

LIBEL-PROOFING FOR COPY EDITORS

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LIBEL-PROOFING FOR COPY EDITORS

Avoiding libel is, in many ways, similar to crossing a busy street safely. The pedestrian has to look both ways to see what's coming. The journalist has to look both ways to see who is making an assertion that is about to be distributed, whether in print, over the air or, increasingly, on the Web. If the answer is no one, it is the journalist, and his or her employer, who is stating the claim as a fact, often without meaning to do so. Here is a real-life example of what can go wrong when a writer fails to put serious charges in the mouth of whoever uttered them.

John Updecrick, a real estate appraiser in Monroe, N.Y. was examining a house a few years ago when he discovered five feet of water in the basement. The mortgage broker arranging a refinancing asked Updecrick to pretend that it wasn't there.

Who said the mortgage broker told the appraiser to lie? Look around. It's not the appraiser. It's not anyone. So it must be the newspaper, stating this as a fact. The repair job is simple. It is to make the invisible appear visible. Someone (very likely the appraiser) said that the broker asked the appraiser to ignore the water. It's the reporter's job to name that someone, so that the claim has a foundation. That is not a bulletproof solution. Publishing a false statement made by someone else may expose the publisher to liability. But attributing a claim like this to someone would go a long way toward negating what a plaintiff would have to prove to hold the publisher liable. (Holding the speaker liable is a different issue.)

Making the writer think about the attribution may also push him or her to question the underlying assertion. If it's a provable fact, that's the best defense there is to a libel claim. As the lawyers say, truth is the ultimate defense. If, on the other hand, the statement is dubious, thinking about the need for attribution may lead the writer or editor to think about the necessity – or even the fairness – of using it, or eliminating or hedging it. In the appraiser example, for instance, little would be lost by changing “the mortgage broker arranging a refinancing asked him to pretend that it wasn't there,” to “someone who wanted to see a transaction go through asked him to pretend that it wasn't there.” The point is still made, but without the finger-pointing.

Let's understand what libel is. It's a false (as in erroneous or inaccurate or maybe misleading) statement about a person – or a company – that harms the subject's reputation. It is not every false statement. If there is no harm to one's reputation, there is no libel. The false statement is an error, which should be corrected, but that is an issue of good journalistic practice, not of libel law.

False statements that cause some sort of damage to the subject are the kinds of assertions that are libelous. In the pantheon of lawsuits that an injured person might bring, a libel suit is what the legal system calls a tort – not so different from a lawsuit stemming from a car crash. Someone injured in a crash has to do two things: prove that someone else (often another driver) was at fault, and establish his or her own injuries. Someone suing for libel has to prove that the statement was false, and prove some damages that resulted from its dissemination.

Statements made by people whom a reporter quotes (or paraphrases) generally have no special immunity, though there are important exceptions. If the subject quoted claims that the statement is false, he or she could sue the person quoted, or the publisher or broadcaster, or both. An explanation that the accusation is unproved, or maybe even dubious, would be good journalism.

I think I hear murmurs in the back of the room: What about the *Sullivan* doctrine? Until the middle of the 20th century, pundits and publishers worried that treating libel as just another tort could expose them to ruinous liability, and that fear made them more hesitant to expose wrongdoing. That reticence eventually caught the eye of the United States Supreme Court in 1964 and revolutionized American libel law. Until then, the primary defense in a libel case was that the supposedly libelous statement is true. It is still the best defense. There cannot be libel, no matter how damaging a statement is, nor how powerful or important the subject is, if it is accurate. Truth was an absolute defense, and is still the best defense. But publishers sought broader protection from libel claims.

The issue, as the industry saw it, was how much leeway, if any, newspapers should have if they unintentionally made errors. The answer, it turns out, is quite a lot. In a historic case, *New York Times v. Sullivan*, the Supreme Court ruled that a public official had to show more than just that a statement was false. The court said that under the free-press clause of the First Amendment, a public official had to show that a statement was not only false, but also that the defendant knew that what it was publishing was false, or published it in reckless disregard of whether or not it was false.

The court called that test “actual malice.” That’s misleading, because the court wasn’t using the word malice in the dictionary sense – spite or ill will. Malice in libel law is knowledge of falsity or serious doubt about truth.

The Supreme Court later extended the *Sullivan* doctrine to public figures. Classifying someone as a public or private figure can be tricky. The mayor of a big city, for example, is probably a public figure at all times, no matter whether he or she is testifying before Congress or vacationing in the Bahamas. The part-time mayor of a small town is probably not a public figure in an article about her pizzeria. A police officer, for example, is a public figure when accused of fixing tickets. He or she is probably not a public figure if accused of not paying a contractor's bill.

