person wrote letter to television station making serious charges against plaintiff absent investigation or deadline pressure), *cert. denied*, 436 U.S. 918 (1978).

97. In *Mahnke v. Northwestern Publications*, 280 Minn. 328, 160 N.W.2d 1 (1968), the Minnesota Supreme Court took account of the seriousness of the charges when a newspaper published an article alleging that the plaintiff, a police detective, refused to arrest a man guilty of sexually molesting a child. *Id.* at 340-42, 160 N.W.2d at 9-10. The court noted that the editor was at least partially motivated to publish the charges because he knew that they would stir up indignation, create a continuing controversy, and presumably boost newspaper sales. While this evidence did not show that the editor was aware that the charges might have been false, it did explain why he may have published the charges despite an awareness of their falsity or may have failed to investigate the charges more thoroughly when there was room for doubt. Arguably, the court did not appreciate fully the subjective nature of the *St. Amant* test. Even though the *Mahnke* opinion was published shortly after *St. Amant* was decided, the majority did not refer to it. Instead, it relied heavily on the Harlan opinion in *Curtis Publishing Co. v. Butts* and at one point even spoke of the defendant's obvious negligence. *Id.* at 338, 343, 160 N.W.2d at 8, 10-11. The dissent argued that, in view of *St.*

that the charges were false and did not wish to have its suspicion confirmed.<sup>98</sup>

The difficulty with reliance on the seriousness of the charge is that the link between the seriousness of the charge and the defendant's awareness of its falsity is quite tenuous. The defendant's recognition that serious charges, whether true or false, might cause significant harm to a plaintiff's reputation does not tend to indicate that the defendant probably was aware that the charges were false.<sup>99</sup> By itself, a serious defamatory allegation could never establish reckless disregard by clear and convincing evidence. In cases in which the courts have relied on the seriousness of the charge, such as *Goldwater v. Ginzburg*, there has been significant additional evidence of reckless disregard.<sup>100</sup> As with ill will evidence, plaintiffs should not be wholly precluded from emphasizing the seriousness of the defamatory charge despite limited probative value given that plaintiffs are required to hurdle the heavy burden of the clear and convincing evidence standard. The seriousness of the charge can provide additional support for an inference of reckless disregard of the truth in a particular case.

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*Amant*, the majority misunderstood the nature of the reckless disregard standard. *Id.* at 352-53, 367-70, 160 N.W.2d at 16, 25-27 (Peterson, J., dissenting). Nevertheless the court's reasoning regarding the significance of the seriousness of the charges still could be of probative value under a subjective oriented standard.

98. Apparently the Second Circuit considered the severity of the criminal charges in *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970), when it observed that "the appellants were very much aware of the possible resulting harm; the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigative techniques, . . ." See also *Miller v. Argus Publishing Co.*, 79 Wash. 2d 816, 832, 490 P.2d 101, 111 (1971) (sufficient evidence of reckless disregard when defendant failed to investigate "transparently disparaging" charges against plaintiff by biased author, but reversing verdict for plaintiff on other grounds).

99. In the course of concluding that there was a sufficient showing of reckless disregard in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), Justice Warren observed:

[L]ittle investigative effort was expended initially, and no additional inquiries were made even after the editors were notified by respondent and his daughter that the account to be published was absolutely untrue. Instead, the Saturday Evening Post proceeded on its reckless course with full knowledge of the harm that would likely result from the publication of the article. This knowledge was signaled by the statements at the conclusion of the article that "Wally Butts will never help any football team again" and "careers will be ruined, that is sure."

*Id.* at 169-70. Presumably, Justice Warren was suggesting that the defendant's decision to publish despite the seriousness of the charge, coupled with the defendant's reason to believe that it might be false, tended to indicate its affirmative disregard for the truth.

100. 414 F.2d 324, 339-40 (2d Cir. 1969) (affirming verdict for plaintiff when defendant published defamatory allegations despite no source, contradictory information, ill will, lack of expertise, and imbalance), *cert. denied*, 396 U.S. 1049 (1970).

(c) *Inherent Improbability*

The inherent improbability of a defamatory charge may suggest that the defendant must have had serious doubts as to its truth, at least in the absence of further investigation. The Supreme Court recognized this inference in *St. Amant v. Thompson*.<sup>101</sup> Certainly there must come a point at which charges are so outlandish that no one would believe them, absent verification. On the other hand, news by its very nature frequently involves the reporting of the unusual. Thus, the mere fact that defamatory statements are out of the ordinary or surprising should not by itself establish that they were published despite serious doubts as to their truth.

Few cases explicitly have based an inference of reckless disregard on the improbability of the allegations. In *Stone v. Essex County Newspapers, Inc.*<sup>102</sup> the Supreme Court of Massachusetts concluded that there was sufficient evidence of reckless disregard with respect to an editor who authorized publication of a story written by an inexperienced reporter alleging that a citizen well known to and respected by the editor had been charged in a narcotics case.<sup>103</sup> The court emphasized that the editor had testified that he was surprised by the report.<sup>104</sup> Presumably most people would be surprised if told that a respected acquaintance was charged in a serious criminal case. Most people would not want to believe the charges and would assume a mistake had been made. It, therefore, is strange that the editor would approve such a story absent verification when, as in *Stone*, there was ample time for further investigation.<sup>105</sup> Serious criminal charges, however, are not so inherently improbable as to inspire disbelief in any absolute sense. Respected citizens occasionally are charged in narcotics cases.<sup>106</sup> Still, when coupled with other evidence, an unlikely criminal charge properly may raise a sufficient inference of reckless disregard to get to the jury.

By way of contrast, the charges at issue in *Hunt v. Liberty Lobby*<sup>107</sup> seem more inherently improbable on their face and hence closer to the type of charges concerning the Supreme Court in *St.*

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101. 390 U.S. 727, 732 (1968).

102. 367 Mass. 849, 869, 330 N.E.2d 161, 174 (1975).

103. *Id.*

104. *Id.*

105. *Id.*

106. See, e.g., *Delorean's Day in Court*, NEWSWEEK, Mar. 12, 1984, at 85; *Medich Gets Probation, Fine*, Dallas Morning News, Mar. 9, 1984, at 7B.

107. 720 F.2d 631 (11th Cir. 1983).

*Amant*. In *Hunt* the defendant magazine published, without significant verification, an article alleging that the Central Intelligence Agency (CIA) was preparing to cover up its role in the Kennedy assassination by revealing that E. Howard Hunt of Watergate notoriety had been involved without official approval.<sup>108</sup> While not wholly beyond the realm of possibility, the charge seemed bizarre and dubious, especially because defendant's editor was aware that the author of the charge was a party to bitterly contested litigation with the CIA.<sup>109</sup> The Court of Appeals for the Eleventh Circuit considered the inherent improbability of the charges a significant factor supporting its conclusion that there was sufficient evidence of reckless disregard of the truth, although it reversed the verdict for the plaintiff on other grounds.<sup>110</sup> While *Hunt* is not the most extreme case imaginable, in context, the Eleventh Circuit was correct in concluding that the improbability of the charges was a factor that could give rise to an inference of serious doubt.<sup>111</sup> Improbability of the allegations is, of course, a double-edged sword—as well it should be. The unsurprising nature of published charges may properly be used by the defendant to undermine an inference of serious doubt in the face of an inadequate investigation.<sup>112</sup>

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108. *Id.* at 634-36, 645-46.

109. *Id.* at 645-46.

110. *Id.* On remand a jury found that the article did not libel the defendant. 11 MEDIA L. REP. (BNA), News Notes, Feb. 19, 1985.

111. The charges in *Weaver v. Pryor* Jeffersonian, 569 P.2d 967 (Okla. 1977), also could readily be characterized as inherently improbable. In *Weaver* the defendant newspaper published absent verification a letter from a person with whom it was unfamiliar, alleging among other things that she had evidence that plaintiff, a sheriff, would "fix" a charge for someone who would do him a political favor, that he had embezzled money, and that his treatment of prisoners was reminiscent of Hitler. *Id.* at 969 & n.1. As in *Hunt v. Liberty Lobby*, the defendant was aware of the author's possible bias in that she explained that her son was one of the allegedly abused prisoners. In addition, there was evidence of ill will between defendant publisher and the plaintiff who was running for re-election. Ironically, the ill will might suggest that the publisher was more inclined to believe the improbable charges against the plaintiff because he already held him in low esteem. Because it would also be possible to infer that the publisher might be more likely to print improbable defamatory charges against a political enemy despite the existence of serious doubt for personal reasons, resolution of the matter was best left to the jury.

112. See, e.g., *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1229 (3d Cir. 1978) (granting summary judgment for defendant when television station alleged that public official had accepted bribe); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.) (reversing verdict for plaintiff when author alleged that Ernest Hemingway had low opinion of plaintiff who had been Hemingway's companion), *cert. denied*, 434 U.S. 834 (1977); *Coughlin v. Westinghouse Broadcasting and Cable*, 603 F. Supp. 377, 387 (E.D. Pa. 1985) (granting summary judgment for defendant when reporter's observations and crime commission report tended to support possibility of police corruption); *Martin Marietta Corp. v. Evening Star Newspaper, Co.*, 417 F. Supp. 947, 958 (D.D.C. 1976) (granting summary judgment for defendant when newspa-

*(d) Awareness of Inconsistent Information*

An inference of reckless disregard may arise when the defendant was aware of reliable information that directly contradicted the defamatory statement. For instance, in *Curran v. Philadelphia Newspapers*,<sup>113</sup> the Pennsylvania Supreme Court held that an inference of reckless disregard was permissible when a reporter wrote that the United States Attorney made certain derogatory remarks about plaintiff at a press conference, despite the fact that the reporter had attended the press conference and no such statements had been made.<sup>114</sup> An additional twist was added in *Airlie Foundation, Inc. v. Evening Star Newspaper Co.*<sup>115</sup> in which the defendant wrote that the plaintiff foundation was covertly financed and supported by the CIA. Following defendant's initial publication, the director of the CIA emphatically denied the truth of these allegations.<sup>116</sup> The defendant then republished the initial allegations along with the additional false statement that the director of the CIA had declined to comment. On this record, the district court quite properly concluded that sufficient evidence of reckless disregard existed because the defendant not only republished the allegations in the face of strong contradictory information but fabricated additional details in order to bolster the apparent credibility of the initial statements. In so holding, the court pointed out that "while it is well established that a failure to investigate, without more, is insufficient to give rise to liability, once one has undertaken to conduct an investigation he should not be permitted to ignore with impunity the fruits of that investigation."<sup>117</sup>

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per article alleged that plaintiff defense contractor provided prostitutes at a party for defense department personnel given that the Secretary of Defense had stated that stag parties were common in the defense industry); *Nader v. de Toledano*, 408 A.2d 31, 56 (D.C. App. 1979) (affirming summary judgment for defendant when columnist questioned well-known consumer advocate's reputation for truth and accuracy), *cert. denied*, 444 U.S. 1078 (1980); *Lexington Herald Leader v. Graves*, 9 Media L. Rep. (BNA) 1065, 1068 (Ky. 1982) (reversing verdict for plaintiff when article alleged that candidate understated property holding), *cert. denied*, 104 S. Ct. 2342 (1984); *Doubleday & Co. v. Rogers*, 674 S.W.2d 751, 756 (Tex. 1984) (reversing verdict for plaintiff when book alleged that optometrist who was indicated three times for practicing without license had been appointed to state optometry board).

113. 497 Pa. 163, 182-83, 439 A.2d 652, 661-62 (1981).

114. *Id.*

115. 337 F. Supp. 421 (D.D.C. 1972).

116. *Id.* at 428.

117. *Id.* at 427-28 (footnote omitted); *cf. Carey v. Hume*, 390 F. Supp. 1026, 1030 (D.D.C. 1975) (denying summary judgment for defendant when columnists arguably distorted or misrepresented information obtained from source), *aff'd mem.*, 543 F.2d 1389 (1976).

If there is little or no support for the defamatory allegation and the contradictory material is indeed reliable, an inference that the defendant published the material with serious doubts as to its truth very well might be warranted.<sup>118</sup> Publishing in the face of contradictory information, however, should not automatically give rise to an inference of reckless disregard. So long as the reporter has some source or support for the information, he still may con-

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118. *Tavoulaareas v. Washington Post Co.*, 759 F.2d 90, 126 (D.C. Cir. 1985) (reversing judgment n.o.v. for defendant when, among other things, reporter made allegation denied by source); *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1578 (D.C. Cir. 1984) (partially reversing summary judgment for defendants when publication accused plaintiff of favoring "forced deportation" though source referred to "voluntary repatriation"); *Carson v. Allied News Co.*, 529 F.2d 206, 212 (7th Cir. 1976) (reversing summary judgment for defendant when defamatory allegations were flatly contradicted by writer's main source); *Beech Aircraft v. National Aviation Underwriters*, 11 Med. L. Rep. (BNA) 1401, 1414 (D. Kan. 1984) (denying summary judgment for defendant when, among other things, reporter described test results critical of plaintiff despite having been informed that test was "worthless"); *Herbert v. Lando*, 596 F. Supp. 1178, 1212-13 (S.D.N.Y. 1984) (partially denying summary judgment for defendant when author wrote that individual did not have a son despite fact that he testified that he had told author that he did); *Green v. Northern Publishing*, 655 P.2d 736, 742-43 (Alaska 1982) (reversing summary judgment for defendant when writer was aware of information contradicting as well as supporting the truth of its statements), *cert. denied*, 103 S. Ct. 3539 (1983); *Reed v. Northwestern Publishing*, 11 Med. L. Rep. (BNA) 1382, 1387 (Ill. App. 1984) (reversing summary judgment for defendant when reporter had read grand jury report inconsistent with story and admitted that he was uncomfortable with story); *Newell v. Field Enters., Inc.*, 91 Ill. App. 3d 735, 756, 415 N.E.2d 434, 451 (1980) (reversing summary judgment for defendant when defamatory allegations were inconsistent with legal complaint relied on by reporter); *Costello v. Capital Cities Communications*, 11 Med. L. Rep. (BNA) 1738, 1740 (Ill. Cir. Ct. 1985) (granting verdict for plaintiff when reporter ignored information contradictory to allegations); *McHale v. Lake Charles Am. Press*, 390 So. 2d 556, 559, 568 (La. Ct. App. 1980) (affirming verdict for plaintiff when, among other things, editor published statement that "no bond buyer would buy a nickel's worth of securities on [plaintiff city attorney's] opinion" although he was aware that bond issues approved by plaintiff did sell), *cert. denied*, 452 U.S. 941 (1981); *Nevada Indep. Broadcasting Corp. v. Allen*, 99 Nev. 404, 416, 664 P.2d 337, 345 (1983) (affirming verdict for plaintiff when television commentator implied that candidato personally wrote a bad check when defendant was aware that it was written by advertising agency for candidate's campaign); *Schermerhorn v. Rosenberg*, 73 A.D.2d 276, 285, 426 N.Y.S.2d 274, 282 (1980) (affirming verdict for plaintiff when there was evidence that reporter wrote false and defamatory headline stating that plaintiff legislator said development corporation could do without support of blacks, despite knowledge that plaintiff made no such statement); *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 143, 148, 416 N.E. 2d 662, 666-67 (1976) (reversing directed verdict for defendant when allegations in article were inconsistent with findings in recent judicial proceedings), *cert. denied*, 449 U.S. 966 (1980); *cf. Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026, 1029 (4th Cir. 1976) (affirming verdict for plaintiff when plaintiff testified that, contrary to allegations in article, he had opposed change by defendant in legal defense fund), *cert. denied*, 429 U.S. 1041 (1977); *Burnett v. National Enquirer*, 144 Cal. App. 3d 991, 999, 193 Cal. Rptr. 206, 209-10 (1983) (affirming reduced punitive damage award for plaintiff when newspaper published article implying that plaintiff was drunk when source "specifically emphatically" said she was not), *appeal dismissed*, 104 S. Ct. 1260 (1984).

clude that it is correct and the contradictory matter is false, especially if the latter appears less reliable.<sup>119</sup> When the contradictory information seems to be credible, however, the issue ordinarily presents a question for the jury.

(e) *No Source*

While there may be no general duty to investigate, the publication of specific factual allegations beyond the realm of common knowledge without any source support may lead readily to an inference of reckless disregard.<sup>120</sup> For instance, in *Kuhn v. Tribune-*

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119. See, e.g., *Herbert v. Lando*, 596 F. Supp. 1178, 1209 (S.D.N.Y. 1984) (granting partial summary judgment for defendant when producer relied on interviews that were somewhat inconsistent with earlier statements given by the same individuals); *Roberts v. Dover*, 525 F. Supp. 987, 993 (M.D. Tenn. 1981) (granting summary judgment for defendant when reporter found citizen's complaint regarding police misconduct more persuasive than officer's denial but printed both sides of the story); *Colombo v. Times-Argus Ass'n*, 135 Vt. 454, 458, 380 A.2d 80, 84 (1977) (affirming directed verdict for defendant when reporter was informed by plaintiff and chief of police that story was "far-fetched" and "unfounded"); see also *Foster v. Upchurch*, 624 S.W.2d 564, 566 (Tex. 1981) (reversing denial of defendant's plea of privilege when plaintiff relied solely on inconsistencies in article); *Holly v. Cannaday*, 669 S.W.2d 381, 384 (Tex. Ct. App. 1984) (reversing denial of defendant's plea of privilege when plaintiff relied solely on internal inconsistencies in article); cf. *Oliver v. Village Voice, Inc.*, 417 F. Supp. 235, 238-39 (S.D.N.Y. 1976) (granting summary judgment for defendant when reporter claimed source purported to credit information provided by third party and source denied having done so).

120. *Golden Bear Distrib. Sys., Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 950 (5th Cir. 1983) (affirming verdict for plaintiff when author knew that plaintiff company was completely separate from company with similar name involved in fraud but wrote that they pursued same business practices, despite absence of any information to that effect); *Carson v. Allied News Co.*, 529 F.2d 206, 211-12 (7th Cir. 1976) (reversing summary judgment for defendant when newspaper published specific defamatory allegations regarding plaintiff's marriage with no source support); *Goldwater v. Ginzburg*, 414 F.2d 324, 332, 336, 340 (2d Cir. 1969) (affirming verdict for plaintiff when writer alleged that presidential candidate was suffering from mental disorders without any source), *cert. denied*, 396 U.S. 1049 (1970); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 577-78, 584-85 (S.D.N.Y. 1984) (denying summary judgment for defendant when, among other things, writer and editor based serious charges on little more than speculation); *Beech Aircraft v. National Aviation Underwriters*, 11 Med. L. Rep. (BNA) 1401, 1416 (D. Kan. 1984) (denying summary judgment for defendant when editor wrote article with no apparent source for critical information); *Shockley v. Cox Enters.*, 10 MEDIA L. REP. (BNA) 1222, 1223 (N.D. Ga. 1983) (denying summary judgment for defendant when author had no basis for statement that plaintiff's voluntary sterilization plan had previously been utilized by the Nazis); *Holter v. WLCY T.V., Inc.*, 366 So. 2d 445, 456 (Fla. Dist. Ct. App. 1978) (reversing judgment for defendant when allegations on broadcast concerning governmental impropriety were totally fabricated); *Peisner v. Detroit Free Press, Inc.*, 82 Mich. App. 153, 166, 266 N.W.2d 693, 699 (1978) (reversing summary judgment for defendant when plaintiff alleged that reporter had admitted prior to publication that there was no basis for allegations concerning plaintiff); *Deloach v. Beaufort Gazette*, \_\_\_ S.C. \_\_\_, 316 S.E.2d 139, 141 (affirming verdict for plaintiff when police officer denied telling reporter that plaintiff had been arrested and charged and reporter failed to check arrest docket), *cert. denied*, 105 S. Ct. 384 (1984); *Sprouse v. Clay Communication, Inc.*, 211



*Republican Publishing Co.*<sup>121</sup> a reporter wrote that a city agency provided a ski resort with a specific amount of business and, in turn, agency officials received free ski passes, although the reporter apparently had no source for the charges that turned out to be false. Obviously, when someone makes a statement of this specificity with no way of knowing whether it is true or false, he is engaging in deliberate fabrication and an inference of actual knowledge of falsity would be warranted. Perhaps because the defendant could believe that his fabricated charges might coincidentally turn out to be true, the courts are content to dispose of such cases as instances of reckless disregard for the truth.

Likewise, an inference of reckless disregard might be drawn, when the evidence established that, in the course of the publication or broadcast, the defendant fabricated other nondefamatory statements or charges. Admittedly, this inference does not prove directly that the defendant knew or had good reason to believe that the defamatory charges were false. If, however, there is any showing at all that the defendant should have suspected the falsity of the defamatory allegations, evidence of the defendant's general disdain for truth and accuracy with respect to plaintiff and the subject matter of the defamation is probative and should not be ignored.

(f) *Obvious Reason to Doubt Source*

In *St. Amant v. Thompson* the Court observed that "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."<sup>122</sup> Reliance on a patently unreliable source may give rise to serious doubts as to the truth of the information. A source might be considered unreliable for a variety of reasons. The reporter may be aware that the source's reputation for veracity is tainted. In *Pep v. Newsweek, Inc.*,<sup>123</sup> for instance, a federal district court held that

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S.E.2d 674, 688 (W.Va.) (affirming verdict for plaintiff when newspaper had no source for innuendo of impropriety by public official), *cert. denied*, 423 U.S. 882 (1975); *cf. Burnett v. National Enquirer*, 144 Cal. App. 3d 991, 999, 101-02, 193 Cal. Rptr. 206, 209, 219 (1983) (affirming reduced punitive damage award for plaintiff when publisher had no source for allegations that plaintiff was intoxicated in public), *appeal dismissed*, 104 S. Ct. 1260 (1984); *Beamer v. Nishiki*, \_\_\_ Hawaii \_\_\_, \_\_\_, 670 P.2d 1264, 1275-76 (1983) (denying summary judgment for defendant when reporter's only source provided no support for defamatory allegations).

121. 637 P.2d 315 (Colo. 1981).

122. 390 U.S. 727, 732 (1968) (footnote omitted).

123. 553 F. Supp. 1000 (S.D.N.Y. 1983).

an inference of serious doubt as to the truth could be drawn when, among other problems, there was evidence that the defendant magazine knew that its primary source was "a convicted felon, a swindler and a self-described 'pathological liar'" yet failed to corroborate the source's defamatory charges.<sup>124</sup> Even when the source's reputation for veracity has not been challenged directly, reliance on a source with a criminal record or generally unsavory background is one factor that may be properly taken into account on the reckless disregard issue.<sup>125</sup>

On the other hand, as the Louisiana Supreme Court noted in *Kidder v. Anderson*,<sup>126</sup> "newspaper investigation of reports of corruption must often obtain first-hand corroboration from those present in the barrooms or gambling houses, rather than from citizens who spend their time only at home, in church, or at work in less colorful occupations."<sup>127</sup> Reporters covering a story in shady areas

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124. *Id.* at 1001-02. The defendant argued that it had found the source worthy of belief despite the source's background. Newsweek ultimately prevailed on a jury verdict that the charge was not substantially false. 10 MEDIA L. REP. (BNA) 1288, News Notes, Mar. 6, 1984; see also *Liherty Lohhy Inc. v. Anderson*, 746 F.2d 1563, 1566, 1574-75 (D.C. Cir. 1984) (reversing a partial summary judgment for defendant when reporter relied on article despite knowledge that plaintiff had previously obtained favorable settlement to libel action concerning same article); *Burnett v. National Enquirer*, 144 Cal. App. 3d 991, 999-1000, 193 Cal. Rptr. 206, 210 (1983) (affirming verdict for plaintiff when editor failed to corroborate allegations by source that it knew to be untrustworthy), *appeal dismissed*, 104 S. Ct. 1260 (1984). The *Burnett* case will be retried because the plaintiff refused to accept the appellate court's reduction of punitive damages. See *Lauter, Burnett Case Going into Reruns*, NAT'L L.J., Mar. 5, 1984, at 3.

125. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 157 (1967) (defendants' failure to corroborate source's allegations although aware source was on probation for bad check charge was one of several factors supporting a finding of highly unreasonable conduct); *id.* at 169-70 (Warren, J., concurring) (incorporating by reference Harlan's discussion of defendant's fault as a predicate for finding reckless disregard); *Tavoulaareas v. Washington Post Co.*, 759 F.2d 90, 129-30 (D.C. Cir. 1985) (reversing judgment n.o.v. for defendant, when, among other things, reporter was aware source had been involved in dishonest business practices); *Alioto v. Cowles Communications, Inc.*, 430 F. Supp. 1363, 1370 (N.D. Cal. 1977) (granting verdict for plaintiff when source's source was a notorious underworld figure reputed to be a "liar" and "name dropper"), *aff'd*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981); *Indianapolis Newspapers, Inc. v. Fields*, 254 Ind. 219, 251, 259 N.E.2d 651, 664 (affirming verdict for plaintiff by equally divided court when, among other sources, reporter relied on "petty criminal" with "an unsavory reputation" who "was obviously making a deal to gain his freedom"), *cert. denied*, 400 U.S. 930 (1970); *Luper v. Black Dispatch Publishing Co.*, 675 P.2d 1028, 1031, 1034 (Okla. 1983) (reversing summary judgment for defendant when, among other things, editor knew source was an ex-convict and ex-mental patient).

126. 354 So. 2d 1306 (La.), *cert. denied*, 439 U.S. 829 (1978).

127. *Id.* at 1309; see also *Barry v. Time*, 584 F. Supp. 1110, 1122 (N.D. Cal. 1984) (dismissing complaint when magazine relied on source who was convicted of assault and failed to pass lie detector test but revealed his background in article); cf. *Pritchard v. Times*

may have to take their sources as they find them—warts and all. While a reputation for untrustworthiness or a serious criminal record may give rise to an inference that the reporter had serious doubts about the truth of the information, the courts should not dismiss the possibility that the reporter convinced himself of the particular source's veracity, in spite of the source's bad reputation. Such a conviction may seem unbelievable, however, when the reporter is aware of the source's lack of credibility and still fails to employ readily available means of verification. Ordinarily the choice of competing inferences should be left to the factfinder.

An inference of reckless disregard also may arise when the reporter has placed primary reliance on a source that he knows to be biased against the plaintiff, such as an estranged spouse,<sup>128</sup> a personal enemy,<sup>129</sup> a political opponent,<sup>130</sup> or someone who was simply

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Southwest Broadcasting, 277 Ark. 458, 459, 642 S.W.2d 877, 878 (1982) (affirming directed verdict for defendant when, in writing article pertaining to grand jury investigation of sheriff, reporter relied on two sources who had been indicted).

128. Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1361-62 (Colo. 1983) (affirming verdict for plaintiff when reporter relied on former spouse in reporting on breakup of marriage); Luper v. Black Dispatch Publishing Co., 675 P.2d 1028, 1034 (Okla. 1983) (reversing summary judgment for defendant when, among other things, editor knew source was "embittered ex-husband" and tone of information was "venomous" and "nearly hysterical"); Stevens v. Sun Publishing Co., 270 S.C. 65, 69-70, 240 S.E.2d 812, 814-15 (affirming verdict for plaintiff when publisher relied on former sister-in-law known to be biased against plaintiff), *cert. denied*, 436 U.S. 945 (1978).

129. Tavoulares v. Washington Post Co., 759 F.2d 90, 128-31 (D.C. Cir. 1985) (reversing judgment n.o.v. for defendant when, among other things reporter relied on former son-in-law of one plaintiff and former business partner of other, both of whom were bitter toward plaintiffs); Hunt v. Liberty Lobby, 720 F.2d 631, 645 (11th Cir. 1983) (sufficient evidence of reckless disregard when, among other things, publisher knew author was involved in litigation against CIA, which was derogatorily depicted in article; court reversed and remanded on other grounds); Beech Aircraft v. National Aviation Underwriters, 11 Med. L. Rep. (BNA) 1401, 1415 (D. Kan. 1984) (denying summary judgment for defendant when, among other things, reporter relied on insurer sources who had a pecuniary interest in criticizing the design of plaintiff's airplane); Cape Publications, Inc. v. Adams, 336 So. 2d 1197, 1199-1200 (Fla. App. 1976) (affirming verdict for plaintiff when, among other things, source and plaintiff had "a running feud" because plaintiff once had source arrested), *cert. denied*, 434 U.S. 943 (1977).

130. News Publishing Co. v. Deberry, 321 S.E.2d 112, 114 (Ga. App. 1984) (affirming verdict for plaintiff when reporter relied on commissioner who had attempted to have plaintiff warden fired twice); Lyons v. New Mass Media, Inc., 390 Mass. 51, 453 N.E.2d 451, 456 (1983) (denying summary judgment for defendant when reporter based story on sources who were involved in "serious, acrimonious" union dispute with plaintiffs); Miller v. Argus Publishing Co., 79 Wash. 2d 816, 833, 490 P.2d 101, 111 (1971) (sufficient evidence of reckless disregard when, among other things, defendant published disparaging article by a political adversary of plaintiff without verification but reversing verdict for plaintiff on other grounds); *cf.* Grebner v. Runyon, 132 Mich. App. 327, 347 N.W.2d 741 (1984) (reversing summary judgment for defendant when, among other things, reporter allegedly placed sole reliance on partisan political opponent of plaintiff's).

angry at the plaintiff.<sup>131</sup> Reliance on a biased source will not give rise to an inference of reckless disregard, however, when the allegations are independently corroborated because there is no reason to believe that the reporter entertained serious doubts concerning the truth.<sup>132</sup> Moreover, as with an otherwise untrustworthy source, reliance on a biased source may not necessarily give rise to an inference of reckless disregard even in the absence of independent verification, because the reporter may have had reason to believe the source in any event.<sup>133</sup>

An inference of reckless disregard also is permissible when the defendant was aware that a source had made a series of highly improbable charges in the past. In *Fitzgerald v. Penthouse Interna-*

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131. *Mahnke v. Northwest Publications, Inc.*, 280 Minn. 328, 342, 160 N.W.2d 1, 11 (1968) (affirming verdict for plaintiff when, among other things, reporter relied on source who was admittedly angry at plaintiff) (arguably applying objective reckless disregard standard); *Weaver v. Pryor Jeffersonian*, 569 P.2d 967, 970, 974 (Okla. 1977) (reversing summary judgment for defendant when, among other things, publisher failed to investigate letter critical of plaintiff sheriff from mother of boy jailed by plaintiff).

132. See, e.g., *Weingarten v. Block*, 102 Cal. App. 3d 129, 150-51, 162 Cal. Rptr. 701, 715-16 (affirming nonsuit against plaintiff when reporter relied on two sources for every statement, some of whom may have been biased against plaintiff), *cert. denied*, 449 U.S. 899 (1980); *Lexington Herald Leader v. Graves*, 9 Media L. Rep. (BNA) 1065, 1071 (Ky. 1982) (reversing verdict for plaintiff when reporter attempted to independently verify allegations made by plaintiff's political enemies), *cert. denied*, 104 S. Ct. 2342 (1984); *Tucci v. Guy Gannett Publishing Co.*, 464 A.2d 161, 167-68 (Me. 1983) (affirming summary judgment for defendant when reporter corroborated memorandum from source biased against plaintiff); *Holy Spirit Assoc. v. Sequoia Elsevier Publishing*, 75 A.D.2d 523 (N.Y. Sup. Ct. 1978) (granting summary judgment for defendant when statements made by questionable sources were corroborated by more reliable sources).

133. See *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.) (reversing verdict for plaintiff when publisher was aware of author's bias against plaintiff but had reason to believe that author was in position to observe the incidents in question first hand), *cert. denied*, 434 U.S. 834 (1977); *Loeb v. New Times Communications Corp.*, 497 F. Supp. 85, 92 (S.D.N.Y. 1980) (granting summary judgment for defendant despite alleged reliance on biased sources); *Lins v. Evening News*, 342 N.W.2d 573, 580-81 (Mich. App. 1983) (affirming summary judgment for defendant despite defendant's failure to verify information provided by biased source); *Pelzer v. Minneapolis Tribune*, 7 Media L. Rep. (BNA) 2507, 2509 (Minn. Dist. Ct. 1981) (granting summary judgment for defendant when reporter relied on tip from candidate opposing plaintiff that was arguably reliable because source incriminated self); cf. *Dowd v. Calabrese*, 589 F. Supp. 1206, 1213 (D.D.C. 1984) ("[C]ollaboration between individuals with an axe to grind and reporters eager for a story is not uncommon; rather, it is the way the news media frequently operate."); *Gaynes v. Allen*, 339 N.W.2d 678, 683 (Mich. App. 1983) (affirming directed verdict for defendant when reporter knew that source had been involved in litigation against plaintiff pertaining to subject matter of defamatory allegations but had been informed that source was trustworthy); *Rye v. Seattle Times*, 37 Wash. App. 45, 678 P.2d 1282 (1984) (granting summary judgment for defendant when reporter relied on two sources that he knew to be hostile to plaintiff but believed nonetheless because they seemed to be incriminating themselves).

*tional, Ltd.*<sup>134</sup> the Court of Appeals for the Fourth Circuit concluded that there was sufficient evidence to indicate that defendant must have realized that its primary source was of dubious reliability given his prior record of bizarre allegations concerning various international conspiracies. This realization, in turn, could support an inference of reckless disregard because defendant failed to verify the information, despite good reason to question the source's credibility.<sup>135</sup> This holding follows as a matter of common sense so long as the defendant is aware of the source's questionable prior conduct.

As the Supreme Court observed in *St. Amant*, an inference of serious doubt may arise when a reporter relied exclusively on an anonymous telephone call or letter.<sup>136</sup> Although a source's refusal to reveal its identity may indicate fear of reprisal, the refusal also may suggest an unwillingness to stand behind allegations. At the very least, anonymity normally should raise a red flag in the reporter's or editor's mind thus permitting an inference that the defendant doubted the truth of the allegations. Similarly, an inference of serious doubt may arise when the source was not anonymous, but the defendant was aware that there was reason to believe that the source, even if trustworthy, may have been mistaken. For instance, in *Alioto v. Cowles Communications, Inc.*<sup>137</sup> a

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134. 691 F.2d 666, 672 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983); *see also* Gertz v. Robert Welch, Inc., 680 F.2d 527, 538-39 (7th Cir. 1982) (sufficient evidence of reckless disregard to affirm punitive damage award when, among other things, editor was aware that author had accused various well-known people of being communists, including Richard Nixon and John Foster Dulles), *cert. denied*, 459 U.S. 1226 (1983).

135. 691 F.2d at 671.

136. 390 U.S. 727, 732 (1968); *see also* Holter v. WLCY T.V., Inc., 366 So. 2d 445, 456 (Fla. App. 1978) (reversing judgment for defendant when, among other things, reporter relied on anonymous telephone call but told editor that he knew the source); Mehau v. Gannett Pac., 66 Hawaii 133, 658 P.2d 312, 321-22 (1983) (reversing summary judgment for defendant when wire service relied on anonymous allegations published in sensational tabloid); Ammerman v. Hubbard Broadcasting, Inc., 91 N.M. 250, 258, 572 P.2d 1258, 1263 (1977) (reversing summary judgment for defendant when, among other sources, defendant purported to have relied on a combination of anonymous telephone calls and confidential sources), *cert. denied*, 436 U.S. 906 (1978); *cf.* Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1578 (D.C. Cir. 1984) (partially reversing summary judgment for defendant when reporter based defamatory allegations on single telephone conversation with source that he knew nothing about).

137. 430 F. Supp. 1363, 1370 (N.D. Cal. 1977), *aff'd*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); *see also* Goldwater v. Ginzburg, 414 F.2d 324, 339 (2d Cir. 1969) (affirming verdict for plaintiff when, among other things, editor continued to rely on polling practices after having been warned by reputable professionals that the practices lacked validity), *cert. denied*, 396 U.S. 1049 (1970); Carey v. Hume, 390 F. Supp. 1026, 1030 (D.D.C. 1975) (denying summary judgment for defendant when reporters were aware that

federal district court properly noted that an inference of reckless disregard could be grounded in part on the fact that the defendant's primary source based his allegations on some rather vague memories of a second hand report of events that took place several years earlier. A reporter may be more skeptical when faced with an apparently confused or ill-informed source than with a biased source. A biased source, despite his prejudice, still may be telling the truth. A confused source in spite of his good faith, very well may be mistaken.

(g) *Failure to Consult an Obvious Source*

Although failure to investigate, alone, does not establish reckless disregard, it may be taken into account when the defendant fails to consult an obvious source,<sup>138</sup> including the plaintiff,<sup>139</sup> at

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source had not witnessed alleged misconduct); *Akins v. Altus Newspapers, Inc.*, 609 P.2d 1263, 1266-67 (Okla. 1977) (affirming verdict for plaintiff when reporter based story largely on overhearing one side of telephone conversation and casual conversation and then misrepresented extent of verification to editor), *cert. denied*, 449 U.S. 1010 (1980); *cf.* *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 869, 330 N.E.2d 161, 174 (1975) (sufficient evidence of reckless disregard when, among other things, editor was aware that reporter covering trial was inexperienced); *Mahnke v. Northwest Publications, Inc.*, 280 Minn. 328, 342, 160 N.W.2d 1, 11 (1968) (affirming verdict for plaintiff when, among other things, evidence indicated that reporter was aware that source obtained information second hand from person who was upset and angry) (arguably applying objective standard).

138. *See, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 157 (1967) (Harlan, J.) (sufficient evidence of highly unreasonable conduct to affirm verdict for plaintiff when, among other things, defendant failed to verify the information with three obvious sources despite reason to doubt primary source); *id.* at 170 (Warren, J. concurring) (incorporating by reference Harlan's factual analysis in finding sufficient evidence of reckless disregard); *Hunt v. Liberty Lobby*, 720 F.2d 631, 645 (11th Cir. 1983) (sufficient evidence of reckless disregard for jury when, among other things, publisher doubted the accuracy of allegations regarding lawsuit but failed to verify with author, with court records, or with newspaper file; court reversed on other grounds); *Pep v. Newsweek, Inc.*, 553 F. Supp. 1000, 1002 (S.D.N.Y. 1983) (denying summary judgment for defendant when, among other things, author failed to contact three obvious sources, though aware that its primary source might be unreliable); *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315, 319 (Colo. 1981) (reinstating verdict for plaintiff when, among other things, defendant failed to corroborate allegations with most obvious source, despite lack of deadline pressure); *Costello v. Capital Cities Communications*, 11 Med. L. Rep. (BNA) 1738, 1740 (Ill. Cir. Ct. 1985) (granting verdict for plaintiff when reporter failed to check with individuals present at board meeting); *Mahnke v. Northwest Publications, Inc.*, 280 Minn. 328, 342, 160 N.W.2d 1, 11 (1968) (affirming verdict for plaintiff when, among other things, reporter failed to contact several obvious sources despite reason to doubt primary source) (arguably applying objective standard); *Sills v. New York Times*, 8 Media L. Rep. (BNA) 1460, 1464 (N.Y. Sup. Ct.), *aff'd mem.*, 90 A.D.2d 1004 (1982) (sufficient evidence of reckless disregard when defendant added material to story based on subjective impression that could readily have been checked with standard reference work); *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143, 145-46, 416 N.E.2d 662, 665 (1979) (reversing summary judgment for defendant when, among other things, re-

least when the defendant had some reason to suspect that the information might not be true. Arguably, when there is some reason to question the accuracy of the information, a reporter's failure to consult an obvious and readily available source suggests that he did not wish to have his suspicions confirmed.<sup>140</sup> Such an inference is particularly strong when, as in *Alioto v. Cowles Communications, Inc.*, the defendant actually interviewed the most obvious and credible source and studiously avoided asking him whether the defamatory allegations were true.<sup>141</sup>

As a general rule, failure to question an obvious source is only of slight relevance to the reckless disregard issue. A failure simply may suggest that the defendant was lazy, thoughtless, or negligent, but not necessarily that the defendant was proceeding to publish

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porter wrote article about matter adjudicated in pretrial hearing without reading transcript), *cert. denied*, 449 U.S. 966 (1980); *cf.* *Carey v. Hume*, 390 F. Supp. 1026, 1028-29 (D.D.C. 1975) (denying summary judgment for defendant when, among other things, reporter declined to verify allegations with eyewitness); *Nevada Indep. Broadcasting v. Allen*, 99 Nev. 404, 416, 664 P.2d 337, 345 (1983) (affirming verdict for plaintiff when, among other things, television commentator deliberately avoided asking plaintiff about bad check until live interview). *But see* *Heritage Publishing Co. v. Cummins*, 124 Cal. App. 3d 305, 311, 177 Cal. Rptr. 277, 281 (1981) (reversing verdict for plaintiff even though defendant failed to verify with three most obvious sources), *cert. denied*, 457 U.S. 1106 (1982).

139. *Fitzgerald v. Penthouse Int'l, Ltd.* 691 F.2d 666, 672 (4th Cir. 1982) (reversing summary judgment for defendant when writer failed to contact plaintiff despite good reason to question reliability of source), *cert. denied*, 460 U.S. 1024 (1983); *Dixson v. Newsweek, Inc.* 562 F.2d 626, 631 (10th Cir. 1977) (affirming verdict for plaintiff, when, among other things, defendant failed to question plaintiff about defamatory allegations during interview); *Pep v. Newsweek, Inc.*, 553 F. Supp. 1000, 1002 (S.D.N.Y. 1983) (denying summary judgment for defendant when, among other things, author failed to question plaintiff about defamatory allegations, despite strong reasons to doubt source); *Kuhn v. Tribune-Republican Co.*, 637 P.2d 315, 318-19 (Colo. 1981) (reinstating verdict for plaintiff when, among other things, reporter failed to question plaintiff public officials regarding allegations of improper conduct); *cf.* *Mahnke v. Northwest Publications, Inc.*, 280 Minn. 328, 341, 160 N.W.2d 1, 10 (1968) (affirming verdict for plaintiff when, among other things, defendant failed to interview plaintiff) (arguably applying objective standard).

140. *Pep v. Newsweek, Inc.*, 553 F. Supp. 1000, 1002-03 (S.D.N.Y. 1983).

141. 430 F. Supp. 1363, 1371 (N.D. Cal. 1977), *aff'd*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981). In *Alioto* the defamatory allegations concerned an alleged meeting between plaintiff and certain underworld figures. Defendant interviewed a presumably honest individual who supposedly had attended the meeting, yet defendant failed to ask him about it. *See also* *Rebozo v. Washington Post Co.*, 637 F.2d 375, 377, 382 (5th Cir.) (reversing summary judgment for defendant when, among other things, reporter interviewed source but failed to ask him about key defamatory allegation), *cert. denied*, 454 U.S. 964 (1981); *Dixson v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977) (affirming verdict for plaintiff when, among other things, reporter failed to question plaintiff about defamatory statements during prepublication interview); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 576, 584-85 (S.D.N.Y. 1984) (denying summary judgment for defendant when, among other things, reporter failed to question source about contents of secret appendix arguably out of fear that it might undermine his own hypothesis).

with a probable awareness of falsity. In *New York Times v. Sullivan*, for instance, the Court was unwilling to infer reckless disregard simply because the defendant could have discovered the falsity of some of the allegations by checking its own files.<sup>142</sup> Consequently, evidence of failure to verify through an obvious source should be considered only in the most extreme cases and even then it should be considered only when there is some independent evidence of serious doubt. In other words, evidence of failure to verify through an obvious source may serve as the extra degree of proof that allows the plaintiff to establish his case to the requisite clear and convincing degree, however, such evidence should not constitute the basic predicate for the showing of reckless disregard.

(h) *Failure to Consult an Expert*

An inference of serious doubt may be supported by evidence that a reporter wrote about a complex or technical matter that he admittedly did not understand, yet failed to seek expert assistance. This evidence does not show necessarily that the reporter seriously doubted the truth of his story but may at least suggest that he was aware that he did not fully understand what he was reporting but was not sufficiently concerned about the truth to obtain assistance. In *Goldwater v. Ginzburg*, for instance, defendant purported to psychoanalyze the plaintiff despite his lack of training in psychiatry and failure to consult experts in that field.<sup>143</sup> Similar situations

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142. 376 U.S. 254, 287-88 (1964); see also *Otepka v. New York Times Co.*, 379 F. Supp. 541, 544 (D. Md. 1973) (granting summary judgment for defendant even though reporter failed to check his own files), *aff'd*, 502 F.2d 1163 (4th Cir. 1974); *Hurley v. Northwest Publications, Inc.*, 273 F. Supp. 967, 974 (D. Minn. 1967) (granting summary judgment for defendant even though reporter failed to interview plaintiff about allegations in legal complaint filed against him), *aff'd*, 398 F.2d 346 (8th Cir. 1968); *Reader's Digest v. Marin County Superior Court*, 37 Cal 3d 244, —, 208 Cal. Rptr. 137, 146, 690 P.2d 610, 619 (1984) (reversing denial of summary judgment for defendant despite failure to contact plaintiff); *Tagawa v. Maui Publishing Co.*, 50 Hawaii 648, 654, 448 P.2d 337, 341 (1968) (affirming summary judgment for defendant when reporter erroneously concluded that construction work was being conducted on plaintiff's property at public expense and failed to verify conclusion with county officials), *cert. denied*, 396 U.S. 822 (1969); *McCarney v. Des Moines Register and Tribune Co.*, 239 N.W.2d 152, 156-57 (Iowa 1976) (reversing denial of summary judgment for defendant when editor failed to check own files); *Capital-Gazette Newspaper, Inc. v. Stack*, 293 Md. 528, 445 A.2d 1038, 1045 (affirming directed verdict for defendant when reporter failed to attempt to confirm allegations with plaintiff), *cert. denied*, 459 U.S. 989 (1982); *Doubleday Co. v. Rogers*, 674 S.W.2d 751, 756 (Tex. 1984), *rev'g* 644 S.W.2d 533, 534 (Tex. App. 1982) (reversing verdict for plaintiff when court of appeals had relied on author's failure to contact obvious source).

143. 414 F.2d 324, 332-33, 339 (2d Cir. 1969) (sufficient evidence of reckless disregard



could arise with respect to the reporting of scientific, legal, or business affairs. Before an inference may be drawn from the defendant's failure to consult an expert, however, the plaintiff must show that the defendant was aware of his own ignorance regarding the particular subject and that expert advice was available. If the reporter was too ignorant to recognize his own ignorance, there is no reason to infer reckless disregard.<sup>144</sup> Even when the reporter appreciates his own ignorance, evidence of failure to consult an expert must be utilized with care because the inference it creates generally will only carry the plaintiff part way home. A person who realizes that he does not fully understand what he is talking about presumably holds some doubt of the truth of his statements but not necessarily serious doubt. Hence by itself, evidence of failure to consult an expert should not be enough to carry a plaintiff to the jury under the clear and convincing evidence standard.<sup>145</sup> Coupled with other evidence of serious doubt, however, failure to consult an expert is probative and will help the plaintiff carry his heavy burden.

(i) *No Further Verification Following Denial*

An inference of reckless disregard also may arise when the plaintiff or a third party with reason to know the truth of the matter, denied the charges and the defendant published or republished them without further verification. For instance, in *Curtis Publishing Co. v. Butts* Chief Justice Warren relied on defendant's failure to conduct further inquiries, after plaintiff and his daughter emphatically denied the charges prior to publication, as one factor supporting a finding of reckless disregard.<sup>146</sup> The inference of reck-

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to support verdict for plaintiff), *cert. denied*, 396 U.S. 1049 (1970); *see also* *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 158-59 (1967) (Harlan, J.) (sufficient evidence of highly unreasonable conduct to support verdict for plaintiff when, among other things, reporter wrote about plot to fix football game though reporter was not a football expert and failed to check with any football experts); *id.* at 169-70 (Warren, C.J., concurring) (sufficient evidence of reckless disregard on record as detailed by Harlan).

144. *Kapiloff v. Dunn*, 27 Md. App. 514, 540, 343 A.2d 251, 269 (1975) (reversing verdict for plaintiff when defendant did not consult education experts before preparing rating system for evaluating high school principals), *cert. denied*, 426 U.S. 907 (1976).