Even though *Sullivan* does not apply to private citizens, the Supreme Court, in a subsequent case, said private figures could not collect punitive damages (which are added to actual damages, and can be significantly higher than the actual damages, because they are designed to punish the defendant) unless they could prove actual malice. In some states, a timely correction by a news organization will also prevent a plaintiff from collecting punitive damages.

It may sound odd, but the best advice for journalists is to forget about *Sullivan*, rather than plan to rely on it. Actual malice is a wonderful concept for libel lawyers and publishers, but not

for reporters and editors. Their job is to use a mix of knowledge, caution and skepticism to make sure that false statements about public officials and public figures do not get published, or broadcast, so that they will never have to rely on the actual-malice defense. After all, an essential, but embarrassing component of that defense is “yes, we were wrong, but. ...”

Situations in which accuracy cannot be proved because the statement is based on unidentified sources who have been promised confidentiality are a murky area of law. Some courts have told juries in such circumstances that they are free to assume that the source does not exist, or have ruled that the defendant cannot refer to sources it will not produce in court. All a reporter or editor can do in such a case is to assess the risk of a successful libel suit if they use anonymous sources who offer information that could be challenged as false.

Unlike absence of malice, in which error is conceded, there are defenses that can be raised without admitting error. Reporters and editors need to know about them.

Truth, of course, is the ultimate defense. Under American law, a reporter cannot be thrown in the dungeon for making a statement, no matter how odious, if it's true. Another defense is **opinion**. An opinion cannot be libelous. The tricky part is that the courts do not always divide fact and opinion the way journalists traditionally do, based on the type of article they appear in – news, on the one hand, and editorials, opinion articles and letters to the editor on the other. A statement in a restaurant review that the food is unappetizing is pure opinion. It may cause harm, but it's not libel. An opinion that contains an implied fact (a statement, for instance, that salad is served at the wrong temperature and an implication that that happens because the kitchen help was told to disregard refrigeration rules, when that is not the case), can be libelous. A statement in that same review that the kitchen is riddled with roaches purports to be fact, and is libelous if there are no roaches.

The same is true for columns and editorials. A statement that a college football coach “couldn't coach a junior-high team successfully” is opinion. A statement that the same coach's team was losing because the coach was stealing money meant for its training is presented as a fact, not as an opinion, and woe be to the writer if it can be disproved.

Insults are not necessarily libelous. A court once ruled that describing an overweight, balding man as looking like a “hard-boiled egg,” wasn't defamatory.

Opinion is protected even if it's in the news columns. A newspaper reported in its main news section: “A man was convicted yesterday of raping a 6-year-old girl at knifepoint under a roller coaster in a busy amusement park. The despicable defendant faces life in jail when he is sentenced next month.”

Most editors would delete despicable. That's good journalism. But if it stays in, it is not libelous. Despicable is opinion, not fact. Our profession doesn't encourage that in the news columns. But the courts do not draw that distinction. If the lead said that “the despicable man “was arrested yesterday on charges of raping a 6-year-old girl,” despicable might be a problem, because it arguably assumes the rape charge to be true. The support for it in the published example comes from the conviction. Calling a rapist despicable is a reasonable (maybe almost universal) opinion, and there's no longer an issue of whether the subject of the report is a rapist.

Another important defense is that a libelous statement is within an **official proceeding**. That is a broad category, from the high-falutin' to the mundane, and everything in between. It covers statements made at any official proceeding, from a United States Senate floor debate to a

county legislature's debate to a criminal trial (for murder or passing bad checks) to a village sewer board meeting.

Official reports and documents give journalists the same protection as statements at official proceedings. The police blotter, the civil suit filed in the local courthouse, the school board report, are all documents whose claims are safe to report, whether they are true or not. But they must be attributed, and they must be accurate. Good journalism, of course, requires that anyone who is attacked or maligned or accused of wrongdoing in any such document be given an opportunity to respond. In fact, if the subject is a public figure, the inclusion of his or her comment, or an attempt to get it, might be evidence that there was no actual malice.

A caveat: if a law or court rule declares certain kinds of legal documents, like divorce papers or juvenile court complaints, sealed, and a reporter gets a copy (perhaps from one side) publication of the claims in that document may not be protected by the official-document rule.

In a situation where there is no protection based on a fair and accurate report of an official proceeding, a newspaper can be liable for reporting a libelous statement made by someone else, unless the actual-malice rule applies. In a high-profile story, reporting such a statement may be unavoidable, but if it appears untrue, the fact that the statement is dubious should always be included. Again, in those situations, consult with a lawyer.

A minority of courts has created another defense for journalists, known as *neutral reportage*. It might be thought of as the he-said, she-said rule. If a report covers both sides of a public issue – by seeking comment from both sides, for example – the publisher has no liability for one side's false statements. Other courts have declined to adopt that standard.

A defense that is most likely to be raised by a Web-based publisher (which includes newspapers' Web sites) is the federal *Communications Decency Act*. It protects operators of Web sites – including newspapers and broadcasters that maintain Web sites – from responsibility for libelous comments posted by third parties. The theory behind that protection is that the Web site proprietor cannot possibly review all third-party commenters' statements for accuracy, and that making the host liable for all those statements would stifle open discussion.

Confronted by the inability to reach a deep pocket news organization, some lawyers representing people who say they were libeled by third parties have asked the Web sites that have immunity to give them information about the posters' online identities, in the hope of finding them. As one libel lawyer put it: the instinct is to say no, but some of the comments are so inane that you give whatever information you have; you have to pick your fights.

There are other, fairly uncommon, defenses to libel. You cannot *libel the dead*. So descendants can't successfully sue over the statement "Lincoln was a philanderer." But journalists' obligation is to the truth. They should ask, questions like "Who says?" and "are we sure" and "is there a historian who might dispute this?"

There is no such thing as *group libel*. Neither an individual nor a group can successfully sue over the statement that "all used-car salesmen are crooks," because the statement doesn't affect a specific person or narrow group. The narrower the group that is tarred, the higher the risk of li

ability. “All the used-car salesmen at Smilin’ Joe’s Car Palace in Bumrush are crooks” might get plaintiffs’ lawyers salivating, if they could identify but one honest salesman.

Corrections do not provide a defense to a libel claim. Perhaps for that reason, some publications have a policy of not repeating the error in a correction, for fear of making matters worse. Others, though, do repeat it, to make it easier for readers to understand what is being corrected. Saying only that John Jones was charged with drunken driving is not as helpful as adding the information that he was not, as previously reported, charged with vehicular homicide.

The real-life examples that follow focus not on battles over who is a public figure but on garden-variety libel – the kind that reporters and editors may well be able to prevent in the self-review or editing process. A lot of the examples come out of crime reporting, which is not surprising. As the Associated Press Stylebook and Briefing and Media Law notes, after a discussion of *Sullivan*, “perhaps 95 of 100 libel suits result from the routine publication of charges of crime, immorality, incompetence or inefficiency.”

A look at examples of troublesome copy shows problems that crop up again and again. The issues they present are sometimes overlapping or the exact problem is blurred.

The examples here are divided into 10 broad categories. But the issues can be arbitrarily sorted into groups – flavors if you will, or maybe deadly sins. The first five, grouped collectively, are **Who Said?** errors. They occur because the writer has failed to look both ways before crossing the street, and reported something said by someone else or something he or she assumes from the known facts is true, like guilt or a confession, as **unattributed fact**.

A variant occurs when no one in the article, not even the reporter, seems to be the source for something. It’s just thrown in as an **accepted fact**. And when the attribution is to no one; in effect, the publication itself is the source, and an unreliable one, at that.

Another variant is **induced reliance**, which occurs when a reporter assumes or is lulled into believing that some official-sounding pronouncement, like a confession or a private group’s formal report or a prosecutor’s statements at a news conference, to be true.

Yet another variant is an erroneous – and maybe blatantly wrong – statement hiding behind quotation marks and lacking any indication that it’s not true. Call it **lurking libel**. It occurs all the time in the blogosphere, and rarely in print. But when it does appear in print, it’s problematic, because it may suggest reckless disregard of truth or falsity. That’s because a statement by a third person, whether a direct quotes or a paraphrase, doesn’t give the publisher a defense, unless, of course, the statement is made in an official proceeding or an official document.

Then there is **peripheral libel** – a statement, often unattributed, about someone who is a peripheral figure in an article – often a long article, in which the problematic statement is deeply buried. The writers’ and editors’ antennas sometimes don’t give statements about such bit players the scrutiny they should – sometimes to everyone’s regret.

Why is attribution so crucial? Because it may offer a defense. While republication of something erroneous that is not privileged (by the official-proceeding exception, for instance) may

still be libelous, attribution may offer a full or partial defense, if it is an official statement or from an official record.