145. *Lexington Herald Leader v. Graves*, 9 Media L. Rep. (BNA) 1065, 1070-71 (Ky. 1982) (reversing verdict for plaintiff when reporter was aware that he probably did not understand fully financial and legal documents on which he based article), *cert. denied*, 104 S. Ct. 2342 (1984). *But see id.* at 1072, (Stephenson, J., dissenting) (argument that the evidence supported an inference of reckless disregard).

146. 388 U.S. 130, 169-70 (1967); *see also* *Levine v. CMP Publications*, 738 F.2d 660, 675 (5th Cir. 1984) (partially affirming punitive damages for plaintiff when plaintiff specifi-

less disregard is stronger when the charge is denied by a trustworthy and knowledgeable third party,<sup>147</sup> as in *Cape Publications, Inc.*

cally informed defendant that he had not been convicted of criminal offense before defendant published the allegation); *Alioto v. Cowles Communications, Inc.*, 430 F. Supp. 1363, 1371 (N.D. Cal. 1977), *aff'd*, 623 F.2d 616 (9th Cir. 1980) (affirming verdict for plaintiff when, among other things, reporter failed to verify after plaintiff denied some of the defamatory allegations), *cert. denied*, 449 U.S. 1102 (1981); *Church of Scientology v. Dell Publishing Co.*, 362 F. Supp. 767, 770 (N.D. Cal. 1973) (denying summary judgment for defendant when publisher republished book in paperback form without further investigation, despite receipt of signed statement by person named in book denying certain allegations pertaining to him); *Buckley v. Esquire, Inc.*, 344 F. Supp. 1133, 1135 (S.D.N.Y. 1972) (denying summary judgment for defendant when defamatory allegations were published following denial by plaintiff); *Bindrim v. Mitehell*, 92 Cal. App. 3d 61, 74, 155 Cal. Rptr. 29, 36 (partially affirming verdict for plaintiff when publisher failed to investigate further, prior to publication of paperback edition after an emphatic denial by plaintiff's attorney), *cert. denied*, 444 U.S. 984 (1979); *Holter v. WLCY T.V., Inc.*, 366 So. 2d 445, 456 (Fla. App. 1979) (reversing judgment for defendant when, among other things, reporter failed to corroborate story after an emphatic denial by plaintiff); *McHale v. Lake Charles Am. Press*, 390 So. 2d 556, 564 (La. App. 1980) (affirming verdict for plaintiff when, among other things, editor's interview with plaintiff contradicted allegation in issue); *Ammerman v. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 259, 572 P.2d 1258, 1264 (1977) (reversing summary judgment for defendant when plaintiff's associate denied charges prior to publication), *cert. denied*, 436 U.S. 906 (1978); *Luper v. Black Dispatch Publishing Co.*, 675 P.2d 1028, 1034 (Okla. 1983) (reversing summary judgment for defendant when plaintiff informed editor that allegations were false prior to second publication); *Braig v. Field Communications*, 310 Pa. Super. 569, 456 A.2d 1366, 1376-77 (1983) (reversing summary judgment for defendant when plaintiff denied allegations prior to rebroadcast), *cert. denied*, 104 S.Ct. 2341 (1984); *Stevens v. Sun Publishing Co.*, 270 S.C. 65, 72, 240 S.E.2d 812, 815 (affirming verdict for plaintiff when newspaper published without further verification after a warning of falsity), *cert. denied*, 436 U.S. 945 (1978); *Nobles v. Eastland*, 678 S.W.2d 253, 256 (Tex. App. 1984) (reversing summary judgment for defendant when plaintiff denied allegations prior to second publication); *Chase v. Daily Record, Inc.*, 83 Wash. 2d 37, 44, 515 P.2d 154, 158 (1973) (reversing summary judgment for defendant when plaintiff denied specific charges prior to publication); *Miller v. Argus Publishing Co.*, 79 Wash. 2d, 816, 834, 490 P.2d 101, 111 (1971) (sufficient evidence of reckless disregard when defendant republished libelous allegations without further verification after a denial by plaintiff but reversing verdict for plaintiff on other grounds); *O'Brien v. Tribune Publishing Co.*, 7 Wash. App. 107, 123, 499 P.2d 24, 33 (1972) (reversing summary judgment for defendant when it failed to verify after a denial by plaintiff), *cert. denied*, 411 U.S. 906 (1973); *cf. Rebozo v. Washington Post Co.*, 637 F.2d 375, 377 (5th Cir.) (reversing summary judgment for defendant when, among other things, plaintiff's attorney told reporter, prior to publication, that plaintiff "flatly denies" gist of defamatory allegation), *cert. denied*, 454 U.S. 964 (1981); *Gleichenhaus v. Carlyle*, 226 Kan. 167, 170, 597 P.2d 611, 613 (1979) (reversing summary judgment for defendant when reporter was informed that allegations were false prior to publication); *Russo v. Padovano*, 84 A.D.2d 925, 446 N.Y.S.2d 645, 648 (1981) (reversing summary judgment for defendant when plaintiff alleged that he informed reporter of his true credentials prior to publication of article misstating them).

147. *Airlie Found., Inc. v. Evening Star Newspapers, Inc.*, 337 F. Supp. 421, 425 (D.D.C. 1972). In *Airlie* the Director of the CIA denied the claim that the plaintiff organization was funded by the agency. Given the necessarily clandestine character of the CIA's role, *Airlie* would seem to be an instance in which a denial by a third party, probably should not be accepted at face value. An inference of serious doubt still was warranted, however, be-

*v. Adams*,<sup>148</sup> in which the Florida Court of Appeals found sufficient evidence of reckless disregard to affirm a jury verdict for plaintiff when a newspaper published defamatory allegations despite denial of the charges by three knowledgeable sources.<sup>149</sup>

An inference of reckless disregard should not follow automatically from the defendant's mere failure to corroborate following a denial by the *plaintiff*. As a federal district court explained in *Martin Marietta Corp. v. Evening Star Newspaper Corp.*,<sup>150</sup> "[i]f potential plaintiffs in libel suits could cut off a malice defense simply by calling a newspaper and giving a broad denial of an article, the first amendment policy embodied in *New York Times* could be undermined."<sup>151</sup> The Court of Appeals for the Second Circuit recently elaborated on this point in *Edwards v. National Audubon Society, Inc.*,<sup>152</sup> when it observed that proof of reckless disregard

cause the newspaper did not simply ignore the denial but affirmatively misrepresented it by writing that "the CIA declined to comment on the charges . . . but government sources said the charges . . . were untrue." *Id.* at 426.

In *Martin Marietta Corp. v. Evening Star Newspaper*, the court distinguished *Airline* on the grounds that in *Martin*, the defendant newspaper initiated the inquiry, the source of information was a third party rather than the plaintiff, and the defendant did not misrepresent the denial nor was it aware of any other information indicating that the charges were false. 417 F. Supp. 947, 960 (D.D.C. 1976); see also *Rinaldi v. Village Voice, Inc.*, 47 A.D.2d 180, 365 N.Y.S.2d 199, 201 (denying summary judgment for defendant when it failed to investigate or alter advertisement despite being warned by reputable source prior to publication that certain allegations were false), *cert. denied*, 423 U.S. 883 (1975).

148. 336 So. 2d 1197 (Fla. App. 1976), *cert. denied*, 434 U.S. 943 (1977).

149. *Id.* at 1199-1200.

150. 417 F. Supp. 947 (D.D.C. 1976).

151. *Id.* at 960 (summary judgment for defendant); see also *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1223 (3d Cir. 1978) (affirming summary judgment for defendant when television station rebroadcast defamatory allegations following denial by plaintiff's attorney); *Davis v. Costa-Gavras*, 595 F. Supp. 982, 988 (S.D.N.Y. 1984) (granting summary judgment for defendant when plaintiffs threatened to sue if book was false and defamatory); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1122 (N.D. Cal. 1984) (dismissing complaint when defendant printed plaintiff's denial but still published charges); *Roberts v. Dover*, 525 F. Supp. 987, 992 (D. Tenn. 1981) (granting summary judgment for defendant when reporter published citizen's complaint of police misconduct despite denial by officer); *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 822 (N.D. Cal. 1977) (granting summary judgment for defendant when defendant published article following denial by plaintiff); *Hurley v. Northwest Publications, Inc.*, 273 F. Supp. 967, 972 (D. Minn. 1967) (granting summary judgment for defendant when plaintiff's attorney told reporter that general denial of complaint would be filed), *aff'd*, 398 F.2d 346 (8th Cir. 1968); *Catalano v. Pechous*, 69 Ill. App. 3d 797, 811-12, 387 N.E.2d 714, 725-26 (1978) (affirming summary judgment for defendant when defendant published despite plaintiff's denial); *Curran v. Philadelphia Newspapers, Inc.*, 497 Pa. 163, 185, 439 A.2d 652, 660 (1981) (partially affirming summary judgment for defendant when reporter published allegations despite prior denial by plaintiff); *Columbo v. Times-Argus*, 135 Vt. 454, 458, 380 A.2d 80, 83 (1977) (affirming directed verdict for defendant when newspaper published contradicted story).

152. 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977).

by clear and convincing evidence "cannot be predicated on mere denials, however vehement; because such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error."<sup>153</sup>

The above cases do not suggest that an inference of serious doubt may never be drawn from the defendant's failure to verify following a denial by plaintiff. Rather, publication without verification following a broad and general denial may be insufficient, by itself, to support a finding of reckless disregard by clear and convincing evidence. Presumably, such an inference would be warranted, however, if the denial was specific and detailed or if, as a practical matter, the denial tended to disprove the charges. This inference would be especially appropriate if there were additional factors indicating that the defendant had reason to doubt the charges. For instance, in *Rinaldi v. Viking Penguin*,<sup>154</sup> the New York Court of Appeals affirmed the denial of defendant's motion for summary judgment when plaintiff had provided defendant publisher with a detailed denial of the defamatory allegations prior to republication of the book in paperback form; defendant's investigation partially corroborated the inaccuracy of some of the charges, yet defendant failed to make any changes.<sup>155</sup>

### 3. Reliance on an Inherently Ambiguous Source

Proof that the defendant relied on information that is capable of more than one interpretation can cut both for and against a finding of reckless disregard for the truth. On the one hand, the plaintiff can argue that such evidence tends to establish that the defendant proceeded with reckless disregard for the truth in that the very existence of the ambiguity must have indicated to the reporter that the conclusion he drew might have been false. On the other hand, the defendant can argue that the evidence tends to undermine any showing of reckless disregard because the presence of the ambiguity suggests that the reporter could have believed that the inference he drew was correct.

The Supreme Court confronted the issue in *Time, Inc. v. Pape*.<sup>156</sup> In *Pape* plaintiff contended that he was defamed by a

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153. *Id.* at 121.

154. 52 N.Y.2d 422, 420 N.E.2d 377, 438 N.Y.S.2d 496 (1981).

155. *Id.* at 437, 420 N.E.2d at 383, 438 N.Y.S.2d at 502.

156. 401 U.S. 279 (1971).

news story which appeared in defendant's magazine summarizing a report of the Federal Civil Rights Commission. The article described and quoted an account of an alleged incident of police brutality set forth in the report without indicating that the report itself was only summarizing the allegations of a complaint filed in a federal civil rights action.<sup>157</sup> Consequently, the article appeared to state that the Commission had concluded that the plaintiff had committed the illegal acts.<sup>158</sup> The ultimate question before the Court was whether defendant's failure to specify that the Commission was only summarizing a legal pleading was sufficient evidence to permit a jury to conclude that defendant had proceeded with reckless disregard for the truth. The Court held that under the circumstances the evidence was inadequate to support such a finding.<sup>159</sup> After scrutinizing the record, the Court observed that whether the Commission was simply recounting the episodes set forth in various legal pleadings or endorsing them as accurate accounts of the underlying incidents was unclear.<sup>160</sup> Consequently, the Court concluded that:

Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under *New York Times*.<sup>161</sup>

*Time, Inc. v. Pape* is an important precedent for the proof of fault issue, because, as the Court recognized, reporters will often need to rely on a source's description of what others said or did.<sup>162</sup> When the source's account is unclear, the reporter runs the risk of inaccuracy if he misunderstands or deliberately chooses one of several possible interpretations. The *Pape* Court doubtlessly was correct in concluding that an inference of reckless disregard should not have been permitted under the clear and convincing evidence standard given the ambiguity present in the Commission Report

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157. *Id.* at 281-82.

158. *Id.* at 284-85.

159. *Id.* at 289. The district court granted summary judgment for defendant. The court of appeals, however, reversed and remanded for trial.

160. *Id.* at 285-89.

161. *Id.* at 290. The Court observed, however, that "[n]othing in this opinion is to be understood as making the word 'alleged' a superfluity in published reports of information damaging to reputation." *Id.* at 292.

162. *Id.* at 286. See Sowler, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469 (1979), for a detailed analysis of *Pape* and an argument that the Court should have provided the press with even greater protection in the reporting of the substance of public documents and proceedings.

and the absence of any further evidence of reckless disregard. While possibly the reporter did realize he was affirmatively distorting the report, possibly he believed that his interpretation was warranted. Absent further proof, the factfinder had no way of resolving the question.

Many of the lower court cases that have explicitly<sup>163</sup> or implicitly<sup>164</sup> applied the analysis of *Time, Inc. v. Pape* to find the plaintiff's evidence of reckless disregard insufficient have concerned factually arguable misinterpretations of legal documents or reports of legal affairs or proceedings. This predominance is not surprising. In reporting legal affairs, members of the press often must attempt to decipher arcane and complex documents and proceedings under deadline pressure.<sup>165</sup> The potential for misunderstanding is great as is the potential for damage to reputation. One can easily appreciate how a nonlawyer could rationally but erroneously conclude that a warrantless search was illegal<sup>166</sup> or that an order directing a

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163. See *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1112, 1116 (6th Cir. 1978) (reversing verdict for plaintiff when defendant interpreted charge of "fraud" in indictment as "swindle"), *cert. denied*, 440 U.S. 960 (1979); *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F. Supp. 742, 749-50 (S.D.N.Y. 1981) (granting summary judgment for defendant when author misunderstood complex administrative regulation); *Buchanan v. Associated Press*, 398 F. Supp. 1196, 1205 (D.D.C. 1975) (granting summary judgment for defendant when, among other things, reporters misinterpreted judicial hearing as disclosing that plaintiff's firm illegally laundered campaign contributions); *Bandelin v. Pietsch*, 98 Idaho 337, 342, 563 P.2d 395, 399 (affirming summary judgment for defendant when newspaper erroneously reported that judicial order directing prosecutor to initiate contempt proceedings against plaintiff had adjudged plaintiff in contempt of court), *cert. denied*, 434 U.S. 891 (1977); *Lawrence v. Bauer Publishing and Printing*, 89 N.J. 451, 469, 446 A.2d 469, 477 (reversing verdict for plaintiff when defendant misunderstood source's tip about election fraud investigation), *cert. denied*, 459 U.S. 999 (1982).

164. See *Levine v. CMP Publications*, 738 F.2d 660, 675 (5th Cir. 1984) (partially reversing award of punitive damages when reporter relied on negative and arguably misleading remarks of judge); *Waskow v. Associated Press*, 462 F.2d 1173, 1175-76 (D.C. Cir. 1972) (affirming summary judgment for defendant when reporter misinterpreted newspaper story as stating that plaintiff was sentenced to jail along with three other individuals); *Dupler v. Mansfield Journal Co.*, 64 Ohio St. 2d 116, 413 N.E.2d 1187, 1192-93 (1980) (affirming reversal of verdict for plaintiff when reporter misinterpreted statement that plaintiff had conducted a warrantless search in prior article to mean that the search was illegal), *cert. denied*, 452 U.S. 962 (1981); *Post v. Oregonian Publishing Co.*, 268 Or. 214, 223-24, 519 P.2d 1258, 1262-63 (1974) (reversing judgment for plaintiff when defendant read police APB as stating that police were seeking plaintiff); see also *Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 688, 321 N.E.2d 580, 591, (1974) (affirming summary judgment for defendant when newspaper published one of several possible interpretations of fire department report), *cert. denied*, 424 U.S. 913 (1975).

165. See *Time, Inc. v. Firestone*, 424 U.S. 448, 471, 478-79 (1976) (Brennan, J., dissenting); see also *infra* notes 387-96 and accompanying text.

166. *Dupler v. Mansfield Journal Co.*, 64 Ohio St. 2d 116, 413 N.E.2d 1187, 1193 (1980), *cert. denied*, 452 U.S. 962 (1981).

prosecutor to initiate contempt proceedings was equivalent to an adjudication of contempt<sup>167</sup> or that a certain disclosure in a judicial hearing pertained to campaign contributions rather than expenditures when "almost all the reporters who were present at the [Watergate-related] hearing were very confused about precisely what was going on."<sup>168</sup> In a given case, such factual misinterpretations might raise an inference of negligence but without other evidence of doubt for the truth of the allegations they do not tend to suggest that the reporter was even dimly aware of the error.

There are limits to the *Pape* principle that misinterpretation does not prove reckless disregard. In *Nader v. de Toledano*<sup>169</sup> for instance, the District of Columbia Court of Appeals refused to apply *Pape* when it was unable to find that the source document was ambiguous on the point in issue.<sup>170</sup> In *Nader*, defendant columnist wrote that a senator had "demonstrated conclusively" that plaintiff had "falsified and distorted evidence."<sup>171</sup> The *Nader* court found that the document published by the senator explicitly had determined that plaintiff had acted in good faith and simply had reached certain erroneous conclusions because he had not had access to all of the evidence.<sup>172</sup> As a matter of abstract principle, the majority in *Nader* doubtlessly is correct in recognizing that a false, defamatory, and unsupportable interpretation of an unambiguous document properly could give rise to an inference of reckless disregard under the *Pape* standard. The dissent in *Nader* argued, however, that the subcommittee report in issue was far more ambiguous than the majority acknowledged and that, indeed, the crucial finding of good faith was largely undercut by the body of the document.<sup>173</sup>

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167. *Bandelin v. Pietsch*, 98 Idaho 337, 342, 563 P.2d 395, 399, *cert. denied*, 434 U.S. 891 (1977).

168. *Buchanan v. Associated Press*, 398 F. Supp. 1196, 1204 (D.D.C. 1975).

169. 408 A.2d 31 (D.D.C. 1979) (reversing summary judgment for defendant columnist), *cert. denied*, 444 U.S. 1078 (1980).

170. *Id.* at 51-52.

171. *Id.* at 37-38.

172. *Id.* at 52-53.

173. *Id.* at 59, 64-67 (Harris, J., dissenting). The dissent noted:

[It] may be said, indeed, that the document de Toledano was faced with interpreting presented a greater problem than mere ambiguity. Specifically, the result the majority reaches today signals that a few introductory platitudes (in all likelihood motivated by a simple sense of political etiquette) prefacing an otherwise straightforward and hard-hitting official investigatory report subsequently may provide the justification for a libel suit. In other words, what may have been intended by the staff as a mere political shield effectively has been turned by the majority into a sword holding a response worthy of First Amendment protection at bay.

The recent case of *Rebozo v. Washington Post Co.*<sup>174</sup> also may suggest an inherent limitation of *Pape*. In *Rebozo*, a reporter while investigating charges that plaintiff, a widely known public figure, had knowingly cashed a stolen stock certificate, had examined a deposition in which an insurance investigator had been asked under oath whether he had informed plaintiff that the securities were "stolen or missing," to which the investigator replied "yes sir."<sup>175</sup> After reading the deposition the reporter contacted plaintiff's attorney and was told that plaintiff "flatly denied" having been informed by the investigator that the securities were stolen.<sup>176</sup> The reporter ultimately wrote a front page story charging that plaintiff had cashed the securities after having been informed that they were stolen.<sup>177</sup> A federal district court granted summary judgment for defendant due to insufficient evidence of reckless disregard. Without citing *Time, Inc. v. Pape*, the Court of Appeals for the Fifth Circuit reversed and remanded on the ground that the reporter's "resolution of the obvious ambiguity whether [the investigator] told [plaintiff] the stock was (a) missing, (b) stolen, or (c) missing or stolen, in favor of the most potentially damaging alternative creates a jury question on whether the publication was indeed made with serious doubt as to its truthfulness."<sup>178</sup> This result may or may not be inconsistent with *Time, Inc. v. Pape* depending upon interpretation of the *Rebozo* record. In *Pape*, the source document revealed one position—the statements were merely allegations in a complaint—but implied another position—the Commission believed the allegations to be true. The reporter in *Pape* might simply have failed to perceive one of the two possible meanings. If so, there would be no room to infer serious doubt of the

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*Id.* at 66.

Somewhat ironically, the dissent further charged that the defamatory statement itself was ambiguous and that the majority had misinterpreted it. The dissent argued that the defamatory statement in issue alleged that the subcommittee report "demonstrates" that the plaintiff falsified evidence and not that the senator said that he falsified evidence. *Id.* at 64. The dissent may be correct in detecting a certain amount of ambiguity in the defamatory statement. Still, the majority's reading seems more natural, and, more significantly, either reading of the statement would appear to be unsupported by the subcommittee report, as construed by the majority.

174. 637 F.2d 375 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981).

175. *Id.* at 376.

176. *Id.* at 377.

177. *Id.*

178. *Id.* at 382. In addition, the court pointed out that there was further evidence of reckless disregard in the form of a memorandum written by the reporter which noted that there was some uncertainty whether plaintiff or his bank cashed the stock and that if the bank cashed the stock the lead paragraph of the article would have to be changed. *Id.*



truth because at most, the reporter simply made a good faith error. Alternatively, the reporter might have understood that two different conclusions could be drawn from the document and reading it more carefully, deliberately and rationally chose one over the other. Again, such a choice would not give rise to an inference of reckless disregard. This rational resolution seems to explain what actually occurred in *Pape*.<sup>179</sup> *Rebozo* may be an example of the first alternative. The reporter in *Rebozo* may have read the investigator's response as meaning that he had told plaintiff that the securities "were either stolen or that they were missing." If so, the reporter may not have spotted the ambiguity because he may not have realized that the investigator's answer also might have meant that either he told plaintiff that "the securities were stolen" or that he told plaintiff that "they were missing," but not both. The reporter's interpretation was rational as he read, or misread, the document and, as such, could not give rise to an inference of reckless disregard under *Pape*. *Rebozo*, however, cannot fit under the second *Pape* alternative. If the reporter did comprehend the ambiguous nature of the deposition question and answer, then the reporter may have understood that the investigator's simple answer of "yes sir" in the deposition could be read as asserting that either: (1) "I told plaintiff that the stock was stolen"; or (2) "I told Plaintiff that it was stolen or missing"; or (3) "I merely told Plaintiff that it was missing." Unlike *Pape*, this reading presents an inherent ambiguity that cannot be resolved rationally through a close reading of the document itself. *Rebozo* is not simply a case of innuendo. If the reporter comprehended the inherent ambiguity yet, absent further investigation, chose "stolen" over "missing" because it made a better story, he knew that what he had written very well might have been false.<sup>180</sup> The reporter's interpretation of the document was not rational under *Pape*. Therefore, a jury might well find the reporter acted with reckless disregard. The Fifth Circuit in *Rebozo* seemed to agree with the above reasoning. The *Rebozo* rationale is not inconsistent with *Pape* so long as there is a sufficient factual predicate for concluding that the reporter was aware of the

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179. 401 U.S. at 285.

180. The reporter's subsequent investigation would suggest that there was greater reason to choose an interpretation opposite from that chosen by the reporter because plaintiff's attorney had "flatly denied" that plaintiff ever had been informed that the securities were stolen. Following the denial of certiorari, the case was settled. See N.Y. Times, Nov. 5, 1983, at 13, col. 3.

ambiguity.<sup>181</sup> The *Rebozo* opinion does not clarify whether the reporter was aware of the ambiguity. When the record is unclear on this point, *Pape* should control because there is a significant possibility that the reporter failed to perceive the ambiguity and no inference of reckless disregard should arise.

*Pape* plays a significant role in defining reckless disregard in the limited context of an ambiguous source. Properly read, *Nader* and *Rebozo* are fair attempts at ensuring that the principle of *Pape* does not extend beyond its functional limitations.

#### 4. Investigation as Affirmative Evidence for the Defendant

In *Tavoulaareas v. Washington Post*, a federal district court recently observed that “[a] reporter cannot shield himself from a charge of reckless disregard merely by showing that he invested a large amount of time and effort on an article’s preparation.”<sup>182</sup> While this statement is no doubt true, evidence pertaining to the defendant’s efforts to investigate or verify the defamatory charges is a double-edged sword. Just as evidence that the defendant failed to investigate or verify, under certain circumstances, can give rise to an inference of serious doubt, evidence that the defendant did research and corroborate, in a given case, can effectively establish that the statements were not published with a high degree of awareness of their probable falsity.<sup>183</sup> For instance, in *Yiamouyi-*

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181. In reliance on *Rebozo*, the Court of Appeals for the District of Columbia Circuit held in *Tavoulaareas v. Washington Post Co.* that a reporter’s practice of consistently selecting the most damaging and sensational inferences from among several ambiguities constituted some evidence of reckless disregard. 759 F.2d 90, 121-23 (D.C. Cir. 1985). In dissent, Judge Wright argued that this was inconsistent with *Pape* and criticized *Rebozo* as “illconceived.” *Id.* at 158 n.15. While it is not entirely clear, the majority opinion seems to suggest that the defendants were aware of the ambiguities and deliberately chose the most harmful interpretations. If so, then the court is correct in concluding that such a practice could provide some evidence of reckless disregard.

182. 567 F. Supp. 651, 658 (D.D.C. 1983), *rev’d*, 759 F.2d 90 (D.C. Cir. 1985). The Court of Appeals quoted this observation with approval. *Id.* at 132. However, it noted that evidence of exhaustive research “may . . . merely be evidence of a dogged and thorough attempt to ‘get’ the subject.” *Id.*

183. *Ryan v. Brooks*, 634 F.2d 726, 732-33 (4th Cir. 1980) (reversing verdict for plaintiff when author had two reliable sources); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 276 (3d Cir. 1980) (affirming summary judgment for defendant when reporter conducted thorough investigation); *Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972) (affirming summary judgment for defendant when reporter spent months documenting and corroborating allegations), *cert. denied*, 409 U.S. 1125 (1973); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 867 (5th Cir. 1970) (affirming summary judgment for defendant when reporter and researcher conducted thorough investigation); *New York Times Co. v. Comer*, 365 F.2d 567,

*annis v. Consumers Union of the United States*,<sup>184</sup> the Court of Appeals for the Second Circuit affirmed a summary judgment for the defendant observing:

[Defendant] made a thorough investigation of the facts. Scientific writings

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576-77 (5th Cir. 1966) (reversing verdict for plaintiff when reporter relied on one or two sources for every statement); *Zimmerman v. Board of Publications*, 598 F. Supp. 1002, 1013, (D. Colo. 1984) (granting summary judgment for defendant when reporters conducted extensive investigation); *Joseph v. Xerox Corp.*, 594 F. Supp. 330, 335 (D.D.C. 1984) (granting summary judgment for defendant when, among other things, author spent time researching to ensure he was correct); *Holt v. Cox Enters.*, 590 F. Supp. 408, 413 (N.D. Ga. 1984) (granting summary judgment for defendant when newspaper followed accepted research procedures in writing story); *Zurita v. Virgin Islands Daily News*, 578 F. Supp. 306, 309 (N.D.V.I. 1984) (granting summary judgment for defendant when reporter and editor confirmed existence of investigation pertaining to plaintiff and unsuccessfully attempted to contact plaintiff); *National Rifle Ass'n v. Dayton Newspapers, Inc.*, 555 F. Supp. 1299, 1317 (S.D. Ohio 1983) (granting summary judgment for defendant when editor consulted several reliable sources); *Wynberg v. National Enquirer*, 564 F. Supp. 924, 930 (C.D. Cal. 1982) (granting summary judgment for defendant when author sought verification from more sources than usual in writing article); *Casper v. Washington Post Co.*, 549 F. Supp. 376, 378 (E.D. Pa. 1982) (granting directed verdict for defendant when reporter conducted thorough investigation); *Fadell v. Minneapolis Star Tribune Co.*, 425 F. Supp. 1075, 1078-84 (N.D. Ind. 1976) *aff'd*, 557 F.2d 107, 109 (7th Cir.); (granting summary judgment for defendant in view of extensive documentation by reporter), *cert. denied*, 434 U.S. 966 (1977); *Lancaster v. Daily Banner-News Publishing Co.*, 274 Ark. 145, 151, 622 S.W.2d 671, 673 (1981) (affirming summary judgment for defendant when reporter had more than 13 sources for the information); *DiLeo v. Koltnow*, 200 Colo. 119, 613 P.2d 318, 324 (1980) (affirming summary judgment for defendant when reporter conducted thorough investigation and had reliable sources); *Fink v. Combined Communications Corp.*, 679 P.2d 1108, 1111 (Colo. App. 1984) (affirming summary judgment for defendants when, among other things, reporter consulted 50 knowledgeable persons); *Catalano v. Pechous*, 69 Ill. App. 3d 797, 811, 387 N.E.2d 714, 726 (1978) (affirming summary judgment for defendant when there was voluminous evidence that it fully investigated circumstance surrounding incident); *Licavali v. Indianapolis Newspapers, Inc.*, 4 Media L. Rep. (BNA) 1833, 1834-38 (Ind. Cir. Ct. 1978) (granting summary judgment for defendant when reporters conducted thorough and systematic investigation relying on multiple sources); *Capital-Gazette Newspapers, Inc. v. Stack*, 293 Md. 528, 539-42, 445 A.2d 1038, 1041-42 (1982) (affirming directed verdict for defendant when writer undertook substantial investigation prior to drafting editorial), *cert. denied*, 459 U.S. 989 (1983); *Dienes v. Associated Newspapers*, 358 N.W.2d 562, 568 (Mich. App. 1984) (affirming summary judgment for defendant when reporter relied on knowledge of search warrant, comments by attorney, and his own personal observations); *Pelzer v. Minneapolis Tribune*, 7 (BNA) 2507, 2508 (Minn. Dist. Ct. 1981) (granting summary judgment for defendant when reporter obtained affidavits from six people stating that they saw plaintiff at party); *Whitmore v. Kansas City Star*, 499 S.W.2d 45, 52 (Mo. App. 1973) (affirming directed verdict for defendant when reporter verified information with several knowledgeable sources); *Jurkawski v. Crawley*, 637 P.2d 56, 61-62 (Okla. 1981) (affirming summary judgment for defendant when investigation revealed nothing inconsistent with allegations); *Wright v. King Broadcasting*, 8 Media L. Rep. (BNA) 1325, 1327 (Or. Cir. Ct. 1981), *aff'd*, 59 Ore. App. 409 (1982) (granting summary judgment for defendant when broadcaster took reasonable steps to investigate and verify factual allegations); *Tilton v. Cowles Publishing Co.*, 76 Wash. 2d 707, 459 P.2d 8, 18 (1969) (reversing verdict for plaintiff when defendant had three reputable sources for information), *cert. denied*, 399 U.S. 927 (1970).

184. 619 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980).

and authorities in the field were consulted, authoritative scientific bodies speaking for substantial segments of the medical and scientific community were investigated. The unquestioned methodology of the preparation of the article exemplifies the very highest order of responsible journalism; the entire article was checked and rechecked across a spectrum of knowledge and, where necessary, changes were made in the interests of accuracy.<sup>185</sup>

The absence of serious doubt may be especially clear when the defendant obtained the information from, or corroborated it by, a source that it knew to be reliable. A source might be deemed trustworthy for a variety of reasons. The reporter may have known the source personally for an extended period of time,<sup>186</sup> or the reporter may have relied on the source's expertise as in *F. & J. Enterprises, Inc. v. Columbia Broadcasting Systems, Inc.*,<sup>187</sup> in which interviewer Mike Wallace consulted a well-respected attorney critic of the toy industry in constructing a "60 Minutes" segment on defective toys.<sup>188</sup> Likewise, a source might be considered reliable when he had an excellent reputation for veracity in the community,<sup>189</sup> or when the source had provided accurate information in the past.<sup>190</sup>

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185. *Id.* at 940; see also B. BROOKS, G. KENNEDY, D. MOEN & D. RANLEY, *NEWS WRITING & REPORTING* 437 (1980) ("Usually a reporter who has tried diligently to do all possible research for a story will be able to meet the actual malice test and win a libel action. The key is verification: checking the information with as many sources as possible.").

186. *Grzelak v. Calumet Publishing Co.*, 543 F.2d 579, 583 (7th Cir. 1975) (affirming summary judgment for defendant); see also *Baldine v. Sharon Herald Co.*, 391 F.2d 703, 707 (3d Cir. 1967) (affirming summary judgment for defendant when advertising manager personally knew that person who submitted political advertisement was "reputable fellow").

187. 373 F. Supp. 292 (N.D. Ohio 1974).

188. *Id.* at 298 (granting summary judgment for defendant); see also *Ryan v. Brooks*, 634 F.2d 726, 732 (4th Cir. 1980) (reversing verdict for plaintiff when author relied on two secondary sources with excellent reputations); *Yiamouyiannis v. Consumers Union of the United States*, 619 F.2d 932, 940 (2d Cir.) (affirming summary judgment for defendant when writer relied on authoritative scientific sources), *cert. denied*, 449 U.S. 839 (1980); *Wolston v. Reader's Digest Ass'n*, 578 F.2d 427, 434 (D.C. Cir. 1978) (affirming summary judgment for defendant when author relied on extensive investigation by the FBI), *rev'd on other grounds*, 443 U.S. 157 (1979); *Simmons Ford, Inc. v. Consumers Union of the United States*, 516 F. Supp. 742, 747 (S.D.N.Y. 1981) (granting summary judgment for defendant when writer of article evaluating automobile relied on automotive experts on defendant's staff); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1350 (S.D.N.Y. 1977) (granting summary judgment for defendant when newspaper relied on opinions of well-known accounting expert); *Reader's Digest v. Marin County Superior Court*, \_\_\_ Cal. 3d \_\_\_, \_\_\_, 690 P.2d 610, 619, 208 Cal. Rptr. 137, 146 (1984) (reversing denial of summary judgment for defendant when reporters relied on reputable professor who had studied plaintiff organization); *Tilton v. Cowles Publishing Co.*, 76 Wash. 2d 707, 723, 459 P.2d 8, 17 (1969) (reversing verdict for plaintiff when experts relied on city attorney and assistant chief of police whose "positions would almost raise a presumption of trustworthiness"), *cert. denied*, 399 U.S. 927 (1970).

189. See *Gaynes v. Allen*, 339 N.W.2d 678, 681 (Mich. 1983) (affirming directed verdict for defendant).

190. See *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1259 (5th Cir. 1980) (re-

Often a source will be considered reliable because he was in an excellent position to obtain the particular information transmitted, as in *Wynberg v. National Enquirer, Inc.*,<sup>191</sup> in which a reporter based allegations that a movie star's boyfriend was exploiting her financially on conversations with the movie star's business manager.<sup>192</sup> As the Supreme Court recognized in *St. Amant v. Thomp-*

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versing verdict for plaintiff), *cert. denied*, 452 U.S. 962 (1981).

191. 564 F. Supp. 924 (C.D. Cal. 1982).

192. *Id.* at 930 (granting summary judgment for defendant); see also *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1575-77 (D.C. Cir. 1984) (granting partial summary judgment for defendant when reporter relied on persons that were in a position to know about plaintiff organization); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 276 (3d Cir. 1980) (affirming summary judgment for defendant when reporter relied on Consumer Affairs Bureau regarding complaints about business); *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1229 (3d Cir. 1978) (affirming summary judgment for defendant when reporter relied on veteran congressman well acquainted with subject matter of allegations); *Walker v. Cahalan*, 542 F.2d 681, 684 (6th Cir. 1976) (affirming summary judgment for defendant when editor relied on letter from prosecutor trying case in issue), *cert. denied*, 430 U.S. 966 (1977); *Cervantes v. Time, Inc.*, 464 F.2d 986, 988, 995 (8th Cir. 1972) (affirming summary judgment for defendant when writer relied on agents from the FBI and the United States Department of Justice for information regarding plaintiff's connection to organized crime), *cert. denied*, 409 U.S. 1125 (1973); *Time, Inc. v. McLaney*, 406 F.2d 565, 568-73 (5th Cir.) (reversing denial of summary judgment for defendant when reporter verified allegations concerning organized crime with Department of Justice attorney), *cert. denied*, 395 U.S. 922 (1969); *Murray v. Bailey*, 11 MEDIA L. REP. (BNA) 1369, 1371 (N.D. Cal. 1985) (granting summary judgment for defendant newspaper when it relied on author attorney for description of events occurring at his trial for drunk driving); *Herbert v. Lando*, 596 F. Supp. 1178, 1217 (S.D.N.Y. 1984) (granting partial summary judgment for defendant when television producer relied on accusation of plaintiff by witness who was allegedly present at incident and was referred to defendant by plaintiff); *Bell v. Associated Press*, 584 F. Supp. 128, 129, 132 (D.D.C. 1984) (granting summary judgment for defendant when reporter verified charges of public lewdness with police department and municipal court); *Bellamy v. Arno Press*, 8 MEDIA L. REP. (BNA) 1420, 1422 (E.D.N.C. 1982) (granting summary judgment for defendant when reporter obtained description of incident from persons concerned); *Nesbitt v. Multimedia*, 9 MEDIA L. REP. (BNA) 1473, 1476-77 (W.D.N.C. 1982) (granting summary judgment for defendant when reporter obtained information pertaining to recovery of stolen property from police officer); *Ali v. Daily News Publishing Co.*, 540 F. Supp. 142, 146-47 (D.V.I. 1982) (granting summary judgment for defendant when reporter interviewed guards involved in prison incident); *Velle Transcendental Research Ass'n v. Sanders*, 518 F. Supp. 512, 519 (C.D. Cal. 1981) (granting summary judgment for defendant when author interviewed former members of cult about its practices); *Adams v. Maas*, 7 MEDIA L. REP. (BNA) 1188, 1190-91 (S.D. Tex. 1981) (granting summary judgment for defendant when reporter verified criminal charges with FBI and police); *Torres v. Playboy Enters.*, 7 MEDIA L. REP. (BNA) 1182, 1186-87 (S.D. Tex. 1980) (granting summary judgment for defendant when author confirmed information pertaining to plaintiff's trial with U.S. Attorney in charge of case); *Logan v. District of Columbia*, 447 F. Supp. 1328, 1332 (D.D.C. 1978) (granting partial summary judgment for defendant newspaper when reporter obtained medical test results from doctor in charge of testing); *LaBruzzo v. Associated Press*, 353 F. Supp. 979, 981 (W.D. Mo. 1973) (granting summary judgment for defendant when reporter confirmed organized crime story with law enforcement officials); *Hurley v. Northwest Publications, Inc.*, 273 F. Supp. 967, 974 (D. Minn. 1967) (granting summary judgment for defendant when reporter confirmed

son, providing information that is self-incriminating or that exposes the source to personal danger also may provide some indication of reliability.<sup>193</sup> Finally, a reporter may conclude that a source is reliable based on his overall assessment of the source and

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story on lawsuit with parties' attorneys), *aff'd*, 398 F.2d 346 (8th Cir. 1968); *Corbett v. Register Publishing Co.*, 33 Conn. Supp. 4, 10, 356 A.2d 472, 476 (Super. Ct. 1975) (granting summary judgment for defendant when reporter relied on police desk officer for information pertaining to arrest); *Jamason v. Palm Beach Newspapers*, 9 Media L. Rep. (BNA) 1965, 1966 (Fla. Cir. Ct. 1983) (granting summary judgment for defendant when reporter relied on sworn statement of police officer regarding bribery investigation); *El Amin v. Miami Herald*, 9 Media L. Rep. (BNA) 1079, 1082 (Fla. Cir. Ct. 1983) (granting summary judgment for defendant when reporter relied on police report about altercation involving plaintiff); *Savannah News-Press, Division Southeastern Newspapers Corp. v. Whetsell*, 149 Ga. App. 233, 235-36, 254 S.E.2d 151, 153 (1979) (reversing denial of summary judgment for defendant when reporter confirmed story regarding serving search warrant with deputy who participated); *Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 561, 372 N.E.2d 1211, 1221 (1978) (granting partial summary judgment for defendant when reporter relied on persons to whom plaintiffs allegedly made comments in issue); *Kidder v. Anderson*, 354 So. 2d 1306, 1309 (La.) (reversing judgment for plaintiff when defendant relied on police officer in position to know about allegations of corruption), *cert. denied*, 439 U.S. 829 (1978); *Malerba v. Newsday, Inc.*, 64 A.D.2d 623, 623-24, 406 N.Y.S.2d 552, 553-54 (App. Div. 1978) (reversing denial of summary judgment for defendant when reporter confirmed report pertaining to police misconduct with police commission and complainant's attorney); *Championship Sports, Inc. v. Time, Inc.*, 71 Misc. 2d 887, 888, 336 N.Y.S.2d 958, 959 (Sup. Ct. 1972) (granting summary judgment for defendant when defendant confirmed report pertaining to tax seizure with IRS information officer); *Cohen v. New York Herald Tribune, Inc.*, 63 Misc. 2d 87, 94-95, 310 N.Y.S.2d 709, 723 (Sup. Ct. 1970) (granting directed verdict for defendant when columnist interviewed police officers, prosecutor, and eyewitnesses about murder); *Bukky v. Painesville Tel. & Lake Geauga Printing Co.*, 68 Ohio St. 2d 45, 46, 428 N.E.2d 405, 406-07 (1981) (reversing denial of summary judgment for defendant when reporter verified allegations about township purchasing irregularities with township clerk); *Henslee v. Monks*, 571 P.2d 440, 444 (Okla. 1977) (affirming verdict for defendant when reporter interviewed police officers and other "authoritative sources" about alleged illegal acts); *Curran v. Philadelphia Newspapers, Inc.*, 497 Pa. 163, 170-71, 439 A.2d 652, 659-60 (1981) (affirming partial summary judgment for defendant when reporter relied on highly placed source within government agency who was likely to know actual reason for plaintiff's resignation); *Times-Mirror Co. v. Harden*, 628 S.W.2d 859, 865 (Tex. Civ. App. 1982) (reversing verdict for plaintiff when "every challenged statement was traced to an identified source" some of whom were involved in events that were the subject of the article); *Tilton v. Cowles Publishing Co.*, 76 Wash. 2d 707, 722, 459 P.2d 8, 17 (1969) (en banc) (reversing verdict for plaintiff when defendant confirmed story about potential lawsuit with attorney and assistant chief of police), *cert. denied*, 399 U.S. 927 (1970); *cf. Drotzmanns, Inc. v. McGraw-Hill, Inc.*, 500 F.2d 830, 834 (8th Cir. 1974) (reversing verdict for plaintiff when reporter obtained information pertaining to plaintiff's business from reliable source); *Tucci v. Guy Gannett Publishing Co.*, 464 A.2d 161, 168-69 (Me. 1983) (affirming summary judgment for defendant when reporter interviewed person who monitored a police promotional examination and was in a position to know whether plaintiff had been charged with cheating); *Moloney v. Tribune Publishing Co.*, 26 Wash. App. 357, 362, 612 P.2d 1179, 1183 (1980) (affirming summary judgment for defendant when newspaper relied on police officer's report of investigation of death).

193. 390 U.S. 727, 733 (1968).

his information, as in *Roberts v. Dover*,<sup>194</sup> in which the reporter testified that he believed a person who called to report an incident of police misconduct "because he sounded genuinely upset and angry and because [the reporter] thought it would be difficult for someone to make up such a series of events and relate them so easily."<sup>195</sup>

A court also may reject an inference of reckless disregard if the reporter based a story on a primary source of information such as public or official records or documents.<sup>196</sup> Failure to trace an

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194. 525 F. Supp. 987 (M.D. Tenn. 1981).

195. *Id.* at 992 (granting summary judgment for defendant for insufficient evidence of reckless disregard).

196. *Time, Inc. v. Pape*, 401 U.S. 279, 285-92, (reversing verdict for plaintiff when reporter consulted report of Civil Rights Commission), *reh'g denied*, 401 U.S. 1015 (1971); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1090 (3d Cir. 1985) (reversing verdict and punitive damage award for plaintiff when editors verified criminal charges with indictment); *Brown v. Herald Co.*, 698 F.2d 949, 951 (8th Cir. 1983) (affirming summary judgment for defendant when reporter examined plaintiff's personnel file); *Schultz v. Newsweek, Inc.*, 668 F.2d 911, 919 (6th Cir. 1982) (affirming summary judgment for defendant when reporter consulted police "rap sheet"); *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1237 (6th Cir.) (affirming directed verdict for defendant when network based drama in large part on court findings in actual case), *cert. dismissed*, 454 U.S. 1095 (1981); *Moorhead v. Millin*, 542 F. Supp. 614, 619 (D.V.I. 1982) (granting summary judgment for defendant when reporter relied on letter written by Lt. Governor criticizing plaintiff's conduct as a public official); *Handelman v. Hustler Magazine, Inc.*, 469 F. Supp. 1053, 1054-55, 1059 (S.D.N.Y. 1979) (denying punitive damages to plaintiff when author relied on original court documents); *Cone v. Phipps Broadcasting*, 5 Media L. Rep. (BNA) 1972, 1974 (M.D. Ga. 1979) (granting summary judgment for defendant when reporter checked allegations against public records); *Hurley v. Northwest Publications, Inc.*, 273 F. Supp. 967, 972 (D. Minn. 1967) (granting summary judgment for defendant when reporter consulted complaint and probate order before writing about legal proceeding), *aff'd*, 398 F.2d 346 (8th Cir. 1968); *Gallman v. Carnes*, 254 Ark. 987, 497 S.W.2d 47, 50-51 (1973) (affirming summary judgment for defendant when reporter consulted report of law school tenure committee); *Weingarten v. Block*, 102 Cal. App. 3d 129, 145-46, 162 Cal. Rptr. 701, 713, 716 (Ct. App.) (affirming nonsuit for defendant when reporter consulted court records and public deeds), *cert. denied*, 449 U.S. 899 (1980); *Russell v. McMillen*, 10 MEDIA L. REP. (BNA) 1888, 1891 (Colo. Ct. App. 1984) (affirming summary judgment for defendant when editor relied on public documents); *Tucci v. Guy Gannett Publishing Co.*, 464 A.2d 161, 169-70 (Me. 1983) (affirming judgment for defendant when, in investigating allegations of cheating on civil service exam, defendant relied on contemporaneous memorandum of city manager and other public documents); *Dawson v. Wright*, 8 Media L. Rep. (BNA) 2001, 2004 (Mich. Cir. Ct. 1982) (granting summary judgment for defendant when reporter relied on public records); *Standke v. B.E. Darby & Sons, Inc.*, 291 Minn. 468, 469, 480-82, 193 N.W.2d 139, 141, 145-46 (1971) (affirming summary judgment for defendant when reporter relied on grand jury records with respect to story concerning investigation), *cert. dismissed*, 406 U.S. 902 (1972); *Biermann v. Pulitzer Publishing Co.*, 627 S.W.2d 87, 88 (Mo. Ct. App. 1981) (affirming summary judgment for defendant when reporter relied on police records); *De Gregorio v. News Printing*, 9 Media L. Rep. (BNA) 1045, 1047 (N.J. Super. Ct. App. Div. 1982) (reversing verdict for plaintiff when reporter based defamatory allegations on information obtained from public records); *Barbarita v. Gannett*, 8 Media L. Rep. (BNA) 1050, 1052 (N.Y. Sup. Ct. 1981)

allegation to an official source, however, does not raise an inference of reckless disregard because the defendant still may have based his report on a reliable source or may have had sufficient reason to believe that the information was true.<sup>197</sup>

Editors and reporters by necessity rely on sources of information within the media. Consequently, proof that a reporter relied on another reporter with a reputation for trustworthiness<sup>198</sup> or that

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(granting summary judgment for defendant when reporters relied on public records); *Fotochrome, Inc. v. New York Herald Tribune, Inc.*, 61 Misc. 2d 226, 231, 305 N.Y.S.2d 168, 173 (Sup. Ct. 1969) (granting summary judgment for defendant when in reporting about financial status of plaintiff corporation, reporter relied on annual reports and proxy statements); *Ferguson v. Dayton Newspaper*, 7 Media L. Rep. (BNA) 2502, 2505 (Ohio Ct. App. 1981) (affirming summary judgment for defendant when reporters relied on public records); *Drye v. Mansfield Journal Corp.*, 32 Ohio Misc. 70, 75, 288 N.E.2d 856, 860 (Ct. Com. Pl. 1972) (granting summary judgment for defendant when reporter relied on official release of governmental agency); *Post v. Oregonian Publishing Co.*, 268 Or. 214, 219, 519 P.2d 1258, 1263 (1974) (reversing verdict for plaintiff when reporter consulted police APB); *cf. Ross v. News-Journal Co.*, 228 A.2d 531, 534-35 (Del. 1967) (affirming summary judgment for defendant when reporter checked some though not all relevant public records).

197. *Ryan v. Brooks*, 634 F.2d 726, 732-33 (4th Cir. 1980) (reversing verdict for plaintiff when author relied on trustworthy secondary rather than primary sources); *Trapp v. Southeastern Newspapers*, 10 MEDIA L. REP. (BNA) 1985, 1993 (S.D. Ga. 1984) (granting summary judgment for defendant even though reporter failed to verify charges with state Ethics Commission findings); *Adams v. Maas*, 7 Media L. Rep. (BNA) 1188, 1191 (S.D. Tex. 1981) (granting summary judgment for defendant when paperback publisher relied on hardbound version of book by reputable publisher); *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 822 (N.D. Cal. 1977) (granting summary judgment for defendant when reporter relied on agency press release rather than official records); *Whitfield v. Southeastern Newspapers*, 10 MEDIA L. REP. (BNA) 1771, 1773 (Ga. Super. Ct. 1984) (granting summary judgment for defendant even though reporter failed to verify allegations with court records); *Dawson v. Wright*, 8 Media L. Rep. (BNA) 2001, 2004 (Mich. Cir. Ct. 1982) (granting summary judgment for defendant even though reporter failed to verify charges with public land records); *O'Connell v. Gannett Co.*, 77 Misc. 2d 344, 348, 353 N.Y.S.2d 144, 149 (City Ct. 1974) (granting summary judgment for defendant even though plaintiff alleged defendant would have discovered falsity by checking public records); *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 430, 437, 291 S.E.2d 852, 854, 858 (1982) (affirming summary judgment for defendant when reporter relied on newspaper clipping file rather than court records); *Hackworth v. Larson*, 83 S.D. 674, 683, 165 N.W.2d 705, 710 (1969) (affirming summary judgment for defendant when reporter relied on press release rather than official records). *But see Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143, 148, 416 N.E.2d 662, 667 (1979) (reversing directed verdict for defendant when, among other things, reporter wrote about trial without attending it or consulting transcript), *cert. denied*, 449 U.S. 966 (1980).

198. *See Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024, 1027-28 (5th Cir. 1975) (affirming judgment n.o.v. for defendant when reporter relied on another reporter with extensive experience); *LaBruzzo v. Associated Press*, 353 F. Supp. 979, 981 (W.D. Mo. 1973) (granting summary judgment for defendant when allegations were confirmed by veteran reporter); *Championship Sports, Inc. v. Time, Inc.*, 71 Misc. 2d 887, 888-89, 336 N.Y.S.2d 958, 959-60 (Sup. Ct. 1972) (granting summary judgment for defendant when allegations were confirmed by a "stringer"); *Colombo v. Times-Argus Ass'n*, 135 Vt. 454, 380 A.2d 80, 84 (1977) (affirming directed verdict for defendant when reporter relied on another reporter's



the publisher relied on reputable reporters or columnists<sup>199</sup> gener-

version of a conversation). *But see* Keogh v. New York Herald Tribune, Inc., 51 Misc. 2d 888, 893-95, 274 N.Y.S.2d 302, 307-08 (Sup. Ct.) (partially denying summary judgment for defendant when source reporter testified that information he passed along to defendant reporter was nothing more than "courthouse gossip"), *aff'd*, 246 A.D.2d 218, 285 N.Y.S.2d 262 (App. Div. 1966).

199. *See* Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1089 (3d Cir. 1985) (reversing verdict and punitive damage award for plaintiff when editors relied on reputation of writer); Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1575 (D.C. Cir. 1984) (affirming partial summary judgment for defendant when editor relied on reporter); Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1258-59 (5th Cir. 1980) (reversing verdict for plaintiffs when editors relied on prior reliability of reporters, one of whom specialized in the subject area of the article), *cert. denied*, 452 U.S. 962 (1981); Steaks Unlimited, Inc. v. Denaner, 623 F.2d 264, 268 (3d Cir. 1980) (affirming summary judgment for defendant when editor relied on reporter's "outstanding reputation for truthfulness and accuracy"); Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.) (reversing verdict for plaintiff when editor relied on excellent reputation of writer), *cert. denied*, 434 U.S. 834 (1977); Firestone v. Time, Inc., 460 F.2d 712, 719-21 (5th Cir.) (reversing verdict for plaintiff when editors relied on information provided by reliable and experienced reporter), *cert. denied*, 409 U.S. 875 (1972); Washington Post Co. v. Keogh, 365 F.2d 965, 971-72 (D.C. Cir. 1966) (reversing denial of summary judgment for defendant when newspaper relied on nationally syndicated columnist with good reputation and 35 years of experience), *cert. denied*, 385 U.S. 1011 (1967); Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 930 (C.D. Cal. 1982) (granting summary judgment for defendant when writer of article was "esteemed journalist on the national and international news fronts"); Velle Transcendental Research Ass'n v. Sanders, 518 F. Supp. 512, 519 (C.D. Cal. 1981) (granting summary judgment for defendant when publisher relied on good reputation of author); Loeb v. Globe Newspaper Co., 489 F. Supp. 481, 487 (D. Mass. 1980) (granting summary judgment for defendant when newspaper relied on reputation of nationally syndicated columnist); Gay v. Williams, 486 F. Supp. 12, 17 (D. Alaska 1979) (granting summary judgment for defendant when A.P. editor relied on stories submitted by project team made up of "some of the nation's top investigative journalists"); Hoffman v. Washington Post Co., 433 F. Supp. 600, 605 (D.D.C. 1977) (granting summary judgment for defendant when newspaper relied on reputation and expertise of writer on sports medicine), *aff'd*, 578 F.2d 442 (D.C. Cir. 1978); Fadell v. Minneapolis Star and Tribune Co., 425 F. Supp. 1075, 1081 (N.D. Ind. 1976) (granting summary judgment for defendant when magazine editor relied on writer who appeared thorough and credible), *aff'd*, 557 F.2d 107, 109 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 952, 959 (D.D.C. 1976) (granting summary judgment for defendant when publisher relied on reporter of "proven reliability," especially on topic of article); Carey v. Hume, 390 F. Supp. 1026, 1029-30 (D.D.C. 1975) (granting partial summary judgment for defendant when newspaper relied on reputation of nationally syndicated columnist); Hensley v. Life Magazine, Time, Inc., 336 F. Supp. 50, 53 (N.D. Cal. 1971) (granting summary judgment for defendant when magazine's reporter was "dependable and reputable" and had made long and thorough investigation of the subject matter in issue); Konigsburg v. Time, Inc., 312 F. Supp. 848, 854 (S.D.N.Y. 1970) (granting summary judgment for defendant when editor relied on reporter acknowledged to be credible and knowledgeable of organized crime); Belli v. Curtis Publishing Co., 25 Cal. App. 3d 384, 400, 102 Cal. Rptr. 122, 133 (Ct. App. 1972) (affirming summary judgment for defendant when publisher relied on reporter's reputation); Dienes v. Associated Newspapers, 358 N.W.2d 562, 568 (Mich. Ct. App. 1984) (affirming summary judgment for defendant when reporter personally observed subject of article); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 382-83, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951-52 (reversing denial of summary judgment for defendant when publisher relied on author's reputation), *cert. denied*, 434

ally undermines an attempt to establish reckless disregard. In the leading case of *Nader v. DeToledano*,<sup>200</sup> for instance, the District of Columbia Court of Appeals rejected an inference of reckless disregard against a newspaper that failed to verify a column by an experienced and widely syndicated columnist with a good reputation for accuracy.<sup>201</sup> Along the same lines, reliance on previously reported accounts in reputable publications tends to establish that the relying reporter did not seriously doubt the truth of the information.<sup>202</sup> Courts also virtually presume that members of the press

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U.S. 969 (1977); *Schwartz v. Time, Inc.*, 71 Misc. 2d 769, 774, 337 N.Y.S.2d 125, 131 (Sup. Ct. 1972) (granting summary judgment for defendant when magazine relied on experienced reporter with impeccable reputation for integrity); *Fotochrome, Inc. v. New York Herald Tribune, Inc.*, 61 Misc. 2d 226, 231, 305 N.Y.S.2d 168, 173 (Sup. Ct. 1969) (granting summary judgment for defendant when publisher of article pertaining to financial status of corporation relied on reporter with substantial experience in covering business affairs); *Doubleday v. Rogers*, 674 S.W.2d 751, 756 (Tex. 1984) (reversing verdict for plaintiff when reporter personally observed subject of article); cf. *Dowd v. Calabrese*, 589 F. Supp. 1206, 1216 (D.D.C. 1984) (dismissing plaintiff's claim when editor relied on "trustworthiness and integrity of his reporters" in writing letter to plaintiff's superior defending prior article about plaintiff). *But see Pep v. Newsweek, Inc.*, 553 F. Supp. 1000, 1001-02 (S.D.N.Y. 1983) (denying summary judgment for defendant despite publisher's reliance on well-respected author).

200. 408 A.2d 31 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980).

201. *Id.* at 54-55.

202. *See Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1575 (D.C. Cir. 1984) (affirming partial summary judgment for defendant when reporter relied on previously published articles); *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1237 (6th Cir.) (affirming directed verdict for defendant when network relied, in part, on book by reputable historian), *cert. dismissed*, 454 U.S. 1095 (1981); *Ryan v. Brooks*, 634 F.2d 726, 733 (4th Cir. 1980) (reversing verdict for author when author relied on articles in publications with excellent reputations); *Rosanova v. Playboy Enters., Inc.*, 580 F.2d 859, 862 (5th Cir. 1978) (affirming summary judgment for defendant when author relied on several prior reports from other published sources); *Waskow v. Associated Press*, 462 F.2d 1173, 1176 (D.C. Cir. 1972) (affirming summary judgment for defendant when wire service relied on newspaper story); *Time, Inc. v. McLaney*, 406 F.2d 565, 569 (5th Cir.) (reversing denial of summary judgment for defendant when reporter verified allegations with newspaper morgue clipping file), *cert. denied*, 395 U.S. 922 (1969); *Davis v. Costa-Gavras*, 595 F. Supp. 982, 987 (S.D.N.Y. 1984) (granting summary judgment when republisher relied on assurances of prior publisher); *National Rifle Ass'n v. Dayton Newspapers, Inc.*, 555 F. Supp. 1299, 1318 (S.D. Ohio 1983) (granting summary judgment for defendant when newspaper relied on editorial in associated newspaper); *McQuoid v. Springfield Newspapers, Inc.*, 502 F. Supp. 1050, 1057 (W.D. Mo. 1980) (denying punitive damages to plaintiff when editors relied on reputable newspaper that "broke" story); *Torres v. Playboy Enters., Inc.*, 7 Media L. Rep. (BNA) 1182, 1186 (S.D. Tex. 1980) (granting summary judgment for defendant when reporter relied on newspaper article); *Handelman v. Hustler Magazine, Inc.*, 469 F. Supp. 1053, 1056 (S.D.N.Y. 1979) (denying punitive damages to plaintiff when editor relied on book, magazines and newspaper articles); *Konigsburg v. Time, Inc.*, 312 F. Supp. 848, 855 (S.D.N.Y. 1970) (granting summary judgment for defendant when magazine relied on prior published accounts of much of the information); *Dupler v. Mansfield Journal Co.*, 64 Ohio St. 2d 116, 413 N.E.2d 1187, 1193 (1980) (affirming summary judgment for defendant when

believe information they obtain from the wire services, given the services' established reputations for accuracy.<sup>203</sup>

If the defendant interviewed the plaintiff about the defamatory allegations and was not persuaded that the allegations were false, this interview may be considered further evidence that the defendant lacked serious doubt as to the truth.<sup>204</sup> This evidence

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reporter relied on prior newspaper article), *cert. denied*, 452 U.S. 962 (1981); *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 428, 291 S.E.2d 252, 254 (1982) (affirming summary judgment for defendant when reporter relied on newspaper's own clipping file).

203. See *Waskow v. Associated Press*, 462 F.2d 1173, 1176 (D.C. Cir. 1972) (affirming summary judgment for defendant when newspaper relied on wire service account of legal proceeding that did not contain any apparent inconsistency or error); *Gay v. Williams*, 486 F. Supp. 12, 16-17 (D. Alaska 1979) (granting summary judgment for defendant when newspaper republished wire service stories dealing with criminal investigation of local interest); *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 822 n.5 (N.D. Cal. 1977) (granting summary judgment for defendant when A.P. reporter relied on prior A.P. dispatches); *LaBruzzo v. Associated Press*, 353 F. Supp. 979, 981-82, 988 (W.D. Mo. 1973) (granting summary judgment for defendant when television station based news reports about local citizens on wire service releases); *Mehau v. Gannett Pac. Corp.*, 66 Hawaii 134, 658 P.2d 312, 322-23 (1983) (affirming summary judgment for defendant when newspaper relied on wire service news releases); *Bannach v. Field Enters., Inc.*, 5 Ill. App. 3d 692, 693-94, 284 N.E.2d 31, 32 (1972) (affirming summary judgment for defendant due to insufficient evidence of reckless disregard to override privilege when newspaper relied on wire service report of judicial proceeding); *McCarney v. Des Moines Register and Tribune Co.*, 239 N.W.2d 152, 155-56 (Iowa 1976) (reversing denial of summary judgment for defendant when editor relied on A.P. dispatch). *But see infra* note 477 and accompanying text (observation that the press does tend to verify wire service reports when practicable to protect against potential error).

204. *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 276 (3d Cir. 1980) (affirming summary judgment for defendant when reporter claimed to have interviewed president of plaintiff company pertaining to the defamatory allegations prior to broadcast); *FoodScience Corp. v. McGraw-Hill, Inc.*, 592 F. Supp. 362, 366 (D. Vt. 1984) (granting summary judgment for defendant when reporter verified allegations with information in plaintiff's press kit); *Trapp v. Southeastern Newspapers*, 10 MEDIA L. REP. (BNA) 1985, 1995 (S.D. Ga. 1984) (granting summary judgment for defendant when reporter contacted plaintiff who replied, "no comment"); *Moorhead v. Millin*, 542 F. Supp. 614, 617 (D.V.I. 1982) (granting summary judgment for defendant when reporter asked plaintiff about charges, and he replied, "no comment"); *Roherts v. Dover*, 525 F. Supp. 987, 994 (M.D. Tenn. 1981) (granting summary judgment for defendant when reporter obtained and published plaintiff's side of the story); *Loeb v. New Times Communications Corp.*, 497 F. Supp. 85, 93 (S.D.N.Y. 1980) (granting summary judgment for defendant when reporters interviewed plaintiff); *Hensley v. Life Magazine*, 336 F. Supp. 50, 53 (N.D. Cal. 1971) (granting summary judgment for defendant when reporter interviewed plaintiff who "substantially verified the subject matter of the article"); *Fink v. Combined Communications Corp.*, 679 P.2d 1108, 1112 (Colo. Ct. App. 1984) (affirming summary judgment for defendant for insufficient evidence of reckless disregard when, among other things, plaintiff responded to some of the allegations posed by defendant); *Tucci v. Guy Gannett Publishing Co.*, 464 A.2d 161, 169-70 (Me. 1983) (affirming summary judgment for defendant when reporter interviewed plaintiff, who denied that he had cheated on exam but did not deny that he had been charged with cheating); *Theckston v. Triangle Publications, Inc.*, 100 N.J. Super. 452, 456, 242 A.2d 629, 631 (Ct. App. Div.) (reversing verdict for plaintiff when reporter interviewed plaintiff and obtained his side of

will be most effective for the defendant when the character of the plaintiff's response is not so compelling as to give rise to an inference that it must have shaken defendant's belief in the truth of the allegations.<sup>205</sup> Thus, when a reporter has a reliable source for an allegation and the plaintiff's response is evasive, is a broad and general denial, or is a mere "no comment," the reporter may be warranted in concluding that his information is accurate.

In rejecting a finding of reckless disregard, courts occasionally point out that the defendant unsuccessfully attempted to interview the future plaintiff.<sup>206</sup> An attempt to speak with the future plaintiff says very little about the reporter's subjective belief of the truth of the information. The attempt may indicate that the reporter had an open mind and was interested in confirming the information by a potentially knowledgeable source, however, it does not indicate whether the reporter probably believed or disbelieved the allegations. Just as the *New York Times* standard imposes no general duty of verification on the defendant, there also is no specific obligation to obtain the plaintiff's side of the story.<sup>207</sup> As

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story), *cert. denied*, 393 U.S. 1001 (1968); *Dunlap v. Philadelphia Newspapers*, 301 Pa. Super. 475, 494, 448 A.2d 6, 16 (1982) (reversing verdict for plaintiff when reporter interviewed plaintiff, who tended to confirm charges); *Brophy v. Philadelphia Newspapers, Inc.*, 281 Pa. Super. 588, 603, 422 A.2d 625, 633 (1980) (affirming summary judgment for defendant when reporter corroborated many allegations with plaintiff and his attorney); *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 85 (Tex. Civ. App. 1982) (reversing verdict for plaintiff when reporter interviewed plaintiff concerning charges prior to publication); *Colombo v. Times-Argus Ass'n*, 135 Vt. 454, 457-58, 380 A.2d 80, 84 (1977) (affirming summary judgment for defendant when plaintiff told reporter that story was "far-fetched").

205. See *supra* notes 150-53 and accompanying text.

206. See *Gallman v. Carnes*, 254 Ark. 987, 993, 497 S.W.2d 47, 51 (1973) (affirming summary judgment for defendant when reporter attempted to reach school official who would not return her call); *Savannah News-Press, Div. Southeastern Newspapers Corp. v. Whetsell*, 149 Ga. App. 233, 236, 254 S.E.2d 151, 153 (1979) (reversing denial of summary judgment for defendant when reporter tried to call plaintiff); *Times Publishing Co. v. Huffstetler*, 409 So. 2d 112, 113 (Fla. Dist. Ct. App. 1982) (reversing verdict for plaintiff when reporter unsuccessfully attempted to contact plaintiff); *Mehau v. Gannett Pac. Corp.*, 66 Hawaii 134, 658 P.2d 312, 322-23 (1983) (affirming summary judgment for defendant when reporter unsuccessfully attempted to reach plaintiff for comment); *Malerba v. Newsday, Inc.*, 64 A.D.2d 623, 624, 406 N.Y.S.2d 552, 553 (1978) (reversing denial of summary judgment for defendant when reporter attempted to contact plaintiff); *Richardson v. Signal Publishing Co.*, 5 Media L. Rep. (BNA) 1593, 1597 (Ohio Ct. App. 1979) (granting summary judgment for defendant when reporter requested and plaintiff refused to produce financial records pertaining to subject matter of article).

207. *Loeb v. New Times Communications Corp.*, 497 F. Supp. 85, 92-93 (S.D.N.Y. 1980) (granting summary judgment for defendant when reporter failed to ask plaintiff about certain relevant matters); *Hurley v. Northwest Publications, Inc.*, 273 F. Supp. 967, 974 (D. Minn. 1967), *aff'd*, 398 F.2d 346 (8th Cir. 1968) (granting summary judgment for defendant when reporter failed to interview plaintiff, though plaintiff's attorney was contacted).

noted earlier, there will be cases in which a failure to attempt to contact a plaintiff who is an obvious source of verification appropriately may be considered by the factfinder as one factor supporting an inference of reckless disregard.<sup>208</sup> This inference should be restricted, however, to those instances in which there already exists some good reason for the reporter to doubt the accuracy of the allegations in question. In these cases, the defendant's failure at least to attempt to contact the plaintiff may suggest a desire to avoid confronting the truth.

Reliance on evidence of the defendant's efforts to investigate and verify in order to negate a finding of reckless disregard need not and should not shift the focus of the inquiry from subjective serious doubt to objective reasonable care. The point of evidence of investigation is not to establish that the defendant behaved like a reasonable reporter or editor but to show that the defendant did not seriously doubt the truth of the allegations. Evidence of investigation and verification is quite pertinent because it may explain exactly why the defendant believed that what he wrote or published was true. Use of investigation and verification evidence is acceptable so long as factfinders recognize that the reverse hypothesis necessarily does not follow. In other words, lack of verification generally does not suggest that the defendant harbored doubts as to the truth. The reporter still may have believed the statements to be true. Yet, a failure to investigate occasionally is probative of doubt as to the truth. At least in the extreme case, when there is some independent reason for the defendant to suspect that the charges may be false, a failure to corroborate when corroboration is neither difficult nor expensive may indicate at the very least that the defendant did not want to have his worst fears verified. Evidence of failure to corroborate in this context will not subvert the *New York Times* subjective standard; indeed it may be essential in a given case to the standard's proper application. A court, however, must recognize both the proper purposes as well as the dangers of such evidence and instruct the jury accordingly.

##### 5. Tone, Style, Editorial Slant, and Language

Occasionally, a plaintiff may be able to prove that a defendant published a defamatory statement with reckless disregard for the truth by proving that the defendant engaged in a policy of slanting

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208. See *supra* note 139 and accompanying text.

or sensationalizing the material. *Curtis Publishing Co. v. Butts*<sup>209</sup> is the leading case on this issue. In *Butts* Justice Warren, in concluding that plaintiff had presented ample evidence of reckless disregard, emphasized in his concurring opinion that, prior to publication of the article, defendant Saturday Evening Post had determined to combat declining advertising revenues by "changing [its] image" and "embark[ing] upon a program of 'sophisticated muckracking,' designed to 'provoke people, make them mad.'"<sup>210</sup> The Post's policy apparently led the Court to infer that defendant was interested more in creating controversy than maintaining accuracy. By itself, such an editorial policy should not be sufficient to establish that the defendant published a particular article with reckless disregard for the truth.<sup>211</sup> Presumably, a newspaper can publish hard hitting, controversial, investigative stories with the utmost concern for accuracy and fairness. The "sophisticated muckracking" policy was of probative value because it helped to explain the magazine's willingness to press forward in the face of several red flags and a grossly inadequate investigation—the Post apparently was desperate for a controversial story, in line with its new image, to boost circulation.<sup>212</sup> In other words, the new policy

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209. 388 U.S. 130 (1967).

210. *Id.* at 169 (Warren, C.J., concurring) (footnote omitted). Justice Harlan relied on the same evidence in finding that the now outmoded "highly unreasonable conduct" standard was satisfied. *Id.* at 155-56.

211. In *Martin Marietta Corp. v. Evening Star Newspaper Co.* the court found that plaintiff had failed to present evidence to support its contention that defendant, like Curtis, had engaged in a policy of "sophisticated muckraking" but the court went on to note that "the court regards this as perhaps the least important factor relied on in *Butts*, and would not find it to create a jury question on the malice issue, even if convincingly proved." 417 F. Supp. 947, 959 (D.D.C. 1976).

212. That "one of its editors had said that what it needed was a "good juicy libel case'" could scarcely have helped the magazine's cause. See Wade, *The Communicative Torts and the First Amendment*, 48 Miss. L.J. 671, 688 (1977).

Recently, in *Tavoulareas v. Washington Post Co.*, the Court of Appeals for the District of Columbia Circuit concluded, in reliance on *Butts*, that while "a general policy favoring sensational or muckraking stories does not, in itself, prove that a defendant acted with actual malice . . ." such a policy could provide a motive for reckless disregard and as such could constitute evidence of actual malice. 759 F.2d 90, 117 (D.C. Cir. 1985). In *Tavoulareas*, there was evidence that Robert Woodward, the Assistant Managing Editor of the *Post* encouraged his staff to produce "hard hitting investigative stories" that might cause the reader to exclaim "holy shit." *Id.* at 120-22. The court cautioned that it did not intend to suggest that there was anything wrong with "aggressive investigative reporting." *Id.* at 121 n.39. In dissent, Judge Wright characterized the majority's consideration of the defendant's muckraking policy as a "deep hostility to an aggressive press" and "directly contrary to the mandates of the Supreme Court and the spirit of a free press." *Id.* at 152-54. As is suggested in the text, the majority would seem to be correct in concluding that a policy of muckraking or sensationalism may provide some, though certainly not clear and convincing

tended to show that the magazine had a motive to publish in disregard of the truth.

In *Washington Post Co. v. Keough* the District of Columbia Circuit read *New York Times v. Sullivan* as having established that "the character and content of [a] publication [is] a constitutionally impermissible evidentiary basis for finding of actual malice . . . ." <sup>213</sup> Certainly, the *Keough* court was correct in holding that an inference of reckless disregard does not arise merely because a published statement obviously would be defamatory if false and in fact turned out to be false. <sup>214</sup> On the other hand, *Keough* should not be read to mean that an inference of reckless disregard never may be drawn from the tone, the style, or the particular language used in a defamatory publication. Words, after all, are the weapons of the libelor. On occasion, words may provide the clearest indication whether the defendant believed what he wrote. Still, judicial consideration of tone, style, and diction is a sensitive matter. If such evidence were admitted too freely the risk of unwarranted self-censorship might be significant. While to avoid covering subjects with a defamatory potential may be difficult for a daily or weekly newspaper or periodical, the threat of liability based on tone, style, or diction arguably could coerce writers and editors into using unduly safe and bland language, thereby sacrificing a good deal of style and substance.

An inference of reckless disregard properly may arise, however, when the defendant has employed a sensationalistic style to attract attention and distorts the truth in the process. Recently, in *Hunt v. Liberty Lobby*, before reversing a verdict for plaintiff on other grounds, the Court of Appeals for the Eleventh Circuit deter-

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evidence of reckless disregard. See also *Beech Aircraft v. National Aviation Underwriters*, 11 Med. L. Rep. (BNA) 1401, 1415 (D. Kan. 1984) (denying summary judgment for defendant when, among other things, evidence suggested reporter slanted story against plaintiff so that it would be more sensational and possibly further her career).

213. 365 F.2d 965, 969 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967); see also *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1350 (S.D.N.Y. 1977) (errors and inaccuracy are not evidence of actual malice); *LaBruzzo v. Associated Press*, 353 F. Supp. 979, 985 (W.D. Mo. 1973) (citing *Keogh*, 365 F.2d at 969); *Sellers v. Stauffer Communications*, 9 Media L. Rep. (BNA) 1398, 1400 (Kan. Dist. Ct. 1983) (granting summary judgment for defendant when plaintiff's evidence consisted of a long series of allegedly false and defamatory news articles about plaintiff).

214. To counter any tendency to overemphasize the falsity of a statement one commentator has argued that "[t]he rules governing admissibility in a defamation proceeding should exclude all evidence that a plaintiff refused to disclose to the defendant in response to detailed defamatory charges and that was not otherwise reasonably available at the time of publication." Note, *In Defense of Fault in Defamation Law*, 88 YALE L.J. 1735, 1747 (1979).

mined that reckless disregard properly could have been inferred from the employment of false and defamatory headlines such as "CIA to Nail Hunt for Kennedy Killing" and "They'll Hang Hunt" when defendant had good reason to doubt that plaintiff was involved in the Kennedy assassination or that the CIA intended to use plaintiff as a scapegoat.<sup>215</sup> The court's conclusion was warranted in view of the blatantly sensationalistic and misleading nature of the headlines coupled with the editor's own admission that he chose them as a "flareful thing."<sup>216</sup> More troublesome, however, is *Sprouse v. Clay Communication, Inc.*,<sup>217</sup> another leading case concerning sensationalistic and misleading headlines. In *Sprouse*, the West Virginia Supreme Court found sufficient evidence of reckless disregard when, in the wake of a major political scandal, defendant newspaper printed two basically truthful stories but published them beneath headlines composed of perjorative catch phrases such as "Land Grab" and "Realty Bonanza" that seemed designed to convey an impression of impropriety when none in fact existed.<sup>218</sup> Somewhat paradoxically, that the underlying story was neither false nor defamatory tended to strengthen the inference of reckless disregard because it suggested that defendant had every reason to know that the headlines were misleading. Still, one must question whether the relatively mild innuendoes of *Sprouse* should have been sufficient to carry plaintiff's burden by clear and convincing evidence. After all, the purpose of a newspaper headline is to attract the reader's attention. While recognition of a headline's value should not create a license to defame, the press ought be permitted to attempt to capture the essence of a story in an eye catching turn of phrase. The difference between permissible attention grabbing and the headlines in *Sprouse* is quite thin.<sup>219</sup> The sensational nature or tone of a story or headline is one factor that may contribute to a finding of reckless disregard<sup>220</sup> but by itself, rarely

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215. 720 F.2d 631, 646 (11th Cir. 1983).

216. *Id.* Although there was other evidence of reckless disregard, the court noted that the headlines themselves were sufficient. *Id.*

217. 158 W. Va. 427, 211 S.E.2d 674, *cert. denied*, 423 U.S. 882 (1975).

218. *Id.* at 449, 466, 471, 211 S.E.2d at 690, 699, 701.

219. *Sprouse* was distinguished in *Hodges v. Oklahoma Journal Publishing Co.*, 617 P.2d 191, 195-96 (Okla. 1980). In *Hodges*, the court refused to infer reckless disregard from headlines that stated "Audit Turns Up Big Slush Fund" and "Report Accuses [Plaintiff]." The court found that, unlike the headlines in *Sprouse*, the instant headlines were "ambiguous" and capable of bearing an innocent meaning. *Id.* To the extent that the headlines falsely implied impropriety, they are easily as sensationalistic and insinuating as those in *Sprouse*. If so, *Hodges* represents a thinly veiled rejection of the *Sprouse* rationale.

220. *Rebozo v. Washington Post Co.*, 637 F.2d 375, 382 (5th Cir.) (reversing summary



should prove conclusive. Indeed, many courts have taken the position that the sensational, glib, or snide tone of an article does not provide a sufficient basis for inferring reckless disregard, at least by clear and convincing evidence.<sup>221</sup>

Beyond the general sensationalistic tone of an article, the choice of one or two ambiguous, inaccurate, and potentially defamatory words or phrases, on a particular record, can support a finding of reckless disregard. In *Burns v. McGraw-Hill Broadcasting Co.*,<sup>222</sup> the Colorado Supreme Court determined that an inference of reckless disregard properly could be drawn when an experienced reporter wrote that plaintiff "deserted" her husband after he suffered severe injuries in an explosion, considering that the reporter knew there were no grounds for concluding that plaintiff had abandoned her husband or left him without just cause.<sup>223</sup> The court explained that "the use of a term with obvious pejorative connotations without underlying factual support is evidence of recklessness especially when the reporter has knowledge that the description is

judgment for defendant when, among other things, reporter's resolution of factual ambiguity against plaintiff turned minor news item into front page story), *cert. denied*, 454 U.S. 964 (1981); *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777, 780 (9th Cir.) (reversing judgment n.o.v. for defendant when, among other things, writers added sensational and unverified allegations to story in hopes of selling it to national magazine), *cert. denied*, 423 U.S. 930 (1975); *Mehau v. Gannett Pac. Corp.*, 66 Hawaii 134, 658 P.2d 312, 321 (1983) (denying summary judgment for defendant when wire service "strung together" a series of quotes from a sensational tabloid creating innuendo that plaintiff was underworld godfather).

221. See *Time, Inc. v. Johnston*, 448 F.2d 378, 384-85 (4th Cir. 1971) (affirming summary judgment for defendant when reporter's description of event in issue was figurative, vivid, and hyperbole); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1352 (S.D.N.Y. 1977) (granting summary judgment for defendant despite snide and uncomplimentary tone permeating article and alleged "cheap shots" and "jabbing headlines"); *Sellers v. Time, Inc.*, 299 F. Supp. 582, 585-86 (E.D. Pa. 1969) (granting summary judgment for defendant despite alleged "flippant" and "smart alecky" style of article), *cert. denied*, 400 U.S. 830 (1970); *Perez v. Times-Picayune*, 9 Media L. Rep. (BNA) 2388, 2389 (La. Dist. Ct. 1983) (granting summary judgment for defendant despite insinuations of wrongdoing); *cf. Mitchell v. Pittsburgh Press*, 7 Media L. Rep. (BNA) 2152, 2158 (Pa. Ct. Com. Pl. 1981) (action for defamation cannot be premised solely on writer's style or utilization of vivid words); *Bandelin v. Pietsch*, 98 Idaho 337, 341, 563 P.2d 395, 399 (affirming summary judgment for defendant despite fact that article was "unjustifiably sensational"), *cert. denied*, 434 U.S. 891 (1977); *Dannis v. Panax Newspapers*, 9 Media L. Rep. (BNA) 1446, 1448 (Mich. Cir. Ct. 1982) (granting summary judgment for defendant when newspaper followed common practice of using large print type in headlines); *Brophy v. Philadelphia Newspapers, Inc.*, 281 Pa. Super. 588, 604, 422 A.2d 625, 633 (1980) (affirming summary judgment for defendant despite strong and sensational language).

222. 659 P.2d 1351 (Colo. 1983) (en banc).

223. 659 P.2d 1351, 1362 (Colo. 1983) (en banc). *Id.* at 1362. The court pointed out that the reporter was aware that plaintiff had filed for divorce prior to her husband's accident.

in fact untrue."<sup>224</sup> Prior to *Burns*, in *Kuhn v. Tribune-Republican Publishing Co.*,<sup>225</sup> the same court had held that an inference of reckless disregard could be drawn when, among other things, a reporter wrote that a ski resort had given free passes to plaintiff city officials personally, instead of to the department for which the officials worked, to "humanize" the story.<sup>226</sup> As these cases correctly recognize, at some point, stylistic considerations must yield to accuracy.<sup>227</sup>

The threat of self-censorship nonetheless may arise if liability can follow simply because a reporter or editor chose imprecise or ambiguous terminology. The California Supreme Court recognized this problem in *Good Government Group, Inc. v. Superior Court*,<sup>228</sup> a case that required the court to draw the difficult dividing line between statements of fact and opinion. In *Good Government*, the court concluded that the question whether defendant's statements that plaintiff "extorted" and "blackmailed" the city were defamatory fact or constitutionally protected opinion was for the jury, and, if the jury found them to be factual and false, the jury could infer reckless disregard from defendant's use of this language only if it further found that "defendant either deliberately cast his statements in an equivocal fashion in hope of insinuating a

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224. *Id.*; see also *Dixson v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977) (affirming verdict for plaintiff when defendant described plaintiff's practices as "fictitious," "phony," and "lying" when defendant knew there was no support for these conclusions); *Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 562, 372 N.E.2d 1211, 1221 (Ct. App. 1978) (partially denying summary judgment for defendant when, among other things, reporter used ambiguous language that falsely could imply wrongdoing by plaintiff); *McHale v. Lake Charles Am. Press*, 390 So. 2d 556, 567-68 (La. Ct. App. 1980) (affirming verdict for plaintiff when, among other things, reporter was aware that the use of the terms "bonds" and "securities" was inaccurate in context), *cert. denied*, 452 U.S. 941 (1981); *Nevada Indep. Broadcasting Corp. v. Allen*, 99 Nev. 404, 416, 664 P.2d 337, 345 (1983) (affirming verdict for plaintiff when, among other things, defendant's reference to "your check" could be taken to refer to plaintiff's personal as opposed to his campaign's check).

225. 637 P.2d 315 (Colo. 1981).

226. *Id.* at 318-19; see also *Chase v. Daily Record, Inc.*, 83 Wash. 2d 37, 44, 515 P.2d 154, 158 (1973) (en banc) (reversing summary judgment for defendant when newspaper wrote that plaintiff was requested to make "repayment" of state funds despite that the newspaper had been informed that he had not taken the funds initially).

227. See *Ragano v. Time, Inc.*, 302 F. Supp. 1005, 1010 (M.D. Fla. 1969), *aff'd*, 427 F.2d 219 (5th Cir. 1970), in which, in concluding that there was sufficient evidence of reckless disregard to go to the jury, the court noted that "[a]dmittedly, journalistic fair and pungency might have been sacrificed, but the law of defamation is not grounded on considerations of whether or not the article in question provides provocative or entertaining reading." *Id.*

228. 22 Cal. 3d 672, 586 P.2d 572, 150 Cal. Rptr. 258 (1978), *cert. denied*, 441 U.S. 961 (1979).

defamatory import to the reader, or that he knew or acted in reckless disregard of whether his words would be interpreted by the average reader as defamatory statements of fact."<sup>229</sup> The court believed that this approach was sensitive enough to avoid "a hobbling of free speech by the continuing fear of liability for the use of inexact semantics."<sup>230</sup> Whether this approach actually will protect free speech may turn on the extent courts require the plaintiff to offer additional extrinsic evidence of reckless disregard, such as a complete absence of support for the language in issue or reliance on an obviously biased source. Several courts have concluded that the use of imprecise or potentially ambiguous and defamatory language alone should not give rise to an inference of reckless disregard, at least by clear and convincing evidence.<sup>231</sup>

In *Bose Corp. v. Consumers Union of the United States, Inc.*<sup>232</sup> a federal district court found clear and convincing evidence of reckless disregard when a writer edited a critique of plaintiff's stereo speakers to read "that the instruments tended to wander about the room" but admitted at trial that "along the wall" probably would have been more accurate.<sup>233</sup> In reaching its conclusion

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229. *Id.* at 684-85, 586 P.2d at 578, 150 Cal. Rptr. at 264.

230. *Id.* The court further noted that "[t]he First Amendment protects not only the expression of a political opinion but the choice of words used to convey that opinion." *Id.* Given that some of the defendants continued to circulate the article after they knew that it was false and defamatory, the court concluded that there was sufficient evidence to permit a jury to infer reckless disregard. *Id.* at 685-86, 586 P.2d at 579, 150 Cal. Rptr. at 264-65. Chief Justice Bird filed a lengthy dissent arguing that the statements were clearly protected statements of opinion. *Id.* at 689, 586 P.2d at 581, 150 Cal. Rptr. at 267.

231. *See, e.g.,* Ryan v. Brooks, 634 F.2d 726, 733 (4th Cir. 1980) (reversing verdict for plaintiff when author arguably described plaintiff's false voucher system inaccurately by reporting that plaintiff "extorted" funds); Orr v. Argus-Press Co., 586 F.2d 1108, 1114 (6th Cir. 1978) (reversing verdict for plaintiff when reporter characterized securities violation charges against plaintiff as "fraud"), *cert. denied*, 440 U.S. 960 (1979); Wolston v. Reader's Digest Ass'n, 578 F.2d 427, 434 (D.C. Cir. 1978) (affirming summary judgment for defendant when author's imprecise language suggested that plaintiff had been convicted of espionage), *rev'd on other grounds*, 443 U.S. 157 (1979); Seymour v. A.S. Abell Co., 557 F. Supp. 951, 958 (D.Md. 1983) (granting summary judgment for defendant when reporter characterized "misappropriation" or "conversion" charges against plaintiff as "theft"); Reader's Digest v. Marin County Superior Court, 37 Cal. 3d 244, 208 Cal. Rptr. 137, 150, 690 P.2d 610, 623 (1984) (reversing denial of summary judgment for defendant when author arguably used "literary license" in writing story); DeCarvalho v. daSilva, 414 A.2d 806, 815 (R.I. 1980) (affirming judgment for defendant when newspaper used harsh language exaggerating gravity of plaintiff's offense); Tilton v. Cowles Publishing Co., 76 Wash. 2d 707, 725, 459 P.2d 8, 18 (1969) (en banc) (reversing verdict for plaintiff when defendant described "unauthorized" appropriation as "unlawful"), *cert. denied*, 399 U.S. 927 (1970).

232. 508 F. Supp. 1249 (D. Mass. 1981), *rev'd*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 104 S. Ct. 1949 (1984).

233. *Id.* at 1276-77. *Bose* was a cause of action for product disparagement. The courts

and rejecting defendant's argument that "about the room" and "along the wall" were synonymous, the district court noted that the writer "is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as 'about' to mean anything other than its plain, ordinary meaning."<sup>234</sup>

The Court of Appeals for the First Circuit reversed, concluding:

The evidence presented merely shows that the words in the article may not have described precisely what the two panelists heard during the listening test. [Defendant] was guilty of using imprecise language in the article—perhaps resulting from an attempt to produce a readable article for its mass audience. Certainly this does not support an inference of actual malice.<sup>235</sup>

The United States Supreme Court granted certiorari and affirmed the court of appeals, noting that "[u]nder the District Court's analysis, any individual using a malapropism might be liable simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time."<sup>236</sup> The approach of the First Circuit and the Supreme Court is clearly correct. While the district court did take demeanor evidence into account in reaching its conclusion, the language of defendant's article was only slightly inaccurate. The language did not appear to sensationalize the evaluation nor did it appear to be pejorative. At most, the record suggested that defendant's writers were not as clear as they might have been. Lack of clarity scarcely seems sufficient to permit an inference of reckless disregard for the truth.<sup>237</sup> As another court recognized in address-

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treated the action as a commercial analogue of defamation, and applied the actual malice test because plaintiff was concededly a public figure. *Id.* at 193.

234. *Id.* at 1276-77.

235. 692 F.2d at 197.

236. 104 S. Ct. 1949, 1966 (1984). In reviewing the evidence the Court explained:

[The editor] displayed a capacity for rationalization. He had made a mistake and when confronted with it, he refused to admit it and steadfastly attempted to maintain that no mistake had been made—that the inaccurate was accurate. That attempt failed, but the fact that he made the attempt does not establish that he realized the inaccuracy at the time of publication.

*Id.*

237. *Montandon v. Triangle Publications, Inc.*, 45 Cal. App. 3d 38, 120 Cal. Rptr. 186, *cert. denied*, 423 U.S. 893 (1975) presented an issue similar to that presented in *Bose*. In *Montandon* a *TV Guide* editor edited a press release describing a forthcoming program by deleting a reference to the fact that a masked prostitute would be appearing. Consequently, the listing for the show, entitled "From Party-Girl to Call-Girl," identified only plaintiff, the

ing the same issue, "[i]mprecision and ambiguity of expression are ills that sometimes afflict even careful and well-intentioned writers including lawyers and judges."<sup>238</sup>

A court, in determining the existence of an inference of reckless disregard, quite properly may consider affirmative efforts by an editor to "tone down" or eliminate potentially defamatory allegations.<sup>239</sup> Considering that mere ambiguity and imprecision in language, unlike blatant sensationalizing, often reveals very little about the defendant's regard for the truth, the generally cautious and sensitive approach to rejecting an inference of reckless disregard that the courts have followed is appropriate.

## 6. Balance and Selectivity

Neither the law of defamation nor *New York Times v. Sullivan* imposes an obligation of fairness, balance, or objectivity on the press.<sup>240</sup> As a matter of necessity, constraints of time and space as well as the desire to create an interesting and readable publication require the press to edit—to select and emphasize some aspects of the raw data that has been compiled through research and investigation and to omit others. That a reporter was aware of, but failed

author of a book entitled "How to be a Party-Girl," as the scheduled guest. The California Court of Appeals affirmed a jury verdict for plaintiff finding sufficient evidence of reckless disregard because defendants must have recognized the false and defamatory implication of the listing from its plain language. *Id.* at 942-44, 948-49, 120 Cal. Rptr. at 188-89, 192-93. While the defamatory implication doubtless was clearer than in *Bose*, the case for inferring subjective awareness of falsity is not stronger. In both cases defendants apparently made simple editorial error and failed to appreciate its significance. Consequently, defendants probably also should have prevailed in *Montandon*.

238. *Wolston v. Readers Digest Ass'n*, 578 F.2d 427, 434 (D.C. Cir. 1978), *rev'd on other grounds*, 443 U.S. 157 (1979).

239. *Hotchner v. Castillo-Puche*, 551 F.2d 910, 911-12, 914 (2d Cir.) (reversing verdict for plaintiff when, among other things, editor toned down or eliminated many statements pertaining to plaintiff and verified others with author), *cert. denied*, 434 U.S. 834 (1977); *FoodScience Corp. v. McGraw-Hill, Inc.*, 592 F. Supp. 362, 366 (D. Vt. 1984) (granting summary judgment for defendant when editor corrected initial inaccuracy); *Handelman v. Hustler Magazine, Inc.*, 469 F. Supp. 1053, 1056 (S.D.N.Y. 1979) (denying punitive damages to plaintiff when, among other things, editors made changes in article to ensure accuracy and defuse defamatory potential); *Medeiros v. Northeast Publishing, Inc.*, 8 Media L. Rep. (BNA) 2500, 2503 (Mass. Super. Ct. 1982) (granting summary judgment for defendant when editor attempted to tone down letter to editor).

240. Some commentators have argued, however, that jurors will disregard judicial instructions on actual malice and find for the plaintiff if they perceive that a media defendant has treated the plaintiff unfairly in print. See Remarks of Conrad Shumadine, Symposium, *New York Times v. Sullivan*, The Next Twenty Years, Mar. 8, 1984, New York, New York. Likewise, one commentator has suggested that potential plaintiffs rarely will file libel actions unless they believe they have been treated unfairly. G. HOUGH, NEWSWRITING 181 (3d ed. 1984).

to include, information favorable to the plaintiff, in a given instance, may suggest that he was not a responsible journalist,<sup>241</sup> but such failure does not show necessarily that he harbored serious doubts for the truth of the allegedly defamatory published statements.<sup>242</sup> In *Westmoreland v. CBS*,<sup>243</sup> a federal district court concluded that evidence that the defendant emphasized sources critical of plaintiff and ignored sources that supported plaintiff to bolster its own preconceived thesis was not sufficient by itself to raise an inference of reckless disregard.<sup>244</sup> Occasionally, however, lack of balance or objectivity may help to establish actual malice.<sup>245</sup> In *Tavoulaareas v. Washington Post Co.*,<sup>246</sup> the Court of Ap-

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241. See *infra* note 494 and accompanying text.

242. *Herbert v. Lando*, 596 F. Supp. 1178, 1209-10 (S.D.N.Y. 1984) (granting partial summary judgment for defendant when documentary questioned the veracity of a statement by plaintiff and failed to acknowledge that there was independent support for the statement); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1352 (S.D.N.Y. 1977) (granting summary judgment for defendant when arguably writer selectively omitted information favorable to plaintiff); *Reader's Digest v. Marin County Superior Court*, 37 Cal. 3d 244, 208 Cal. Rptr. 137, 147, 690 P.2d 610, 620 (1984) (reversing denial of summary judgment although story failed to present defendant's views); *Russell v. McMillen*, 8 Media L. Rep. (BNA) 1646, 1649 (Colo. Dist. Ct. 1982) (granting summary judgment for defendant when reporter chose to rely on sources whose information was most detrimental to plaintiff), *aff'd*, 10 Media L. Rep. (BNA) 1888 (Colo. App. 1984); *Theckston v. Triangle Publications, Inc.*, 100 N.J. Super. 452, 456, 242 A.2d 629, 631 (Ct. App. Div. 1968), *cert. denied*, 393 U.S. 1001 (1968) (reversing verdict for plaintiff when article lacked quality of impartiality); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 381, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951 (granting summary judgment for defendant when writer may have omitted some details in admittedly subjective article on the judicial process), *cert. denied*, 434 U.S. 969 (1977); *cf.* *New York Times Co. v. Conner*, 365 F.2d 567, 576-77 (5th Cir. 1966) (recognizing that lack of balance and objectivity do not show reckless disregard); *McQuoid v. Springfield Newspapers, Inc.*, 502 F. Supp. 1050, 1057 (W.D. Mo. 1980) ("assuming *arguendo* that defendant was aware of the favorable developments achieved by plaintiff, there is no authority holding that a conscious decision not to publish such events would constitute a reckless disregard for the truth . . ." (emphasis in original)); *Belli v. Curtis Publishing Co.*, 25 Cal. App. 3d 384, 398, 102 Cal. Rptr. 122, 132 (1972) ("He who revels and prospers in the limelight of publicity may not complain if his failures are highlighted as well as his successes."); *McHale v. Lake Charles Press*, 390 So. 2d 556, 562-63 (La. Ct. App. 1980) (prior articles pertaining to incident lacked objectivity but did not provide evidence of reckless disregard), *cert. denied*, 452 U.S. 941 (1981).