The other five sins are *plain error*, where someone gets the facts wrong, *implication*, which suggests, often by juxtaposition, that something is true when it is not, *tone*, which may convey actual malice, *ambiguity* and *headlines* that contradict or are not supported by the copy. We'll take a look at some examples

Unattributed facts

An upscale version of Thelma and Louise has been sued by a real estate broker for posing as wealthy apartment buyers to pilfer diamonds and other luxury items from Manhattan pads.

While touring the multimillion dollar apartments, the team would take turns distracting the brokers, swiping everything they could get their sticky little fingers on.

How does the reporter know what these defendants did while visiting ritzy apartments? Was he or she there? The swiping in the second paragraph needs attribution. The real estate broker's claim in the lead won't do – especially if the broker doesn't win this civil suit.

Spirited out of Guantanamo Bay in the dead of night, an al Qaeda henchman fidgeted and smiled in a Manhattan courtroom yesterday as he was charged in a pair of deadly bombings.

Did someone use the term al Qaeda henchman? The copy is not clear. Was it the claim of an official, or the reporter's assumption? If it was an assumption, it's not only unfair, but also legally dangerous because the United States government has admitted that after investigations, it determined that some of the detainees held at Guantanamo Bay were not terrorists, and sent them home. So the mere fact that this defendant was at Guantanamo does not prove that he is an al Qaeda henchman – a claim never addressed anywhere else in the story. (Of course, truth might emerge as a defense, but that's not an excuse for reporting what can't be proved at the time.) It's time to find that old villain, Who Said, again, and determine who used the al Qaeda label. If no one did, it should be deleted.

A driver was charged with drug possession after police found 51 bags of cocaine in his underpants.

The district attorney's office said the driver was arrested after police pulled him over for several traffic violations. After patting him down, they discovered the drugs.

Who said the police found 51 bags of coke in his underwear? The police aren't quoted as saying that. The newspaper said it, because when you look around, there's no one else speaking. If the charges collapse, how many zeros might there be on a settlement check?

CHECKPOINT: Police officers set up a drunken-driver checkpoint yesterday. The officers check every fifth car that passes through the checkpoint, handing out pamphlets and asking drivers if they have been drinking. Officers give a man a sobriety test in the background. The man was found to be impaired and taken into custody.

Photos may not lie, but their captions can. This is a caption that ran with a photo of a man, clearly identifiable, handcuffed, surrounded by police officers. This man wasn't found, in any legal sense, to be impaired. He was accused of that. The fix is to not jump-start justice. The man was accused of being impaired, not convicted of it and will, presumably, have his day in court.

A police sergeant shot and wounded a 27-year-old man who ran a stop sign and then tried to drive away after he was pulled over, the police said. The car had drugs in it, but the man did not appear to have a weapon.

How does the reporter know the car had drugs in it? Was he or she there? Did he or she then take the drugs to a lab for analysis? Once again, the fix is basic journalism. Someone said the car had drugs in it. Attribute the claim to that person.

A woman about to testify against her accused rapist was attacked by the pervert, who had stalked her for months and then pounced on her outside her home and slit her throat, cops said yesterday.

What pervert? Presumably the accused rapist. But he hasn't been convicted of anything, so a pervert he isn't. At least not yet. Change "pervert" to "defendant."

A hands-on biology professor has been busted for giving personal anatomy lessons to two female students, police said. They said the frisky-fingered prof was demonstrating anatomy by pointing to parts of a student's body. A former student claimed that a year ago, the pervy prof had some students hand in papers, and when she handed in hers, he squeezed her breast.

One problem here is that “hands-on” assumes the truth of the charges. The other is that the police almost certainly didn’t use the phrase frisky-fingered prof nor did the ex-student use the words pervy prof. That’s the newspaper speaking, at its peril if the charges aren’t true or are plea-bargained down to something less serious.

Eight current or former police officers were charged yesterday with accepting thousands of dollars in cash to drive a caravan of firearms into the state, an act of corruption that brazenly defied the city’s strenuous efforts to get illegal guns off the streets.

Who’s calling this a brazen act of corruption? No one I can see. In fact, it was prosecutors, but the failure to attribute that claim makes this sound like an editorial, and one that convicts the defendants without a trial. Inserting “which prosecutors called” before “an act of corruption” fixes the problem.

The aged beef at a well-known steak house was treated better than a 66-year-old former salad maker who is suing the famed restaurant for age discrimination.

After complaining to an owner, about the alleged mistreatment, Pepper Green was demoted to “shrimp and onion peeler,” according to the complaint filed in Brooklyn Federal Court, which seeks unspecified monetary damages.

In an attempt at a cutesy approach, the lead states mistreatment of the employee as a fact. Of course, it isn’t at this juncture. The repair is to put the claim in the claimant’s mouth: A 66-year-old former salad maker at a well-known steak house says the aged beef there was treated better than he was. He is suing the famed restaurant for age discrimination.