243. 596 F. Supp. 1170 (S.D.N.Y. 1984).

244. *Id.* at 1173-74.

245. See *Beech Aircraft v. National Aviation Underwriters*, 11 Med. L. Rep. (BNA) 1401, 1415 (D. Kan. 1985) (denying summary judgment for defendant when, among other things, reporter relied on information critical of plaintiff and disregarded favorable information); *Machleder v. Diaz*, 538 F. Supp. 1364, 1373 (S.D.N.Y. 1982) (denying summary judgment for defendant when reporter excised material favorable to plaintiff from videotape, arguably to create false impression that plaintiff was responsible for toxic waste dump); *Ragano v. Time, Inc.*, 302 F. Supp. 1005, 1008 (S.D. Fla.) (denying summary judgment for defendant when editor labeled picture as representing "meeting of Cosa Nostro hoodlums" without indicating that two of the persons present were lawyers), *aff'd*, 427 F.2d 219 (5th

peals for the District of Columbia Circuit held that evidence indicating that the reporter and editors omitted or deleted information favorable to the plaintiff and "slanted" the story against the plaintiff provided some support for an inference of reckless disregard.<sup>247</sup> Likewise, in *Goldwater v. Ginzburg*,<sup>248</sup> the Court of Appeals for the Second Circuit concluded that the record contained sufficient evidence of reckless disregard when, among other faults, the defendant omitted some information, exaggerated and distorted source material, and quoted out of context to create an unfavorable impression of plaintiff.<sup>249</sup> *Goldwater* illustrates that courts properly may draw an inference of reckless disregard when the defendant has engaged in a pervasive pattern of editorial selectivity and imbalance that on its face, seems designed to cast a highly misleading image of the plaintiff. In less egregious cases, however, courts should be hesitant to treat editorial selectivity as proof of reckless disregard because mild selectivity reveals little about the editor's subjective belief in the truth of the story.<sup>250</sup> In a similar vein the

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Cir. 1970); *Steadman v. Lapensohn*, 408 Mich. 50, 55 n.5, 288 N.W.2d 580, 583 n.5 (1980) (reversing summary judgment for defendant when, among other things, reporter failed to inform plaintiff that initial article had been completed prior to their discussion and then reporter printed interview with plaintiff as if it were a response); cf. *Indianapolis Newspapers, Inc. v. Fields*, 254 Ind. 219, 246, 259 N.E.2d 651, 662, 664 (affirming, by an equally divided court, verdict for plaintiff, when, among other things, defendant published crucial fact that witness had repudiated story on only one occasion and failed to mention it in several subsequent accounts of the incident); *McHale v. Lake Charles Am. Press*, 390 So. 2d 556, 563-64 (La. Ct. App. 1980) (evidence that editor failed to disclose information favorable to plaintiff could be considered by jury on issue of reckless disregard), *cert. denied*, 452 U.S. 941 (1981).

246. 759 F.2d 90 (D.C. Cir. 1985).

247. *Id.* at 121-25. The district court had concluded that the articles in issue fell "far short of being a model of fair, unbiased investigative journalism," however that this did not raise an inference of reckless disregard. 567 F. Supp. 651, 654 (D.D. C. 1983), *rev'd*, 759 F.2d 90 (D.C. Cir. 1985).

248. 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

249. *Id.* at 329, 334, 337, 339-40; see also *Dixson v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977) (affirming verdict for plaintiff when there was evidence that reporter knew that he was taking quote out of context to create misrepresentation).

250. In finding sufficient evidence to support an inference of reckless disregard the court in *Braig v. Field Communications*, 310 Pa. Super. 569, 456 A.2d 1366 (1983), *cert. denied*, 104 S. Ct. 2341 (1984), placed heavy reliance on the station manager's staged panel discussion that was biased toward one side of the controversy in issue. *Id.* at 588-90, 456 A.2d at 1776-77. In context, the *Braig* facts do not support such an inference. Even if, as the court suggested, the discussion arguably ran afoul of the fairness doctrine, this does not necessarily lead to the conclusion that the station manager doubted the truth of the statements made during the discussion, prior to its rebroadcast. While the imbalance of the panel is a factor worthy of some consideration on the issue of reckless disregard, the *Braig* court's opinion suggests that it may have given more weight to the factor than it deserved.

court in *McIntire v. Westinghouse Broadcasting Co.*<sup>251</sup> recognized that defendant's juxtaposition of an unrelated discussion of the Nazis in an editorial criticizing plaintiff was insufficient to establish reckless disregard. As the court observed "[t]he defendant was not constitutionally required to arrange its editorial comments in such a way as to present the plaintiff in the best possible light and to treat comment-worthy matters under separate headings."<sup>252</sup>

As with proof of verification, evidence of the balance and impartiality of an article may serve as affirmative proof that the defendant did not publish in reckless disregard of the truth.<sup>253</sup> Defensive use of this evidence is appropriate so long as courts do not give this factor undue weight. While a balanced article may suggest that the defendant was attempting to be fair to the plaintiff and therefore would not have published an allegation pertaining to the plaintiff if he seriously doubted its truth, the possibility still exists that the defendant may have doubted a specific statement even if the article, considered as a whole, was fair and impartial.

## 7. Editorial Process

In *Herbert v. Lando*,<sup>254</sup> defendant CBS argued that in a defamation action the first amendment should be construed to provide a privilege against discovery of information pertaining to internal discussions and conclusions of the press that occur during the editorial process. Although the Court of Appeals for the Second Circuit accepted this argument,<sup>255</sup> the Supreme Court disagreed, not-

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251. 479 F. Supp. 808, 811 (D. Mass. 1979).

252. *Id.*

253. *Ainheiter v. Random House*, 578 F.2d 804, 805 (9th Cir. 1979) (affirming summary judgment for defendant when author presented both sides of the controversy pertaining to plaintiff's command of a captured naval vessel), *cert. denied*, 444 U.S. 931 (1979); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1122 (N.D. Cal. 1984) (dismissing plaintiff's complaint when magazine published plaintiff's denial and acknowledged questions concerning character of primary source); *Henderson v. Van Buren Pub. School*, 4 Media L. Rep. (BNA) 1741, 1744 (E.D. Mich. 1978) (granting summary judgment for defendant when defendant interviewed persons in favor of and opposed to plaintiff and published responses of both); *Dattner v. Pokoik*, 81 A.D.2d 572, 573, 437 N.Y.S.2d 425, 427 (1981) (reversing judgment for plaintiff when newspaper interviewed plaintiff and printed his response to its allegation that he took a bribe); *Direct Import Buyer's Ass'n v. K.S.L., Inc.*, 572 P.2d 692, 695 (Utah 1977) (affirming directed verdict for defendant when station reported both sides of controversy involving plaintiff); *cf. Dickey v. CBS, Inc.*, 583 F.2d 1221, 1224 (3d Cir. 1978) (affirming judgment for defendant when, among other things, defendant broadcast denial by plaintiff's attorney along with defamatory charges).

254. 441 U.S. 153 (1979).

255. 568 F.2d 974 (2d Cir. 1977); see Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 *HOFSTRA L. REV.* 655 (1979), for an extended defense of



ing that other courts consistently have held editorial process evidence admissible<sup>256</sup> and that a discovery privilege would impede severely the ability of a public official or public figure plaintiff to establish the prerequisite of actual malice.<sup>257</sup> There is no clear distinction between the process of investigating and writing an article and the process of editing it. Whatever distinctions do exist will vary with the nature and organization of the publication as well as with the particular story. Moreover, many of the factors discussed previously, including nature and degree of verification, tone, and selectivity, often will concern conduct within the editorial process. Evidence pertaining to the operation of the editorial process itself, especially when it pertains to the type of partisan selectively discussed in the previous section, still sometimes will contribute to an inference of reckless disregard.<sup>258</sup>

Recently editorial process evidence has played a major role in the highly publicized federal court decisions in *Westmoreland v. CBS*,<sup>259</sup> *Sharon v. Time, Inc.*,<sup>260</sup> and *Tavoulareas v. Washington Post Co.*<sup>261</sup> In *Westmoreland* the district court found that there was a reckless disregard issue for the jury when plaintiff submitted evidence that defendant edited an interview to create a false impression, arguably misidentified interviewees, and implicitly misrepresented the context of interviewees' remarks to create an unfavorable impression of plaintiff.<sup>262</sup> While the court concluded that

the Second Circuit's approach by one of the judges who joined the majority opinion.

256. 441 U.S. at 160-65.

257. *Id.* at 170. On remand, the district court granted summary judgment for defendant on nine of eleven defamatory allegations. 596 F. Supp. 1178, 1228 (S.D.N.Y. 1984).

258. See, e.g., *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 538-39 (7th Cir. 1982) (affirming punitive damage award for plaintiff when, among other things, editor spent only a few hours attempting to check article and added more defamatory material), *cert. denied*, 459 U.S. 1226 (1983); *Goldwater v. Ginzburg*, 414 F.2d 324, 334-35, 357 (2d Cir. 1969) (affirming verdict for plaintiff when, among other things, editor deleted much favorable information pertaining to plaintiff and inserted damaging statements in quoted source material), *cert. denied*, 396 U.S. 1049 (1970); *Beech Aircraft v. National Aviation Underwriters*, 11 Med. L. Rep. (BNA) 1415 (D. Kan. 1985) (denying summary judgment for defendant when, among other things, editor made article significantly more negative toward plaintiff than reporter's initial draft and failed to verify allegations); *Ragano v. Time, Inc.*, 302 F. Supp. 1005, 1010 (M.D. Fla. 1969) (denying summary judgment for defendant when editor made deletion rendering story misleading and defamatory), *aff'd*, 427 F.2d 219 (5th Cir. 1970); *McHale v. Lake Charles Am. Press*, 390 So.2d 556, 565 (La. Ct. App. 1980) (affirming verdict for plaintiff when, among other things, editor deliberately inserted false and defamatory term into editorial), *cert. denied*, 452 U.S. 941 (1981).

259. 596 F. Supp. 1170, 1174-77 (S.D.N.Y. 1984).

260. 599 F. Supp. 538, 572-73, 576, 578-79, 584-85 (S.D.N.Y. 1984).

261. 759 F.2d 90 (D.C. Cir. 1985).

262. 596 F. Supp. at 1174-77. Plaintiff's evidence suggested that: (1) defendant edited

this evidence was sufficient to raise a factual question for the jury, it refrained from deciding whether such proof would constitute clear and convincing evidence of reckless disregard if the jury resolved all of the disputed issues in plaintiff's favor.<sup>263</sup> Likewise in *Sharon* the district court found that reckless disregard might be inferred from defendant editor's failure to question an apparent incongruity between the story and source relied on by the reporter.<sup>264</sup> In addition the court also found that the editor's failure to verify independently information received from a reporter who had been disciplined previously for providing false information also might provide some support for an inference of reckless disregard.<sup>265</sup> Finally, in *Tavoulaareas v. Washington Post Co.*<sup>266</sup> the Court of Appeals for the District of Columbia Circuit found evidence of reckless disregard when one of defendant's copy editors wrote a memorandum concluding that the allegations contained in the article did not seem significant and that "[i]t's impossible to believe that [plaintiff] alone could put together such a scheme for the sake of his son's business career, or that he would want to."<sup>267</sup> The court noted that the evidence did not tend to support the district court's finding that the copy editor lacked responsibility for the article's content, however, it concluded that even if she did not have such authority, the very fact that her doubts were brought to the attention of and discussed by three editors who did have such responsibility provided support for an inference of reckless disre-

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a statement of an interviewee to imply that he considered an estimate of enemy strength that he had supported on behalf of plaintiff to be "crap" when during the interview he actually was referring to a different set of figures; (2) defendant identified an interviewee who provided some information that was arguably critical of plaintiff as a member of plaintiff's staff and therefore privy to inside information when in fact the interviewee did not have access to such information; (3) defendant indicated that a witness was referring to falsification of information by plaintiff when, in fact, he was responding to a hypothetical question; and (4) defendant indicated that a cable under discussion was sent by plaintiff when in fact it was not. *Id.*

263. *Id.* at 1177.

264. 599 F. Supp. 538, 576, 579, 585 (S.D.N.Y. 1984). The reporter based in Israel had assured his editors that a source had informed him and had subsequently confirmed that the secret appendix to a report by an Israeli government commission investigating the massacre of Palestinian refugees, stated that plaintiff, an Israeli general, had discussed the "need for revenge" with leaders of the Lebanese faction responsible for the massacre. The defendant's editors failed to question this assertion despite the fact that they had read the report and were aware that it referred to several items appearing in the confidential appendix and knew that it did not make reference to the incident in issue. *Id.*

265. *Id.* at 570-72, 579, 583-84.

266. 759 F.2d 90 (D.C. Cir. 1985).

267. *Id.* at 115.

gard.<sup>268</sup> Standing alone the plaintiff's editorial process evidence in *Tavoulaareas* may not have been sufficient to establish reckless disregard by "clear and convincing" evidence, however, such evidence is more than adequate when coupled with the other evidence detailed in the court of appeals opinion.<sup>269</sup> These cases indicate that editorial process evidence can aid the plaintiff on occasion.<sup>270</sup>

Judicial reliance on editorial process evidence in the case of *Braig v. Field Communications*<sup>271</sup> seems misguided, however. In *Braig*, plaintiff complained to defendant's station manager about the alleged inaccuracy of statements made during a panel discussion. The court concluded that a jury could have inferred reckless disregard because the station manager viewed the tape of the panel discussion several times prior to rebroadcast, after speaking with plaintiff.<sup>272</sup> If anything, this evidence should have demonstrated defendant's concern for accuracy rather than its doubts as to the truth. *Braig* is unlike *Tavoulaareas* in that there was no apparent

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268. *Id.* at 116-17.

269. Along with the issue of reckless disregard, the parties also hotly contested the issue of falsity. See Brill, *Inside the Jury Room at the Washington Post Libel Trial*, AM. LAW., Nov. 1982, at 1, 92.

270. In *Akins v. Altus Newspapers, Inc.*, the Supreme Court of Oklahoma heavily relied on editorial process evidence in affirming a verdict for a public official plaintiff against a newspaper, its publisher, its editor, and its reporter. 609 P.2d 1263 (Okla. 1977), *cert. denied*, 449 U.S. 1010 (1980). In *Akins* the reporter wrote a story containing allegations that all defendants recognized as quite serious based almost exclusively on bits and pieces of overheard conversations. *Id.* at 1266. The reporter falsely represented to the editor that he had "checked it out" and the publisher decided to run the story after having been assured by the editor that it could be verified. *Id.* at 1267. In concluding that there was sufficient evidence of reckless disregard, the court emphasized that "[t]here was no detailed discussion between the editor and the reporter . . . [and] [n]o other checking occurred prior to the publication of the . . . story." *Id.* The *Akins* facts amply support a finding of reckless disregard against the reporter. The case against the editor and publisher, however, is troubling. The editorial process was perfunctory and probably inadequate, but that tends to suggest negligence not serious doubt of the truth. Absent any facts suggesting that the editor and publisher had reason to believe that the reporter had misrepresented his efforts at verification, there is no basis for inferring that they published with reckless disregard for the truth. Cf. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 157-58 (1967) (sufficient evidence of highly unreasonable conduct to support jury verdict for plaintiff when, among other things, editors made little effort to discuss story between themselves or determine whether it could be verified); *Time, Inc. v. Hill*, 385 U.S. 374, 394 (1967) (finding sufficient evidence of reckless disregard in false light privacy action when editor deleted phrase indicating that incident was "somewhat fictionalized" in view of his knowledge that it was but reversing verdict due to inadequate jury instruction); *Durso v. Lyle Stuart, Inc.*, 33 Ill. App. 3d 300, 306, 337 N.E.2d 443, 448 (1975) (affirming verdict for plaintiff when publisher failed to investigate expose despite knowledge that several other publishers had rejected it).

271. 310 Pa. Super. 569, 586-89, 456 A.2d 1366, 1376-77 (1983) (reversing summary judgment for defendant), *cert. denied*, 104 S.Ct. 2341 (1984).

272. *Id.*

evidence in the record that anyone within defendant's organization had doubted the truthfulness of the defamatory statements made during the panel discussion.

At a general level, evidence of the defendant's critical analysis during the editorial process presents a dilemma. Presumably, the press should be encouraged to subject articles to a rigorous and skeptical review prior to publication in the hope that this review will lead to greater accuracy. To the extent that courts consider critical evaluations as evidence of serious doubt of the truth of the article, however, the courts may create a disincentive for this type of scrutiny, or at the very least for committing such efforts to writing.<sup>273</sup> Moreover, an executive editor should be able to reject the doubts of an editorial staff member after careful consideration without necessarily laying the predicate for proof of reckless disregard. Still, evidence of critical evaluation may be, in a particular case, the best possible evidence that the defendant published the article with a high degree of awareness of its probable falsity. The Supreme Court has considered the effect of permitting judicial evaluation of editorial process evidence. In *Herbert v. Lando*,<sup>274</sup> after emphasizing plaintiff's need for editorial process evidence under the *New York Times* standard, the Court concluded that

whether or not there is liability for the injury, the press has an obvious interest in avoiding the infliction of harm by the publication of false information, and it is not unreasonable to expect the media to invoke whatever procedures may be practicable and useful to that end. Moreover, given exposure to liability when there is knowing or reckless error, there is even more reason to resort to prepublication precautions, such as a frank interchange of fact and opinion. Accordingly, we find it difficult to believe that error-avoiding procedures will be terminated or stifled simply because there is liability for culpable error and because the editorial process will itself be examined in the tiny percentage of instances in which error is claimed and litigation ensues. Nor is there sound reason to believe that editorial exchanges and the editorial process are so subject to distortion and to such recurring misunderstanding that they should be immune from examination in order to avoid erroneous judgments in defamation suits. The evidentiary burden [plaintiff] must carry to prove at least reckless disregard for the truth is substantial indeed, and we are unconvinced that his chances of winning an undeserved verdict are such that an inquiry into what Lando learned or said during the editorial process must be foreclosed.<sup>275</sup>

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273. See generally Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083 (1983) (referring to the chilling effect of disclosure of self-critical analyses as a principle behind development of privilege of such analyses).

274. 441 U.S. 153 (1979).

275. *Id.* at 173-74. Two dissenting Justices disagreed with the majority's conclusion that the absence of an editorial process privilege would not chill conversations and inquiry during the course of the editorial process. See *id.* at 193-94 (Brennan, J., dissenting), 208-09

The balance struck by the Court is defensible given that the press has not been granted an absolute privilege in public official/public figure cases. The press, however, still may be more cautious in determining which critiques it commits to writing.<sup>276</sup> As *Lando* and *Bose* suggest, however, the press may receive sufficient protection for the editorial process through conscientious application of the clear and convincing evidence standard.

Often, a plaintiff's editorial process evidence will fail to raise an inference of reckless disregard. For instance, evidence that an editor made a mistake,<sup>277</sup> or that he rewrote portions of a story for legitimate journalistic reasons<sup>278</sup> will not show serious doubt for

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(Marshall, J., dissenting).

276. There is some indication the press already is taking a more guarded approach to recording information. See Eugene Roherts, Jr., Executive Editor, Philadelphia Inquirer, Remarks at Lawyers Defense Research Council Steering Committee Dinner, reprinted in LDRC Bulletin No.9:

Look at the *Tavoulaareas* case. The worst strike against the Washington Post was that a copy editor had questioned the thrust of the Tavoulaareas story in a note to another editor. Never mind that this is precisely what we hire copy editors to do—raise questions again and again, over and over, all night long if necessary, to ensure accuracy. In the juror's minds the Post got no credit for setting up the procedure that allowed the copy editors to be heard. It got only blame for deciding against the copy editor and printing the story . . . .

Written challenges from copy desks can help ensure accuracy, internal reports can help ensure fairness. But neither written reports nor written challenges will long endure when they result in multi-million dollar libel verdicts.

*Id.*; see also Brill, *Redoing Libel Law*, AM. LAW., Sept. 1984, at 1, 10 ("the fact that the copy editor's memo caused the Post so much trouble with the jury can't help but chill future memo writers, or, for that matter, editors or broadcast producers who would otherwise encourage prior internal debate about articles").

277. *Marcone v. Penthouse Int'l*, 754 F.2d 1072, 1090 (3rd Cir. 1985) (reversing verdict and punitive damage award for plaintiff when editors failed to catch misreading of document); *Rood v. Finney*, 418 So. 2d 1, 2 (La. Ct. App. 1982) (affirming summary judgment for defendant when wording of story was inexplicably altered during editorial process to produce defamatory meaning), *cert. denied*, 460 U.S. 1013 (1983); *Glover v. Herald Co.*, 549 S.W.2d 858, 860 (Mo.) (en banc) (reversing verdict for plaintiff when editor inadvertently transposed names received over telephone from reporter), *cert. denied*, 434 U.S. 965 (1977); *Donaldson v. Washington Post*, 3 Media L. Rep. (BNA) 1436, 1438 (D.C. Super. Ct. 1977) (granting summary judgment for defendant when the word "not" was inadvertently omitted prior to the word "guilty" after the article was transmitted to the typesetter); *McCarney v. Des Moines Register & Tribune Co.*, 239 N.W.2d 152, 155 (Iowa 1976) (reversing denial of summary judgment for defendant when editor changed wording after confusing story with another article).

278. See *Bose Corp. v. Consumers Union of United States, Inc.*, 692 F.2d 189, 197 (1st Cir. 1982) (reversing verdict for plaintiff when editorial staff altered wording of allegedly defamatory statement), *aff'd*, 104 S.Ct. 1949 (1984); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1133 (6th Cir. 1978) (reversing verdict for plaintiff when defendant rewrote A.P. story in order to run story under its own byline), *cert. denied*, 440 U.S. 960 (1979); *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 958 (D.D.C. 1976) (granting summary judgment for defendant when editor modified story because of doubts of accuracy);

the truth. At least one court has recognized that the defendant's refusal to permit the plaintiff to play a role in the editorial process prior to publication is not evidence of reckless disregard. In *James v. Gannett Co.*<sup>279</sup> plaintiff interviewee argued that defendant reporter's refusal to permit her to review his notes prior to publication demonstrated reckless disregard. The New York Court of Appeals quite correctly disagreed noting that:

[A] requirement that persons mentioned in proposed newspaper accounts or articles be permitted a first instance, prepublication review, including a review of direct quotations, would, in effect, impose the equivalent of censorship traditionally anathema in our society. Outsiders have no right to sit in the editor's chair; to insist that an interviewee should be assured an opportunity with the benefit of reflection and hindsight to revise spontaneous statements would be equally to strike at the vitality of news reporting. Moreover, a quick glance at any major daily newspaper would reveal the impracticability of such a requirement. Countless persons, corporations, associations and businesses are mentioned in publications every day and a publication could scarcely remain timely if publication had to await a review and confirmation by every person or entity whose name is mentioned.<sup>280</sup>

Evidence that the defendant conformed to standard editorial procedures may indicate that a story was not published with reckless disregard for the truth.<sup>281</sup> Presumably, if the editors followed

*LaBruzzo v. Associated Press*, 353 F. Supp. 979, 986 (W.D. Mo. 1973) (granting summary judgment for defendant for insufficient evidence of reckless disregard when editor changed draft to conform more closely with information provided by source); *Readers' Digest v. Marin County Superior Court*, 37 Cal. 3d 344, 208 Cal. Rptr. 137, 147, 690 P.2d 610, 620 (1984) (reversing denial of summary judgment for defendant when editor deleted phrase that was arguably favorable to plaintiffs).

279. 40 N.Y.2d 415, 423-24, 353 N.E.2d 834, 840, 386 N.Y.S.2d 871, 877 (1976).

280. *Id.* The *James* court also observed:

A newspaper is a private enterprise and there is certainly no absolute right on the part of citizens to insist upon the right to inspect newspaper accounts, files or notes in the absence of legal process . . . . Moreover, although such a review might alert the publisher to a potential difficulty, the newspaper would be under no requirement to accede to the suggestions or demands of those mentioned in its reports.

*Id.* at 423-24, 353 N.E.2d at 840-41, 386 N.Y.S.2d at 877. The court's conclusions endorsed accepted journalistic procedure. See *infra* note 430 and accompanying text.

281. See *Bose Corp. v. Consumers Union of United States, Inc.*, 692 F.2d 189, 197 (1st Cir. 1982) (reversing verdict for plaintiff when magazine followed "normal editorial procedures"), *aff'd*, 104 S. Ct. 1949 (1984); *National Rifle Ass'n v. Dayton Newspapers, Inc.*, 555 F. Supp. 1299, 1318 (S.D. Ohio 1983) (granting summary judgment for defendant when newspaper "did not deviate from accepted, normal procedures"); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1351 (S.D.N.Y. 1977) (granting summary judgment for defendant when editors applied "their usual editing procedures to the article, including discussions with the author, stylistic and copy editing, spot checking of some of the sources cited by the author, and reviewing drafts and redrafts in consultation with the author and other editors"); cf. *Baldine v. Sharon Herald Co.*, 280 F. Supp. 440, 442-43 (W.D. Pa. 1966) (granting summary judgment for defendant when newspaper deviated from policy of not accepting controversial political ads shortly before election but did so only after review and discussion

normal procedures, they would have taken care to ensure accuracy and alarming information would be discovered. Prepublication consultation between editor and writer also may undermine an inference of reckless disregard because such procedures may suggest that the editor was able to satisfy himself as to the accuracy of the allegations.<sup>282</sup> While the editorial process is not off limits, it is yet to provide a particularly fruitful source of evidence for plaintiffs on the issue of reckless disregard.

#### 8. Reliance on Counsel

Some segments of the media commonly have counsel review material that could give rise to defamation litigation prior to publication.<sup>283</sup> The role of counsel may vary from one instance to another. Often the attorney will attempt to determine whether any statements in the article are potentially defamatory, whether they are accurate, whether any privileges exist, or whether the publisher could prevail on the issues of reckless disregard or negligence if litigation were to ensue. The courts should encourage the press to seek review of an article by an objective and legally trained party, at least when there is some reason to believe that the article contains potentially defamatory statements as a means of avoiding potential litigation.<sup>284</sup> Because the involvement of counsel at the pre-

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between ad manager and editor), *aff'd*, 391 F.2d 703 (3d Cir. 1968).

282. See *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 268, 276 (3d Cir. 1980) (affirming verdict for defendant when editor discussed story with reporter); *Joseph v. Xerox Corp.*, 594 F. Supp. 330, 335 (D.D.C. 1984) (granting summary judgment for defendants when, among other things, editor received assurances from author that allegations were supportable); *Handelman v. Hustler Magazine, Inc.*, 469 F. Supp. 1053, 1056 (S.D.N.Y. 1979) (denying punitive damages to plaintiff when, among other things, editor relied on assurances of author); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1351 (S.D.N.Y. 1977) (granting summary judgment for defendant when, among other things, editor discussed article in detail with author); *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 958 (D.D.C. 1976) (granting summary judgment for defendant when, among other things, editor reviewed details of article with author prior to publication).

283. See Riley, *Lawyers Who Look for Libel*, NAT'L L.J., May 27, 1985, at 1, 30-31.

284. See *Pre-Publication Review Emphasized by ABA Forum*, MEDIA L. REP. (BNA), News Notes, 1984 (Remarks of Robert Sack and Barbara Mack). Some commentators have argued that independent journalistic decision-making will be undermined if too much authority in the editorial and publication process is delegated to legal counsel, especially because the attorney is trained to err on the side of caution. See H. GOODWIN, *GRIPPING FOR ETHICS IN JOURNALISM* 284 (1982) (quoting Lyle Denniston of the Baltimore Sun) ("Our lawyers have scared the bejesus out of us . . . . Having lawyers in the newsroom is as great a threat to the First Amendment as having reporters in jail"); Anderson, *supra* note 22, at 428-441; Note, *The Editorial Function and the Gertz Public Figure Standard*, 87 YALE L.J. 1723, 1742 (1978); Letter from Professor Ellen Solender to the Editor, 2 COM. LAW. 26 (1984) (criticizing press spokesmen for admitting that they can live with lawyers in the newsroom).

publication stage tends to show that the publisher conscientiously was attempting to avoid publishing a false and defamatory article, use of counsel is another factor that undermines the plaintiff's attempt to establish reckless disregard, especially if the attorney concluded that the article was accurate based on his own prepublication inquiry.<sup>285</sup>

Certainly, as a matter of policy, courts should not conclude that the very decision to submit an article to counsel for prepublication review is in itself evidence that the editor seriously doubted its truth. Whether review by counsel is used as a standard practice or only in an isolated instance, such review does not suggest that the editor had reason to doubt the truth of the article. Rather, the decision to seek legal review is more probably an acknowledgement that the editor is incapable of evaluating the legal risks and that he

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While there is obviously some reason to fear a chilling effect as the result of reliance on counsel, seeking the advice of counsel does not require delegation of the decision to publish to the lawyers any more than it would require delegation in other areas in which a course of action is predicated to a certain extent on an evaluation of potential legal consequences. For an editor to fight against an arguably unsympathetic publisher for publication of a controversial story when the risks are apparent and the economic costs of killing the story seem negligible, at times may be difficult; responsible journalists nevertheless must wage this battle as a matter of professional integrity. So long as there is a possibility of defamation litigation, the courts should encourage legally informed decision-making even at the risk of sacrificing a certain degree of journalistic purity. *But cf.* F. BASKETTE, J. SISSORS & B. BROOKS, *THE ART OF EDITING* 137 (3d ed. 1977) ("On extra sensitive stories in which the precise wording has been dictated by an attorney, the desk should not make any change.").

285. See *Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972) (affirming summary judgment for defendant when, among other things, "one researcher, four editors and three lawyers spent countless hours corroborating and evaluating [the] data."), *cert. denied*, 409 U.S. 1125 (1973); *Handelman v. Hustler Magazine, Inc.*, 469 F. Supp. 1053, 1059 (S.D.N.Y. 1979) (denying punitive damages to plaintiff when material in issue was reviewed by author's and publisher's counsel); *Fadell v. Minneapolis Star & Tribune Co.*, 425 F. Supp. 1075, 1081-82 (N.D. Ind. 1976) (granting summary judgment for defendant when, among other things, outside counsel questioned reporter in detail and received supporting documents), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977); *Konigsburg v. Time, Inc.*, 312 F. Supp. 848, 854 (S.D.N.Y. 1970) (granting summary judgment for defendant when, among other things, article was independently checked and verified by attorney familiar with subject matter); *Belli v. Curtis Publishing Co.*, 25 Cal. App. 3d 384, 393, 102 Cal. Rptr. 122, 128 (1972) (affirming summary judgment for defendant when, among other things, legal department reviewed article critically for accuracy); *Licovoli v. Indianapolis Newspapers, Inc.*, 4 Media L. Rep. (BNA) 1833, 1837 (Ind. Cir. Ct. 1978) (granting summary judgment for defendant when, among other things, allegations were reviewed by three attorneys); *cf.* *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 73, 155 Cal. Rptr. 29, 36 (partially affirming judgment n.o.v. for defendant when "editor knowledgeable in the field of libel" reviewed book prior to hardback publication), *cert. denied*, 444 U.S. 984 (1979); *Torres v. Playboy Enters., Inc.*, 7 Media L. Rep. (BNA) 1182, 1184, 1186 (S.D. Tex. 1980) (granting summary judgment for defendant when, among other things, counsel reviewed item but did not make independent investigation).



desires to act carefully. All sides would suffer if the courts created a disincentive to a procedure that offers both to ensure accuracy and to decrease the risk of litigation. When counsel questions the accuracy of the article, however, and the editor decides to publish it anyway, as with an expression of internal editorial skepticism, an inference of reckless disregard may be warranted. Even when there is evidence that counsel objected to publication, however, such evidence provides only an inference of serious doubt, subject to explanation by the defendant and rejection by the factfinder.<sup>286</sup> In any given instance, truth may be a legal question but it is always a journalistic query. The decision whether to publish ultimately must be made by the editor and not by counsel.<sup>287</sup> The defendant can rebut the inference of reckless disregard that arises from counsel's warning so long as the editor can explain why he disagreed with counsel's assessment of the accuracy of the article. Moreover, an inference of reckless disregard should not arise when the editor published in spite of legal advice that was based on an issue other than accuracy, such as the likelihood or costs of prevailing should litigation ensue. Finally, a court should not permit an inference of reckless disregard because the editor failed to have counsel review an article, even if such review is standard practice with that publisher or in that particular segment of the industry.<sup>288</sup> While review by counsel is an important protective procedure that should be given its due on the issue of reckless disregard, a publisher cannot insulate itself from liability simply by running its drafts past an attorney. In a given case, a plaintiff still should be able to establish reckless disregard despite the fact that an article was read and approved by counsel prior to publication.

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286. See *Doubleday & Co. v. Rogers*, 674 S.W.2d 751, 756 (Tex. 1984) (reversing verdict for plaintiff when publisher's attorney expressed concern about defamatory potential of allegation, thereby causing author to falsely change story).

287. See D. McHAM, *LAW AND THE PRESS IN TEXAS: A HANDBOOK FOR JOURNALISTS* 72 (4th ed. 1982) ("Reporters and editors make constant evaluations that are subjective, but professional. The profession demands an expertise. But too often news managers use the legal standard as a scapegoat: If it's legal, use it.")

288. See *Hensley v. Life Magazine, Time, Inc.*, 336 F. Supp. 50, 54 (N.D. Cal. 1971) (granting summary judgment for defendant despite editors' failure to have attorneys review table of contents of magazine). *But cf. Hellman v. McCarthy*, 10 MEDIA L. REP. (BNA) 1789, 1795 (N.Y. Sup. Ct. 1984) (denying summary judgment for defendant when television producer failed to have counsel review potentially defamatory remarks despite lapse of three months prior to broadcast).

## 9. Retraction

Courts disagree on the evidentiary significance of a retraction or of a failure to retract on demand. *New York Times v. Sullivan* strongly suggested that a failure to retract a defamatory allegation does not constitute evidence of reckless disregard.<sup>289</sup> Because the reckless disregard inquiry focuses on the state of the defendant's mind at the time of publication, subsequent inaction arguably is irrelevant.<sup>290</sup> The failure to retract reveals nothing about the defendant's state of mind when no reliable party has brought the falsity of the statement to the defendant's attention.<sup>291</sup> Although a failure to retract does not prove directly that the defendant doubted the truth of the allegation at the time of publication, it may provide some additional evidence that the defendant was prepared to publish despite an awareness of falsity, at least when the demand to retract is accompanied by proof that the allegation is false.<sup>292</sup> On the other hand, a prompt retraction or correction can

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289. 376 U.S. 254, 287 (1964) ("It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party." (emphasis added)).

290. See *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 822 (N.D. Cal. 1977) (granting summary judgment for defendant when newspaper republished original article despite demand for retraction by plaintiff's attorney); *Pelzer v. Minneapolis Tribune*, 7 Media L. Rep. (BNA) 2507, 2509 (Minn. D. Ct. 1981) ("failure to retract has no bearing on the issue of malice"); cf. *Hurley v. Northwest Publications, Inc.*, 273 F. Supp. 967, 975 (D. Minn. 1967) (granting summary judgment for defendant when newspaper's retraction did not comply with statutory prerequisites), *aff'd*, 398 F.2d 346 (8th Cir. 1968); *Dupler v. Mansfield Journal Co.*, 64 Ohio St. 2d 116, 125, 413 N.E.2d 1187, 1194 (1980) (affirming reversal of verdict for plaintiff when newspaper's retraction failed to comply with statutory prerequisites), *cert. denied*, 452 U.S. 962 (1981).

Recently in *Travoulaareas v. Washington Post Co.*, the Court of Appeals for the District of Columbia Circuit recognized that in "certain circumstances, a refusal to retract may provide some evidence that a statement was not published with reckless disregard in that it may confirm that the defendant believed and continues to believe in the truth of the statement." 759 F.2d 90, 132 n.51 (D.C. Cir. 1985). As the court recognized, however, the factfinder must determine whether such an inference is warranted in a given case. *Id.* A publisher may not automatically defeat a potential libel verdict merely by refusing to retreat.

291. *Rood v. Finney*, 418 So. 2d 1, 2 (La. Ct. App. 1982) (affirming summary judgment for defendant when wire service did not retract but plaintiff did not request retraction), *cert. denied*, 460 U.S. 1013 (1983).

292. *Tavoulaareas v. Washington Post Co.*, 759 F.2d 90, 132 (D.C. Cir. 1985) (reversing judgment n.o.v. for defendant when, among other things, defendant refused to retract or print letter from plaintiff); *Golden Bear Distrib. Sys., Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 950 (5th Cir. 1983) (affirming verdict for plaintiff when magazine failed to retract despite plaintiff's efforts to prove that allegations were false); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 581 (S.D.N.Y. 1984) (denying summary judgment for defendant when subsequent to publication editor ignored report from reliable source that defamatory allegations in article were false); *Church of Scientology v. Dell Publishing Co.*, 362 F. Supp. 767, 770 (N.D. Cal.

provide evidence that the defendant did not publish the article with serious doubts for truth.<sup>293</sup> While a subsequent retraction reveals little about the defendant's state of mind at the time of publication, it does suggest that the defendant was concerned with publishing the truth, and that he was not predisposed toward publishing a defamatory falsehood despite serious doubts concerning its accuracy. A newspaper, of course, might publish an allegation with an awareness of potential falsity and then subsequently retract the allegation to cover itself. This scenario is fairly unlikely, however, because the retraction should defuse whatever effect the initial article may have had and, more importantly, the retraction might undermine the publisher's reputation for accuracy by drawing attention to publishing errors. On balance, courts properly can consider a prompt retraction or correction for some evidentiary value in undercutting an inference of reckless disregard. Still, because a subsequent retraction only is related tangentially to the defendant's state of mind at the time of publication, a subsequent retraction should not be sufficient, in itself, to negate an inference of reckless disregard that otherwise is supported by credible evidence.<sup>294</sup>

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1973) (denying summary judgment for defendant when publisher republished after denial and demand for retraction); *Durso v. Lyle Stuart, Inc.*, 33 Ill. App. 3d 300, 305-06, 337 N.E.2d 443, 448 (1975) (affirming verdict for plaintiff when, among other things, publisher failed to retract and continued to publish defamatory statement despite knowledge of its falsehood); *Peisner v. Detroit Free Press, Inc.*, 104 Mich. App. 59, 64-65, 304 N.W.2d 814, 816 (1981) (affirming verdict for plaintiff when, among other things, newspaper refused to retract after demand by plaintiff).

293. *Bryant v. Associated Press*, 595 F. Supp. 814, 818 (D.V.I. 1984) (granting summary judgment for defendant when newspaper published prompt retraction); *Logan v. District of Columbia*, 447 F. Supp. 1328, 1330, 1332 (D.D.C. 1978) (granting partial summary judgment for defendant when, among other things, newspaper published correction explaining that plaintiff was improperly listed as illicit drug user); *Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 605 (D.D.C. 1977) (granting summary judgment for defendant noting that publication of retraction was "significant" and tended to negate any inferences of actual malice), *aff'd*, 578 F.2d 442 (D.C. Cir. 1978); *Ross v. News-Journal Co.*, 228 A.2d 531, 534-36 (Del. 1967) (affirming summary judgment for defendant when newspaper promptly corrected misstatements about plaintiff); *Lexington Herald Leader v. Graves*, 9 Media L. Rep. (BNA) 1065, 1068 (Ky. 1982) (reversing verdict for plaintiff when newspaper published story explaining that article concerning plaintiff was wrong), *cert. denied*, 104 S. Ct. 2342 (1984); *Gulf Publishing Co. v. Lee*, 434 So. 2d 687, 697 (Miss. 1983) (reversing verdict for plaintiff when newspaper "took every reasonable step to correct any error in the article" concerning plaintiff).

294. See *Kerwick v. Orange County Publications*, 53 N.Y.2d 625, 627, 420 N.E.2d 970, 970, 438 N.Y.S.2d 778, 778-79 (1981) (reversing summary judgment for defendant despite prompt retraction); *DeLoach v. Beaufort Gazette*, \_\_\_\_\_ S.C. \_\_\_\_\_, 316 S.E.2d 139 (1984) (affirming verdict for plaintiff despite prompt retraction), *cert. denied*, 105 S. Ct. 384 (1984).

A retraction will not aid the defendant who knowingly continued to distribute the original defamatory article after publishing the retraction.<sup>295</sup> In *Di Lorenzo v. New York News, Inc.*,<sup>296</sup> the publisher included a false and defamatory statement in an article that was intended to appear in a Sunday supplement.<sup>297</sup> Because the supplement already had been distributed to news vendors by the time the publisher learned that the allegations in the article were false, it printed a retraction insert to be collated with the supplement so that both the defamatory article and the retraction would be published together. On these facts, the Court held that the jury could decide whether the decision to publish the retraction simultaneously, rather than recalling the initial article, constituted evidence of reckless disregard itself as opposed to constituting only proof of the defendant's concern for the truth.<sup>298</sup> Allowing this issue to reach the jury is troubling. While technically, simultaneous publication of the defamatory statement and the retraction does show that the defendant published the initial article with a high degree of awareness of falsity, simultaneous publication also shows that the defendant attempted to publish the truth. Although a fully developed record might suggest otherwise, given the practical and economic difficulties of recalling the already distributed section before the paper was to be sold publicly, the defendant's response was both reasonable and conscientious. Consequently, the defendant arguably satisfied the spirit, if not the letter, of *New York Times*. Finally, a retraction will not undermine an inference of reckless disregard<sup>299</sup> and may even bolster it, if the retraction is equivocal or if it compounds the original defamatory charge.<sup>300</sup>

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295. *Good Gov't Group of Seal Beach, Inc. v. Superior Court*, 22 Cal. 3d 672, 679-81, 586 P.2d 572, 578-79, 150 Cal. Rptr. 258, 264-65 (1978) (denying summary judgment for defendant when, among other things, there was evidence that newspaper reprinted and distributed original defamatory article subsequent to retraction), *cert. denied*, 441 U.S. 961 (1979).

296. 78 A.D.2d 669, 432 N.Y.S.2d 483 (1981).

297. *Id.* at 669-70, 432 N.Y.S.2d at 484-85.

298. *Id.* at 672, 432 N.Y.S.2d at 487. Arguably, the combination of failure to verify serious charges with obvious sources and the reporter's ill will still could support an inference of reckless disregard, even in the absence of the retraction evidence. *Id.* at 671-72, 432 N.Y.S.2d at 485-87.

299. *Burnett v. National Enquirer*, 144 Cal. App. 3d 991, 1011-12, 193 Cal. Rptr. 206, 219 (1983) (affirming reduced punitive damage award for plaintiff when, among other things, purported retraction was "evasive, incomplete and by any standard, legally insufficient"), *appeal dismissed*, 104 S. Ct. 1260 (1984).

300. *Nevada Indep. Broadcasting Corp. v. Allen*, 99 Nev. 404, 416, 664 P.2d 337, 345 (1983) (affirming verdict for plaintiff when, among other things, retraction insinuated that plaintiff committed additional wrongful acts).

#### D. Summary

The courts have developed the law for proof of actual malice quite extensively in the two decades following *New York Times v. Sullivan*. Although the Supreme Court has played a relatively minor role, state and lower federal courts have provided guidance in many well-known and frequently cited cases.<sup>301</sup> As several studies have shown and as the preceding review of cases should reaffirm, defendants ultimately prevail in the vast majority of defamation cases in which the plaintiffs are required to prove actual malice.<sup>302</sup> In many of the cases won by defendants, the plaintiff's proof simply failed to raise an inference of reckless disregard, or if it did, plaintiff's proof failed to surmount the clear and convincing evidence barrier. In a remarkable number of cases, however, the defendants thoroughly have refuted any suggestion of reckless disregard through the introduction of affirmative evidence of due care.<sup>303</sup> This result is not surprising because the press primarily is motivated by its professional obligation to achieve accuracy rather than by the threat of legal sanction.<sup>304</sup> To the extent that the prospect of potential litigation or liability does influence behavior, the press ordinarily will attempt to conform to the less protective negligence standard because it is difficult to determine with any certainty whether a prospective plaintiff will be considered a public figure.<sup>305</sup> The presentation of evidence pertaining to the investigative procedures employed by defendants has not misled the courts into concluding either that the defendant must prove due care or that the plaintiff can prevail by establishing negligence. Rather, it is quite apparent from a review of the cases that, in accordance with *St. Amant v. Thompson*, lower courts, in the overwhelming majority of cases, clearly have understood that the question of reckless disregard turns ultimately on the subjective beliefs or

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301. See, e.g., *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976); *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970); *Washington Post Co. v. Keough*, 365 F.2d 965 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967); *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947 (D.D.C. 1976); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, cert. denied, 434 U.S. 969 (1977).

302. See, e.g., *Franklin Winners and Losers and Why: A Study of Defamation Litigation*, supra note 28, at 491.

303. See supra notes 182-208 and accompanying text.

304. See infra note 407 and accompanying text.

305. See, e.g., Branson, *The Public Figure—Private Person Dichotomy—A Flight from First Amendment Reality*, 2 COM. LAW. 13, 18 (1984); Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 DUKE L.J. 811, 820.

doubts of the publisher. At the same time, however, but still in accordance with *St. Amant*, courts quite properly have refused to permit the intent issue to dissolve into nothing more than a swearing match over the defendant's state of mind. Instead, as *St. Amant* seems to require, courts have recognized that, in most instances, proof of the defendant's awareness of probable falsity will depend on inferences drawn from circumstantial evidence. Consequently, most opinions that discuss the reckless disregard issue in any detail engage in an analysis of the circumstantial evidence that has been presented, regardless of whether the courts ultimately decide for the plaintiff or for the defendant.

As a general rule, plaintiffs seldom prevail without establishing several of the evidentiary factors discussed above. Consequently, defendants tend to prevail when the plaintiff attempts to establish reckless disregard on the basis of a single evidentiary factor.<sup>306</sup> This weighting in favor of the defendant probably results because the plaintiff must prove his case by clear and convincing evidence. Plaintiffs most frequently have received jury verdicts or defeated defendants' motions for summary judgment when they have been able to establish at least two, and often several, of the factors discussed above, including at least one factor which rather strongly shows that the defendant was aware that the allegations probably are false. Plaintiffs frequently have prevailed upon showing either publication of apparently defamatory information in the absence of a reliable source, or publication without further verification in the face of contradictory information or denial.<sup>307</sup> Many of

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306. See, e.g., *Brown v. Herald Co.*, 698 F.2d 949, 951 (8th Cir. 1983) (affirming summary judgment for defendant when reporter ignored information favorable to plaintiff); *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 120-21 (2d Cir.) (reversing verdict for plaintiff when reporter published charges despite plaintiff's denial), *cert. denied*, 434 U.S. 1002 (1977); *Seymour v. A.S. Abell Co.*, 557 F. Supp. 951, 958 (D. Md. 1983) (granting summary judgment for defendant when writer used arguably imprecise language); *Loeb v. Globe Newspaper Co.*, 489 F. Supp. 481, 486-87 (D. Mass. 1980) (granting summary judgment for defendant when reporter allegedly bore ill will toward plaintiff); *Otepka v. New York Times Co.*, 379 F. Supp. 541, 544 (D. Md.) (granting directed verdict for defendant when reporter failed to verify charges in newspaper's clipping file), *aff'd*, 502 F.2d 1163 (3d Cir. 1973); *DeCarvalho v. daSilva*, 414 A.2d 806, 815 (R.I. 1980) (affirming verdict for defendant when newspaper exaggerated seriousness of charges against plaintiff); *Rye v. Seattle Times Co.*, 37 Wash. App. 45, 678 P.2d 1282 (1984) (reversing denial of summary judgment for defendant when reporter relied on sources biased against plaintiff).

307. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 169-70 (1967) (Warren, C.J., concurring) (incorporating by reference Harlan's discussion of the record and affirming verdict for plaintiff when there was denial, unreliable source, lack of expertise, sensationalistic tone, serious charges, and sufficient lead time); *Tavoulareas v. Washington Post Co.*, 759 F.2d 90, 134-35 (D.C. Cir. 1985) (reversing judgment n.o.v. for defendant when there was

## the leading cases that have sustained findings of reckless disregard

unreliable source, ill will, imbalance, contradictory information, doubt in editorial process, sensationalistic tone, serious charges, refusal to retract and sufficient lead time); *Hunt v. Liberty Lobby*, 720 F.2d 631, 642-46 (11th Cir. 1983) (finding sufficient evidence of reckless disregard but reversing on other grounds when there was unreliable source, inherent improbability, sensationalistic tone, failure to contact obvious source, serious charges, and sufficient lead time); *Golden Bear Distrib. Sys., Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 950 (5th Cir. 1983) (affirming verdict for plaintiff when there was no source and failure to retract); *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 671-72 (4th Cir. 1982) (reversing summary judgment for defendant when there was unreliable source and failure to contact plaintiff), *cert. denied*, 460 U.S. 1024 (1983); *Sbaron v. Time, Inc.*, 599 F. Supp. 538, 563-85 (S.D.N.Y. 1984) (denying summary judgment for defendant when there was contradictory information, inadequate editorial process, failure to verify following denial, bias, failure to contact obvious source); *Beech Aircraft v. National Aviation Underwriters*, 11 Med. L. Rep. (BNA) 1401, 1416 (D. Kan. 1985) (denying summary judgment for defendant when there was unreliable source, contradictory information, no source, sensationalistic tone, imbalance, and inadequate editorial process); *Pep v. Newsweek, Inc.*, 553 F. Supp. 1000, 1001-1003 (S.D.N.Y. 1983) (denying summary judgment for defendant when there was an unreliable source and failure to contact obvious source); *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1361-62 (Colo. 1983) (en banc) (reinstating verdict for plaintiff when there was an unreliable source, misleading language, and sufficient lead time); *Holter v. WLCY T.V., Inc.*, 366 So. 2d 445, 456 (Fla. Dist. Ct. App. 1978) (reversing directed verdict for defendant when there was no source, unreliable source, and denial); *Cape Publications, Inc. v. Adams*, 336 So. 2d 1197, 1199-1200 (Fla. Dist. Ct. App. 1976) (affirming verdict for plaintiff when there was unreliable source, denial, serious allegation, and ill will), *cert. denied*, 434 U.S. 943 (1977); *Mebau v. Gannett Pac. Corp.*, 66 Hawaii \_\_\_\_, \_\_\_\_, 658 P.2d 312, 321-22 (1983) (reversing verdict for defendant when there was unreliable source and sensationalistic tone); *Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 561-62, 372 N.E.2d 1211, 1221 (1978) (reversing summary judgment for defendant when there was unreliable source, misleading language, and ill will); *McHale v. Lake Charles Press*, 390 So. 2d 556, 561-68 (La. Ct. App. 1980) (affirming judgment for plaintiff when there was denial, contradictory information, misleading language, imbalance, and inadequate editorial process), *cert. denied*, 542 U.S. 941 (1981); *Nevada Indep. Broadcasting Co. v. Allen*, 99 Nev. 404, 416, 664 P.2d 337, 344-45 (1983) (affirming verdict for plaintiff when there was contradictory information, failure to verify with obvious source, misleading language, sufficient lead time, and equivocal retraction); *Ammerman v. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 572 P.2d 1258 (Ct. App. 1977) (reversing summary judgment for defendant when there was unreliable source and denial), *cert. denied*, 436 U.S. 906 (1978); *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143, 147-49, 416 N.E.2d 662, 666-67 (1979) (reversing directed verdict for defendant when there was contradictory information and failure to verify by obvious source), *cert. denied*, 449 U.S. 996 (1980); *Akins v. Altus Newspapers, Inc.*, 609 P.2d 1263, 1266-67 (Okla. 1977) (affirming verdict for plaintiff when there was an unreliable source and inadequate editorial process), *cert. denied*, 449 U.S. 1010 (1980); *Braig v. Field Communications*, 310 Pa. Super. 569, 586-89, 456 A.2d 1366, 1376-77 (1983) (reversing summary judgment for defendant when there was denial by plaintiff, imbalance, and inadequate editorial process), *cert. denied*, 104 S. Ct. 2341 (1984); *Stevens v. Sun Publishing Co.*, 270 S.C. 65, 70-71, 240 S.E.2d 812, 815 (affirming verdict for plaintiff when there was unreliable source, denial, ill will, and sufficient lead time), *cert. denied*, 436 U.S. 945 (1978); *Chase v. Daily Record, Inc.*, 83 Wash. 2d 37, 44, 515 P.2d 154, 158 (1973) (en banc) (reversing summary judgment for defendant when there was denial and misleading language); *Miller v. Argus Publishing Co.*, 79 Wash. 2d 816, 823-32, 490 P.2d 101, 111 (1971) (en banc) (finding reckless disregard but reversing on other grounds when there was unreliable source, denial, serious charge, and sufficient lead time); *Sprouse v. Clay Communications, Inc.*, 211 S.E.2d 674, 688-92 (W. Va.) (af-

were decided on the basis of records replete with circumstantial evidence indicating that the defendants must have realized the probable falsity of the allegations in issue.<sup>308</sup>

Occasionally, proof that the defendant based defamatory allegations on an unreliable source, or no source whatsoever, or published in the face of contradictory information, may be sufficient to raise an inference of reckless disregard with little or no further supporting evidence.<sup>309</sup> In *Shockley v. Cox Enterprises*,<sup>310</sup> for in-

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firming verdict for plaintiff when there was no source and sensationalistic tone), *cert. denied*, 423 U.S. 882 (1975); *cf.* *Burnett v. National Enquirer*, 144 Cal. App. 3d 991, 1011-12, 193 Cal. Rptr. 206, 209-10, 219 (1983) (affirming award of punitive damages for plaintiff when there was contradictory information, unreliable source, no source, and equivocal retraction), *appeal dismissed*, 104 S. Ct. 1260 (1984); *Mahnke v. Northwest Publications, Inc.*, 280 Minn. 328, 339-44, 160 N.W.2d, 1, 9-11 (1968) (affirming jury verdict for plaintiff arguably applying objective standard when there was unreliable source, sufficient lead time, serious charges, and ill will).

308. *Carson v. Allied News Co.*, 529 F.2d 206, 210-13 (7th Cir. 1976) (reversing summary judgment for plaintiff when there was no source, contradictory information, and sufficient lead time); *see also* *Goldwater v. Ginzburg*, 414 F.2d 324, 332-33, 336-37, 339-40 (2d Cir. 1969) (affirming verdict for plaintiff when there was no source, contradictory information, imbalance, ill will, lack of expertise, serious charges, sufficient lead time, and inadequate editorial process), *cert. denied*, 396 U.S. 1049 (1970); *Alioto v. Cowles Communications, Inc.*, 430 F. Supp. 1363, 1369-71 (N.D. Cal. 1977) (granting judgment for plaintiff when there was unreliable source, no source, failure to verify with obvious source, contradictory information and denial), *aff'd*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1982); *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315, 317-19 (Colo. 1981) (en banc) (reinstating verdict for plaintiff when there was no source, failure to contact obvious source, misleading language, and sufficient lead time).

309. *See* *Appleyard v. TransAmerican Press, Inc.*, 539 F.2d 1026, 1029-30 (4th Cir. 1976) (affirming punitive damage award for plaintiff when there was contradictory information), *cert. denied*, 429 U.S. 1041 (1977); *Machleder v. Diaz*, 538 F. Supp. 1364, 1372-73 (E.D.N.Y. 1982) (denying summary judgment for defendant when there was contradictory information); *Church of Scientology v. Dell Publishing Co.*, 362 F. Supp. 767, 769-70 (N.D. Cal. 1973) (denying summary judgment for defendant when there was denial); *Airlie Found., Inc. v. Evening Star Newspaper Co.*, 337 F. Supp. 421, 425-26 (D.D.C. 1972) (affirming verdict, subject to remittitur, for plaintiff when there was denial and misleading language); *Green v. Northern Publishing Co.*, 655 P.2d 736, 742 (Alaska 1982) (reversing summary judgment for defendant when there was contradictory information), *cert. denied*, 103 S. Ct. 3539 (1983); *Nader v. de Toledano*, 408 A.2d 31, 51-53 (D.C. 1979) (reversing summary judgment for defendant when there was contradictory information), *cert. denied*, 444 U.S. 1078 (1980); *Beamer v. Nishiki*, 66 Hawaii \_\_\_\_, 670 P.2d 1264, 1273-76 (1983) (denying summary judgment for defendant when there was no source); *Gleichenhaus v. Carlyle*, 226 Kan. 167, 168-69, 597 P.2d 611, 613 (1979) (reversing summary judgment for defendant when there was denial); *Lyons v. Mass Media, Inc.*, 390 Mass. 51, 58, 453 N.E. 2d 451, 456 (1983) (denying summary judgment for defendant when there was an unreliable source); *Rinaldi v. Viking Penguin, Inc.*, 52 N.Y.2d 422, 437, 420 N.E.2d 377, 383, 438 N.Y.S.2d 496, 502 (1981) (affirming denial of summary judgment for defendant when there was contradictory information); *Rinaldi v. Village Voice, Inc.*, 47 A.D.2d 180, 182, 365 N.Y.S.2d 199, 201 (affirming denial of summary judgment for defendant when there was contradictory information), *cert. denied*, 423 U.S. 883 (1975); *Curran v. Philadelphia Newspapers, Inc.*, 497 Pa. 163, 182-84, 439 A.2d 652, 661-62 (1981) (partially reversing summary judgment for defendant when



stance, the plaintiff was able to reach the jury on the reckless disregard issue almost solely because defendant failed to identify a source for the defamatory allegations.<sup>311</sup> A failure to consult an obvious source or the use of sensationalistic or misleading language are also factors that may play a significant role in supporting an inference of reckless disregard,<sup>312</sup> as in *Rebozo v. Washington Post Co.*,<sup>313</sup> in which both were present. Generally, however, these factors do not appear to carry as much weight as reliance on an untrustworthy source or disregarding contradictory information.

No single evidentiary factor leads inevitably to an inference of reckless disregard. In view of the emphasis on the publisher's state of mind and the clear and convincing evidence standard, defendants often have prevailed despite plaintiff's production of circumstantial evidence from which an inference arguably could have been drawn.<sup>314</sup> In *Dickey v. CBS, Inc.*,<sup>315</sup> for instance, the court of appeals affirmed defendant's motion for summary judgment despite that prior to rebroadcast plaintiff's attorney denied the

there was contradictory information); *DeLoach v. Beaufort Gazette*, \_\_\_ S.C. \_\_\_, 316 S.E.2d 139, 142 (1984) (affirming verdict for plaintiff when there was no source), *cert. denied*, 105 S. Ct. 384 (1984); *O'Brien v. Tribune Publishing Co.*, 7 Wash. App. 107, 499 P.2d 24 (1972) (reversing summary judgment for defendant when there was denial), *cert. denied*, 411 U.S. 906 (1973).

310. 10 MEDIA L. REP. (BNA) 1222 (N.D. Ga. 1983).

311. *Id.* at 1223.

312. See *Dixson v. Newsweek, Inc.*, 562 F.2d 626, 630-31 (10th Cir. 1977) (affirming verdict for plaintiff when there was misleading language, failure to contact obvious source, and imbalance); *Carey v. Hume*, 390 F. Supp. 1026, 1029-30 (D.D.C. 1975) (partially denying summary judgment for defendant when there was distortion and failure to contact obvious source), *aff'd*, 543 F.2d 1389 (D.C. Cir. 1976); *Montandon v. Triangle Publications, Inc.*, 45 Cal. App. 3d 938, 945-47, 120 Cal. Rptr. 186, 191-93 (affirming verdict for plaintiff when editor created misleading impression), *cert. denied*, 423 U.S. 893 (1975); *DiLorenzo v. New York News, Inc.*, 78 A.D.2d 669, 670-72, 432 N.Y.S.2d 483, 485-87 (1981) (reversing summary judgment for defendant when there was failure to contact obvious source, ill will, insufficient retraction, and serious charges); *Sills v. New York Times*, 8 Media L. Rep. (BNA) 1460, 1461, 1464 (N.Y. Sup. Ct.), *aff'd mem.*, 90 A.D.2d 1004 (1982) (denying summary judgment for defendant when there was failure to contact obvious source and ill will).

313. 637 F.2d 375, 381-82 (5th Cir.) (reversing summary judgment for defendant), *cert. denied*, 454 U.S. 964 (1981).

314. See, e.g., *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1122 (N.D. Cal. 1984) (granting summary judgment for defendant despite reliance on arguably unreliable source and denial by plaintiff); *Lexington Herald Leader v. Graves*, 9 Media L. Rep. (BNA) 1065, 1066-71 (Ky. 1982) (reversing verdict for plaintiff despite biased sources and lack of expertise), *cert. denied*, 104 S. Ct. 2342 (1984); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 382-84, 366 N.E.2d 1299, 1307-08, 397 N.Y.S.2d 943, 951-52 (reversing denial of summary judgment for defendant despite bias, imbalance, and contradictory information), *cert. denied*, 434 U.S. 969 (1977); *Padgett v. Sun News*, 278 S.C. 26, \_\_\_, 292 S.E.2d 30, 30-32 (1982) (reversing verdict for plaintiff despite biased sources and denial).

315. 583 F.2d 1221, 1229 (3d Cir. 1978).

charges, the source refused to produce documentation, and one of defendant's reporter's expressed concern about the credibility of the source.<sup>316</sup>

The actual malice standard set forth in *New York Times* and elaborated in *St. Amant* seems to be operating in practice as it was intended. The standard provides the press with a large degree of protection. For plaintiffs to prevail is quite difficult though hardly impossible. While some, perhaps many, deserving plaintiffs have and will continue uncompensated in order to promote a vigorous press, the plaintiff who is able to present persuasive proof, either through direct or circumstantial evidence, that a defendant published defamatory allegations with serious doubts for truth can obtain and retain a verdict.

### III. NEGLIGENCE AND GROSS IRRESPONSIBILITY

*Gertz v. Robert Welch, Inc.*<sup>317</sup> required state courts to decide the type of fault standard to employ in defamation actions involving private figure plaintiffs. The great majority of courts that have addressed the issue to date have adopted a negligence standard. New York, which is a very significant jurisdiction in the area of defamation law because it is the center of publishing and broadcasting industries, however, has adopted a standard of gross irresponsibility with respect to matters arguably of public concern.<sup>318</sup> Cases are beginning to accumulate that attempt to flesh out the dimensions of negligence and gross irresponsibility in the area of reporting and publishing. Approximately forty-two published opinions have addressed the issue of journalistic negligence to date and another twenty-three have spoken to the question of gross irresponsibility. For the most part, these opinions tend to address the sufficiency of the plaintiff's attempt to prove fault at the summary judgment or motion to dismiss stage. Consequently, the analysis is often cursory. Nevertheless, the courts gradually are beginning to provide guidance in this area.

The large body of case law that has developed about proof of reckless disregard often will prove useful in defining the scope of negligence and gross irresponsibility. As the Court of Appeals for the Seventh Circuit noted recently on remand in *Gertz v. Robert Welch, Inc.*, "evidence of actual malice subsumes a breach of duty

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316. *Id.* at 1223-24.

317. 418 U.S. 323 (1974).

318. *See supra* note 14.

which satisfies the negligence standard.”<sup>319</sup> Proof that a defendant published allegations with “a high degree of awareness as to their probable falsity” would inevitably suffice to establish failure to use reasonable care in attempting to discover the truth. Consequently, cases in which sufficient evidence of reckless disregard exists to sustain a jury verdict for plaintiff or to deny summary judgment for defendant should provide examples of the type of journalistic conduct that by definition constitutes negligence. This conclusion is especially true to the extent that the court has judged the conduct in issue sufficient to give rise to a high degree of subjective doubt for the truth by clear and convincing evidence. Reckless disregard cases can be relevant to the negligence issue even when the plaintiff has failed to meet the *New York Times* standard. Because negligence is a lower standard than reckless disregard, courts frequently have observed that the evidence presented by “public figure plaintiffs” probably would satisfy the former, though not the latter, applicable standard. Although clearly dicta, this type of language does provide insight into judicial thinking concerning journalistic negligence. Finally, cases in which the courts have rejected an inference of reckless disregard in large part on the basis of the defendants’ affirmative showing of due care also are helpful in the negligence context. Judicial dicta that the publisher’s conduct was consistent with the highest standards of professionalism, based on a lengthy review of the record in the course of an actual malice case, provide some indication of how the courts are likely to react to similar conduct when the standard is negligence.

Legal standards of due care and responsibility in journalism should not and will not develop without careful consideration of the profession’s customs and practices. Although debate exists whether a professional standard should apply in journalistic negligence cases and whether expert testimony ordinarily should be required,<sup>320</sup> evidence of the customs, practices, and standards of journalism has been employed on the proof of fault issue in defamation litigation and doubtlessly will play a major role in the future. Despite a great deal of diversity,<sup>321</sup> many well-accepted prac-

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319. 680 F.2d 527, 539 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983).

320. See *infra* notes 333-47 and accompanying text.

321. See, e.g., S. CRUMP, *NEWSGATHERING: REPORTING FOR THE 1980s AND BEYOND, THE NEW FUNDAMENTALS OF JOURNALISM* 57 (1981) (“Journalistic ethics, exempt from legislative control, . . . have an immense range of differences. . . . The nature and intensity of journalism ethics varies among individuals, employers, by geographic area, and by the news medium.”); see also Daniels, *Public Figures Revisited*, 25 WM. & MARY L. REV. 957, 959-60

tices and standards of conduct exist in journalism with respect to what a reasonably prudent publisher does to achieve accuracy.<sup>322</sup> The generally agreed upon objectives of the profession are often stated in nonbinding ethical codes.<sup>323</sup> The more specific standards, practices, and customs frequently have been set forth in training manuals for journalism students as well as working journalists.<sup>324</sup>

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(1984) (argument by Vice President and Counsel of Newsweek that there are no agreed upon objective standards in journalism). *But see* *News Publishing Co. v. Deberry*, 321 S.E.2d 112, 114-115 (Ga. App. 1984) (where the court permitted a professor of journalism to testify to "certain generally recognized minimum standards in journalism for the reporting of stories" and rejected the argument "that there are no recognized journalistic standards" in an actual malice case).

322. See W. AGEE, P. AULT & E. EMERY, *REPORTING AND WRITING THE NEWS* 10 (1983) ("Although today's reporters work with the aid of fascinating electronic technology, they carry on a tradition of recording human activities and natural disasters rooted deep in history. The journalistic rules and ethical standards that guide them have evolved through many generations of newsgatherers."); E. BROUSSARD & J. HOLGATE, *WRITING AND REPORTING BROADCAST NEWS* 17 (1982) ("The principles of accuracy, balance, objectivity, clarity and conciseness are widely known to all good journalists even though they may not be mentioned very often in the newsroom."); J. HOHENBERG, *THE PROFESSIONAL JOURNALIST* 323-24 (5th ed. 1983) ("There is general agreement within the profession on the basic obligations of journalists. Briefly stated, they are as follows: . . . To cover the news fairly, thoroughly and accurately.").

323. Several press organizations have adopted codes of ethics. They tend to be brief, general, and largely aspirational. Nevertheless, they provide some evidence of the values and goals that are widely shared within the journalistic profession. Among the more widely known codes are: ASSOCIATED PRESS MANAGING EDITORS, *CODE OF ETHICS FOR NEWSPAPERS AND THEIR STAFFS* (1975) [hereinafter cited as APME, *CODE OF ETHICS*]; AMERICAN SOCIETY OF NEWSPAPER EDITORS, *STATEMENT OF PRINCIPLES* (1975) [hereinafter cited as ASNE, *STATEMENT OF PRINCIPLES*]; SOCIETY OF PROFESSIONAL JOURNALISTS, *SIGMA DELTA CHI, CODE OF ETHICS* (1973) [hereinafter cited as SPJ, *CODE OF ETHICS*]; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *CODE OF BROADCAST NEWS ETHICS* [hereinafter cited as RTNDA, *CODE OF ETHICS*]; NATIONAL ASSOCIATION OF BROADCASTERS, *CODE OF PROGRAM STANDARDS* [hereinafter cited as NAB, *CODE*]. In addition, several newspapers have adopted their own codes of ethics and standards; see, e.g., WASHINGTON POST, *STANDARDS & ETHICS* (1977) [hereinafter cited as WASHINGTON POST STANDARDS]; CHICAGO SUN-TIMES & DAILY NEWS, *CODE OF PROFESSIONAL STANDARDS* (1974) [hereinafter cited as CHICAGO SUN-TIMES, *CODE*].

324. Litigants frequently will introduce principles of due care in journalism into defamation litigation through expert testimony. In addition, recognized journalism textbooks and manuals provide a wealth of information regarding the practices of the reasonably prudent reporter and editor. See, e.g., W. AGEE, P. AULT & E. EMERY, *REPORTING AND WRITING THE NEWS* (1983); D. ANDERSON & B. ITALE, *Contemporary News Reporting* (1984); F. BASKETTE, J. SISSORS & B. BROOKS, *THE ART OF EDITING* (3d ed. 1982); J. BITTNER & D. BITTNER, *RADIO JOURNALISM* (1977); E. BLISS & J. PATTERSON, *WRITING NEWS FOR BROADCAST* (2d ed. 1978); J. BOLCH & K. MILLER, *INVESTIGATIVE AND IN-DEPTH REPORTING* (1978); J. BRADY, *THE CRAFT OF INTERVIEWING* (1977); B. BROOKS, G. KENNEDY, D. MOEN & D. RANLEY, *NEWS REPORTING AND WRITING* (1980); E. BROUSSARD & J. HOLGATE, *WRITING AND REPORTING BROADCAST NEWS* (1982); W. BURROW, *ON REPORTING THE NEWS* (1977); A. CROWELL, *CREATIVE NEWS EDITING* (2d ed. 1975); S. CRUMP, *NEWSGATHERING AND REPORTING FOR THE 1980S AND BEYOND: THE NEW FUNDAMENTALS OF JOURNALISM* (1981); D. DARY, *HOW TO WRITE NEWS FOR BROADCAST AND PRINT MEDIA* (1973); E. DENNIS & A. ISMACH, *REPORTING PROCESSES AND*

Members of the profession recognize that these standards and practices often have developed to help ensure accuracy and that failure to abide by them sometimes will result in error.<sup>325</sup> This analysis will attempt to provide a basic framework for considering claims of negligence in defamation litigation. As in the section on actual malice, this section will review the existing case law and will attempt to consider each factor that the courts take into account in analyzing the negligence issue. When useful, reference will be made to principles developed in actual malice litigation. In addition, this section will cite provisions of the various ethical codes of

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PRACTICES: NEWSWRITING FOR TODAY'S READERS (1981); F. FEDLER, REPORTING FOR THE PRINT MEDIA (2d ed. 1979); W. FOX, WRITING THE NEWS: PRINT JOURNALISM IN THE ELECTRONIC AGE (1977); R. GARST & T. BERNSTEIN, HEADLINES AND DEADLINES (4th ed. 1982); D. GARVEY & W. RIVERS, NEWSWRITING FOR ELECTRONIC MEDIA (1982); M. GIBSON, EDITING IN THE ELECTRONIC AGE (1984); H. GOODWIN, GROPING FOR ETHICS IN JOURNALISM (1983); G. HAGE, E. DENNIS, A. ISMACH & S. HARTGEN, NEW STRATEGIES FOR PUBLIC AFFAIRS REPORTING (2d ed. 1983) [hereinafter cited as G. HAGE]; J. HOHENBERG, THE PROFESSIONAL JOURNALIST (5th ed. 1983); G. HOUGH, NEWSWRITING (3d ed. 1984); J. HULTENG, THE MESSENGER'S MOTIVES . . . Ethical Problems of the News Media (1976); C. LEWIS, REPORTING FOR TELEVISION (1984); C. MACDOUGAL, INTERPRETATIVE REPORTING (8th ed. 1982); D. MCHAM, LAW AND THE PRESS IN TEXAS: A HANDBOOK FOR JOURNALISTS (4th ed. 1982); M. MENCHER, NEWS REPORTING AND WRITING (3d ed. 1984); K. METZLER, NEWSGATHERING (1979); J. NEAL & S. BROWN, NEWSWRITING AND REPORTING (1976); A. PLOTNICK, THE ELEMENTS OF EDITING: A MODERN GUIDE FOR EDITORS AND JOURNALISTS (1982); W. RIVERS, NEWS IN PRINT: WRITING & REPORTING (1984); D. SHAW, JOURNALISM TODAY (1977); M. STEIN, REPORTING TODAY: THE NEWSWRITER'S HANDBOOK (1971); H. SHULTE, REPORTING PUBLIC AFFAIRS (1981); M. STEPHENS, BROADCAST NEWS - RADIO JOURNALISM AND AN INTRODUCTION TO TELEVISION (1980); H. STONECIPHER, EDITORIAL AND PERSUASIVE WRITING: OPINION FUNCTION OF THE NEWS MEDIA (1979); H. STONECIPHER, E. NICHOLLS & D. ANDERSON, ELECTRONIC AGE NEWSEDITING (1981); J. STOVALL, C. SELF & L. MULLINS, ON LINE EDITING (1984); THE EDITORIAL PAGE (Babb ed. 1977); C. WARREN, MODERN NEWS REPORTING (3d ed. 1959); J. WEAVER, BROADCAST NEWSWRITING AS PROCESS (1984); T. WHITE, A. MEPPEN & S. YOUNG, BROADCAST NEWS WRITING, REPORTING AND PRODUCTION (1984); P. WILLIAMS, INVESTIGATIVE REPORTING AND EDITING (1978).

325. See J. NEAL & S. BROWN, *supra* note 324, at 278 ("Few libel suits result from name-calling or what a layman would define as malice. Many, however, are the result of negligence that at least borders on what the Supreme Court has defined as 'actual malice'—reckless disregard of whether a story is true or false. A man named Hunter is accused of a felony, and the reporter writes 'Fisher'. Fisher sues. Or the reporter omits 'Jr.' after a man's name. His father sues. Or somebody switches the complaining witness's name with the defendant's in a minor police story. Or the identifications under a photograph are transposed. Or the address comes out wrong in a story on a vice raid. Or a reporter accepts something defamatory from a previously reliable source and fails to check it. The list of possibilities is endless, but they all add up to the same thing: failure to check names, addresses and other second-hand information."). See also D. DARY, *supra* note 324, at 65 ("In news writing, inaccuracy is usually caused by carelessness."); H. GOODWIN, *supra* note 324, at 303 ("Competence may be the number one ethical problem in the field . . . Every newsroom in the country has incompetent people. Errors and misinterpretations continue to be a major problem in every news medium we have."); M. STEIN, *supra* note 324, at 183 ("Most libel suits result from careless reporting . . . In almost all libel cases, the reporter did not check his facts thoroughly enough.").

the profession along with a representative sample of the vast body of learning on professional standards and practices when they bear on the issues under discussion. Because negligence case law has not developed to the same extent as case law on actual malice, some of the suggested guidelines are based on custom and practice as reported in the journalistic literature.

### A. *The Standard of Care*

#### 1. Negligence Analysis

Although several elements of the defamation tort, including defamatory character, publication, control of the communication, or reference to the plaintiff,<sup>326</sup> may constitutionally require the plaintiff to prove fault, or negligence, in the great majority of cases proof of negligence will relate solely to the question of falsity. The discussion in this section will be restricted to the latter question.

The application of negligence principles by the courts in the area of defamation should not differ markedly from other areas of tort law. In the context of defamation, as with other torts, the *Restatement of Torts* defines negligence as "conduct that creates an unreasonable risk of harm."<sup>327</sup> The Restatement elaborates that "the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or the particular manner in which it is done."<sup>328</sup> Thus determining whether a risk is unreasonable requires balancing the likelihood and severity of the risk against the utility of the defendant's conduct. In the context of defamation, however, at least one adjustment should be made to the basic negligence calculus in deference to first amendment values. *Gertz* abandoned the public interest standard in part to avoid placing the judiciary in the difficult and dangerous position of having to determine whether one speaker's message is of greater value than another's.<sup>329</sup> To revital-

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326. RESTATEMENT (SECOND) OF TORTS § 580B comment g, at 227 (1976). In developing standards in this area state courts likely will be influenced by the *Restatement*. See, e.g., *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 820 n.15 (Tex. 1976), cert. denied, 429 U.S. 1123 (1977); *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 976 (Utah 1981); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 596-97, 350 A.2d 688, 697-98 (1976). See generally Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 835 (1984) (discussion of proof of fault in contexts other than falsity).

327. RESTATEMENT (SECOND) OF TORTS § 580B comment g (1976).

328. *Id.* § 291; see also *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

329. 418 U.S. 323, 346 (1974).

ize such a process by requiring courts to engage in comparative evaluations of speech in the course of analyzing the utility of the defendant's conduct under the negligence standard would be unfortunate. One commentator has argued that this process is inevitable, noting that "the traditional formula for determining negligence liability cannot be meaningfully employed in an action for defamation without plugging in some measure of social utility of the subject matter of the defamatory communication."<sup>330</sup> Although the value of uninhibited speech must be considered, a comparative evaluation of the subject matter of the article in issue is not required necessarily. Rather than attempt to distinguish political speech from other forms of speech, for instance, the courts should presume that there is a high and relatively constant interest in protecting the defendant's right to publish whatever he chooses.<sup>331</sup> This generalized interest should be balanced against the potential for harm to the plaintiff's reputation along with the costs of avoiding the error.

In addition to the value of free communication, an application of negligence principles in the defamation context will require consideration of a variety of relatively obvious factors including the likelihood of defamatory harm, the seriousness of the potential harm, the effectiveness of precautionary measures taken, and the cost and practicality of additional precautionary measures. Disregarding momentarily the possibility of a professional standard of care, a publisher theoretically has employed reasonable care in attempting to ensure the truth of the published material if, in view of the likelihood of error and the seriousness of defamatory harm in the event of falsity, the cost of further precautions would impair

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330. Smolla, *supra* note 28, at 82. Recognizing the constitutional problem, Professor Smolla observed that "[a]ny weighing of the utility of speech must be done cautiously, to minimize the potential for offending first amendment values, because it apparently contemplates content-sensitive prioritization of speech." *Id.* at 84.

331. No reason exists to believe that the press is generally less careful when reporting on a matter of great public importance such as public corruption; indeed, the opposite is more likely to be true. That a particular subject would appear to be of unusual significance to the citizen and voter suggests that the interest in *accurate* information is that much greater. Moreover, the subject of great public significance often presents the gravest risks to reputation and hence the greatest threat of litigation in the event of error. To the extent that the press does follow different standards in verifying a story concerning government policies, for instance, as opposed to one regarding Hollywood gossip, to avoid confusion, the press should receive the benefit of the most speech protective standard across the board. Timing is a different matter, however. A lesser degree of verification may be consistent with due care when the reporter is working on a "hot news story" as opposed to a leisurely feature story. See *infra* notes 410-18 and accompanying text. This differing standard does not entail necessarily a substantive evaluation of the nature speech in issue.

the important societal interest in free communication. This definition is theoretical in that it states the inquiry in terms that are more complex or abstract than ordinarily would be presented in a jury charge. The central question for the factfinder usually will be phrased in terms of what the reasonable person or publisher would do under similar circumstances or as the *Restatement* states the inquiry, "whether the defendant acted reasonably in checking on the truth or falsity . . . of the communication before publishing it."<sup>332</sup> Presumably, the court will provide the primary line of protection for first amendment values by factoring in the potential impact on free communication in determining whether a sufficient case of negligence has been presented for submission to the jury. If a plaintiff has presented a prima facie case, however, defense counsel may argue, and the court may instruct the jury, that, in assessing the cost and practicality of requiring further precautions, consideration should be given to the potential impact that such a requirement might have on free communication. Obviously, a jury would not be equipped to measure potential chilling effect with any precision considering that neither scholars, attorneys, nor media have been able to do so yet. The first amendment interest, however, could be factored in the decision in at least a rough, common sense manner. More significantly, the potential threat to free press values can, and presumably will, be considered more analytically on a motion for summary judgment, a motion for directed verdict, a motion for judgment notwithstanding the verdict or an appeal.

## 2. Professional or an Ordinary Standard of Care

A jurisdiction adopting a negligence standard eventually must decide whether to adopt a professional or an ordinary standard of care. A choice between these alternatives determines whether the plaintiff should be required to prove that, in publishing a defamatory falsehood, the defendant failed to act like a reasonable "person" under the circumstances or that the defendant failed to behave like a reasonable journalist for the particular medium in issue. If a jurisdiction adopts a professional standard, a plaintiff generally would need to produce expert testimony to establish the standard as well as the defendant's deviation therefrom.<sup>333</sup> A professional standard would not be necessarily lower or higher than an

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332. RESTATEMENT (SECOND) OF TORTS § 580B comment (1976).

333. W. KEETON & W. PROSSER, *supra* note 1 § 32.



ordinary person standard. In a given instance, a professional journalist arguably might investigate more or less thoroughly than the layperson, depending on professional practice and custom.<sup>334</sup> Journalists would find adoption of a professional standard very desirable, however, because it would provide guidance and reassurance. A reporter or an editor would be able to proceed on the assumption that a plaintiff would find presenting a viable libel claim difficult if the standards of the profession were honored.<sup>335</sup> Contrastingly, an ordinary person standard would offer journalists no such assurance.

No uniform basis appears to exist for determining whether a particular group qualifies as a profession for purposes of applying a separate standard of care.<sup>336</sup> As with other recognized professions, such as law and medicine, journalism requires its members to apply intellect and skill acquired through training. Unlike other professions, however, the first amendment prohibits the state from restricting access at least to nonbroadcast journalism through licensing or enforcement of a code of conduct by administrative sanction.<sup>337</sup> Journalism, however, does have recognized codes and standards, even though they are nonbinding in nature.<sup>338</sup> The *Restatement* would apply a specialized standard to "skilled trades" as well as to professions.<sup>339</sup> This intelligent approach certainly would encompass journalism.

Courts that have considered the question have split on whether to apply a professional or an ordinary person standard.

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334. If the professional custom in a particular context proved to be less rigorous than the ordinary standard of care, this would redound to the defendant's benefit if the jurisdiction adopted a professional standard and if the court did not conclude that the particular custom was negligent in itself. *See, e.g., Northern Barge Corp. v. Eastern Transp. Co.*, 60 F.2d 737, 740 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

335. *See Note, In Defense of Fault in Defamation Law*, 88 YALE L.J. 1735, 1738 (1979).

336. *See generally* Comment, *Professional Negligence*, 121 U. PA. L. REV. 627, 631-32 (1973) (concluding that the exercise of intellectual judgment as a special skill and historic social status are the two primary determinants of the professional).

337. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974).

338. *See supra* note 323 and accompanying text. In certain legal contexts, courts have held that journalism is not a profession. *See, e.g., Express-News Corp. v. San Antonio Typographical Union* 172, 223 N.L.R.B. 627, 629 (1976) (journalism is not a profession under the National Labor Relations Act); *Frye v. Commissioner of Fin.*, 62 N.Y.2d 841, 466 N.E.2d 151, 477 N.Y.S.2d 611 (1984) (journalist not professional within New York City Administrative Code for purposes of tax exemption).

339. RESTATEMENT (SECOND) OF TORTS § 299A comment a (1965). The Restatement emphasizes the acquisition of skill through learning and "aptitudes developed by special training and experience." *Id.*

Some jurisdictions expressly have rejected a professional standard on the ground that it unfairly would permit the defendant class to prescribe its own standard of care,<sup>340</sup> while other jurisdictions have concluded that a professional standard is appropriate.<sup>341</sup> The *Restatement*, which has adopted the professional standard, provides that:

[t]he defendant, if a professional disseminator of news, such as a newspaper, a magazine or a broadcasting station, or an employee, such as a reporter, is held to the 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, though a custom is not controlling . . . .<sup>342</sup>

Given the peculiar demands of journalism, the existence of a body of professional standards and the need for predictability, a professional standard should be applied in media defendant defamation cases. Expert testimony, however, may not be required necessarily in every journalistic negligence case. As a New York appellate court recognized in *Greenberg v. CBS, Inc.*<sup>343</sup> “[t]he elementary standards of basic news reporting are common knowledge. News articles and broadcasts must contain the answers to the essential inquiries of who, what, where, when, why and how.”<sup>344</sup> When the procedures at issue are complex or technical, however, a

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340. See, e.g., *Troman v. Wood*, 62 Ill. 2d 184, 197-98, 340 N.E.2d 292, 299 (1975); *McCall v. Courier-Journal & Louisville Times*, 623 S.W.2d 882, 886 (Ky. 1981), cert. denied, 456 U.S. 975 (1982); *Schrottman v. Barnicle*, 386 Mass. 627, —, 437 N.E.2d 205, 215 (1982); *Bank of Oregon v. Independent News*, 693 P.2d 35, 43 (Or. 1985); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 418 (Tenn. 1978); *Denny v. Mertz*, 106 Wis. 2d 636, 657-58, 318 N.W.2d 141, 151, cert. denied, 459 U.S. 883 (1982). Other courts have adopted an ordinary care standard without necessarily denigrating the professional standard. See, e.g., *Dodrill v. Arkansas Democrat Co.*, 590 S.W.2d 840, (Ark. 1979), cert. denied, 444 U.S. 1076 (1980); *Embers Supper Club v. Scripps-Howard Co.*, 9 Ohio St. 3d 22, —, 457 N.E.2d 1164, 1167 (1984); *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 445-47, 546 P.2d 81, 85 (1976). Other jurisdictions that have adopted a negligence standard have not clearly indicated whether they will apply a professional or an ordinary standard of care. See, e.g., *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 818-19 (Tex. 1976), cert. denied, 429 U.S. 1123 (1977); *Gazette v. Harris*, — Va. —, —, 325 S.E.2d 713, 724-25 (1985).

341. See *Peagler v. Phoenix Newspapers*, 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1977); *Gohin v. Globe Publishing Co.*, 216 Kan. 223, 232-33, 531 P.2d 76, 83-84 (1975); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 595-96, 350 A.2d 688, 697 (1976); *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 92 (Okla. 1976); *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 974 (Utah 1981); see also *Anderson*, *supra* note 22, at 466-67 (recommending adoption of a professional standard that would take account of the publisher's medium, school of journalism, resources, deadline pressure, space limitations and technological capabilities).

342. RESTATEMENT (SECOND) OF TORTS § 580B comment g (1976).

343. 69 A.D.2d 693, 419 N.Y.S.2d 988 (1979).

344. *Id.* at 710, 419 N.Y.S.2d at 998 (1979); see also *Schrottman v. Barnicle*, 386 Mass. 627, —, 437 N.E.2d 205, 214 (1982); *supra* note 485.

plaintiff should have to present expert testimony to reach the jury.<sup>345</sup> In simpler cases concerning nontechnical issues, expert testimony should be considered helpful, though not necessarily essential.

As a practical matter, whether a jurisdiction adopts an ordinary or a professional standard of care may be inconsequential. Under an ordinary care standard, the fact-finder must determine how the reasonable person would behave under the circumstances. Placing the reasonable person in a vacuum would distort analysis. Therefore, the demands of a functioning news room should qualify as *circumstances* that the reasonable person would consider relevant in a media defendant case. The factfinder could and should consider the factors that essentially dictate the content of professional standards such as the cost and efficacy of further verification, the overall reliability of a particular type of source, for example, a wire service, and the necessity for prompt publication of a particular story. Expert testimony would be admissible to establish these factors. This testimony would provide the factfinder with the professional benchmark, even in an ordinary care case. Presumably, however, professional custom would not be decisive under an ordinary care standard and hence predictability of the outcome would not be as great. Well-marshalled evidence that the defendant behaved like a reasonably prudent professional journalist, however, often would prove persuasive, especially at the appellate review stage.<sup>346</sup> In contrast, evidence that a media defendant breached professional standards could prove damning to a media defendant even when an ordinary care standard was applicable.<sup>347</sup>

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345. See *Kohn v. West Hawaii Today, Inc.* 65 Hawaii 584, 589-90, 656 P.2d 79, 83 (1982) (court noting "[A]lthough we recognize that there may conceivably be certain circumstances where expert evidence is necessary in a private figure defamation case, we refrain from adopting a rigid rule requiring expert testimony in all such defamation cases. The determination of whether expert evidence is required . . . should be made on a case-by-case basis, depending on the nature of the issue to be decided and the evidence actually adduced on that issue); Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power*, 54 Tex. L. Rev. 271, 276 n.21 (1976) (argument that the processing and dissemination of news today is a technologically complex enterprise with which the jury needs to be familiarized).

346. See *Horvath v. Ashtabula Tel.*, 8 Media L. Rep. (BNA) 1657, 1663 (Ohio App. 1982) (reversing verdict for plaintiff because of insufficient evidence of negligence when a comparison of procedures used by defendant reporter with "those used by other similar news reporters" indicated defendant's "procedures were well within the bounds of professionalism"); Spencer, *supra* note 32, at 383 [as of 1977], ("[p]revailing state judicial attitudes seem to indicate a willingness to absolve the press of liability for reported falsehoods which could not have been avoided by standard practices of good journalism").

347. See, e.g., *Rancho La Costa v. Penthouse*, 8 Media L. Rep. (BNA) 1865 (Cal.

### 3. Gross Irresponsibility

As noted earlier<sup>348</sup> New York has concluded that when "the content of [an] article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition," the plaintiff may recover only by proving "by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration of the standards of information gathering and dissemination ordinarily followed by responsible parties."<sup>349</sup> Basically a gross negligence standard, the focus of the New York test is objective, like a negligence standard and unlike the *New York Times* actual malice approach.<sup>350</sup> This standard appears to be similar to the one advocated by Justice Harlan in *Curtis Publishing Co. v. Butts*, which would have permitted public figures to recover only on "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."<sup>351</sup> Although closely related, the negligence and gross irresponsibility standards are not the same. Both use an objective measure of care as the benchmark. Professional customs and practices will be quite relevant to both standards.<sup>352</sup> Both will require consideration of the same type of factors such as amount of lead time, degree of verification, and reliability of sources.

Presumably, New York will require a greater departure from the standard of due care in the journalism profession than will simple negligence jurisdictions because the term "gross irresponsibility," on its face, suggests error of a more egregious nature than

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Super. Ct. 1982) (granting judgment n.o.v. for plaintiff where court found "defendants violated the standard of care existing in the industry"); cf. *Kohn v. West Hawaii Today*, 65 Hawaii 584, 589-90, 656 P.2d 79, 83 (1982) (affirming denial of directed verdict for defendant when there was evidence that newspaper deviated from its own verification procedures); *Gazette, Inc. v. Harris*, \_\_\_ Va. \_\_\_, 325 S.E.2d 713, 731 (1985) (sufficient evidence of negligence to affirm verdict for plaintiff when, among other things, defendant deviated from its own custom of listing only the defendants and not the complaining witnesses names in summarizing docketed criminal proceedings).

348. See *supra* note 14.

349. *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975). New York retains the negligence standard when the plaintiff is a private figure and a matter of public concern is not implicated.

350. *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 544, 416 N.E.2d 557, 563, 435 N.Y.S.2d 556, 562 (1980).

351. 388 U.S. 130, 155 (1967).

352. The New York gross irresponsibility standard expressly uses the professional practice as the benchmark.

mere negligence. In *Gaeta v. New York News, Inc.*,<sup>353</sup> the appellate division of New York was presented with a persuasive case in which to find an inference of negligence when a reporter falsely published that the plaintiff was charged with serious offenses, despite failure to contact obvious sources in the absence of deadline pressure. Applying the gross irresponsibility standard, however, the New York Court of Appeals unanimously reversed, observing that the reporter had been told that its source was reliable and that it had no reason to doubt the truth of the allegedly defamatory allegations.<sup>354</sup> Whether the difference between the analysis and conclusions of the appellate division and the court of appeals illustrates the difference between the respective standards applied or whether the court of appeals would have rejected the lower court's negligence analysis solely on the record is not clear. As in actual malice cases, the New York courts doubtlessly will reject attempts to prove gross irresponsibility when the defendant is able to establish behavior of a responsible and professional journalist.<sup>355</sup> These cases can provide insight to how courts will assess professional care in the journalism profession, and with a certain amount of caution, they may provide guidance in the ordinary negligence area.

### B. Proof of Negligence/Gross Irresponsibility

As in studying actual malice cases, the development of negligence principles in the area of defamation may be understood more readily by isolating and examining the various considerations that courts have found relevant.

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353. 95 A.D.2d 315, 327, 466 N.Y.S.2d 321, 328-29 (1983), *rev'd*, 62 N.Y.2d 340 (1984).

354. 62 N.Y.2d 340, 351, 465 N.E.2d 802, 806, 477 N.Y.S.2d 82, 86 (1984). That defendants prevail with far greater frequency under the gross irresponsibility standard than under negligence would seem to indicate that there is a significant difference. *See supra* notes 511-15 and accompanying text.

355. *See, e.g.*, *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 541-42, 416 N.E.2d 557, 561, 435 N.Y.S.2d 556, 561 (1980) (affirming summary judgment for defendant because of insufficient evidence of gross irresponsibility when "there is not the slightest suggestion that [the managing editor's] own behavior was anything but responsible and in accord with accepted journalistic practices"); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y. 2d 196, 200, 341 N.E.2d 569, 572, 379 N.Y.S.2d 61, 65 (1975) (affirming summary judgment because insufficient evidence of gross irresponsibility exists when "it appears that the publisher exercised reasonable methods to insure accuracy");

### 1. Reason to Doubt the Accuracy of the Statement

Whether a publisher exhibited reasonable care in failing to discover the falsity of the allegations in question often will depend to a large degree on whether the publisher had reason to suspect that those allegations might not be true. Several factors may bear on whether a publisher should have doubted the truth of potentially defamatory statements prior to publication.

#### (a) *Inconsistent Information*

A publisher is negligent by definition if it publishes potentially defamatory information with actual awareness that such information is false.<sup>356</sup> Even when there is considerable support for an allegation, however, a publisher may fail to exercise reasonable care if it prints the material in the face of contradictory information and in the absence of further efforts at verification. In *Miami Herald Publishing Co. v. Ane*,<sup>357</sup> for instance, the Florida Court of Appeals found sufficient evidence of negligence to affirm a jury verdict for plaintiff, when a reporter published a story implicating the plaintiff in a major drug arrest despite the fact that two reliable sources, the police and the department of vehicles, had indicated that a truck seized by the police did not belong to the plaintiff and that the sheriff's office had informed the reporter that the plaintiff was not a suspect in the case.<sup>358</sup> Similarly, the Fifth Circuit held in a recent case<sup>359</sup> that there was sufficient evidence of negligence to

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356. See *supra* notes 41-49 and accompanying text.

357. 423 So. 2d 376 (Fla. App. 1982), *aff'd*, 458 So.2d 239, 242 (1984).

358. *Id.* at 390-91; see also *Newell v. Field Enters.*, 91 Ill. App. 3d 735, 739-40, 756, 415 N.E.2d 434, 439, 450 (1980) (sufficient evidence of negligence to reverse summary judgment for defendant when reporter published story about legal proceeding that was inconsistent with complaint on which it was based); *Slocum v. Webb*, 375 So. 2d 125, 130 (La. App. 1979) (sufficient evidence of negligence to reverse dismissal of plaintiff's complaint when defendant's notes regarding name of arrestee referred to plaintiff "Jerry Slocum, Jr.," and plaintiff's son "Jerry Slocum"); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 414, 418 (Tenn. 1978) (sufficient evidence of negligence to reverse directed verdict for defendant when reporter wrote that woman was shot by another woman while she was with the latter's husband at night although police reports which reporter apparently relied on indicated that the incident took place during the day and that other people were present); *cf. Street v. National Broadcasting Co.*, 645 F.2d 1227, 1236 n.6 (6th Cir.) (affirming directed verdict for defendant on insufficient evidence of *reckless disregard* but noting in dicta that there arguably would have been sufficient evidence of negligence for a jury when defendant rebroadcast film after plaintiff complained that it was inaccurate), *cert. denied*, 454 U.S. 815 (1981); *Liquori v. Republican Co.*, 396 N.E.2d 726, 730 (Mass. App. 1979) (sufficient evidence of negligence to affirm verdict for plaintiff when, among other things, reporter failed to alert sister newspaper to fact that story was incorrect prior to republication of article).