City officials missed a glaring clue that could have exposed a corruption scheme that resulted in the indictment of one Bloomberg administration’s top housing officials.

What corruption scheme? The one stated as a fact in the lead? Or the one that is just an allegation until one or more officials is convicted? Putting alleged before corruption fixes this.

A high-end madam who boasted she used cops as security and made millions by peddling flesh – including underage girls – to rich and powerful clients has been busted after a probe.

Did the madam (or is she maybe a reputed madam?) really boast about these things to the

writer? If not, then to whom? And was the writer present? If the answers are no and no, the copy has to say who is claiming that this woman made these boasts.

The children's father turned violent. One night he flung a pot from the stove at Ms. Appel. Then he pounded her skull into the wall. The police came and arrested him.

An arrest doesn't prove an assault, or who did it. The best fix is more reporting. Was there a conviction? If not, or if the outcome is unknown, the skull-pounding needs to be attributed to someone – Ms. Appel, the arresting officer, someone. (And for the sake of good journalism, the reporter needs to try to get a response from the reputed pounder.)

Kenny Kramer, the inspiration for Kramer on "Seinfeld," filed a \$1 million defamation suit against a former writer on the show for defaming him and his business in a new book.

Would that the legal world were that simple. You sue someone for defamation and it's an established fact. That's what this lead says: the writer was sued for defaming Mr. Kramer. Diners shake salt out of salt-shakers. Put allegedly between "for" and "defaming."

Accepted fact

A cruise ship passenger will testify in a civil suit against the cruise line this week that she was raped by a bartender who slipped her a Mickey, but prosecutors were stymied by cruise management.

If the passenger is going to testify that cruise management stymied prosecutors, all is fine. But if she is just testifying about being raped, who is it who's saying that the cruise ship's management stymied prosecutors? No one, which means the newspaper is stating it as fact. When there are two elements in a sentence, and each is a claim or allegation, each needs its own attribution. The copy can't be fixed until the big question – who said stymied? – is resolved.

A state senator was slapped with a federal indictment Monday charging him with lying to FBI agents about a liquor store in which he was a secret partner.

All well and good. Except that the hidden ownership was not an established fact, but part of the government's claim. Only that's not what the lead says. It needed to say he was accused of lying about a liquor store in which prosecutors said he was a secret partner.

A teenager who the authorities said started a fatal house fire last week now faces another murder charge after a second victim died of injuries relating to the arson.

This assumes the truth of one element of a criminal case – that there was arson. But that’s just an allegation. If the suspect’s defense is that the fire was accidental, the newspaper has stated as fact something damaging and perhaps never to be proved. All that’s needed is “alleged” before the arson.

A teenager who allegedly helped two other teens beat a black man in a bias attack told cops he’s being threatened by them for agreeing to testify against them, police sources said.

The problem here is that the lead states as fact that the two other teens beat the black man. All that’s alleged is that the teen who has turned on them was also involved. Beginning with “A teenager who police say told them he helped two other teenagers accused of beating a black man” would solve the problem.

A variant is what might be called an attenuated fact. The attribution is murky, or is too far away to provide clarity.

An elderly nursing home patient was left dazed and bloody after a vicious altercation with a nurse – but the facility kept the victim’s next of kin in the dark for days, the woman’s shell-shocked family claims.

Is the family saying that there was a vicious altercation with a nurse? Let’s hope so, because the article goes on to say that the police questioned the nurse, but did not bring any charges against her. If the family made the claim, the repair is simple. Move the attribution: An elderly nursing home patient was left dazed and bloody after a vicious altercation with a nurse, her shell-shocked family claims. And they say the facility kept them in the dark for days. If the family didn’t make the claim of a bloody altercation, who did? That needs to be added.

Induced reliance

“I’m sorry, I’m sorry. I didn’t mean to shoot him,” an alleged gunman told cops.

He plays a chef on the Sopranos, but Jack Trades cooked himself a recipe for disaster when he was busted for drunken-driving yesterday. The actor admitted to cops he drank four glasses of wine before getting behind the wheel and driving home.

How do the reporters of these two articles know that someone confessed? Probably, they don’t. What they know is that the police said someone confessed. The fix is proper attribution: “The police said that the suspect confessed.”

The court papers make clear that Ms. De La Place did not participate in robbing drug dens. Rather, her role was to hook up with a man, who, in turn, pointed her uncle and his helper toward robbery targets.

Most court papers, including complaints and indictments, don't show anything, or make anything clear. They only describe one side's claims. The wording should be hedged to reflect that these are one side's accusations or allegations. There might be a public-records defense available to a claim that the statement was libelous, but there could be a counterargument that this was not an accurate report based on public records, because such records do not make anything clear – they merely allege it. And worse, Ms. De La Place's role in the robberies is not even attributed to the court papers. It's not attributed to anyone or anything. It's a bald statement of fact.

DNA from a cigarette butt confirmed that the suspect, who was arrested last week, is the rapist wanted for attacks in four states.

Alvin Sann was arrested last year after DNA extracted from a glass he had used at a restaurant matched DNA from a series of high-profile murders and rapes.

“Confirmed” and “matched” are not givens. Prosecution experts may testify that DNA links these people to these crimes. Defenses experts may rebut them. Then jurors will decide what the DNA proves. Until then, attribute the claims to someone. They are not stand-alone facts.

The cop busted for spying with a surveillance camera was actually peeping on his own stepdaughter for sick sexual gratification, officials revealed Monday.

A rising National Football League star, Aaron Hernandez, was slapped with a murder charge Wednesday as prosecutors revealed he ordered a friend out of a rental car, stood over him and then shot him five times with a .45 caliber handgun.

The man accused of gunning down three shopkeepers execution-style bizarrely told cops he was a CIA operative ordered to kill Jews by Arab men who paid him for his role in the murders, explosive court documents revealed yesterday.

Reveal connotes a ring of truth. But prosecutors and court documents (even explosive ones)

do not reveal things and by some alchemy turn them into facts. There are lots of other perfectly good verbs out there that can solve this problem, like charged, claimed, alleged, and said.

Lurking libel

Many in Buffalo lustily cheered for someone who delivered blunt tirades about taking out the trash in Albany. But then another side of Carl Paladino came to the fore: someone who had forwarded racist and pornographic e-mails, who got into a violent argument with a reporter and who called gay pride parades “disgusting.”

“Absolutely, I was thinking of voting for him,” said Vera Fune, who works for the federal government in Buffalo. “But then he’s making gay slurs, he’s threatening to beat up that guy on camera, and people see all that. You don’t want a mobster as governor.”

People called Carl Paladino, the losing 2010 New York gubernatorial candidate, a lot of things, but no one ever called him a mobster, and there’s no evidence that he is or was one. The speaker being quoted may think he is. Thinking it doesn’t make it so. Quotation marks offer no protection for what’s lurking inside them. The fix is simple. End the quote after “all that.” That’s why computers have delete keys. Putting an obviously false statement in someone else’s mouth is no defense to libel. And the very fact that the falsity is obvious makes the problem worse.

Peripheral libel

Libel lawyers often say that it is not the people who have central roles in news reports who sue, but people who are on the periphery. Perhaps that is because the journalistic process focuses on the main figures, and lapses about the minor players do not set off alarm bells, even though there is often a lack of attribution. That could be because the peripheral players were never asked to comment, and are angered by what they see as errors and the lack of an opportunity to have been given their say. As David McCraw, the *New York Times* lawyer, said, “Over and over, the minor characters are the main plaintiffs.”

The following examples did not, as far as we know, lead to libel suits. But they might have.

As early as last year, a cover story about Tom Cruise attracted not only the usual denials from the Church of Scientology but also an angry denunciation from Bert Fields, Mr. Cruise’s lawyer and a longtime Hollywood fixer.

This was deep in a 1,500 word story focused on *Vanity Fair* magazine. And no one handling the copy noticed that someone who was mentioned exactly once was called a “long-time Hollywood fixer.” Libelous to call a lawyer that? Maybe. Maybe even more so when it is the publication doing the name-calling, because there’s no one else to attribute the description to. One solution is to ask the reporter to support the statement. But precisely because Fields is so peripheral, a better solution might be to describe him as Cruise’s lawyer and say nothing potentially defamatory.

“The celebrities get into a mode where they’re making a lot of money and they just don’t have any conception about the fact that if they’re making \$10 million on a movie, \$5 million goes to taxes and \$2 million to managers or whoever,” said Namo Droppa, chairman of the estates division of High-Test California Realty, who has worked with Nicolas Cage, Ryan Seacrest, Harrison Ford, and Ozzy Osbourne, among others. “They end up with \$3 million and a lifestyle of \$200,000 a month and think they can afford a second or third house for \$5 million.”