359. *Levine v. CMP Publication*, 738 F.2d 660, 673 (5th Cir. 1984).

support a jury verdict for the plaintiff when a reporter wrote that plaintiff had been "convicted" of an offense despite knowledge that the litigation in issue was civil rather than criminal, that the plaintiff had "disappeared" although he had been contacted with little difficulty, and that law enforcement officials were investigating the plaintiff although the reporter was aware that the police had little interest in the case.

The reasonable journalist presumably would be reluctant to publish a potentially defamatory allegation in the face of reliable contradictory information.<sup>360</sup> A reporter's awareness of inconsistent information, by itself, should not give rise automatically to an inference of negligence. Consideration also must be given to the reliability of the sources of the contradicting information and the ease of further verification.

Additional verification also may be called for in the face of a denial by a plaintiff or his representative, especially if other reasons exist to question the accuracy of the information such as a basis to believe that the source of the denial is creditable.<sup>361</sup> As with reckless disregard,<sup>362</sup> however, a plaintiff should not be able necessarily to "stop the presses" simply by denying the truth of the allegations, at least when good reason remains to believe that the charges are accurate and supportable.<sup>363</sup>

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360. Cf. B. BROOKS, *supra* note 324, at 202 (in covering criminal incidents "seldom can the reporter resolve conflicting reports, so the best answer . . . may be to acknowledge the conflict and to publish both versions of the story"); J. HOHENBERG, *supra* note 324, at 289. Although publishing both sides of a dispute and attributing the allegations to their respective sources may be prudent journalistic practice, it would not necessarily protect the journalist against liability for defamation in the absence of the doctrine of neutral reportage, which apparently would not be applicable in the negligence context. See *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977).

361. *Levine v. CMP Publications*, 738 F.2d 660, 673 (5th Cir. 1984) (sufficient evidence of negligence to affirm verdict for plaintiff when, among other things, defendant republished defamatory charges following denial by plaintiff); *Hogan v. Herald Co.*, 84 A.D.2d 470, 476, 446 N.Y.S.2d 836, 840-41 (sufficient evidence of gross irresponsibility to affirm denial of summary judgment for defendant when reporter failed to credit flat denial by plaintiff's father and relied on ambiguous answer to casual question), *aff'd per curiam*, 58 N.Y.2d 630, 444 N.E.2d 1002, 458 N.Y.S.2d 538 (1982).

362. See *supra* notes 150-53 and accompanying text.

363. *Walker v. Colorado Springs Sun*, 188 Colo. 86, 99, 538 P.2d 450, 458 (reversing verdict for plaintiff because of insufficient evidence of "objective" reckless disregard when conversation with plaintiff failed to convince reporter that allegations were untrue), *cert. denied*, 423 U.S. 1025 (1975); *overruled by Diversified Management v. Denver Post, Inc.*, 653 P.2d 1103, 1106 (Colo. 1982) (extending "subjective approach" to "matter of public interest" cases); *Campo Lindo for Dogs v. New York Post Corp.*, 65 A.D.2d 650, 409 N.Y.S.2d 453, 455 (1978) (affirming summary judgment for defendant because of insufficient evidence of gross irresponsibility when defendant published article critical of plaintiff despite denials

(b) *No Source*

A strong inference of negligence also may arise when the defendant publishes potentially defamatory information without any source support.<sup>364</sup> Indeed this inference is little more than a charitable method for concluding that the defendant fabricated the allegations. Furthermore, this activity generally would be sufficient to support an inference of gross irresponsibility or reckless disregard. Presumably, professional journalists would not condone the publication of apparently defamatory factual matter beyond the writer's own personal knowledge in the absence of a source for the information.<sup>365</sup>

(c) *Unreliable Source*

Reliance on an apparently unreliable source can be a very significant factor in creating an inference of negligence. In the reckless disregard context, such reliance may suggest an awareness of

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and explanations by its president).

364. See *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 (7th Cir. 1982) (sufficient evidence of reckless disregard and negligence to affirm verdict for plaintiff, when, among other things, defendant editor added further defamatory material to article based on author's "facts"), *cert. denied*, 459 U.S. 1226 (1983); *Meadows v. Taft Broadcasting Co.*, 98 A.D.2d 959, 960, 470 N.Y.S.2d 205, 208 (1983) (sufficient evidence of gross irresponsibility to affirm denial of summary judgment for defendant when reporter had little or no recall concerning source of charge that plaintiff might be implicated in murder); *cf. Rancho La Costa v. Penthouse, Int'l, Ltd.*, 8 Media L. Rep. (BNA) 1865, 1867-68 (Cal. App. Ct. 1982) (granting judgment n.o.v. for plaintiff when there were no facts in source document on which defendant could reasonably rely in publishing defamatory charges). The cases in which the courts have found sufficient evidence of reckless disregard when a defendant published defamatory allegations with no apparent source, such as *Carson v. Allied News Co.* and *Goldwater v. Ginzburg*, provide clear instances of journalistic conduct that definitely would constitute negligence. See *supra* notes 120-21 and accompanying text.

365. See SPJ, CODE OF ETHICS, *supra* note 323, Accuracy and Objectivity, No.1 ("Truth is our ultimate goal."), No. 6 ("Partisanship in editorial comment which knowingly departs from the truth violates the spirit of American journalism."); W. BURROWS, *supra* note 324, at 18 ("Reporters ought to be wary of libel, not because some judge might rule against them in court, but because lying is morally wrong. Libel is, in essence, an ethical, not a strictly legal problem."); F. FEDLER, *supra* note 324, at 135 ("Never create or manufacture information; repeat only the facts you obtain from reliable sources."); J. HOHENBERG, *supra* note 324, at 327 ("Either an interview is real and honest and true or it is not. Either people in the news are real or they are not. You can't make things up to prove a point unless you are writing something clearly labeled fiction."); *At the New Yorker, Editor and a Writer Differ on the 'Facts'*, Wall St. J., July 5, 1984, at 1, 27, col. 3 (editors of *New Yorker* magazine and journalism critics disapprove of writer's practice of inventing background facts in feature article). In several highly publicized incidents recently, respected publications including the *Washington Post* and *New York Times* have discovered, to their great embarrassment, that published articles have contained information that reporters knew to be false or fictionalized. J. HOHENBERG, *supra* note 324, at 321.



falsity.<sup>366</sup> This type of evidence is even more pertinent when the issue is negligence because the reasonable reporter or editor generally would not publish a potentially defamatory allegation in sole reliance on an obviously unreliable source, even though the particular defendant may have failed to recognize the probable falsity of the allegations.<sup>367</sup> An inference of negligence can arise when the source of information is obviously biased or has demonstrated a lack of credibility in the past. For example, in *Gertz v. Robert Welch, Inc.*, the publisher was aware that the author previously had identified Richard Nixon, John Foster Dulles, and Hubert Humphrey as communists or persons under communist control.<sup>368</sup> In other cases<sup>369</sup> courts have permitted an inference of *reckless disregard* attributable in part to the defendant's reliance on an obviously untrustworthy source. These cases illustrate conduct that almost certainly would give rise to an inference of negligence if the reporter failed to verify the information with more reliable sources.<sup>370</sup> In *McCall v. Courier-Journal & Louisville Times*,<sup>371</sup> the Supreme Court of Kentucky apparently concluded that a jury issue on negligence arose when a newspaper accurately reported that a woman charged with drug offenses *had alleged* that an attorney

366. See *supra* notes 122-37 and accompanying text.

367. See P. WILLIAMS, *supra* note 324, at 15.

Equally important is evaluation of the tipster, if she or he is known. Is it reasonable to assume that this person knows the facts? Is there any information about the tipster in the morgue? Is the tipster known by other members of the news staff? What ax does this person have to grind? If a story develops as a result of this tip, will the informant personally benefit through job promotion, financial gain, advancement of political interest? Is he or she trying to 'get' somebody? An ex-boss? An ex-lover?

*Id.*; see also B. BROOKS, *supra* note 324, at 320 ("Never trust a lawyer unless you know him or her very well. Although most lawyers are honest, every lawyer is an advocate. Consequently, everything he or she writes or says must be interpreted as being designed to help a client or hurt an opponent."); E. DENNIS & A. ISMACH, *supra* note 324, at 68; K. GALVIN, *MEDIA LAW: A LEGAL HANDBOOK FOR THE WRITING JOURNALIST* 15 (1984); M. MENCHER, *supra* note 324, at 49 ("Good reporters learn to discriminate between reliable and unreliable sources and to check material from the latter."); H. SCHULTE, *supra* note 324, at 294 ("No source should be underestimated in keeping track of the inner workings of the political parties, but the reporter should take care to assure that information supplied by dissidents is not unduly colored by natural bias"); T. WHITE, A. MEPPEN & S. YOUNG, *supra* note 324, at 268.

368. 680 F.2d 527, 538 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983).

369. See, e.g., *Pep v. Newsweek, Inc.*, 553 F. Supp. 1000, 1002 (S.D.N.Y. 1983) (reporter relied on a source reputed to be a "pathological liar"); *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1361-62 (Colo. 1983) (reporter relied on an estranged spouse); *Cape Publication, Inc. v. Adams*, 336 So. 2d 1197 (Fla. App. 1976) (reporter relied on plaintiff's political enemies), *cert. denied*, 434 U.S. 943 (1977).

370. See *supra* notes 122-37 and accompanying text.

371. 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982).

had offered to fix the case, even though an independent investigation by the newspaper had failed to confirm that the attorney was prepared to bribe a judge.<sup>372</sup> Similarly, placing sole reliance on an anonymous source probably would establish an absence of due care because of the difficulty in assessing the source's credibility.<sup>373</sup>

Aside from bias or inherent lack of credibility, a source also may be unreliable when the reporter should realize that there is a significant likelihood for misunderstanding the transmitted information. For instance, in *Miami Herald Publishing Co. v. Ane*, the court quite properly found sufficient evidence of negligence when, along with other proof a reporter based a statement implicating plaintiff in criminal activity almost exclusively on hearsay from an individual who was not necessarily in a position to obtain accurate information.<sup>374</sup> Occasionally, a reporter may not be in a position to perceive events reliably, in which case his or her own senses may not constitute a trustworthy source. For example, the Arkansas Supreme Court found sufficient evidence of negligence when a broadcaster based a story concerning a purported robbery on an "eyewitness" account by a reporter who arrived on the scene late and who could obtain no corroboration from the police or other eyewitnesses.<sup>375</sup> Both common sense and the journalist's professional training and experience counsels skepticism toward information obtained from sources whose perceptions may be distorted for any of a number of reasons.<sup>376</sup>

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372. 623 S.W.2d at 884-85. The court did not explain exactly why it reversed and remanded for trial. Arguably, the court placed more weight on the newspaper's repeated use of pejorative and sensationalistic language than its inability to verify the information obtained from the woman charged with the drug offenses. *See id.*

373. As noted earlier, the Supreme Court cited reliance on an anonymous source as pertinent evidence of reckless disregard in *St. Amant v. Thompson*, 390 U.S. 727 (1968). *See supra* note 136 and accompanying text. Journalists are aware of the hazards of relying on an anonymous tip. *See* C. MACDOUGALL, *supra* note 324, at 49 ("No reporter should write a story supplied by an anonymous source, which means that practical jokers and persons with grievances who telephone and write to newspapers in the hope of giving news without revealing their identity seldom are successful.").

374. 423 So. 2d 376, 379, 390 (Fla. Dist. Ct. App. 1983), *aff'd*, 458 So.2d 239, 242 (Fla. 1984); *see also* *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 157-58 (1967) (sufficient evidence of "highly unreasonable conduct" to affirm verdict for plaintiff when publisher relied on source who had criminal record and was not football expert but who purportedly overheard phone call in which plaintiff coach allegedly fixed game).

375. *KARK-TV v. Simon*, 280 Ark. 228, 332-33, 656 S.W.2d 702, 704 (1983) (verdict reversed on other grounds). *But see* *Benson v. Griffin Television, Inc.*, 593 P.2d 511, 514 (Okla. Ct. App. 1979) (affirming summary judgment for defendant because of insufficient evidence of negligence when reporter learned that police raided a house described as plaintiff's and assumed plaintiff was a suspect).

376. *See* C. MACDOUGALL, *supra* note 324, at 26 ("It is human to distort an impression

Simply because reasons exist to doubt a primary source does not mean that a journalist should hesitate to cover a story. Even the most disreputable source may prove correct in a given instance.<sup>377</sup> One, however, should make further efforts at verification in such a situation.<sup>378</sup>

(d) *Ambiguity*

*Time, Inc. v. Pape*<sup>379</sup> established that a plaintiff cannot prevail on the issue of reckless disregard by clear and convincing evidence simply by showing that the defendant relied on a source of information that was inherently ambiguous.<sup>380</sup> When a defendant relies on ambiguous information there generally is no way of knowing whether the defendant perceived the potentially nondefamatory interpretation and therefore recognized that a defamatory reading was possibly false. In negligence actions, however, the defendant's protection should not be as great. In a negligence case, the ultimate question is not whether the reporter perceived the ambiguity and therefore doubted the truth of the defamatory implication, but whether the reasonable reporter *should have* perceived the ambiguity and *should have* questioned the more damaging interpretation. Moreover, because the plaintiff need not establish fault by clear and convincing evidence, it is not inappropriate to permit the factfinder to determine what the reasonable

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to conform to one's preconceived notions, prejudices and experiences."); M. MENCHER, *supra* note 324, at 37 ("After the information has been filtered once or twice, only the most foolhardy journalist would stake his reputation on the accuracy of the report."); D. MCHAM, *supra* note 324, at 9 ("Reporters should remember that witnesses who are not trained to observe details may see them inaccurately.").

377. J. BOLCH & K. MILLER, *supra* note 324, at 25 ("I would take a tip from the devil himself if it was a story," says an experienced political reporter."); B. BROOKS, *supra* note 324, at 394 ("A person's enemies usually are the best sources when you are trying to find out anything bad about him or her."); W. BURROWS, *supra* note 324, at 138 ("[E]ven the most personally embittered and spiteful persons can bring solid material to reporters.").

378. In a given instance, a journalist may assess the credibility of a potentially biased or mistaken source and conclude that the source is telling the truth without further verification. In *Ortiz v. Valdescastilla*, 102 A.D.2d 513, 478 N.Y.S. 895, 901 (1984) (reversing denial of summary judgment for defendant), a New York court found that a reporter did not act in a grossly irresponsible manner by relying, without further verification, on a source who was emotionally distraught and embittered against the plaintiff. As with *Gaeta*, the opposite conclusion might arguably be reached under a negligence standard. In *Ortiz* the dissent argued that placing sole reliance on an emotionally disturbed source should be sufficient to give rise to an inference of gross irresponsibility. *Id.* 102 A.D.2d at —, 478 N.Y.S. at 902, 903.

379. 401 U.S. 279 (1971).

380. See *supra* notes 156-81 and accompanying text.

reporter should have understood. Thus, the principle of *Pape* is inappropriate in the negligence context.

The above analysis was recognized implicitly in *Melon v. Capital City Press*.<sup>381</sup> In *Melon*, a reporter read a sheriff's office press release which stated that four persons, including the plaintiff, had been arrested and in the next sentence listed a series of charges that had been filed.<sup>382</sup> The reporter incorrectly interpreted the release as stating that each defendant had been arrested and had been charged with each of the specified offenses.<sup>383</sup> Plaintiff, who had been arrested and charged with only two of the three offenses, sued for defamation.<sup>384</sup> Because the reporter apparently misunderstood an inherently ambiguous document, within the *Pape* holding summary judgment for the defendant would have been warranted if the plaintiff were a public figure. The court found, however, that the plaintiff was a private figure. The court properly concluded that because the jurisdiction had adopted a negligence standard, the jury should determine whether the news release was ambiguous and, if ambiguous, whether the defendant should have perceived the ambiguity and recognized that further investigation was necessary.<sup>385</sup> A breach of the professional standard could arise readily under these circumstances because the journalist is trained to search for ambiguities in information received and to obtain clarification prior to publication.<sup>386</sup>

Misinterpretation of an ambiguous source, however, does not constitute negligence automatically. The defendant often may argue persuasively that the ordinary person or the reasonably prudent journalist would not have perceived the ambiguity or recog-

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381. 407 So. 2d 85 (La. App. 1981).

382. *Id.* at 86.

383. *Id.*

384. *Id.*

385. *Id.* at 87; see also *Hogan v. Herald Co.*, 84 A.D.2d 470, 476, 446 N.Y.S.2d 836, 839-41 (sufficient evidence of gross irresponsibility to affirm denial of summary judgment for defendant when, among other things, reporter asked judge an ambiguous question about charges against plaintiff, received an ambiguous answer, and drew an incorrect conclusion that proved to be defamatory), *aff'd per curiam*, 58 N.Y.2d 630, 458 N.Y.S.2d 538, 444 N.E.2d 1002 (1982).

386. See B. BROOKS, *supra* note 324, at 103 ("Accuracy is a major problem in all interviews. Both the question and the answer may be ambiguous."); E. BROUSSARD & J. HOLGATE, *supra* note 324, at 135 (In interviewing "[b]e certain that you understand exactly what was said and exactly what was meant. Recheck what was said if you have any doubt in your mind as to the accuracy of what you think you heard and what was actually said. Never take anything for granted."); F. FEDLER, *supra* note 324, at 121 ("If you do not understand a topic, never try to write about it. Instead, go back to your source and ask for a better explanation."); see also W. RIVERS, *supra* note 324, at 172.

nized a need for further investigation. Summary judgment for the defendant still may be appropriate to the extent that additional support for the defendant's interpretation exists. The United States Supreme Court faced similar facts in *Time, Inc. v. Firestone*.<sup>387</sup> In *Firestone*, a "stringer" for the defendant read the judgment in a highly publicized divorce case which, among other allegations, stated: Mrs. Firestone had filed for divorce on grounds of extreme cruelty and adultery; there was testimony of adultery by both Mr. and Mrs. Firestone; the parties were not domesticated; the marriage was dissolved; the equities were with Mr. Firestone; and Mr. Firestone would be required to pay alimony.<sup>388</sup> The defendant ultimately published a news brief stating that a divorce had been granted to Mr. Firestone on the basis of "extreme cruelty and adultery."<sup>389</sup> The Florida Supreme Court found that the trial court apparently had intended to grant the divorce on the nonexistent ground of "lack of domestication," but affirmed the decision on the ground that there was sufficient evidence of extreme cruelty in the record.<sup>390</sup> Mrs. Firestone sued for defamation alleging that the report in *Time* magazine falsely stated that the state supreme court had found against her on grounds of adultery. In affirming a judgment in her favor, the Supreme Court of Florida stated that *Time's* "erroneous reporting is clear and convincing evidence of the negligence" because under current Florida law, "a wife found guilty of adultery could not be awarded alimony, [and therefore a] careful examination of the final decree, prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty . . . ."<sup>391</sup> The United States Supreme Court vacated and remanded on the ground that whether the Florida Supreme Court actually had made a finding of fact on the issue of negligence was unclear.<sup>392</sup>

In a concurring opinion that is quite important for negligence analysis, Justice Powell argued persuasively that the *Firestone* record contained significant support for the conclusion that *Time* did not breach a duty of reasonable care.<sup>393</sup> In reaching that conclusion he noted that the "opaqueness" of the divorce decree was one fac-

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387. 424 U.S. 448 (1976).

388. *Id.* at 450-51.

389. *Id.* at 452.

390. *Id.* at 458-59.

391. 305 So. 2d 172, 178 (1974).

392. 424 U.S. at 464.

393. *Id.* at 464-70. Justice Stewart concurred in Justice Powell's opinion.

tor to be considered, but Powell placed more emphasis on the defendant's relatively thorough attempt to verify the accuracy of the statement.<sup>394</sup> This analysis is quite different from the contention of Justice Marshall in dissent<sup>395</sup> that, pursuant to *Pape*, reliance on an inherently ambiguous document is in itself a sufficient defense to a negligence claim. As Justice Rehnquist properly recognized in the majority opinion, however, *Pape* is concerned with proof of reckless disregard and does not provide an outright defense when the issue is negligence.<sup>396</sup>

(e) *Inherent Improbability*

As with actual malice,<sup>397</sup> an inference of negligence could arise if a reporter published inherently improbable charges absent verification because, almost by definition, the reasonably prudent reporter would not publish allegations that were highly questionable on their face without some assurance of truth.<sup>398</sup> To date, however, this factor has not played a role in litigated negligence cases.

(f) *Lack of Expertise*

Reason to doubt the truth of statements in an article may exist if the article concerns a complex or technical matter clearly beyond the expertise of the reporter or editor. Reporters recognize that to cover adequately stories concerning complex or technical information, they either must develop expertise themselves or must seek the assistance of those who hold expertise.<sup>399</sup> In *Gazette, Inc. v. Harris*,<sup>400</sup>

the Supreme Court of Virginia held that there was sufficient evidence of negligence to sustain a verdict for the plaintiff when a reporter wrote a story based on a judicial docket sheet although he

394. *Id.* at 464-68, 470 n.9.

395. *Id.* at 484, 490-91.

396. *Id.* at 459 n.4.

397. *See supra* notes 101-112 and accompanying text.

398. *See C. MACDOUGALL, supra* note 324, at 40 ("when a story contains something that seems improbable it is safer to miss an edition than use the story before checking").

399. *See J. HOHENBERG, supra* note 324, at 284 ("Most professional police and court reporters have an excellent practical knowledge of the law, and some even have law degrees. It is virtually impossible to cover police and court news intelligently without acquiring a basic legal background."); H. SCHULTE, *supra* note 324, at 404-05 (investigative reporters must obtain expertise from bankers, lawyers, brokers, and accountants on technical stories); *see also* F. BASKETTE, J. SISSORS, B. BROOKS, *supra* note 324, at 146; B. BROOKS, *supra* note 324, at 307; G. HAGE, *supra* note 324, at 42; R. IZARD, *supra*, note 324, at 63, 76.

400. — Va. —, 325 S.E.2d 713 (1985).

was aware that he did not understand what the sheet meant.<sup>401</sup> In a contrasting decision,<sup>402</sup> a New York appellate court refused to find sufficient evidence of gross irresponsibility to create a jury issue when a reporter with little training or expertise regarding police or legal procedures misstated the effect of a particular legal plea in reliance on a conversation with a police officer.<sup>403</sup> This case may illustrate the difference between the gross irresponsibility and the negligence standards. Although the reporter's conduct would not rise to the level of "gross irresponsibility," especially given that he was misled by the officer,<sup>404</sup> his obvious lack of legal expertise should have put him on notice of the likelihood of error and thus should have provided evidence of negligence. An inference that the defendant failed to use reasonable care may be stronger when the defendant knowingly proceeds in awareness of his own ignorance. This inference still may be warranted, however, if a reporter blissfully was unaware of his lack of expertise so long as the reasonable reporter should have realized that assistance was needed.<sup>405</sup>

## 2. Investigation and Verification

That a reporter or editor had reason to question whether an assertion in an article might be untrue does not show, in itself, that the reporter or editor was negligent in publishing the assertion; it may suggest, however, a need for further verification. The journalism profession places extreme emphasis on the need for thorough investigation and verification.<sup>406</sup> The potential for inaccuracy is

401. *Id.* at \_\_\_, 325 S.E.2d at 729-30; *See also* Curtis Publishing Co. v. Butts, 388 U.S. 130, 158 (1967) (Harlan, J., concurring) (sufficient evidence of "highly unreasonably conduct" when, among other things, defendant published an article charging the plaintiff with fixing a football game despite the writer's lack of football expertise and failure to consult an expert); Charlottesville Newspaper, Inc. v. Matthews, \_\_\_ Va. \_\_\_, \_\_\_, 325 S.E.2d 713, 732, 734 (1985) (sufficient evidence of negligence to affirm verdict for plaintiff when, among other things, defendant assigned "part time reporter . . . [with] no training, guidance or instruction in covering the 'courthouse beat'" to cover rape trial).

402. *Grobe v. Three Village Herald*, 69 A.D.2d 175, 420 N.Y.S.2d 3 (1979), *aff'd*, 49 N.Y.2d 932, 406 N.E.2d 491, 428 N.Y.S.2d 676 (1980).

403. *Id.* at 176-77, 420 N.Y.S.2d at 4-5.

404. *But see id.* at 177-79, 420 N.Y.S.2d at 5-6 (Gulatta, J. dissenting) (argument that the record supported an inference of gross irresponsibility).

405. *Cf.* H. GOODWIN, *supra* note 324, at 277

("The streak of antiintellectualism that has been part of the history of American journalism from its beginning has not dissipated . . . Ignorance and incompetence will continue to pollute the news process unless news media owners and executives recruit and retain better educated and smarter journalists.")

406. E. BROUSSARD & J. HOLGATE, *supra* note 324, at 50 ("There is only one effective way to prevent errors of fact—verification. You must verify your facts with as many sources

greatly minimized if reporters and editors check facts and consult reliable sources. Interestingly, the profession itself demands much more than the law because of its emphasis on accuracy<sup>407</sup> and not simply on reasonable care. A superficial investigation of serious charges when some reason exists to doubt accuracy and sufficient time to verify is available often will lead to a jury issue on negligence.<sup>408</sup> In contrast, when a reporter or editor has undertaken ver-

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as practicable before you use them and don't make assumptions."); S. CRUMP, *supra* note 324, at 50 ("the best safeguards against libel when dealing in controversies are double-checking sources and backing them up with 'second' sources and documents"); F. FEDLER, *supra* note 324, at 121 ("Most factual errors, . . . are caused by carelessness. After finishing a news story, reporters must learn to recheck their notes to be certain that the story is accurate. If reporters lack some information, they should recontact their source. If the source is unavailable, or unable to provide the information, reporters may have to delete portions of their story, or in extreme cases, kill the entire story."); D. GARVEY & W. RIVERS, *supra* note 324, at 131 ("Electronic news editing begins, like all news editing, with the careful checking of facts in the story . . . . Even under the tightest deadlines, a good writer checks the copy."); J. HOHENBERG, *supra* note 324, at 83 ("The only way to insure accuracy is to check all sources continually and leave nothing to guesswork or chance."); G. HOUGH, *supra* note 324, at 27 ("Checking, crosschecking and verifying are basic steps in the reporting process . . . . Careful reporters check everything. They take nothing for granted."); K. METZLER, *supra* note 324, at 116 ("By checking a wide variety of sources, you can compare, verify, corroborate, cross check, contrast, fill in missing details. . . ."); see J. BOLCH & K. MILLER, *supra* note 324, at 94; A. CROWELL, *supra* note 324, at 35; R. GARST & T. BERNSTEIN, *supra* note 324, at 39; C. MACDOUGALL, *supra* note 324, at 40; D. MCHAM, *supra* note 324, at 67; M. MENCHER, *supra* note 324, at 29, 33; H. SCHULTE, *supra* note 324, at 167; M. STEPHENS, *supra* note 324, at 194; C. WARREN, *supra* note 324, at 224.

407. SPJ, CODE OF ETHICS, ACCURACY AND OBJECTIVITY, *supra* note 323, No. 3 ("There is no excuse for inaccuracies or lack of thoroughness."); APME, CODE OF ETHICS, *supra* note 323, Accuracy ("The newspaper should guard against inaccuracies, carelessness, bias or distortion through either emphasis or omission."); ASNE, STATEMENT OF PRINCIPLES, *supra* note 323, art. iv ("Every effort must be made to assure that the news content is accurate . . . ."); B. BROOKS, *supra* note 324, at 307 ("Above all, be accurate. An inaccurate reporter is worse than useless . . . . The best way to assure accuracy is to check and double-check." (emphasis in original)); H. GOODWIN, *supra* note 324, at 11 ("Although the history of American journalism contains some colorful lapses in the accuracy standard, accuracy has been an undisputed goal of virtually all journalists in this country for at least a century."); G. HOUGH, *supra* note 324, at 175 ("'Accuracy always' has long been the slogan of the journalist. The careful professional checks and crosschecks the facts."); W. RIVERS, *supra* note 324, at 21 ("It is customarily maintained in some newspaper offices that there are three rules in journalism: accuracy, accuracy and accuracy."); M. STEPHENS, *supra* note 324, at 132 ("Accuracy is the journalist's religion; an error of fact is a professional sin."); P. WILLIAMS, *supra* note 324, at 31 ("Write only what you know. Write with conservative accuracy."); see also W. AGEE, P. AULT & E. EMERY, *supra* note 324, at 55-56; J. BITTNER & D. BITTNER, *supra* note 324, at 17; C. MACDOUGALL, *supra* note 324, at 38.

408. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 158-59 (1967) (sufficient evidence of highly unreasonable conduct to affirm verdict for plaintiff when defendant published serious allegations by questionable source "without substantial independent support"); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 (7th Cir. 1982) (sufficient evidence of negligence to affirm verdict for plaintiff when publisher "made virtually no effort to check the validity of statements that were defamatory *per se*"), *cert. denied*, 459 U.S. 1226 (1983); General



ification, any inference of negligence may be dispelled, despite the initial doubts concerning the charges.

Although some publishers attempt to verify every factual statement that is printed as a matter of procedure,<sup>409</sup> many publishers, including daily newspapers and broadcast stations, find this extreme degree of thoroughness unattainable.<sup>410</sup> For many publishers, the amount of verification undertaken will depend upon a variety of factors including the amount of lead time, the

*Prods. Co. v. Meredith Corp.*, 526 F. Supp. 546, 552 (E.D. Va. 1981) (sufficient evidence of negligence to deny summary judgment for defendant when author relied on memory and did not recheck sources); *KARK-TV v. Simon*, 280 Ark. 228, 230, 656 S.W.2d 702, 704 (1983) (sufficient evidence of negligence when reporter was unable to corroborate information regarding alleged arrest but reversing verdict for plaintiff on other grounds); *Newell v. Field Enters. Inc.*, 91 Ill. App. Ct. 2d 735, 755, 415 N.E.2d 434, 450 (1980) (sufficient evidence of negligence to reverse summary judgment for defendant when reporter failed to investigate charges in legal complaint); *Meadows v. Taft Broadcasting Co.*, 98 A.D.2d 959, 960, 470 N.Y.S.2d 205, 208 (1983) (sufficient evidence of gross irresponsibility to affirm denial of summary judgment for defendant when reporter made serious charges with "little or no effort" to authenticate [their] veracity"); *Hogan v. Herald Co.*, 84 A.D.2d 470, 476, 446 N.Y.S.2d 836, 840-41, *aff'd per curiam*, 58 N.Y.2d 630, 444 N.E.2d 1002, 458 N.Y.S.2d 538 (1982) (sufficient evidence of gross irresponsibility to affirm denial of summary judgment for defendant when reporter accepted ambiguous response after casual questioning); *Greenberg v. CBS, Inc.*, 69 A.D.2d 693, 710, 419 N.Y.S.2d 988, 998 (1979) (sufficient evidence of negligence to affirm denial of summary judgment for defendant when reporter failed to ask basic questions of "who, what, where, when, why and how" about story); *Gazette, Inc. v. Harris*, \_\_\_ Va. \_\_\_, \_\_\_, 325 S.E.2d 713, 730 (1985) (sufficient evidence of negligence to affirm verdict for plaintiff when reporter failed to verify information from docket sheet that he did not understand); *Port Pack Corp. v. Lewis*, \_\_\_ Va. \_\_\_, \_\_\_, 325 S.E.2d 713, 735, 740 (1985) (sufficient evidence of negligence to affirm verdict for plaintiff when editor failed to verify serious charges despite absence of deadline pressure); *see also Robertson, supra* note 26, at 263 (argument that before publishing a potentially defamatory story, the reasonably prudent reporter will either ensure that the information is accurate or that the source is reliable); *cf. McCarney v. Des Moines Register & Tribune Co.*, 239 N.W.2d 152, 155 (Iowa 1976) (reversing verdict for plaintiff due to insufficient evidence of *reckless disregard* but noting that failure to investigate serious charges constituted negligence); *Lawrence v. Bauer Publishing & Printing, Ltd.*, 89 N.J. 451, 467, 446 A.2d 469, 477 (1982) (reversing judgment for plaintiff because of insufficient evidence of *reckless disregard*, although failure to investigate allegations was "careless and perhaps irresponsible").

409. *See At the New Yorker, Editor and a Writer Differ on the 'Facts'*, *Wall St. J.*, July 5, 1984, at 1, 27, col. 3 (*New Yorker* magazine attempts to verify every statement of fact it publishes); *Machalara, Does Saul Bellow Stand on His Head? Ask a Fact Checker*, *Wall St. J.*, Dec. 15, 1981, at 1, col. 4 ("People spends \$800,000 a year on its fact checking department which employs 18 people plus free-lancers . . ." (emphasis added)); *see also J. HOHENBERG, supra* note 324, at 252 ("The first rule for staying out of trouble with the libel law is to check for accuracy *everything* you write or broadcast.").

410. A. PLOTNICK, *supra* note 324, at 36 ("If you have a rule that makes an editor check every single fact . . . you are going to be putting out a monthly newspaper.") (quoting Benjamin Bradlee, Executive Editor, *Washington Post*); *see also J. STOVALL, C. SELF & L. MULLINS, supra* note 324, at 123 (time pressure will not allow an editor to check every fact even if the resources are available).

seriousness of the allegation, the cost, practicality and efficacy of further verification, and the reliability of verification efforts already undertaken. Not surprisingly, these common sense factors play a significant role in judicial analysis of journalistic negligence.

(a) *Lead Time*

The existence or lack of deadline pressure is a factor of some importance. As discussed above,<sup>411</sup> Justice Harlan emphasized the contrast between the "hot news" situation in *Walker* and the absence of any deadline pressure in the publication of the feature article in *Curtis Publishing Co. v. Butts*, which enabled a finding of sufficient evidence of highly unreasonable conduct in the latter but not the former instance.<sup>412</sup> The public interest in prompt publication of news should and doubtlessly will be considered by the courts.<sup>413</sup> Whether a reasonably prudent journalist would continue to investigate a story when there may be some concern for accuracy will depend in part on whether time to do so is available. Failure to verify when sufficient time exists to do so may provide some proof of negligence.<sup>414</sup> Likewise, deadline pressure on a "hot news" story may preclude exhaustive verification without breaching the standard of reasonable care.<sup>415</sup> Excuse of failure to verify will de-

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411. See *supra* notes 82-93 and accompanying text.

412. 388 U.S.130, 158-59 (1967).

413. See *Benson v. Griffin Television, Inc.*, 593 P.2d 511, 514 (Okla. Ct. App. 1978) ("The need to report matters as quickly as possible is not merely good competition but serves a paramount concern of society to have access to information of public concern as soon as possible. [This consideration is] . . . relevant in determining the standard of care for the media in reporting about private persons."). *But see Daniels, supra* note 320, at 962 (author expresses concern that the courts and juries may give inadequate consideration to deadline pressure after the fact).

414. *Jones v. Sun Publishing Co.*, 278 S.C. 12, 13, 292 S.E.2d 23, 24, *cert. denied*, 459 U.S. 944 (1982) (sufficient evidence of negligence to reverse judgment n.o.v. for defendant when reporter failed to verify name of individual pleading guilty to criminal charges with public records despite six day hiatus prior to publication); *Re v. Gannett*, 480 A.2d 662, 666 (Del. Super. Ct. 1984) (finding sufficient evidence of negligence but remanding for new trial on damages when defamatory paragraph "involved background information only peripherally related to current news article").

415. See F. FEDLER, *supra* note 324, at 121 ("Some errors may be inevitable. Because of the need to meet strict deadlines, reporters must work quickly and often lack the time needed to perfect their stories."); H. GOODWIN, *supra* note 324, at 11 ("Many newsrooms in an earlier day posted the old International News Source admonition, 'Get It First, But Get It Right.' Fine, but every journalist soon learns that getting it first sometimes means you don't get it right, and taking the time to get it right often means you don't get it first."); J. HOHENBERG, *supra* note 324, at 29-30 ("Making the deadline is journalism's most inflexible rule . . . . [I]nvariably there comes a moment when fact-gathering must end and writing must start."); M. MENCHER, *supra* note 324, at 50 ("[o]n some occasions, adequate verifica-

pend on the nature of the story and the need for immediate coverage. For instance, in a factual situation as was presented in *Associated Press v. Walker*, in which the press was covering a major riot during the attempted integration of a state university, the public interest in prompt publication was obviously quite great. On the other hand, a story about an ongoing grand jury investigation, while also of great public significance, in a particular instance might permit more deliberate development because the news value may not depend to such a large degree on immediate dissemination. Other factors also will play a role including the seriousness of the charge and the risk of inaccuracy. Although deadline pressure may excuse a failure to doublecheck or to verify by official records, deadline pressure rarely, if ever, would justify a complete failure to investigate or to proceed solely in reliance on an untrustworthy source.<sup>416</sup> Finally, deadline pressure must be attributable to the exigencies of the news itself and not simply the predilections of the publisher. As the Seventh Circuit Court of Appeals recognized in *Gertz v. Robert Welch, Inc.*,<sup>417</sup> a publisher, for purposes of negligence analysis, may not transform a feature story into "hot news" simply by shortening the verification period from several weeks to four hours to squeeze the article into an earlier issue.<sup>418</sup>

(b) *Seriousness of the Allegation*

The seriousness of the allegation will play a major role in determining the extent of verification that a reasonably prudent publisher should engage in prior to publication. The fact that a charge is serious, or even defamatory on its face does not suggest that it is likely to be false and therefore in need of support.<sup>419</sup> Grave allegations should, however, alert the publisher to the possibility that

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tion is virtually impossible even when data and records exist. When reporters are out on a story and under the pressure of a deadline, verification is a difficult task."); *id.* at 244 ("It is the clock that is the journalist's major obstacle to truth-telling.").

416. See A. CROWELL, *supra* note 324, at 50 ("In an occasional deadline emergency, it may be necessary to move to composing copy containing unverified names. These should be verified immediately thereafter, for under no circumstances should unverified names be allowed to run unchecked in subsequent editions."); M. MENCHER, *supra* note 324, at 31 ("Although the reporter works under severe space and time limitations, he or she is never too pressed or rushed to allow the dubious, much less incorrect, material to pass through the typewriter.").

417. 680 F.2d 527 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983).

418. *Id.* at 538.

419. *Geiger v. Dell Publishing Co.*, 719 F.2d 515, 518 (1st Cir. 1983) ("[w]e do not agree with appellant that the injurious nature of the statements is itself a 'substantial reason' to question their accuracy").

the charge may seriously injure the reputation of the plaintiff and that litigation and liability may follow if the charge proves to be false. Common sense, along with journalistic custom, suggests, therefore, that the reasonable publisher should take greater pains to ensure the accuracy of a potentially defamatory charge than of a relatively innocuous assertion; this reasoning will follow as a matter of negligence analysis.<sup>420</sup> That a defamatory assertion, however, may have appeared relatively harmless at the time of publication will provide strong evidence toward establishing that a very minimal investigation was sufficient.<sup>421</sup> Indeed, as the Supreme Court suggested in *Gertz v. Robert Welch, Inc.*, a defamation action now may be constitutionally impermissible when the defamatory potential is not apparent from the face of the article.<sup>422</sup>

(c) *Cost and Practicality*

Under a negligence calculus, a court will not require verification for its own sake. The reasonable journalist will continue to

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420. See *Levine v. CMP Publications*, 738 F.2d 660, 674 (5th Cir. 1984) (sufficient evidence of negligence to affirm verdict for plaintiff when, among other things, plaintiff's and defendant's language experts testified that phrase was potentially libelous); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983) (sufficient evidence of negligence to affirm verdict for plaintiff when, among other things, publisher failed to verify charges that plaintiff was a communist); *Hogan v. Herald Co.*, 84 A.D.2d 470, 446 N.Y.S.2d 836, 840, *aff'd per curiam*, 58 N.Y.2d 630, 444 N.E.2d 1002, 458 N.Y.S.2d 538 (1982) (sufficient evidence of gross irresponsibility to affirm denial of summary judgment for defendant when allegations involved "serious charges of criminal activity and political impropriety"); K. GALVIN, *supra* note 367, at 69 ("anything having to do with crimes, sex, communism, etc. should always be double checked"); M. MENCHER, *supra* note 324, at 243 (it is necessary, when possible, to check "strong quotations with the source and others if the reporter is unsure of what has been said."); Smolla, *supra* note 28, at 85 ("More duty to investigate is required as the allegations become more damaging, because the law should encourage greater expense on prevention of damages as the potential harm from defamation increases.").

421. *Cefalu v. Globe Newspaper Co.*, 8 Mass. App. Ct. 71, 77, 391 N.E.2d 935, 938 (1979), *cert. denied*, 444 U.S. 1060 (1980) (affirming summary judgment for defendant because of insufficient evidence of negligence when little reason existed to assume that the person pictured in a line to receive an unemployment check would be offended); *Pollnow v. Poughkeepsie Newspapers*, 11 Med. L. Rptr. (BNA) 1528, 1532 (N.Y.A.D. 1985) (dismissing complaint due to insufficient evidence of gross irresponsibility when editors failed to verify letter to editor that did not seem defamatory or identify specific individual); *Torres-Silva v. El Mundo*, 3 Media L. Rep. (BNA) 1508, 1511 (P.R. 1977) (affirming summary judgment for defendant because of insufficient evidence of negligence when, among other things, charge that person was son of plaintiff was not defamatory on its face).

422. 418 U.S. 323, 348 (1974). Recently in *Gazette, Inc. v. Harris*, the Virginia Supreme Court held that a private figure plaintiff must prove actual malice in order to recover when substantial dangers to reputation is not apparent from the face of the statement in issue. — Va. —, —, 325 S.E.2d 713, 725 (1985).

investigate and verify only if to do so would likely improve the accuracy of the article without being prohibitively expensive. The need to consider the costs of verification, in view of the first amendment interest in free dissemination of information, has been recognized. In the influential actual malice case of *Washington Post Co. v. Keough*,<sup>423</sup> the Court of Appeals for the District of Columbia Circuit observed:

Verification of syndicated news reports and columns is a time-consuming process, a factor especially significant in the newspaper business where news quickly goes stale, commentary rapidly becomes irrelevant, and commercial opportunity in the form of advertisements can easily be lost. In many instances considerations of time and distance make verification impossible. Thus the newspaper is confronted with the choice of publication without verification or suppression. Verification is also a costly process, and the newspaper business is one in which economic survival has become a major problem, made increasingly grave by the implications of this fact for free debate. We should be hesitant to impose responsibilities upon newspapers which can be met only through costly procedures or through self-censorship designed to avoid the risks of publishing controversial material.<sup>424</sup>

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423. 365 F.2d 965, 972 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

424. *Id.* at 972. This point has been echoed in several negligence and gross irresponsibility cases. In *Torres-Silva v. El Mundo*, 3 Media L. Rep. (BNA) 1508, 1512 (P.R. 1977), for instance, the Supreme Court of Puerto Rico recognized that "[t]he corroboration of news is an expensive step in terms of money, time and personnel, which can be only demanded when from the face of the information there exists doubt as to its veracity or when the information can be easily corroborated due to special circumstances." *Id.* The Court of Appeals for the First Circuit recently made a similar observation in *Geiger v. Dell Publishing Co.*:

Although it is true that book publishers are not often under the sort of time pressure that requires them to commit a story to print within the space of a few hours, we note that they operate under economic constraints that prevent their conducting the kind of routine check appellant wishes us to impose on them. A non-fiction work often details events that are long past and describes people who are unavailable to verify the author's statements. To require a book publisher to check, as a matter of course, every potentially defamatory reference might raise the price of non-fiction works beyond the resources of the average man.

719 F.2d 515, 518 (1st Cir. 1983); *see also* *Re v. Gannett*, 480 A.2d 662, 666 (Del. Super. Ct. 1984) ("Applying the standards of a reasonable and careful reporter and newspaper takes into consideration the pressures under which current news is assembled and published."); *Cefalu v. Globe Newspaper Co.*, 8 Mass. App. Ct. 71, 77, 391 N.E.2d 935, 938 (1979) (requiring reporter to interview everyone appearing in news photograph would encourage self censorship), *cert. denied*, 444 U.S. 1060 (1980); *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 543, 416 N.E.2d 557, 562, 435 N.Y.S.2d 556, 561 (1980) (requiring editors to recheck reporters' work when no reason exists to doubt accuracy "would dampen free exercise of rights guaranteed by the First Amendment"); *Greenberg v. CBS, Inc.*, 69 A.D.2d 693, 711, 419 N.Y.S.2d 988, 998 (1979) ("[p]ressures of time, staff and budget self created or otherwise, are some of the factors which must be considered" in applying negligence standard); *Horvath v. Ashtabula Tel.*, 8 Media L. Rep. (BNA) 1657, 1664 (Ohio Ct. App. 1982) (degree of verification urged by plaintiff "would all but prevent the publication of news in this country").

As *Keough* points out, first amendment considerations must be factored in the equation directly because courts must encourage publishers to avoid the very real costs of potential self-censorship.

Without providing a simple rule of thumb, case law emphasizes that cost and practicality definitely are relevant factors that must be considered in determining whether the defendant exercised reasonable care. These factors obviously play a very important role in determining how news organizations behave because such organizations are similar to all businesses that attempt to publish a product in a timely manner while ensuring a profit.

The potential cost of further verification is a relative matter. Presumably, a news organization with great resources, such as a television network or wire service, reasonably may be required to shoulder a greater burden than a rural gazette.<sup>425</sup> The question, however, is not whether additional verification in the particular case before the court would have been affordable but whether verification procedures of the type in question would impose an undue burden and expense on publishers. Because costs and practicality of verification are matters beyond the competence of the average juror, expert testimony ordinarily will be required on this issue.

#### *(d) Examples of Inadequate Investigation and Verification*

The decision whether a reasonably prudent publisher would verify or attempt further verification will be influenced by a variety of factors, including the ease with which verification could be accomplished and the likelihood that it would increase the potential for accuracy. Several common fact patterns reveal situations in which professional practice and the reasonable care standard may require greater efforts at verification than publishers sometimes undertake.

##### (1) Failure to Contact an Obvious Source

A reporter may have failed to utilize due care by neglecting to contact an obvious source of verification,<sup>426</sup> including the plain-

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425. Cf. W. RIVERS, *supra* note 324, at 183 ("Most of the great newspapers spend large sums to try to purge their columns of errors.")

426. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 n.19 (7th Cir. 1982) (sufficient evidence of negligence to affirm verdict for plaintiff when reporter failed to interview participants in litigation discussed in article and failed to consult documents pertaining to defamatory charges), *cert. denied*, 459 U.S. 1226 (1983); *Jenoff v. Hearst Corp.*, 453 F. Supp. 541, 547 (D. Md. 1979), *aff'd*, 644 F.2d 1004 (4th Cir. 1981) (sufficient evidence of negligence to deny summary judgment for defendant when reporter failed to interview source who

tiff.<sup>427</sup> For example, a federal district court found evidence of negligence as a matter of law when, among other abuses, the defendant published an article alleging that the plaintiff had been involved in a corporate extortion scheme, despite the editor's failure to attempt to contact the plaintiff "beyond a perfunctory and futile telephone call" to plaintiff's former employer and the editor's failure to interview any of the executives of the company allegedly implicated in the scheme.<sup>428</sup> Recognized professional practice im-

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made defamatory allegations) (verdict for plaintiff affirmed on appeal); *Miami Herald Publishing Co. v. Ane*, 423 So. 2d 376, 389 (Fla. Dist. Ct. App. 1983), *aff'd*, 458 So.2d 239, 242 (Fla. 1984) (sufficient evidence of negligence to affirm verdict for plaintiff when reporter failed to verify whether plaintiff owned truck involved in smuggling with purported seller of truck); *Liquori v. Republican Co.*, 8 Mass. App. Ct. 671, 676, 396 N.E.2d 726, 729 (1979) (sufficient evidence of negligence to affirm verdict for plaintiff when reporter failed to check address of individual pleading guilty to criminal charges with court personnel or defense counsel); *Hogan v. Herald Co.*, 84 A.D.2d 470, 476, 446 N.Y.S.2d 836, 840-41, *aff'd per curiam*, 58 N.Y.2d 630, 444 N.E.2d 1002, 458 N.Y.S.2d 538 (1982) (sufficient evidence of gross irresponsibility to affirm denial of summary judgment for defendant when "means to determine the truth" of serious charges were of "ready accessibility" to reporter); *Charlottesville Newspapers, Inc. v. Matthews*, \_\_\_ Va. \_\_\_, \_\_\_, 325 S.E.2d 713, 732, 734 (sufficient evidence of negligence to affirm verdict for plaintiff when reporter did not attend trial and failed to speak with participants); *cf. Woods v. Hustler*, 736 F.2d 1084, 1093, *cert. denied*, 105 S.Ct. 783 (1985) (5th Cir. 1984) (sufficient evidence of negligence to affirm verdict in false light privacy action for plaintiff when magazine's procedure for verifying consent of subjects prior to publication of nude photos was inadequate); *Sibley v. Holyoke Transcript-Telegram*, 8 Media L. Rep. (BNA) 2497, 2498 (Mass. Super. Ct. 1982), *aff'd*, 461 N.E.2d 823 (1984) (sufficient evidence of negligence when reporter failed to interview four individuals who made defamatory charges but granting summary judgment for defendant because of qualified privilege); *Mazart v. State*, 109 Misc. 2d 1092, 441 N.Y.S.2d 600, 604 (Ct. Cl. 1983) (sufficient evidence of gross irresponsibility when editor failed to verify that plaintiffs actually sent letter identifying themselves as members of the gay community but dismissing because university was not responsible for conduct of student newspapers).

427. *Miami Herald Publishing Co. v. Frank*, 442 So. 2d 982, 983-84 (Fla. Dist. Ct. App. 1983) (sufficient evidence of negligence to affirm verdict for plaintiff when reporter failed to confirm charges with plaintiff); *Jones v. Sun Publishing Co.*, 278 S.C. 12, 14, 292 S.E.2d 23, 24 (sufficient evidence of negligence to reverse judgment n.o.v. for defendant when reporter failed to contact plaintiff, with whom he was acquainted, before writing that he had pleaded guilty to criminal charges), *cert. denied*, 459 U.S. 944 (1982); *see also Embers Supper Club, Inc. v. Scripps-Howard Broadcasting Co.*, 9 Ohio St. 3d 22, 24, 457 N.E.2d 1164, 1166 (1984) (apparently finding sufficient evidence of negligence to reverse directed verdict for defendant when reporter failed to contact plaintiff regarding serious charges); *Hawks v. Record Printing*, \_\_\_ A.D.2d \_\_\_, 486 N.Y.S.2d 463, 466 (1985) (sufficient evidence of gross irresponsibility to affirm denial of summary judgment for defendant when reporter failed to contact participants in legal proceeding in issue).

428. *Lawlor v. Gallagher Presidents' Report, Inc.*, 394 F. Supp. 721, 733 (S.D.N.Y. 1975). In *Horvath v. Ashtabula Tel.*, 8 Media L. Rep. (BNA) 1657, 1663 (Ohio Ct. App. 1982), in the course of reversing a verdict for the plaintiff, the court asked:

Is a reporter required to call an entity such as Horvath Service and determine if said service is laundering money from a drug business? To ask this question is to answer it! It is ludicrous to think that such telephone call would produce an answer, let alone an answer that the Reporter could conclude was reliable.

poses on the journalist the duty to give the subject of serious charges an opportunity to comment, preferably prior to initial publication.<sup>429</sup> As a general rule, however, journalists refuse to permit the subject of a story or interview actually to review or approve the story prior to publication for fear that this review would delay publication or lead to attempts to pressure the publisher into changing or omitting some of the details.<sup>430</sup> As noted earlier,<sup>431</sup> the New York Court of Appeals provided legal support for this particular professional practice in the influential case of *James v. Gannett*.<sup>432</sup> Courts should apply the same approach under a negligence standard.

To expect a reporter to at least make a good faith effort to contact a source whom the reporter knows is likely to possess significant information pertaining to the accuracy of potentially defamatory allegations, especially when the source is readily accessible, is not unreasonable. If the reporter is not aware of the source's existence or reasonably cannot discover the source or if the source cannot be contacted without extensive cost and effort, then, by definition, the source is not obvious and the reporter probably has not violated a duty of due care by failing to seek it out. Similarly, a newspaper may well be negligent for failing to attempt to verify a potentially defamatory allegation by checking its own files, at least when some reason exists to believe that they contain the relevant information and that the information can be located without un-

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*Id.* at 1663. While the failure to make such a call might not constitute negligence by itself, for a reporter to make such an inquiry before publishing charges of this nature, does not seem unreasonable, let alone ludicrous. If he is mistaken, the subject of the charge might be able to explain to the reporter's satisfaction that the charges are false.

429. SPJ, CODE OF ETHICS, *supra* note 323, Fair Play, no. 1 ("The news media should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply."); F. FEDLER, *supra* note 324, at 122 ("If a story contains information critical of an individual, that person should be contacted and given an opportunity to respond. It is not enough to call the victim after a story has been published . . ."); J. STOVALL, C. SELF & L. MULLINS, *supra* note 324, at 236 ("If at all possible, get a comment from the subject of a story who is being cast in a bad light. Make certain that the subject talks for the record and include this comment in the story."); *see also* S. Rosenfeld in *The Editorial Page*, *supra* note 324, at 122.

430. E. BROUSSARD & J. HOLGATE, *supra* note 324, at 135 ("Never promise the interviewee the opportunity to read your story before you air it. If you do, you're in deep trouble, for the chances are great that the person will try to change or even 'kill' your story."); W. RIVERS, *supra* note 324, at 171 ("Journalists are almost unanimous in insisting that their stories should never be checked by sources—officials, celebrities, or private citizens—before publication or broadcast."); *see also* F. FEDLER, *supra* note 324, at 122; J. HOHENBERG, *supra* note 324, at 219.

431. *See supra* notes 279-80 and accompanying text.

432. 40 N.Y.2d 415, 423-24, 353 N.E.2d 834, 423-24, 386 N.Y.S.2d 871, 877 (1976).



due cost or effort.<sup>433</sup> Checking one's own files is a common method of verification.<sup>434</sup>

## (2) Failure to Consult an Authoritative Source

An inference of negligence also may arise when a reporter fails to verify a potentially defamatory allegation by consulting an authoritative source such as a public record.<sup>435</sup> The Hawaii Supreme Court recently found<sup>436</sup> sufficient evidence of negligence to affirm a jury verdict for the plaintiff when a reporter apparently disregarded the newspaper's own practices and failed to verify a story, which pertained to a police narcotics search, with the police blotter that contained correct information.<sup>437</sup> Frequently, articles containing potentially defamatory material concern legal or governmental proceedings that may be readily verified with official documents. To the extent that verification is easily accomplished and consistent with prevailing journalistic practices in the particular context,<sup>438</sup> failure to verify, at least, should be considered some evi-

433. Cf. *New York Times v. Sullivan*, 376 U.S. 254, 261 (1964) (newspaper negligent, if at all, for failing to check accuracy of advertisement against its own files).

434. E. DENNIS & A. ISMACH, *supra* note 324, at 98 ("Reporters make use of the morgue regularly in writing about local subjects that have a history of any kind."); see *infra* note 473; see also *Torres-Silva v. El Mundo*, 3 Media L. Rep. (BNA) 1508, 1512 (P.R. 1977) (failure to check files is not evidence of negligence when there is no showing that information in issue would be kept in such a file) (citing Robertson, *supra* note 22, at 261); Robertson, *supra* note 22, at 262 n.387 ("The reasonableness of requiring a newspaper to check the accuracy of a story against its files turns on the facial defamatory potential of the story and the type of 'files' the newspaper possesses. If a newspaper maintains indexed, accessible files, as opposed to unindexed collections of back issues, then the newspaper should check its files to guard against highly defamatory falsehoods.").

435. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 n.19 (7th Cir. 1982) (sufficient evidence of negligence to affirm verdict for plaintiff when author, among other things, reviewed public records only on a very selective basis), *cert. denied*, 459 U.S. 1226 (1983); *Melon v. Capital City Press*, 407 So. 2d 85, 87 (La. Ct. App. 1981) (reversing summary judgment for defendant when reporter relied on newspaper report of press release pertaining to arrest instead of checking public records); *Jones v. Sun Publishing Co.*, 278 S.C. 12, 17, 292 S.E.2d 23, 25, *cert. denied*, 459 U.S. 944 (1982) (sufficient evidence of negligence to affirm verdict for plaintiff when reporter failed to verify name of person pleading guilty to criminal charge in public records); cf. *E.W. Scripps Co. v. Cholmondelay*, 569 S.W.2d 700, 704 (Ky. Ct. App. 1978) (affirming verdict for private figure plaintiff, though not explicitly addressing negligence issue, when reporter relied on information obtained from murder victim's sister and apparently failed to verify in detail with police).

436. *Kohn v. West Hawaii Today, Inc.*, 65 Hawaii 584, 656 P.2d 79 (1982).

437. *Id.* at 588-89, 656 P.2d at 82-83.

438. See P. WILLIAMS, *supra* note 324, at 37-38 ("The First and great commandment of investigative reporting is this: get the record: [The investigative reporter] recognizes that there is an institutional record of almost everything . . . [H]e does not limit his search to public record sources . . . He knows that records are often the best evidence—far better than prejudiced recollections of oral accounts—of what happened . . . He also realizes

dence of negligence, especially when the defamatory potential is great and the information is complex or technical. As will be discussed,<sup>439</sup> however, failure to trace an allegation to an official record source should not necessarily allow a plaintiff to reach the jury on the negligence issue, at least, when the reporter did have a reliable source or when verification with the primary source would have been unduly burdensome or costly.<sup>440</sup> For example, in *Jones v. Sun Publishing Co.* the dissent argued persuasively that a reporter's failure to drive either seventy or one hundred forty miles to verify information, obtained over the telephone by an assistant United States attorney, should not have supported an inference of negligence.<sup>441</sup>

### (3) Failure to Update

Frequently, information obtained by a reporter may be correct as originally published or conveyed but inaccurate by the time it was obtained or republished by a subsequent reporter. This situation often arises when convictions are overturned on appeal or individuals who have been arrested are released without having any charges filed against them. A failure to update could provide evidence of negligence when a reporter relies on a source that is obviously not current in an area in which subsequent developments

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that no single record—public or private—is certain to be complete or accurate for his purposes. He constantly thinks compare and contrast. He knows that a record may reflect clerical lapses, typographical errors, erasures, or outright deception. At the very best, a document is a record of a situation at a single point in time, usually from a single view point, and for a single reason.”); *see also* D. MCHAM, *supra* note 324, at 10 (“Reporters should be careful about taking the law officer’s word that a complaint has been filed. This fact should be checked out.”); M. MENCHER, *supra* note 324, at 233 (“When it is necessary to rely on second-hand accounts, use high-quality published sources, records and documents and the most knowledgeable and authoritative human sources available.”), at 532 (“The courthouse reporter regularly checks court papers filed in the clerk’s office. . . . Reporters usually rely on records and court personnel for information on civil trials.”); *see supra* notes 436-66 and accompanying text.

439. *See infra* notes 456-63 and accompanying text.

440. *Wilson v. Capital City Press*, 315 So. 2d 393, 398 (La. Ct. App. 1975) (reversing verdict for plaintiff because of insufficient evidence of negligence when reporter failed to check public record of persons arrested in drug raid); *Salcedo v. El Diario Publishing*, 5 Media L. Rep. (BNA) 2308 (N.Y. Sup. Ct. 1979) (granting summary judgment for defendant newspaper because of insufficient evidence of gross irresponsibility when reporter and editor failed to read indictment).

441. 278 S.C. 12, 18, 22, 292 S.E.2d 23, 26, 28 (Lewis, C.J., dissenting), *cert. denied*, 459 U.S. 944 (1982). An inference of negligence still may have been warranted in *Jones*, however, in view of evidence suggesting that the reporter may have incorrectly copied down the information received from the source. 278 S.C. 12, 14, 292 S.E.2d 23, 24; *see infra* note 486 and accompanying text.

likely have rendered the information inaccurate.<sup>442</sup> In contrast, to require the press to ensure that everything that it prints is current as of the time of publication would be unduly burdensome and expensive. A diligent attempt, however, to check readily available sources, when some reason exists to believe that circumstances may have changed, ordinarily should suffice.<sup>443</sup> This area is doubtlessly one in which professional customs and practices could prove influential in striking a balance between the risks of error and costs of up to the minute accuracy.<sup>444</sup>

#### (4) Failure to Verify Names

An inference of negligence can arise when a reporter or editor fails to verify that the person identified in a story is actually the person involved in the underlying event. The press customarily attempts to identify individuals fully and accurately, especially when an article has defamatory potential, such as in the reporting of an arrest or an indictment.<sup>445</sup> In *Liquori v. Republican Co.*,<sup>446</sup> for ex-

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442. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 (7th Cir. 1982) (sufficient evidence of negligence to affirm verdict for plaintiff, when among other things, editor failed to update information obtained from old report of the House Committee on Un-American Activities), *cert. denied*, 459 U.S. 1226 (1983); *General Prods. Co. v. Meredith Corp.*, 526 F. Supp. 546, 552 (E.D. Va. 1981) (sufficient evidence of negligence to deny summary judgment for defendant when author relied on memory of book he had read and failed to update).

443. *Cf. Torres v. Playboy Enters.*, 7 Media L. Rep. (BNA) 1182, 1187 (S.D. Tex. 1980) (granting summary judgment for defendant because of insufficient evidence of *reckless disregard* when reporter relied on assistant U.S. Attorney and failed to contact clerk to check on further proceedings in criminal litigation immediately prior to publication); *McQuoid v. Springfield Newspapers, Inc.*, 502 F. Supp. 1050, 1057 (W.D. Mo. 1980) (granting summary judgment for defendant because of insufficient evidence of *reckless disregard* when newspaper relied on stories by experienced reporter who broke story and failed to discover recent developments pertaining to criminal proceedings).

444. *See* E. BROUSSARD & J. HOLGATE, *supra* note 324, at 106 ("Be sure to keep updating your information."); A. CROWELL, *supra* note 324, at 50 ("Old clippings may contain errors with libelous implications; titles and addresses have changed."); J. STOVALL, C. SELF & L. MULLINS, *supra* note 324, at 152 ("Particularly critical for local editors is the danger that syndicated copy may be out of date.")

445. *See* F. FEDLER, *supra* note 324, at 121 ("Newspapers are particularly careful in their handling of names . . . [M]any newspapers require their reporters to verify the spelling of every name that appears in local news stories by consulting a second source, usually a telephone book or city directory."); D. McHAM, *supra* note 324, at 15 ("Reporters and editors should be especially careful of details such as names and addresses. A person does not necessarily live at the address he or she gives police. And someone else with the same name may live in the same town or city. Checking is absolutely necessary."); M. MENCHER, *supra* note 324, at 568 ("The reporter who confuses plaintiff and defendant is heading for a libel suit."); *see also* E. BROUSSARD & J. HOLGATE, *supra* note 324, at 87-90; A. CROWELL, *supra* note 324, at 50; G. HOUGH, *supra* note 324, at 180; C. MACDOUGALL, *supra* note 324, at 170; K. METZLER, *supra* note 324, at 164; M. STEIN, *supra* note 324, at 79; J. STOVALL, C. SELF & E. MULLINS, *supra* note 324, at 9.

446. 8 Mass. App. Ct. 671, 396 N.E.2d 726 (1979).

ample, the defendant newspaper, to attempt to avoid potential misidentification, required that its reporters provide a street address for participants in judicial proceedings.<sup>447</sup> To comply with this policy, however, the reporter checked a 1974 telephone directory for the address of an individual named in a 1968 indictment and failed to verify the address that he discovered with court personnel.<sup>448</sup> On these facts, the court quite properly concluded that the reporter's careless attempt at verification could support an inference of negligence.<sup>449</sup>

In *Ryder v. Time, Inc.*<sup>450</sup> the Court of Appeals for the District of Columbia Circuit suggested, without deciding, that the defendant may have been negligent in failing to identify fully an attorney who had been disciplined by including his middle initial or address and thereby avoiding confusion with plaintiff, who was also a practicing attorney in the same jurisdiction.<sup>451</sup> While it may seem harsh that potential liability may turn on whether the defendant printed "Richard Ryder" or "Richard R. Ryder," the court recognized that the defendant readily obtained the correct and full identification from the very case it was discussing.<sup>452</sup> Moreover, providing a middle initial to ensure proper identification is common journalistic practice.<sup>453</sup> As one federal court has observed,

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447. *Id.* at 673, 396 N.E.2d at 728.

448. *Id.* at 674, 396 N.E.2d at 728.

449. *Id.* at 674, 396 N.E.2d at 729-730.

450. 557 F.2d 824 (D.C. Cir. 1976).

451. *Id.* at 826.

452. *Id.*; see also *Charlottesville Newspapers, Inc. v. Matthews*, \_\_\_ Va. \_\_\_, \_\_\_, 325 S.E.2d 713, 732, 734-35 (1985) (sufficient evidence of negligence to affirm verdict for plaintiff when reporter referred to pregnant rape victim as "Miss" although verification would have revealed that she was married); *Slocum v. Webb*, 375 So. 2d 125, 130 (La. Ct. App. 1979) (court found sufficient evidence of negligence to reverse a summary judgment for defendant in the reporter's confusion of the plaintiff with his son who had been arrested). The *Slocum* case is somewhat troubling considering that the son was known as "Jerry Slocum" and the father's name was "Jerry Slocum, Jr."

453. A. CROWELL, *supra* note 324, at 50 ("A name should include the middle initial if the individual customarily uses one"); H. SCHULTE, *supra* note 324, at 228 ("Carelessness in identification is one of the chief causes of libel suits against publications. That's why the police reporter will exercise such care in obtaining middle initials and correct addresses."); M. STEPHENS, *supra* note 324, at 134 ("Reporting that John Q. Smith was arrested for robbery, when it was John Z. Smith, is cause for legal action by John Q."); see Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc., and Beyond*, 6 RUT.-CAM. L.J. 471, 489 (1975) (argument that a "substantial deviation from accepted journalistic practices" standard as opposed to a negligence test should apply when the defendant has lost the benefit of the *Times* test through misidentification; i.e. substituting the name of the private figure plaintiff when a public figure plaintiff was intended).

however, "[standard publishing] procedures do not require a detailed search for persons with similar names whose existence is unknown to the defendant. . . . [S]uch searches . . . would place an inordinate burden upon the press."<sup>454</sup>

(e) *Verification as Evidence of Due Care*

Just as superficial investigation or verification can give rise to an inference of negligence, thorough verification procedures can defeat such a conclusion. For example, one court found that defendant reporters had acted reasonably in concluding that plaintiff, the owner of a cafe, was a bookie, when over the course of a week, defendants attempted to "test and retest" their conclusions through a series of phone calls and surveillance.<sup>455</sup>

In the absence of evidence suggesting that the statements in an article are likely to be false, an inference of negligence should not arise when a reporter has based a story on a reliable source.<sup>456</sup> Not surprisingly, many defamation cases involve press coverage of

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454. *Nesbitt v. Multimedia*, 9 Media L. Rep. (BNA) 1473, 1477 (W.D.N.C. 1982) (granting summary judgment for defendant because of insufficient evidence of negligence and reckless disregard when article failed to indicate that plaintiff's son, not the plaintiff, was arrested); *see also* *Lake Havasu Estates, Inc. v. Readers Digest Ass'n*, 441 F. Supp. 489, 493 (S.D.N.Y. 1977) ("Defendant was under no duty when publishing an article to check to see whether other companies existed which bore the same name as the subject of its article as claimed by plaintiff").

455. *Dwyer v. Globe Newspaper*, 6 Media L. Rep. (BNA) 2176, 2177-79 (Mass. Super. Ct. 1980).

456. *See* *Gaeta v. New York News, Inc.*, 62 N.Y.2d 340, 465 N.E.2d 802, 806, 477 N.Y.S.2d 82, 86 (1984) (reversing denial of summary judgment for defendant because of insufficient evidence of gross irresponsibility when reporter had been assured that source was reliable); *Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, 304, 445 N.Y.S.2d 156, 162 (1981) (reversing denial of defendant's motion for summary judgment because of insufficient evidence of gross irresponsibility when reporter contacted "responsible officials" at institutions where plaintiff had allegedly submitted his plans); *Campo Lindo for Dogs v. New York Post Corp.*, 65 A.D.2d 650, 650, 409 N.Y.S.2d 453, 454-55 (1978) (affirming summary judgment for defendant because of insufficient evidence of gross irresponsibility when reporter relied on information provided by well-known actress who was head of local humane society); *DeLuca v. New York News, Inc.*, 109 Misc. 2d 341, 343, 438 N.Y.S.2d 199, 204 (N.Y. Sup. Ct. 1981) (granting summary judgment for defendant because of insufficient evidence of gross irresponsibility when, among other things, reporter read plaintiff's case file and contacted Board of Education and school where she worked); *Horvath v. Ashtabula Tel.*, 8 Media L. Rep. (BNA) 1657, 1661 (Ohio Ct. App. 1982) (reversing verdict for plaintiff due to insufficient evidence of negligence when reporter attempted to verify, using statements of the prosecuting attorney, law enforcement officials, and tape of news conference, charges that plaintiff was arrested); *see also* W. AGEE, P. AULT & E. EMERY, *supra* note 324, at 194-95 ("when one of the media receives a news release from a properly identified source, it can reasonably assume that the routine facts it contains are correct, with accurate names and addresses.").

citizens' encounters with the criminal justice system. Media coverage of crime, arrests, investigations, indictments and trials is frequent and extensive, prompted by the public interest in the subject matter. Many stories are "fast breaking" news with intense deadline pressure. Moreover, the charges against the plaintiff often are serious and, as a result, the defamatory potential is great.<sup>457</sup> Given that the plaintiff and witnesses often are unavailable for comment, law enforcement personnel are frequently the most authoritative, if not the only, available source.<sup>458</sup> Consequently, a reporter's reliance on law enforcement personnel in this context often will undermine any possible inference of negligence.<sup>459</sup> In the

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457. See E. BROUSSARD & J. HOLGATE, *supra* note 324, at 108 ("Crime stories can easily result in libel suits if the reporter does not choose his/her words carefully. You should never presume a person is guilty no matter what the circumstances of the crime . . ."); H. SCHULTE, *supra* note 324, at 214 ("Danger of defamation is much greater in law enforcement than on other public affairs beats, and the reporter must constantly be on guard. Criminal accusations are particularly sensitive."); M. STEIN, *supra* note 324, at 183 ("The majority of libel suits stem from the handling of police and court news."); see also B. BROOKS, *supra* note 324, at 214; G. HAGE, *supra* note 324, at 156; J. HOHENBERG, *supra* note 324, at 291; M. STEPHEN, *supra* note 324, at 134.

458. See G. HAGE, *supra* note 324, at 156

Because prosecution officials . . . may be more accessible to the court reporter assigned to cover the courthouse, there is a tendency for the reporter not to interview the defendant. At the very least, the reporter should attempt to contact the defendant's attorney, particularly if the case appears to be one worthy of extended coverage.

459. See *Nesbitt v. Multimedia*, 9 Media L. Rep. (BNA) 1473, 1475 (W.D.N.C. 1982) (granting summary judgment for defendant because of insufficient evidence of negligence and reckless disregard when reporter relied on information obtained from police detective); *El Amin v. Miami Herald*, 9 Media L. Rep. (BNA) 1079, 1082 (Fla. Cir. Ct. 1983) (granting summary judgment for defendant because of insufficient evidence of negligence when reporter relied on police report); *Karp v. Miami Herald Publishing Co.*, 359 So. 2d 580, 582 (Fla. Dist. Ct. App. 1978) (affirming summary judgment for defendant because of insufficient evidence of negligence when reporter obtained information from immigration officer); *LeBoeuf v. Times Picayune Publishing Corp.*, 327 So. 2d 430, 431 (La. Ct. App. 1976) (affirming summary judgment for defendant because of insufficient evidence of negligence when reporter relied on police department public information officer); *Wilson v. Capital City Press*, 315 So. 2d 393, 398 (La. Ct. App. 1975) (reversing verdict for plaintiff because of insufficient evidence of negligence when reporter relied on police news release); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 200, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975) (affirming summary judgment for defendant because of insufficient evidence of gross irresponsibility when reporter relied on police captain and police record); *Simonsen v. Malone Evening Telegram*, 98 A.D.2d 905, 470 N.Y.S.2d 898, 899 (1983) (affirming summary judgment for defendant because of insufficient evidence of gross irresponsibility when reporter relied on telephone conversations with police); *Carlucci v. Poughkeepsie Newspapers, Inc.*, 88 A.D.2d 608, 450 N.Y.S.2d 54, 55, *aff'd*, 57 N.Y.2d 883, 442 N.E.2d 442, 456 N.Y.S.2d 44 (1982) (reversing denial of defendants motion to dismiss because of insufficient evidence of gross irresponsibility when reporter obtained information from police barracks); *Grobe v. Three Village Herald*, 69 A.D.2d 175, 176, 420 N.Y.S.2d 3, 4 (1979), *aff'd*, 49 N.Y.2d 932, 406 N.E.2d 491, 428 N.Y.S.2d 676 (1980) (affirming summary judgment for defendant because of insufficient evidence of gross irresponsibility when reporter verified information with police

leading case of *Robart v. Post-Standard*<sup>460</sup> a New York appellate court concluded that the plaintiff could not make a showing of gross irresponsibility when an experienced reporter relied on information obtained in a conversation with a state police public information officer.<sup>461</sup> Similarly, a recent trial court decision in the District of Columbia found insufficient evidence of negligence as a matter of law when a reporter relied on information obtained from a police "hot-line" that was set up to eliminate the need for reporters to interview police detectives personally.<sup>462</sup>

The rejection of an inference of negligence in these circumstances appears correct, at least when a reporter lacks sufficient time for further verification or when experience has shown that the information obtained from law enforcement officials generally was reliable.<sup>463</sup> Considering that the journalism profession has counseled its members that law enforcement officials do make mistakes and that information obtained from them must be verified,<sup>464</sup> reli-

officer and court personnel); *Sbarbati v. New York Post*, 10 MEDIA L. REP. (BNA) 2190, 2191 (N.Y. Sup. Ct. 1984) (granting summary judgment for defendant because of insufficient evidence of gross irresponsibility when reporters relied on prosecutor's press conference); *Horvath v. Ashtabula Tel.*, 8 MEDIA L. REP. (BNA) 1657, 1662-63 (Ohio Ct. App. 1982) (reversing verdict for plaintiff because of insufficient evidence of negligence when reporter relied on conversation with sheriff, prosecutor, and court personnel); *Benson v. Griffin Television, Inc.*, 593 P.2d 511, 514 (Okla. Ct. App. 1979) (affirming summary judgment for defendant because of insufficient evidence of negligence when reporter relied on statements by police suggesting that plaintiff might be suspect in police investigation); *Torres-Silva v. El Mundo*, 3 MEDIA L. REP. (BNA) 1508, 1512 (P.R. 1977) (affirming summary judgment for defendant because of insufficient evidence of negligence when reporter verified information with police).

460. 74 A.D.2d 963, 425 N.Y.S.2d 891 (1980), *aff'd*, 52 N.Y.2d 843, 418 N.E.2d 664, 437 N.Y.S.2d 71 (1981).

461. 74 A.D.2d at 963, 425 N.Y.S.2d at 892; *see also* H. SCHULTE, *supra* note 324, at 243 ("The answer for the reporter who insists on thorough coverage [of state police agencies] is to carefully cultivate sources in the beginning and rely heavily on effective telephone contact.").

462. *Phillips v. Washington Post*, 8 MEDIA L. REP. (BNA) 1835, 1837 (D.C. Super. Ct. 1982).

463. *See, e.g., LeBoeuf v. Times Picayune Publishing Corp.*, 327 So. 2d 430 (La. Ct. App. 1976).

The uncontroverted affidavits show that this report was given to the paper pursuant to an established policy. There was no indication of irregularity in the police procedures, such reports in the past had been accurate and this particular one was routine. The reporter had never known plaintiff previously and treated this as an ordinary news item. There is nothing to suggest that the reporter or the paper was placed on guard or to suggest a finding of "fault" in the publication of the May 9, 1974, article.

*Id.* at 431.

464. B. BROOKS, *supra* note 324, at 201 ("Crime stories often are written from the police report alone. In the case of routine stories many editors view such reporting as sufficient. Good newspapers, however, demand much more because police reports frequently are

ance on such officials should not constitute reasonable care per se.<sup>465</sup> Although reliance on law enforcement officials often will be consistent with professional custom and practice, and as such, constitute strong evidence of due care,<sup>466</sup> the plaintiff must be allowed to present his case to the jury if he can show that, in a particular fact situation, a reasonable journalist would have undertaken further attempts at verification.

Many journalists, and investigative reporters in particular, rely heavily on public records.<sup>467</sup> While a reporter may not be necessarily under a duty to trace an allegation to an authoritative source such as a public record whenever such a source is available, doing so effectively may undermine any inference of negligence.<sup>468</sup>

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inaccurate . . . [G]ood reporters do their own reporting and do not depend solely upon a police officer's account."); J. HOHENBERG, *supra* note 324, at 288 ("There can be no guarantee of police accuracy; in fact, an impressive body of evidence can be amassed to the contrary. That means police versions of names, addresses and other facts must be checked."); D. McHAM, *supra* note 324, at 10 ("Too many news organizations rely exclusively on the police report in building their stories . . . . Reliance on the police report and it alone in handling the police story may be risky."); *see also* A. CROWELL, *supra* note 324, at 43; M. STEIN, *supra* note 324, at 183-84; M. STEPHEN, *supra* note 324, at 133.

465. *See Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 414-15 (E.D. Pa. 1978) (denying summary judgment for defendant when newspaper allegedly obtained photograph of plaintiff from F.B.I. because jury should determine whether reporter's reliance on information provided by F.B.I. was reasonable).

466. *See* A. CROWELL, *supra* note 324, at 43 ("The reporter is advised to accept the word of the careful policeman who has always given him accurate information."); C. WARREN, *supra* note 324, at 379 ("Pressed for time and always confronted with the danger of libel, newsmen rely almost wholly upon tips and statements from policemen, complaint sheets and official records of arrest.").

467. *See* F. FIEDLER, *supra* note 324, at 268 ("Court documents, like police reports, provide all the information needed for routine stories."); J. NEAL & S. BROWN, *supra* note 324, at 225 (Many editors "argue with considerable justification that the best source is a written report or document because of its legal status and the care that has been taken in preparing it."); H. SCHULTE, *supra* note 324, at 410 ("Documents and information they contain serve as the key to nearly every significant investigative report produced by the press."); P. WILLIAMS, *supra* note 324, at 198 ("The legal system is probably as thorough and accurate in record keeping as any in American life."); *supra* note 438 and accompanying text.

468. *Lake Havasu Estates, Inc. v. Reader's Digest Ass'n*, 441 F. Supp. 489, 491 (S.D.N.Y. 1977) (granting summary judgment for defendant because of insufficient evidence of negligence when researcher read transcript of hearing and examined land sales records); *Freeze Right Refrigeration and Air Conditioner Servs., Inc. v. City of New York*, 101 A.D.2d 175, 184, 475 N.Y.S.2d 383, 390 (1984) (reversing denial of summary judgment for defendant because of insufficient evidence of gross irresponsibility when reporter relied on records of government agency); *Ritter v. Matthes*, 9 Media L. Rep. (BNA) 1744, 1748 (N.Y. Sup. Ct. 1983) (granting summary judgment for defendant because of insufficient evidence of gross irresponsibility when reporter attended government meetings and reviewed court records); *DeLuca v. New York News, Inc.*, 109 Misc. 2d 341, 349, 438 N.Y.S.2d 199, 204 (N.Y. Sup. Ct. 1981) (granting summary judgment for defendant because of insufficient evidence of



Given that professional journalists, however, appear to proceed on the working assumption that public records frequently are incorrect and should be verified when possible,<sup>469</sup> reliance on public records should not be conclusive proof of due care.

Frequently, a reporter will obtain information or verification from the media itself. Obviously, prior or contemporaneous press coverage of a subject provides a major source of information. From experience a reporter or editor will know whether a particular newspaper or magazine generally is trustworthy. Reliance on one of the major wire services,<sup>470</sup> or a reputable publication,<sup>471</sup> or the research and editorial work of a prior publisher of the particular arti-

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gross irresponsibility when, among other things, reporter read plaintiff's case file); *see also* Anderson, *supra* note 22, at 466 (reliance on official records should constitute reasonable care); *cf.* Time, Inc. v. Firestone, 424 U.S. 448, 464, 466-67 (1976) (Powell, J., concurring) (arguing that there was insufficient evidence of negligence in the record when, among other things, magazine's bureau chief read portions of divorce decree over the phone to New York office).

469. *See* B. BROOKS, *supra* note 324, at 319 ("The greatest danger arises from the one-sidedness and frequent inaccuracy of police reports. At best, the reports represent the officer's viewpoint."); E. BROUSSARD & J. HOLGATE, *supra* note 324, at 108 ("Always verify the information contained in police reports. Police officers sometimes make errors in spelling or errors of fact which you can compound by putting them in your story."); G. HAGE, *supra* note 324, at 81 ("[S]ummary arrest records . . . are notoriously incomplete. Often these records contain an initial entry at the time of arrest or inquiry but do not indicate disposition. A person may be questioned by police and released, but the latter fact may not be recorded."); *see also* E. DENNIS & A. ISMACH, *supra* note 324, at 90.

470. *See* Turner v. Harcourt, Brace, Jovanovich, 5 Media L. Rep. (BNA) 1437, 1438 (W.D. Ky. 1979) (granting summary judgment for defendant because of insufficient evidence of negligence when news magazine relied on information obtained from Associated Press and *New York Times*); Zetes v. Richman, 86 A.D.2d 746, 747, 447 N.Y.S.2d 778, 779 (1982) (reversing denial of dismissal of complaint due to insufficient evidence of gross irresponsibility when newspaper relied on wire service report); Torres-Silva v. El Mundo, 3 Media L. Rep. (BNA) 1508, 1511-12 (P.R. 1977) (affirming summary judgment for defendant because of insufficient evidence of negligence when, among other things, newspaper relied on U.P.I. news release); *see also* Robertson, *supra* note 26, at 202 (a newspaper should be able to rely reasonably on wire services unless the information received is highly improbable or especially easy to verify); *cf.* Time, Inc., v. Firestone, 424 U.S. 448, 464, 466-67 (1976) (Powell, J., concurring) (arguing that there was insufficient evidence of negligence in the record when, among other things, news magazine relied in part on dispatch from wire service).

471. *Cf.* McQuoid v. Springfield Newspapers, Inc., 502 F. Supp. 1050, 1058, 1059 n.10 (W.D. Mo. 1980) (granting summary judgment for defendant because of insufficient evidence of *reckless disregard* and suggesting that there would be insufficient evidence of negligence when local paper followed "customary practice in the newspaper business" by relying on story in another newspaper); National Rifle Ass'n v. Dayton Newspapers, Inc., 555 F. Supp. 1299, 1318 n.31 (S.D. Ohio 1983) (when granting summary judgment for the defendant because of insufficient evidence of *reckless disregard*; the Executive Director of Publications for the *plaintiff* testified that "it is customary practice to use information from other newspapers and publications without independent verification").

cle,<sup>472</sup> or the newspaper's own files,<sup>473</sup> or the expertise of a colleague<sup>474</sup> often should be sufficient to establish due care, especially in view of the cost and burden of constant verification. Indeed, the wire services are established and maintained on the assumption that they will provide an accurate source of information on which their members may rely.<sup>475</sup> Reliance on a prior published source, however, will not automatically negate an inference of negligence. Journalists are aware that their own files<sup>476</sup> as well as the files of the wire services<sup>477</sup> sometimes will contain errors. If the media

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472. See *Geiger v. Dell Publishing Co.*, 719 F.2d 515, 517-18 (1st Cir. 1983) (affirming summary judgment for defendant because of insufficient evidence of gross irresponsibility when editor was aware that defamatory passage had been published on four prior occasions without objection); *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 550-51, 416 N.E.2d 557, 566, 435 N.Y.S.2d 556, 565 (1980) (affirming summary judgment for defendant because of insufficient evidence of gross irresponsibility when republisher of book relied on work of original publisher).

473. See *W. BURROWS*, *supra* note 324, at 99 ("The 'morgue'—the place near the newsroom where 'clips' are kept—is almost always the starting point."); *M. MENCHER*, *supra* note 324, at 41 ("There are, of course, certain routine verifications a reporter must make . . . [for example when] [b]ackground information is taken from clips in the morgue. This kind of verification is essential to the reporter's work."); *H. STONECIPHER*, *supra* note 324, at 74 ("The newspaper's morgue, if there is one, should also be of service to the editorialist . . . what better place exists for the editorial writer to begin his research than with his own newspaper?"); see also *W. AGEE*, *P. AULT & E. EMERY*, *supra* note 324, at 183, *supra* note 434.

474. See *Ortiz v. Valdescastilla*, 102 A.D.2d 513, 478 N.Y.S.2d 895, 901 (1984) (granting summary judgment for defendant because of insufficient evidence of gross irresponsibility when publisher relied on experienced and reputable writer); see also *J. BOLCH & K. MILLER*, *supra* note 324, at 47 ("Consider your colleagues as additional or beginning sources, never as ends in themselves."); *A. CROWELL*, *supra* note 324, at 43 ("Unless something is obviously questionable, the copy editor accepts copy from the reporter who covers the beat involved, that is, from only the writer who has covered this kind of thing before and is respected for his accuracy in that area."); *S. ROSENFELD*, *RESEARCH & WRITING IN THE EDITORIAL PAGE* (1977) ("Our own reporters and editors in the news room are among our best sources."). But see *C. MACDOUGALL*, *supra* note 324, at 40 ("Verifying a story means more than checking the statements of different news sources against each other."), 41 ("many an editor has held up a story until she/he has had a chance to check on even a reliable reporter's work").

475. See *National Rifle Ass'n v. Dayton Newspapers, Inc.*, 555 F. Supp. 1320, 1317-18 (S.D. Ohio 1983) (In case in which court granted summary judgment for defendant because of insufficient evidence of *reckless disregard*, managing editor of defendant testified that wire services are professional organizations that may be relied on.); *supra* note 203 and accompanying text.

476. See *A. CROWELL*, *supra* note 324, at 44 ("The clips [in the newspaper morgue] are notorious for having preserved the newspaper's mistakes; any old clip is out-of-date and therefore potentially dangerous for use now."); *G. HOUGH*, *supra* note 324, at 177; see also *M. MENCHER*, *supra* note 324, at 286.

477. See *E. BROUSSARD & J. HOLGATE*, *supra* note 324, at 120 ("[W]ire copy is not transmitted free of errors. There are mistakes in spelling, facts, and general accuracy. It is risky just to rip copy off the teletype and air it."); *J. STOVALL*, *C. SELF & L. MULLENS*, *supra*

source is outdated, or in any other sense apparently unreliable, or if independent verification is easy and customary, an inference of negligence still may arise.<sup>478</sup> Generally, however, reliance on trustworthy press sources would be consistent with reasonable care.

### 3. Writing and Editing

#### (a) Notation and Transcription

Despite thorough research and use of reliable sources, a reporter may be negligent if his careless notation results in inaccurate and defamatory information being published. In *Schrottman v. Barnicle*,<sup>479</sup> for example, a reporter published an article attributing a racial slur to the plaintiff. The plaintiff, although admitting to having been interviewed by the reporter, denied having made the remark in question.<sup>480</sup> The plaintiff testified and the court found that the reporter had not taken notes in the plaintiff's presence.<sup>481</sup> The notes on which the reporter relied were introduced into evidence at the trial. The court observed that these notes covered seven different interviews and that the defamatory phrase appeared on the third page but was not set off in quotation marks.<sup>482</sup> In addition, "[t]he plaintiff's name [was] interlineated just above the phrase, but appears again several lines below. The balance of the notes between the plaintiff's name and that of the next interview subject mention some but not all of the statements and information attributed to the plaintiff in the article."<sup>483</sup> The Supreme Judicial Court of Massachusetts held that sufficient evidence existed to support a finding of negligence and remanded to the trial

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note 324, at 150 (Wire copy "needs the same hard-nosed examination the editor would give local copy . . . [W]ire copy is written quickly and under pressure . . . [T]he medium is uniquely subject to error, produced when the process is abbreviated by the force of deadline pressure."); see also E. BLISS & J. PATTERSON, *supra* note 324, at 86; M. MENCHER, *supra* note 324, at 236; M. STEPHENS, *supra* note 324, at 107.

478. See *General Prods. Co. v. Meredith Corp.*, 526 F. Supp. 546, 552 (E.D. Va. 1981) (sufficient evidence of negligence to deny summary judgment for defendant when reporter relied on memory of book he had read); *Triangle Publications v. Chumley*, 253 Ga. 179, 317 S.E.2d 534, 537-38 (Ga. 1984) (affirming denial of summary judgment for defendant on libel claim when *TV Guide* relied on television station submitting advertisement); *Melon v. Capital City Press*, 407 So. 2d 85, 87 (La. Ct. App. 1981) (sufficient evidence of negligence to reverse summary judgment for defendant when reporter relied on newspaper article).

479. 386 Mass. 627, 437 N.E.2d 205 (1982).

480. *Id.*, at \_\_\_\_\_, 437 N.E.2d at 208.

481. *Id.*

482. *Id.*

483. *Id.*

court for a specific finding on the issue with the observation:

[T]o determine whether [the reporter] was negligent with respect to accuracy, the judge could consider the testimony concerning [his] notetaking and research methods, as well as the clarity and reliability of the notes themselves. This evidence should be viewed in light of circumstances including the relative risk of harm and the presence or absence of time constraints against verification.<sup>484</sup>

This result is correct because to base a story on information obtained from "reliable" sources would be of little use if the reporter is unable to process the information in a manner designed to ensure that it is roughly as accurate when published as when obtained. Moreover, diligent methods of transcribing data are relatively elementary matters with which even the most neophyte journalist should be familiar.<sup>485</sup>

A false and defamatory statement sometimes will be published simply because a reporter was told one thing and inadvertently

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484. *Id.* at \_\_\_\_, 437 N.E.2d at 214; see also *Slocum v. Webb*, 375 So. 2d 125, 130 (La. Ct. App. 1979) (sufficient evidence of negligence to reverse dismissal of complaint exists when, among other things, reporter's notes contained inconsistent references to plaintiff and plaintiff's son, who was actually the subject of the criminal charges in issue); *Re v. Gannett*, 480 A.2d 662, 666 (Del. Super. Ct. 1984) (finding sufficient evidence of negligence when newspaper misstated information obtained from its own archives, but remanding for new trial on issue of damages); cf. *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 414, 418 (Tenn. 1978) (sufficient evidence of negligence to reverse directed verdict for defendant when reporter wrote inaccurate story, despite apparent reliance on police reports containing correct information).

485. In *Schrottman*, for example, the court did not believe that "expert testimony [was] necessary to enable triers of fact to apply a standard of ordinary negligence to the methods used by a journalist to record interviews. Due care in gathering information is not a technical matter for which a jury unaided by experts would have no basis for decision." 386 Mass. at \_\_\_\_, 437 N.E.2d at 215; see *B. BROOKS*, *supra* note 324, at 103 ("[n]ot taking any notes at all is risky. Only a few reporters can leave an interview and accurately write down what was said. Certainly no one can do it and reproduce direct quotes verbatim. You should learn shorthand or develop a system of your own."); *J. HOHENBERG*, *supra* note 324, at 219 ("Today's reporters, especially the younger ones, are likely to find that considerable notetaking will be more useful to them than the casual attitude of veteran reporters. The reason is that modern reporting must be more careful, more thorough and, if possible, more accurate than the news gathering of 35 or 40 years ago."), 224 ("Don't try to get information out of records in a hurry. Double check every entry. You can make mistakes by copying too hastily."); *P. WILLIAMS*, *supra* note 324, at 27-28 ("Transcribe your interview notes in clear English . . . . At the beginning of the interview notes, write a brief statement of your own about the color and circumstances surrounding the interview: where it was, who else was present, how the interviewee acted, one-sided telephone conversations you may have heard, questions that may not have been resolved in the interview. It may be two or three months before you write a story. Therefore, make your interview notes as lucid and as solid as possible so that when it is time to write them into a story, you and your teammates will be able to understand them."); see also *J. BRADY*, *supra* note 324, at 122-35; *E. BROUSSARD & J. HOLGATE*, *supra* note 324, at 106; *G. HOUGH*, *supra* note 324, at 28.

wrote down another.<sup>486</sup> Because this type of error often will be the result of an unavoidable momentary lapse in concentration or a mental transposition, prevention of its occurrence is difficult if not impossible. A fair degree of accuracy, however, may be ensured if the reporter or editor verifies the initial statements prior to publication. The feasibility of such verification will depend on several factors including the potential for defamatory harm, the likelihood of error, the degree of deadline pressure, and the availability of sources of verification.<sup>487</sup>

(b) *Tone and Language*

Although most litigation concerning journalistic negligence has focused on investigation and verification of the news story, a finding of negligence also may be based on a reporter's choice of language. Justice Harlan's opinion in *Curtis Publishing Co. v. Butts*, applying an objective-oriented gross negligence standard, placed reliance on the defendant's recently instituted "sophisticated muckracking" policy.<sup>488</sup> Journalists emphasize that the precise and accurate use of language is a primary objective of their profession.<sup>489</sup> A reporter's use of language that conveys an impression

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486. See, e.g., *Charlottesville Newspapers, Inc. v. Matthews*, — Va. —, —, 325 S.E.2d 713, 732, 734-35 (1985) ("reporter testified that his use of 'Miss' [instead of 'Mrs.'] was 'just a slip of memory'"). In this type of case, the jury often must resolve a credibility question because the source frequently will testify that he provided the reporter with the correct information and the reporter will testify that the defamatory information that was published was correctly quoted. See, e.g., *Mills v. Kingsport Times-News*, 475 F. Supp. 1005, 1007 (W.D. Va. 1979) (sufficient evidence of negligence to deny summary judgment for defendant when source denied conveying defamatory information to reporter); *Jones v. Sun Publishing Co.*, 278 S.C. 12, 14, 292 S.E.2d 23, 24 (sufficient evidence of negligence to affirm verdict for plaintiff when, among other things, U.S. Attorney testified that he had read correct name to reporter over the phone and reporter testified that he had not), *cert. denied*, 459 U.S. 944 (1982). Reporters realize that, to be able to defend themselves in such a case, they must make and retain careful notes and, in some instances, tape record source interviews if feasible.

487. See *infra* notes 404-425 and accompanying text.

488. 388 U.S. 130, 158-59 (1967); cf. *Levine v. CMP Publications*, 738 F.2d 660, 673 (5th Cir. 1984) (in finding negligence, jury could rely on fact that reporter was predisposed to write story about computer "crime" although plaintiff was only involved in civil litigation); see *supra* notes 209-212 and accompanying text.

489. See B. BROOKS, *supra* note 324, at 253 ("Precisely—that is the way words should be used. They should mean exactly what you intend them to mean."); E. BROUSSARD & J. HOLGATE, *supra* note 324, at 17 ("Your story also must be clear and concise . . . Your words must be selected very carefully and must convey the correct meaning."); F. FEDLER, *supra* note 324, at 20 ("To communicate effectively, reporters must also be precise, particularly in their selection and arrangement of words. Imprecision creates confusion and misunderstanding."); D. GARVEY & W. RIVERS, *supra* note 324, at 148 ("Each word you choose carries with it a sort of halo of related ideas. You have to know your language well to under-

significantly more sensationalistic and defamatory than the facts warrant may present a jury question on negligence. For example, in *Forrest v. Lynch* the Louisiana Court of Appeals found sufficient fault, presumably negligence, to sustain a verdict for the plaintiff when a staff member of the defendant newspaper wrote a headline using the pejorative term "rigged" to describe bid specifications even though the underlying article merely referred to the bids as "proprietary."<sup>490</sup> Conversely, a New York trial court found that a newspaper's characterization of a disabled teacher as a "no-show" was insufficient to give rise to an inference of gross irresponsibility.<sup>491</sup>

Determining whether an editor or reporter failed to use due care in choosing particular language or in creating a certain impression is a difficult and delicate undertaking. A broad spectrum of literary styles is protected by the first amendment, from the erudite and cautious to the blatant sensationalism of the tabloid, even though the latter may be out of step with the mores of the profession.<sup>492</sup> An inference of negligence should not arise merely

stand the full meanings of the words you select and their connotations for your listeners . . . . One poorly chosen word can change the meaning of a story."); M. MENCHER, *supra* note 324, at 144 ("Without accuracy of language, the journalist cannot make the story match the event."); H. SCHULTE, *supra* note 324, at 229 ("Precision is essential to total fairness. The importance of qualifying information cannot be overemphasized."); *see also* H. STONECIPHER, *supra* note 324, at 127.