This paragraph was (you guessed it) buried deep in an article about whether property owned by celebrities sells at a premium. It is not clear whether Droppa is saying that Cage, Seacrest and Osbourne live beyond their means, in which case a “he said of them” attribution is needed after \$5 million, or whether he is just citing them as clients to burnish his own credentials. The fix is to ask Droppa directly what he means. If he is just saying they are among his clients, their names need to be far away from profligate Hollywood types, or, better yet, not included at all, because they weren’t described as having sold property. If Droppa is criticizing the celebrities he named for spending beyond their means that needs to be made clear, and they are owed the opportunity to respond.

Mr. Dee was arrested in July 2004. He pleaded guilty to Kidnapping, murder and other crimes before turning state’s witness, hoping for leniency. He said he made about \$600,000 from loan sharking over his life as a mobster, spending it on “clothes, cars, dinner, drinks.”

After his arrest, Mr. Dee said, he, his girlfriend and his mother paid \$212,000 to a lawyer who refused to represent him when he began cooperating with the government. He was left with \$259 to his name, he said.

Mr. Dee was a pretty high-profile defendant in a high-profile case, so it would not be hard for a reader to figure out who his lawyer – the one who supposedly stopped representing him – was.

Even though the reference to that lawyer was buried in a long article, he or she should have been asked to comment on claims that he dropped a client who turned state's witness and kept the client's fee. (That might well be an action that could get the lawyer disbarred, so if it's false, it's quite damaging to reputation.)

Plain error

Writers, for a variety of reasons, sometimes get things wrong not because of lack of attribution, but because of flat-out mistakes. Infrequently, those errors are libelous. (A look at the 45 corrections published in *The New York Times* over a random seven-day period indicated how infrequently errors are libelous. Not one of those 45 raised an issue that, on its face, looked like it might have caused libel problems.

A convicted killer could be freed soon, after using a 2000 Supreme Court decision to force a new trial that excludes most of the evidence against him – including the fact that he was carrying the murder weapon when he was arrested. Guy Bullit, who committed the crime, was serving time in prison when he read about a Supreme Court case that made it illegal for officers to stop and frisk someone based only on an anonymous 911 call – which is what happened to him. He used that decision to win a retrial – this one will not include the gun or ballistics evidence.

What did Mr. Bullit get from the courts? His conviction was reversed and he won a new trial, which means that he is no longer a convicted killer. And so it is no longer established that he committed the crime. If he is acquitted at a retrial (as the reporter seems to fear) he hasn't committed that crime. The cure is to tell it like it is: A man once convicted of murder has won a new trial – one in which the murder weapon, which he was carrying, cannot be used as evidence against him.

Mr. Vair runs a tight ship in his office, too. Post-it notes and highlighters are banned. Executives bring in their own pens. To illustrate his commitment to that principle, Mr. Vair produced two pens from his pocket, both stolen from hotel rooms.

Stolen? One could argue that hotels put pens emblazoned with their names in guests' rooms as amenities to be taken, and as a form of advertising. Is that description trivial, especially since this was deep in a profile of the chief executive of a no-frills airline? Maybe. But this chief executive has a reputation for litigiousness. Would he sue? Maybe, if just for the publicity value. Changing "stolen from hotel rooms" to "bearing hotel chains' logos" makes the point that Mr. Vair is a tightwad, without using inflammatory language.

One of three men who murdered an on-duty officer was reportedly a police informant.

Lee Grain began working for the police in February 2007, five months before he and two others killed the officer during a car stop. Grain was convicted of murder, as was Octavio Boston. Both are serving life in prison, but the third man, Ellis Liberty, who shot and wounded the cop's partner, was convicted only of gun possession.

Look carefully – which is, after all, what journalists are paid to do. The lead and second paragraph refer to three men who murdered a police officer. The third paragraph says one of those three was convicted only of possessing a gun. Oops.

Implication

Implication may involve the unintentional juxtaposition of facts – or sometimes facts and images – to suggest a situation that does not exist. Or it may involve use of language that implies something short of the truth. The first example implies a relationship – that because A, thus B. But the relationship, on closer inspection, is wanting – and thus legally dangerous.

The Target store in the City Center could be looking for a few new honest cashiers after four employees were arrested Monday on theft charges.

This seems to be an attempt at cuteness gone bad. It implies that the four employees arrested Monday are not honest cashiers. But that is something that has not been established.

A black teenager is shopping for justice, charging snooty Barneys staff and city cops racially profiled him for credit card fraud after he bought a \$300 belt. He has filed a lawsuit.

The phrasing strongly implies that the teenager has been denied justice, which may be the case, but cannot be determined until a trial settlement. And as the next chapter, on tone, discusses, use of the word snooty may create problems. The solution is a straight lead: A black teenager has sued Barney and the police, charging that the store and officers racially profiled him for credit card fraud after he bought a \$300 belt.