490. 347 So. 2d 1255, 1257-58 (La. Ct. App. 1977), *cert. denied*, 435 U.S. 971 (1978); *see also* *Lawlor v. Gallagher Presidents' Report, Inc.*, 394 F. Supp. 721, 733 (S.D.N.Y. 1975) (sufficient evidence of negligence to grant judgment for plaintiff when reporter may have "carelessly distorted the information and magnified the wrong in order to sensationalize the story; . . . or negligently used inaccurate language to describe the true facts"); *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 885 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982) (reversing summary judgment for defendant apparently because of sufficient evidence of negligence when newspaper repeatedly used pejorative terms such as "fix," "bribe," and "payoff" to describe allegations against plaintiff despite defendant's inability to verify that plaintiff had engaged in any such conduct). Professor Robertson interprets *Lawlor* as establishing the following standard of journalistic conduct: "A publisher is negligent when he extemporizes on the facts known to him for purposes of sensationalism." Robertson, *supra* note 26, at 257.

Journalists recognize that they must take care to ensure that headlines are supported by underlying articles. *See* F. BASKETTE, J. SISSORS & B. BROOKS, *supra* note 324, at 197 ("The key to ensuring accuracy is close and careful reading of the story. Erroneous headlines result when the copyeditor doesn't understand the story, infers something that is not in the story, fails to portray the full dimension of the story, or fails to shift gears before moving from one story to the next.").

491. *DeLuca v. New York News, Inc.*, 109 Misc. 2d 341, 349, 438 N.Y.S.2d 199, 205 (N.Y. Sup. Ct. 1981).

492. SPJ, CODE OF ETHICS, *supra* note 323, Fair Play, No. 3 ("The media should not pander to morbid curiosity about details of vice and crime"); W. AGEE, P. AULT, & E. EMERY, *supra* note 321, at 68 ("Although sensational 'quotes' taken out of context make eye-catch-

because the defendant has offended the factfinder's taste or sense of decorum. Such an inference is permissible only when the tone or language at issue creates or magnifies the false and defamatory innuendo in a fairly egregious way. Any less extreme basis for the inference arguably would impose an unduly severe check on the reporter's task of conveying information in an interesting and readable manner. Applying this relatively strict approach, fact situations such as those in *Forrest v. Lynch*<sup>493</sup> probably should not warrant an inference of negligence.

(c) *Balance and Fairness*

The journalism profession places great emphasis on its obligation of fairness and objectivity.<sup>494</sup> The law of defamation, however, focuses on falsity rather than fairness. Although no legal duty currently exists to present the news in a balanced and unbiased manner, a persistent practice of reporting only the negative and defamatory aspects of a controversy arguably could give rise to an inference of negligence on the theory that such a practice demonstrates the defendant's unconcern with discovering and reporting the truth or even reveals an affirmative attempt to ignore the truth. At present, no case law exists on point. Evidence of this nature should be used with caution because the factfinder could easily but erroneously assume that proof of unfair selectivity should,

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ing headlines, they constitute irresponsible journalism."); A. CROWELL, *supra* note 324, at 40 ("[T]he modern American newspaper is not a sensational or spicy sheet. It tries to report the news responsibly and accurately in good taste"); F. FEDLER, *supra* note 324, at 59 (in writing a lead "[n]ever exaggerate, sensationalize or belittle."); H. GOODWIN, *supra* note 324, at 299-300 ("Hyping news by the use of exciting language, whether the facts justify it or not, and by taking little shortcuts with the facts, is a more common problem in their field than journalists like to admit. And the hyping is done not just by the reporters trying to make their stories sound better than they are but by editors trying to sell those stories for the front page, or even for prizes.").

493. 347 So.2d 1255 (La. Ct. App. 1977), *cert. denied*, 435 U.S. 971 (1978).

494. See SPJ, CODE OF ETHICS, *supra* note 323, Accuracy and Objectivity, No. 2 ("Objectivity in reporting the news is another goal, which serves as the mark of an experienced professional. It is the standard of performance toward which we strive."); Fairplay No. 1 ("The news media should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply."); APME, CODE OF ETHICS, *supra* note 323, Accuracy ("The newspaper should guard against inaccuracies, carelessness, bias or distortions through emphasis or omission."), Integrity ("The newspaper should strive for impartial treatment of issues and dispassionate handling of controversial subjects."); ASNE, STATEMENT OF PRINCIPLES, *supra* note 323, art. iv ("Every effort must be made to assure the news content is accurate, free from bias and in context, and that all sides are presented fairly."); see also WASHINGTON POST STANDARDS, *supra* note 323 (detailed discussion of the fairness principle); E. BROUSSARD & J. HOLGATE, *supra* note 324, at 90. K. METZLER, *supra* note 324, at 300.

in and of itself, give rise to liability rather than merely providing some support for an inference that the defendant failed to exercise due care in attempting to discover the truth. Conversely, evidence that a reporter provided balanced and objective coverage of a controversy or that he presented both sides of the story may demonstrate a reasonably careful attempt to ascertain and publish the truth.<sup>495</sup> As a general rule, an inference of due care based on fairness and impartiality would be more probative than a contrary inference grounded on imbalanced coverage.

(d) *Editorial Process*

An inference of negligence may be based on inadequate editorial procedures. In finding sufficient evidence of negligence to affirm a jury verdict for plaintiff the Seventh Circuit in *Gertz* emphasized the editor's cavalier attitude in rushing an article with obvious defamatory potential into print, absent sufficient verification.<sup>496</sup> Similarly, the New York Court of Claims recently declared that the editorial staff of a college newspaper had acted in a grossly irresponsible manner by proceeding to publish potentially defamatory letters to the editor without having adopted any guidelines or policies for verification although it ultimately found for the defendant on the ground that the state was not legally responsible for the tortious conduct of the student newspaper staff.<sup>497</sup> An inference of negligence could arise if an editor failed to employ the customary standard of care as by failing to verify a potentially defamatory allegation or by failing to question the reporter when

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495. *Freeze Right Refrigeration and Air Conditioning Servs., Inc. v. City of New York*, 101 A.D.2d 175, 185, 475 N.Y.S.2d 383, 390 (1984) (reversing denial of summary judgment for defendant when, among other things, reporter printed plaintiff's denial and explanation); cf. *Riley*, *supra* note 283, at 31.

496. 680 F.2d 527, 538-39 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983); See also *Levine v. CMP Publications*, 738 F.2d 660, 673-74 (5th Cir. 1984) (sufficient evidence of negligence to affirm verdict for plaintiff against publisher when evidence existed that editor worked closely with negligent reporter and failed to delete false and defamatory charges); cf. *Shutt v. Harte-Hanks*, 7 Media L. Rep. (BNA) 2559, 2562 (E.D. Mich. 1981) (granting summary judgment for defendant because of insufficient evidence of *reckless disregard* but noting that editor "may have been negligent in writing the headline without carefully reading the story"); *McCarney v. Des Moines Register and Tribune Co.*, 239 N.W.2d 152, 155 (Iowa 1976) (granting summary judgment for defendant because of insufficient evidence of *reckless disregard* but noting that editor clearly was negligent in confusing one story with another and failing to investigate); *Glover v. Herald Co.*, 549 S.W.2d 858, 861 (Mo.) (en banc) (reversing judgment for plaintiff because of insufficient evidence of *reckless disregard* but noting that rewrite man may have been negligent in confusing names received over the phone), *cert. denied*, 434 U.S. 965 (1977).

497. *Mazart v. State*, 109 Misc. 2d 1092, 1098, 441 N.Y.S.2d 600, 604 (Ct. Cl. 1981).



some reason existed to doubt the accuracy of a statement.<sup>498</sup> Presumably, an inference of negligence also might arise if an editor significantly changed the content of a story without adequate factual basis when defamatory potential was apparent.<sup>499</sup> In no sense, however, is an editor an insurer of accuracy. In the leading case of *Karaduman v. Newsday, Inc.*,<sup>500</sup> the New York Court of Appeals held that a managing editor could not be found "grossly irresponsible" when he had no reason to know that the reporters who wrote the story apparently fabricated information and cited nonexistent sources.<sup>501</sup> The court's approach in *Karaduman* is sensible and

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498. See J. STOVALL, C. SELF & L. MULLINS, *supra* note 324, at 123 ("Accuracy is the most important consideration of an editor. Accuracy is the central reason for much of what an editor does. . . . For an editor, the pursuit of accuracy is a state of mind. An editor must be willing to check everything he doubts and must be willing to doubt anything. He must cast a cold eye on the work of his reporters, even those with the most experience and best reputation; he must demand an accounting from them as much as from his unexperienced recruits. He must even be willing to doubt his own knowledge and experience and must occasionally recheck what he knows to be true."); see also F. BASKETTE, J. SISSORS & B. BROOKS, *supra* note 324, at 39 ("Of all of the copyeditor's duties, editing for accuracy is probably the most important. . . . Editors ensure accuracy by questioning the reporter about information obtained and the means of obtaining it, and by checking verifiable facts."); A. CROWELL, *supra* note 324, at 11 ("The editor's first job is to check for accuracy."); S. CRUMP, *supra* note 324, at 99, 435; J. HOHENBERG, *supra* note 324, at 231; A. PLOTNICK, *supra* note 324, at 66 ("If one enduring reform emerges from the Year of the Hoax, it is likely to be that editors will subject staff writing to the same scrutiny usually applied to outside contributors, especially those unsolicited.").

499. A. CROWELL, *supra* note 324, at 41 ("In handling potentially dangerous material the editor takes extra care to make as few alterations as possible. The slightest change can upset the accuracy of carefully chosen words and produce libel.").

500. 51 N.Y.2d 531, 416 N.E.2d 557, 435 N.Y.S.2d 556 (1980).

501. 51 N.Y.2d at 542-43, 416 N.E.2d at 562, 435 N.Y.S.2d at 561-62. The *Karaduman* court observed:

Newspapers, like any other organization, must operate through the delegation of responsibilities and chores to workers at the appropriate level of the organizational hierarchy. If a newspaper is to function with a modicum of efficiency and perform its important task of carrying information to its readers, its editors must feel reasonably free to rely upon the trustworthiness and integrity of their reporters, at least in the absence of any indication that the reporters in question are not to be trusted. A rule which, absent proof to the contrary, would permit an inference against an editor to be drawn upon a simple showing that his reporters had been "grossly irresponsible" on a single occasion would indirectly impose upon editors the burden of duplicating their reporters' work and rechecking with specificity all of their sources in order to establish a defense to libel claims arising from the potential misconduct of the reporters. Such a result would be completely unacceptable, since it would require a far higher degree of care than has previously been required in our case law . . . and would, more seriously, operate to dampen the free exercise of the rights guaranteed by the First Amendment.

We do not believe that this conclusion imposes an insuperable or unfair burden upon plaintiffs who seek to hold the editorial and managerial staff of a newspaper personally liable for the publication of defamatory material. Where the reporters have acted irresponsibly, an editor or managerial employee might be held personally liable, for

should apply when the standard is negligence instead of gross irresponsibility, although a slightly greater duty of verification may exist under the latter standard even in the absence of reason to doubt the accuracy of the statement.

While an editor may not be under a duty to verify every statement in an article prior to publication, an inference of negligence may arise if he fails to proofread his copy prior to distribution.<sup>502</sup> Proofreading is standard practice and should impose virtually no significant additional cost or burden on the media. Errors, however, will slip past even the careful proofreader.<sup>503</sup> Because the standard imposed is reasonable care rather than total accuracy, the fact that a mistake or typo was published should not raise an inference of negligence so long as the defendant followed procedures that were designed to catch most errors.<sup>504</sup> Just as carelessness at the editorial stage may support an inference of negligence, thorough editorial review should provide strong evidence of due care.<sup>505</sup>

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example, upon a showing by concrete proof that he knew or had reason to know that his reporter or his reporter's sources were unreliable or subject to question. Similarly, proof that the procedures used by the newspaper in checking its stories were generally slipshod or careless could perhaps support an inference that the particular editor or manager personally "acted in a grossly irresponsible manner" in allowing a statement to be published without making further inquiries about its accuracy.

*Id. see also* *Simonsen v. Malone Evening Telegram*, 98 A.D.2d 905, 470 N.Y.S.2d 898, 900 (1983) (affirming summary judgment for defendant because of insufficient evidence of gross irresponsibility when editor made further inquiries but had no reason to doubt accuracy of reporter's copy).

502. *Pettengill v. Booth Newspapers, Inc.*, 88 Mich. App. 587, 591, 278 N.W.2d 682, 684 (1979) (sufficient evidence of negligence to reverse summary judgment for defendant when editors apparently failed to proofread advertisement copy).

503. *See* A. PLOTNICK, *supra* note 324, at 7 ("Murphy's law assures us that no amount of proofreading will uncover all the errors of a work about to be published. The questions are, how many re-readings are reasonable and when should compulsiveness be applied? In my experience I have found that two editorial-level readings of galleys and two of pages will catch 99 percent of errors. Unfortunately, the remaining one percent are so often the mistakes that cause not just embarrassment but trouble . . . The editor who understands how people feel about such errors will compulsively check for them in third and fourth readings of page proofs.").

504. *See* *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 200, 341 N.E.2d 569, 572, 379 N.Y.S.2d 61, 65 (1975) ("The mere fact that the word trio was mistakenly substituted for the word duo should not, of itself, result in liability. A limited number of typographical errors . . . are inevitable.").

505. *See* *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 200, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 65 (1975) (affirming summary judgment for defendant because of insufficient evidence of gross irresponsibility when article was "checked by at least two persons other than the writer"); *Ortiz v. Valdescastilla*, 102 A.D.2d 513, 478 N.Y.S.2d 895, 901 (1984) (reversing denial of summary judgment for defendant because of insufficient evidence of gross irresponsibility when article was reviewed by two editors prior to publication); *Shapiro v. Newsday, Inc.*, 5 Media L. Rep. (BNA) 2607, 2608 (N.Y. Sup. Ct. 1980) (granting

*(e) Review by Counsel*

Failure to have an article reviewed by counsel prior to publication should not give rise to an inference of negligence. Although many newspapers seek legal advice regarding potential liability on sensitive stories,<sup>506</sup> the ultimate assessment of whether a story is accurate is basically an editorial rather than a legal judgment. If, however, after careful review, counsel advised an editor that a story was inaccurate and the newspaper published it regardless of such advice, an inference of negligence could arise if the editor had no legitimate reason for disagreeing with the assessment of counsel. In such a case, the relevant fact is the editor's decision to publish with reason to doubt the accuracy of the statement; that he disregarded the opinion of a lawyer is irrelevant. Conversely, review by counsel focusing on accuracy should tend to undermine an inference of negligence as would any systematic verification procedure. The Eleventh Circuit Court of Appeals, for example, affirmed a summary judgment for a record company and individual songwriters concluding that these defendants "took reasonable precautions to ensure the song's accuracy . . . . Several individuals, including two attorneys, repeatedly reviewed the lyrics."<sup>507</sup>

## 4. Retraction

Evidence that a periodical failed to publish a prompt retraction should constitute some proof of negligence if the defendant had been presented with information clearly demonstrating that the allegations in the story were false. The journalism profession has accepted an obligation to retract or correct inaccurate information.<sup>508</sup> Although at least one court has taken the position that con-

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summary judgment for defendant because of insufficient evidence of gross irresponsibility when editors followed "standard procedures" in selecting photograph to accompany article).

506. B. BROOKS, *supra* note 324, at 391 ("[M]ost investigative stories require consultation with the newspaper's lawyer before publication."); S. CRUMP, *supra* note 324, at 144 ("Since many investigative stories are controversial by their nature . . . newspapers often have an attorney specializing in libel and invasion of privacy read the articles and review the investigative methods and sources with reporters before publication to determine if a libel suit could successfully be defended."); J. STOVALL, C. SELF & L. MULLINS, *supra* note 324, at 237 ("[W]hen in doubt about whether a story is libelous, consult an attorney.").

507. *Valentine v. CBS, Inc.*, 698 F.2d 430, 432 (11th Cir. 1983). The court also appears to have concluded that the defendants did not recognize the arguable defamatory meaning and were not negligent in failing to discover it. *But see Jenoff v. Hearst Corp.*, 453 F. Supp. 541, 547 (D. Md. 1978), *aff'd*, 644 F.2d 1004 (4th Cir. 1981) (sufficient evidence of negligence to deny summary judgment for defendant despite fact that "defendant's editors and attorneys carefully scrutinized the articles prior to publication").

508. See SPJ, CODE OF ETHICS, *supra* note 323, Fairplay, No. 4 ("It is the duty of news

duct following publication has no bearing on whether the publisher proceeded with due care,<sup>509</sup> this approach takes an unduly narrow view of the scope of the defendant's duty. A failure to retract may provide evidence that, on the whole, the defendant was unconcerned with accuracy, both at the time of the initial publication and at the point when the defendant learned that the information was false. Conversely, the defendant could undermine the inference by proving that it failed to retract because it had grounds to believe that the allegations were accurate, in spite of the plaintiff's complaint.

In addition, the plaintiff's reputation may be damaged both by the defendant's failure to retract and by the initial publication. The reader may assume that when a newspaper fails to repudiate a defamatory allegation, the newspaper is reaffirming its belief in the truth of the statement. To the extent that the defendant does or should have reason to believe that a previously published statement concerning an individual is false, the defendant may be under a duty to use reasonable care to correct the inaccuracy. From this perspective of a continuing duty, a failure to retract can be quite probative. A publisher quite possibly may not have been negligent in publishing a statement initially but may have been grossly negligent in failing to publish a correction after having learned that the statement was false and defamatory. Although not disproving that the initial publication was the result of negligence, a prompt retraction may demonstrate that the defendant maintained an overall concern for truth and accuracy that should be considered as part of the context of the publication. Furthermore, retractions can mitigate damages.

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media to make prompt and complete correction of their errors."); APME, CODE OF ETHICS, *supra* note 323, Accuracy ("It should admit all substantive errors and correct them promptly."); ASNE, A STATEMENT OF PRINCIPLES, *supra* note 323, art. iv. ("Significant errors of fact, as well as errors of omission should be corrected promptly and prominently."); M. MENCHER, *supra* note 324, at 350 ("When a libel has been committed, a retraction should be published."); F. BASKETTE, J. SISSORS & B. BROOKS, *supra* note 324, at 139 ("when the defense of truth is not clearly evident, the publisher should make the decision to correct."); *see also* H. GOODWIN, *supra* note 324, at 292; E. BROUSSARD & J. HOLGATE, *supra* note 324, at 159.

509. *Walters v. Sanford Herald, Inc.*, 31 N.C. App. 233, 236, 228 S.E.2d 766, 767-68 (1976) (granting summary judgment for defendant because of insufficient evidence of negligence and noting that failure to retract is of no probative value on issue of fault).

### C. Summary

Since *Gertz* was decided by the Supreme Court in 1974, approximately forty-two written opinions have addressed the issue of proof of negligence and another twenty-three have discussed proof of gross irresponsibility.<sup>510</sup> In the negligence cases, the defendants have prevailed in fourteen cases—either on motions to dismiss, summary judgment or directed verdict at trial, or on appeal.<sup>511</sup> The plaintiffs have obtained or retained verdicts in fourteen cases,<sup>512</sup>

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510. Cases that adopt a negligence standard but do not address the proof of fault issue or cases which affirm a verdict for a private figure plaintiff with no discussion of the negligence issue have been included.

511. See *Valentine v. CBS, Inc.*, 698 F.2d 430 (11th Cir. 1983) (affirming summary judgment for defendant); *Turner v. Harcourt, Brace, Javanovich*, 5 Media L. Rep. (BNA) 1437 (W.D. Ky. 1979) (granting summary judgment for defendant); *Lake Havasu Estates, Inc. v. Reader's Digest Ass'n*, 441 F. Supp. 489 (S.D.N.Y. 1977) (granting summary judgment for defendant); *Phillips v. Washington Post Co.*, 8 Media L. Rep. (BNA) 1835 (D.C. Super. Ct. 1982) (granting summary judgment for defendant); *Karp v. Miami Herald Publishing Co.*, 359 So. 2d 580 (Fla. Dist. Ct. App. 1978) (affirming summary judgment for defendant); *El Amin v. Miami Herald Publishing Co.*, 9 Media L. Rep. (BNA) 1079 (Fla. Cir. Ct. 1983) (granting summary judgment for defendant); *LeBouef v. Times Picayune Publishing Corp.*, 327 So. 2d 430 (La. Ct. App. 1976) (affirming summary judgment for defendant); *Wilson v. Capitol City Press*, 315 So. 2d 393 (La. Ct. App. 1975) (reversing verdict for plaintiff); *Cefalu v. Globe Newspaper Co.*, 8 Mass. App. Ct. 71, 391 N.E.2d 935 (1979) (affirming summary judgment for defendant), *cert. denied*, 444 U.S. 1060 (1980); *Dwyer v. Globe Newspaper Co.*, 6 Media L. Rep. (BNA) 2176 (Mass. Super. Ct. 1980) (judgment for defendant); *Walters v. Sanford Herald, Inc.*, 31 N.C. App. 233, 228 S.E.2d 766 (1976) (granting summary judgment for defendant); *Horvath v. Ashtabula Tel.*, 8 Media L. Rep. (BNA) 1657 (Ohio Ct. App. 1982) (reversing verdict for plaintiff); *Benson v. Griffin Television, Inc.*, 593 P.2d 511 (Okla. 1979) (affirming summary judgment for defendant); *Torres-Silva v. El Mundo, Inc.*, 3 Media L. Rep. (BNA) 1508 (P.R. 1977) (affirming summary judgment for defendant); see also *KARK-TV v. Simon*, 280 Ark. 228, 656 S.W.2d 702 (1983) (finding sufficient evidence of negligence but reversing verdict for plaintiff on other grounds).

512. See *Levine v. CMP Publications*, 738 F.2d 660 (5th Cir. 1984) (affirming verdict for plaintiff); *Gertz v. Robert Welch, Inc.* 680 F.2d 527 (7th Cir. 1982) (affirming verdict for plaintiff), *cert. denied*, 459 U.S. 1226 (1983); *Jenoff v. Hearst Corp.*, 453 F. Supp. 541 (D. Md. 1978), *aff'd*, 644 F.2d 1004 (4th Cir. 1981) (affirming verdict for plaintiff); *Lawlor v. Gallagher Presidents' Report, Inc.*, 394 F. Supp. 721 (S.D.N.Y. 1975) (granting judgment for plaintiff); *Re v. Gannett Co.*, 480 A.2d 662 (Del. Super. Ct. 1984) (finding sufficient evidence of negligence to support verdict for plaintiff but remanding for new trial on damages); *Miami Herald Publishing Co. v. Frank*, 442 So. 2d 982 (Fla. Dist. Ct. App. 1983) (affirming verdict for plaintiff); *Miami Herald Publishing Co. v. Ane*, 423 So. 2d 376 (Fla. Dist. Ct. App. 1983), *aff'd*, 458 So.2d 239 (Fla. 1984) (affirming verdict for plaintiff); *Kohn v. West Hawaii Today, Inc.*, 65 Hawaii 584, 656 P.2d 79 (1982) (affirming verdict for plaintiff); *Forrest v. Lynch*, 347 So. 2d 1255 (La. Ct. App. 1977), *cert. denied*, 435 U.S. 971 (1978) (affirming verdict for plaintiff); *Liquori v. Republican Co.*, 8 Mass. App. Ct. 671, 396 N.E.2d 726 (1979) (affirming verdict for plaintiff); *Gazette, Inc. v. Harris*, \_\_\_ Va. \_\_\_, 325 S.E.2d 713 (1985) (affirming verdict for plaintiff); *Charlottesville Newspapers, Inc. v. Matthews*, \_\_\_ Va. \_\_\_, 325 S.E.2d 713 (1985) (affirming verdict for plaintiff); *Port Packet Corp. v. Lewis*, \_\_\_ Va. \_\_\_, 325 S.E.2d 713 (1985); *Jones v. Sun Publishing Co.*, 278 S.C. 12, 292 S.E.2d 23 (reinstating verdict for plaintiff), *cert. denied*, 459 U.S. 944 (1982).

and have successfully resisted or obtained reversal of defense motions for summary judgment, directed verdict or judgment notwithstanding the verdict in fourteen cases.<sup>513</sup> Of the gross irresponsibility cases, the defense has prevailed in nineteen actions,<sup>514</sup> and

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513. *General Prods. Co. v. Meredith Corp.*, 526 F. Supp. 546 (E.D. Va. 1981) (denying summary judgment for defendant); *Mills v. Kingsport Times-News*, 475 F. Supp. 1005 (W.D. Va. 1979) (denying summary judgment for defendant); *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406 (E.D. Pa. 1978) (denying summary judgment for defendant); *Rancho La Costa, Inc. v. Penthouse Int'l, Ltd.*, 8 Media L. Rep. (BNA) 1865 (Cal. Super. Ct. 1982) (vacating judgment for defendant and granting new trial); *Triangle Publications, Inc. v. Chumley*, 253 Ga. 179, 317 S.E.2d 534 (1984) (affirming denial of summary judgment for defendant); *Newell v. Field Enters. Inc.*, 91 Ill. App. 3d 735, 415 N.E.2d 434 (1980) (reversing summary judgment for defendant); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982) (reversing summary judgment for defendant); *Melon v. Capital City Press*, 407 So. 2d 85 (La. Ct. App. 1981) (reversing summary judgment for defendant); *Slocum v. Webb*, 375 So. 2d 125 (La. Ct. App. 1979) (reversing dismissal of complaint); *Schrottman v. Barnicle*, 386 Mass. 627, 437 N.E.2d 205 (1982) (remanding for specific finding on negligence); *Pettengill v. Booth Newspapers, Inc.*, 88 Mich. App. 587, 278 N.W.2d 682 (1979); *Greenberg v. C.B.S., Inc.*, 69 A.D.2d 693, 419 N.Y.S.2d 988 (1979) (affirming denial of summary judgment for defendant); *Embers Supper Club, Inc. v. Scripps-Howard Broadcasting Co.*, 9 Ohio St. 3d 22, 457 N.E.2d 1164 (1984) (reversing directed verdict for defendant); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978) (affirming reversal of directed verdict for defendant).

514. *Geiger v. Dell Publishing Co.*, 719 F.2d 515 (1st Cir. 1983) (affirming summary judgment for defendant); *Gaeta v. New York News, Inc.*, 62 N.Y.2d 340, 465 N.E.2d 802, 477 N.Y.S.2d 82 (1984) (reversing denial of summary judgment for defendant); *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 416 N.E.2d 557, 435 N.Y.S.2d 556 (1980) (affirming summary judgment for defendant); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975) (affirming summary judgment for defendant); *Poltnow v. Poughkeepsie Newspapers*, 11 Med. L. Rptr. (BNA) 1528 (N.Y.A.D. 1985) (affirming dismissal of complaint against defendant); *Ortiz v. Valdescastilla*, 102 A.D.2d 513, 478 N.Y.S.2d 895 (1984) (granting summary judgment for defendant); *Freeze Right v. New York City*, 101 A.D.2d 175, 475 N.Y.S.2d 383 (1984) (reversing denial of summary judgment for defendant); *Simonsen v. Malone Evening Telegram*, 98 A.D.2d 905, 470 N.Y.S.2d 898 (1983) (affirming summary judgment for defendant); *Carlucci v. Poughkeepsie Newspapers, Inc.*, 88 A.D.2d 608, 450 N.Y.S.2d 54, *aff'd*, 57 N.Y.2d 883, 442 N.E.2d 442, 456 N.Y.S.2d 44 (1982) (reversing denial of dismissal for defendant); *Zetes v. Richman*, 86 A.D.2d 746, 447 N.Y.S.2d 778 (1982) (reversing summary judgment for plaintiff and dismissing complaint); *Robart v. Post-Standard*, 74 A.D.2d 963, 425 N.Y.S.2d 891 (1980), *aff'd*, 52 N.Y.2d 843, 418 N.E.2d 664, 437 N.Y.S.2d 71 (1981) (reversing denial of summary judgment for defendant); *Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, 445 N.Y.S.2d 156 (1981) (reversing denial of summary judgment for defendant); *Grobe v. Three Village Herald*, 69 A.D.2d 175, 420 N.Y.S.2d 3 (1979), *aff'd*, 49 N.Y.2d 932, 406 N.E.2d 491, 428 N.Y.S.2d 676 (1980) (affirming summary judgment for defendant); *Campo Lindo for Dogs, Inc. v. New York Post Corp.*, 65 A.D.2d 650, 409 N.Y.S.2d 453 (1978) (affirming summary judgment for defendant); *Sbarbati v. New York Post*, 10 MEDIA L. REP. (BNA) 2190 (N.Y. Sup. Ct. 1983) (granting summary judgment for defendant); *Ritter v. Matthes*, 9 Media L. Rep. (BNA) 1744 (N.Y. Sup. Ct. 1983) (granting summary judgment for defendant); *Shapiro v. Newsday, Inc.*, 5 Media L. Rep. (BNA) 2607 (N.Y. Sup. Ct. 1980) (granting summary judgment for defendant); *DeLuca v. New York News, Inc.*, 109 Misc. 2d 341, 438 N.Y.S.2d 199 (Sup. Ct. 1981) (granting summary judgment for defendant); *Salcedo v. El Diario Publishing Co.*, 5 Media L. Rep. (BNA) 2308 (N.Y. Sup. Ct. 1979) (granting summary judgment for defendant);

the plaintiffs have resisted summary judgment in three.<sup>515</sup>

As previously discussed,<sup>516</sup> courts finding clear and convincing evidence of reckless disregard often have relied on several different evidentiary factors to support their conclusions. The great majority of courts that have found sufficient evidence of negligence, however, have relied on only one<sup>517</sup> or two<sup>518</sup> of these factors. Indeed, only *Gertz v. Robert Welch, Inc.*,<sup>519</sup> which also contains a finding of reckless disregard to support an award of punitive damages,

515. *Hawks v. Record Printing*, \_\_\_ A.D.2d \_\_\_, 486 N.Y.S.2d 463 (1985) (affirming denial of summary judgment for defendant); *Meadows v. Taft Broadcasting Co.*, 98 A.D.2d 959, 470 N.Y.S.2d 205 (1983) (affirming denial of summary judgment for defendant); *Hogan v. Herald Co.*, 84 A.D.2d 470, 446 N.Y.S.2d 836, *aff'd per curiam*, 58 N.Y.2d 630, 444 N.E.2d 1002, 458 N.Y.S.2d 538 (1982) (affirming denial of summary judgment for defendant); *cf. Mazart v. State*, 109 Misc. 2d 1092, 441 N.Y.S.2d 600 (Ct. Cl. 1981) (finding sufficient evidence of gross irresponsibility but reversing on other grounds).

516. See *supra* notes 306-08 and accompanying text.

517. *General Prods. Co. v. Meredith Corp.*, 526 F. Supp. 546 (E.D. Va. 1981) (failure to update); *Jenoff v. Hearst Corp.*, 453 F. Supp. 541 (D. Md. 1978), *aff'd*, 644 F.2d 1004 (4th Cir. 1981) (failure to contact obvious source); *Rancho La Costa, Inc. v. Penthouse Int'l, Ltd.*, 8 Media L. Rep. (BNA) 1865 (Cal. Super. Ct. 1982) (no source); *Miami Herald Publishing Co. v. Frank*, 442 So. 2d 982 (Fla. Dist. Ct. App. 1983) (failure to contact obvious source); *Triangle Publications, Inc. v. Chumley*, 253 Ga. 179, 317 S.E.2d 534 (1984) (inadequate verification); *Kohn v. West Hawaii Today, Inc.*, 65 Hawaii 584, 656 P.2d 79 (1982) (failure to consult authoritative source); *Forrest v. Lynch*, 347 So. 2d 1255 (La. Ct. App. 1977) (misleading language), *cert. denied*, 435 U.S. 971 (1978) *Schrottman v. Barnicle*, 386 Mass. 627, 437 N.E.2d 205 (1982) (inadequate notation); *Pettengill v. Booth Newspapers, Inc.*, 88 Mich. App. 587, 278 N.W.2d 682 (1979) (failure to proofread); *Enibers Supper Club, Inc. v. Scripps-Howard Broadcasting Co.*, 9 Ohio St. 3d 22, 457 N.E.2d 1164 (1984) (failure to contact obvious source); *Greenberg v. CBS Inc.*, 69 A.D.2d 693, 419 N.Y.S.2d 938 (1976) (inadequate verification); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978) (contradictory information).

518. *Lawlor v. Gallagher Presidents' Report, Inc.*, 394 F. Supp. 721 (S.D.N.Y. 1976) (failure to contact obvious source and misleading language); *Newell v. Field Enters., Inc.*, 91 Ill. App. 3d 735, 415 N.E.2d 434 (1980) (contradictory information and inadequate investigation); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982) (unreliable source and misleading language); *Melon v. Capital City Press*, 407 So. 2d 85 (La. Ct. App. 1981) (unreliable source and failure to contact authoritative source); *Slocum v. Webb*, 375 So. 2d 125 (La. Ct. App. 1979) (contradictory information and inadequate notes); *Liquori v. Republican Co.*, 8 Mass. App. 671, 396 N.E.2d 726 (1979) (contradictory information and failure to contact obvious source); *Gazette, Inc. v. Harris*, \_\_\_ Va. \_\_\_, 325 S.E.2d 713 (1985) (inadequate verification and lack of expertise); *Charlottesville Newspapers, Inc. v. Matthews*, \_\_\_ Va. \_\_\_, 325 S.E.2d 713 (1985) (inadequate verification and lack of expertise); *Port Packet Corp. v. Lewis*, \_\_\_ Va. \_\_\_, 325 S.E.2d 713 (1985) (inadequate verification and sufficient lead time); *Jones v. Sun Publishing Co.*, 278 S.C. 12, 292 S.E.2d 23 (failure to contact obvious or authoritative source), *cert. denied*, 459 U.S. 944 (1982); see also *KARK-TV v. Simon*, 280 Ark. 228, 656 S.W.2d 702 (1983) (unreliable source and inadequate verification) (reversing verdict for plaintiff on other grounds).

519. 680 F.2d 527 (7th Cir. 1982) (no source, unreliable source, failure to contact obvious source, failure to contact authoritative source, failure to update, inadequate editorial process), *cert. denied*, 459 U.S. 1226 (1983)

*Miami Herald Publishing Co. v. Ane*,<sup>520</sup> and *Levine v. CMP Publications*<sup>521</sup> rely on a variety of factors. The subjective focus of the reckless disregard standard coupled with the clear and convincing evidence requirement probably best explain the more detailed showings in the reckless disregard cases. Certain types of evidence seem to prove persuasive in cases in which the plaintiffs are successful. Plaintiffs in negligence actions frequently prevail, at least in defeating defense motions for summary judgment, by establishing that the defendants published false and defamatory material, despite knowledge of contradictory information, or without a source, or based on an unreliable source, or after having failed to contact an obvious source, or after having failed to consult an authoritative source, or after having otherwise failed to verify adequately.<sup>522</sup> The great majority of cases in which the defendant has prevailed have included affirmative proof of thorough investigation and verification.<sup>523</sup> Verification is the key issue in most negligence litigation.

In a recent article, Professor Franklin concluded that the courts have yet to provide clear guidelines regarding the contours of journalistic negligence, that some of the rules which have developed are in conflict, and that the media is losing a disproportionate amount of the litigation.<sup>524</sup> Consequently, he concluded that the introduction of negligence principles into defamation law is unsuccessful and should be abandoned.<sup>525</sup> Based on the study of case law, this conclusion seems, at the very least, premature and unduly pessimistic. The obvious reason that a comprehensive set of judicial guidelines for establishing negligence in journalism has not yet developed is simply that there have not been a sufficient number of reported negligence cases in the ten year period following *Gertz*. Forty-two reported cases have discussed the proof of negligence issue (approximately sixty-five, if New York's gross irresponsibility cases are included) spread over fifty states, Puerto Rico, and the federal courts. This small number of cases amounts to an average of less than one case per jurisdiction, certainly not enough prece-

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520. 423 So. 2d 376, 389 (Fla. Dist. Ct. App. 1983), *aff'd*, 458 So.2d 239, 242 (Fla. 1984) (contradictory information, unreliable source, and failure to contact obvious source).

521. 738 F.2d 660 (5th Cir. 1984) (contradictory information, denial, and serious charges).

522. *See supra* notes 518-22.

523. *See supra* notes 455-78 and accompanying text.

524. Franklin, *Negligence*, *supra* note 22, at 277-81.

525. *Id.*



dent to establish a well-developed set of guidelines. Professor Franklin is correct in suggesting that uncertainty still must exist, which in turn, could promote press self-censorship. The relatively limited amount of reported negligence litigation during this period, however, suggests that the press need not be overly concerned with the threat of excessive litigation or the frequent imposition of liability. Presumably, if a far greater number of cases had been reported during the same period, commentators would argue vigorously that the press is "chilled" by the very volume of the litigation, even if that caselaw resulted in a set of guidelines which provided greater predictability.

Whether negligence cases will be litigated at an increased rate in the future is unclear. The great majority of reported cases continue to be brought by public figures or public officials who must meet the actual malice standard. During the same ten year period in which the courts addressed the meaning of journalistic negligence in approximately forty-two cases, they discussed proof of actual malice in over one hundred and fifty cases.<sup>526</sup> Perhaps public figures and public officials are defamed by the press with greater frequency, or perhaps public officials and public figures are more likely to consider the cost and burden of litigation worthwhile. The press should consider the surprisingly slow development of precedent in this area more as a blessing than a curse.

No reason exists to believe that reasonably clear standards will not eventually develop, albeit gradually, as more cases are litigated. Professor Franklin contrasts *Wilson v. Capitol City Press*,<sup>527</sup> in which a Louisiana appellate court found that reliance on an apparently reliable law enforcement source constituted due care as a matter of law, with *Mathis v. Philadelphia Newspapers, Inc.*,<sup>528</sup> in which, on similar facts, a federal district court held that the question of due care was for the jury. From this comparison he argues that the case law is developing contradictory principles.<sup>529</sup> Certainly, to expect that a variety of courts developing negligence principles through the common-law method necessarily would achieve results that are wholly consistent would be naive, especially considering that each case will be influenced by its own nuances as well as disagreements among journalists concerning the

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526. This figure was derived by counting the cases decided between 1974 and 1984 discussed in section II of this Article.

527. 315 So. 2d 393 (La. Ct. App. 1975); see *supra* note 459.

528. 455 F. Supp. 406 (E.D. Pa. 1978); see *supra* note 465 and accompanying text.

529. Franklin, *Negligence*, *supra* note 22, at 267-68.

type of procedures that should be employed in a given situation. The press is not in complete agreement on the degree of reliance that should be placed on law enforcement sources.<sup>530</sup> An attorney would not be able to advise a media client that placing sole reliance on a seemingly reliable law enforcement source inevitably would result in a favorable decision if litigation ensued. Based on present case law, however, an attorney could inform his client that a solid majority of courts would consider such reliance strong evidence of due care and, so long as no apparent reason were present to doubt the information obtained, the chances of prevailing on summary judgment at trial, or reversal of a verdict on appeal, would be quite high.<sup>531</sup> Success is not an absolute certainty. Even the stringent actual malice standard with its clear and convincing evidence rule cannot provide that degree of protection. The result is reasonably predictable, however, and should be more than sufficient to check any significant self-censorship. At a minimum, this new degree of predictability should prove less intimidating to the press than the *certainty* that existed under the strict liability rule prior to *Gertz*.

Professor Franklin also suggests that the rejection of the professional standard by several state courts may lead to *ad hoc* decisionmaking, and thus further uncertainty.<sup>532</sup> As previously discussed,<sup>533</sup> a professional standard definitely would be preferable from the standpoint of predictability. Several courts, however, have adopted a professional standard, and there is no reason to believe that courts which have chosen an ordinary care standard will ignore evidence of relevant professional custom and practice. Citation to the professional journalism manuals throughout the latter part of this Article is intended to emphasize that, in addition to expert testimony, extensive literature is available which often can prove useful to the parties and courts in efforts to apply negligence principles in this area. Moreover, as a few courts have noted, many of the issues that will be litigated in journalistic negligence cases can be resolved quite properly and quite consistently with professional practice through the application of common sense.<sup>534</sup> If courts consider evidence of professional standards when presented and articulate their reasoning explicitly, a body of prece-

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530. Compare *supra* note 464 with *supra* note 466.

531. See *supra* notes 458-63 and accompanying text.

532. Franklin, *Negligence*, *supra* note 22, at 266.

533. See *supra* notes 333-48 and accompanying text.

534. See *supra* note 344 and accompanying text.

dent can develop that is relatively consistent both internally and with professional practice. Despite a few aberrations in the present case law,<sup>535</sup> the great majority of decisions, including those in which the plaintiffs have prevailed, are consistent with common sense, professional custom as represented in the journalism manuals, and standard negligence analysis.

Finally, Professor Franklin expresses concern that the plaintiffs are reaching juries and winning and retaining verdicts with far greater frequency than under the actual malice standard.<sup>536</sup> Assuming plaintiffs are prevailing with higher frequency, however, the very point of the Supreme Court's decision in *Gertz* was that private figure plaintiffs deserve a more realistic opportunity to prevail in a defamation litigation than they would receive under the actual malice standard. Although plaintiffs have been more successful under the negligence than under the actual malice standard, defendants have still prevailed in a significant number of negligence cases.<sup>537</sup> Moreover, under New York's gross irresponsibility standard, defendants have prevailed with virtually as much frequency as under the actual malice test.<sup>538</sup> Professor Franklin is concerned that even if defendants win a substantial number of cases they still will be forced to litigate most cases through the appellate stage.<sup>539</sup> This reasoning builds on Professor Anderson's argument that the expense of litigation may promote self-censorship.<sup>540</sup> Although this analysis is basically sound, a few points should be considered. Defendants have prevailed at the summary judgment stage in several of the negligence cases.<sup>541</sup> Furthermore, defendants who have prevailed at the summary judgment stage in actual malice cases often must defend their judgments through one

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535. See *Slocum v. Webb*, 375 So. 2d 125 (La. Ct. App. 1979); *Forrest v. Lynch*, 347 So. 2d 1255 (La. Ct. App. 1977), *cert. denied*, 435 U.S. 971 (1978); *supra* notes 358, 484 & 490.

536. Franklin, *Negligence*, *supra* note 22, at 272-73. Professor Franklin relied on two studies that he has conducted, Franklin, *Winners*, *supra* note 28, at 492; Franklin, *Litigation*, *supra* note 28, at 824-25, as well as a study by the Libel Defense Resource Center, Bulletin No. 6, 35, 42 (1983). These studies suggest that plaintiffs tend to be more successful in negligence cases than in actual malice cases. The number of negligence cases reviewed in these studies, however, is relatively small.

537. See *supra* note 511.

538. See *supra* note 514-15.

539. Franklin, *Negligence*, *supra* note 22, at 272, 278.

540. See Anderson, *supra* note 22, at 430-41; Massing, *Libel Chill: How Cold Is It Out There?*, COLUM. J. REV., May/June 1985 at 31; see also *supra* notes 22-24 and accompanying text.

541. See *supra* note 511.

or more levels of appellate litigation as well. At least to date, with the exception of *Rancho La Costa, Inc. v. Penthouse International, Ltd.*,<sup>542</sup> and the possible exception of *Gertz v. Robert Welch, Inc.*,<sup>543</sup> which involved proof of both negligence and actual malice, all of the reported negligence cases appear relatively simple and straightforward. The large complex defamation cases, such as *Westmoreland v. CBS, Inc.*,<sup>544</sup> *Herbert v. Lando*,<sup>545</sup> *Tavoulareas v. Washington Post Co.*,<sup>546</sup> and *Sharon v. Time, Inc.*<sup>547</sup> that have involved extensive discovery and lengthy trials generally appear to be brought by public official or public figure plaintiffs who must meet the stringent actual malice standard. In *Gertz v. Robert Welch, Inc.*,<sup>548</sup> the Supreme Court essentially rejected the notion that the press has a constitutional right to avoid the cost and burden of virtually all private figure defamation cases. Assuming that private figure plaintiffs will be allowed to reach the jury and to win and retain judgments with greater frequency than public figure or public official plaintiffs, this trend will not result necessarily in significantly greater press self censorship, given the limited volume and scope of the litigation that has occurred to date.

As an institution, the press appears vigorously committed to the professional objectives of accuracy and fairness. On a daily basis, the press attempts to meet an internal standard that is far more stringent than that which is imposed by the law of negligence. If a reporter or editor decides to delay or even to kill a story on account of an inability to verify, the decision more likely will be based on considerations of professionalism than fear of litigation or liability.

#### IV. CONCLUSION

During the twenty-year period since *New York Times v. Sullivan* was decided, courts have addressed proof of actual malice in a large number of reported cases. While the issue can be complex, courts have developed principles that provide some guidance. Even

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542. 8 Media L. Rep. (BNA) 1865 (Cal. Super. Ct. 1982); see Bruck, *The La Costa Trial: Will Grandstanding Lawyers And Sloppy Journalists Make Bad Law?*, AM. LAW., Mar., 1982, at 24; Granelli, *La Costa Fights for Its Name*, NAT'L L. J., Jan. 4, 1982, at 6; Granelli, *The Penthouse Case Aftermath*, NAT'L L. J., May 31, 1982, at 3.

543. 680 F.2d 527 (7th Cir. 1982), cert. denied, 459 U.S. 1226 (1983).

544. 596 F. Supp. 1170 (S.D.N.Y. 1984).

545. 441 U.S. 153 (1979), on remand, 596 F. Supp. 1178 (1984).

546. 759 F.2d 90 (D.C. Cir. 1985).

547. 599 F. Supp. 538 (1984).

548. 418 U.S. 323, 341-49 (1974); cf. *Herbert v. Lando*, 411 U.S. 153, 176 (1979).

though the ultimate focus of the standard is subjective in nature, that the defendant's awareness of probable falsity may be established through circumstantial evidence is well recognized. The subjective focus approach coupled with the clear and convincing evidence standard provide a high level of protection for the press. Although press defendants prevail in most cases, the plaintiff's barrier is not insurmountable. A plaintiff can prevail if he is able to establish several objective factors that are highly probative of reckless disregard. In a large number of cases, press defendants prevail by establishing affirmatively that they proceeded with due care. The case law suggests that, in practice, the actual malice standard operates basically as intended. The vast majority of courts seem to understand its nature and apply it properly. Although the actual malice standard provides a large measure of protection to the press and presents a formidable obstacle to public official and public figure plaintiffs, it certainly does not preclude recovery in all cases.

In the ten years since *Gertz v. Robert Welch, Inc.* was decided, a body of precedent has begun to emerge that fleshes out the standards of negligence and gross irresponsibility. Even though some principles have developed, not enough reported cases exist to provide clear guidelines on all questions that are likely to arise. Under New York's gross irresponsibility standard, defendants prevail in a large number of cases. Plaintiffs seem to prevail on the proof of negligence issue, however, more frequently than do defendants. Nevertheless, defendants continue to establish due care in a significant number of cases. In view of the objective nature of the negligence standard and the absence of the clear and convincing evidence rule, plaintiffs need not produce as much affirmative proof of fault to resist summary judgment or retain a verdict under the negligence standard as under the actual malice test. So long as courts take account of professional custom and practice, a body of precedent defining journalistic negligence eventually should develop with sufficient clarity to provide guidance to journalists, attorneys, judges, and juries.

Although the standards for proving fault in media defamation cases are not wholly free of difficulties, nonetheless when applied, they work reasonably well. Despite criticism from representatives of both press defendants and aggrieved plaintiffs, the *Sullivan* and *Gertz* approaches to the proof of fault issue should be retained.