Then there's loaded language:

Extort-Case Lawyer Beats the Rap

An 81-year-old lawyer was found not guilty yesterday of helping a client extort \$11 million from his cousin.

There are two problems here. The phrase “beat the rap” is a euphemism for being acquitted even though one is guilty. But there is no evidence that that is the case. Just as bad, the lead says flatly that the client was guilty of extortion. But there is no evidence of that, either. “Acquitted” would have been a good substitute for “beat the rap.”

Tone

Another problem category not related to unattributed statements is tone. Taking-sides words are not inherently libelous. But they are bad journalism. And if there are factual inaccuracies elsewhere in the article, the unfair words can be cited as evidence that the writer or publication was seeking to get the subject – in other words, actual malice.

These examples contain loaded or taking-sides language that might be appropriate in a column, but not in the news columns of a mainstream publication. None of the leads cited is libelous, but the problem they present is that if there are errors elsewhere, this language could suggest a reporter who sacrificed accuracy for advocacy.

A religious school is under fire for planning to boot two dozen family members, including many elderly and disabled immigrants, from an apartment building. The school purchased the building in January. It is relying on a loophole in state housing law that allows non-profit groups to kick out tenants in rent-regulated apartments if they will use the apartments for educational purposes.

There is nothing overtly libelous in this lead. But if another part was claimed to be libelous, three loaded words here might be used to prove that the reporter didn’t like, and had it in for, the school. The fix here is to tone the copy down. The school is preparing to evict the families, not “boot” them. It is relying on a provision of state housing law, not a “loophole,” to do so, and that provision allows it to remove tenants, not “kick out” anybody. The tenants’ plight can be told just as clearly without the shrillness.

Woman, 93, With Strokes, Bad Leg, Gets Eviction Notice

Alice Apple enjoys living in the apartment where she has been for more than 20 years. But Apple, who raised five children while working at a bakery, and later helped take care of her grandchildren and great-grandchildren, is on the verge of being evicted.

There is no doubt whose side the reporter and headline writer are on. The tone is: Big Bad Landlord Goes After Helpless Granny. As the rest of the article made clear, however, Granny has violated her lease by having a grandchild live with her. She did not dispute that. There is nothing libelous in the head or the lead, but there better not be any libel anywhere else in the piece, because this loaded-language treatment could go a long way toward proving actual malice. There are less heavy-handed ways to portray Granny with empathy, perhaps as a woman who innocently ran afoul of a lease provision in order to give a grandchild a home, if that's the case.

A&P corporate spokesman Denny
All refused for the second day in a
row to return calls seeking comment.

“Refused” is a loaded word. No one knows whether all refused to answer the calls, or maybe just had other priorities on those days. If there were errors in the article, the tone here might suggest actual malice. A more appropriate version would be: An A&P spokesman did not return phone calls.

Ambiguity

The chief of one of the police de-
partments involved in the wrongful
fatal shooting of a college football
player is retiring.

It is not clear whether the chief or the department was involved in the fatal shooting. The ambiguity is caused by imprecise writing. The shooting was by the officers in the chief's department, not by the chief. But a reader could have easily reached the wrong conclusion. That kind of ambiguity could bring a libel suit. It's probably defensible under the *Times v. Sullivan* public-official doctrine, which would probably excuse such an error, but the goal is to not have to admit error and then invoke that doctrine.

A 25-year-old graduate student was
struck and killed by a drunken driver
early yesterday in a hit-and-run acci-
dent that occurred as she was crossing
a street with friends, the police said.

What “polilce said” refers to is ambiguous. Is it “struck and killed?” “Crossing the street with friends?” “Drunken driving?” All of those? Bulletproof the most controversial or most dubious claim in a string like this. (That she was with friends hardly needs attribution.)

A drunken off-duty cop ran over
and killed a photographer taking pic-
tures on the Queensboro Bridge early
yesterday, police said. Housing cop
Sharpe Smith slammed his SUV into
Julie Lebow at 3:40 a.m. Lebow
died on the bridge while a friend, who
had managed to leap out of the path of
the drunken cop's SUV, stood help-
lessly nearby, police said.

The only serious allegation in the second paragraph is “the drunken cop’s SUV.” And that’s the only one that’s not clearly attributed. Did it come from the police, or from the source named at the end of the sentence, or was it an inference from the lead? If the man died later, rather than on the bridge, or if the friend didn’t stand helplessly nearby, and neither of those statements was attributed, you’d need a correction.

Headlines

If an article is libelous, and the headline reflects the article, chances are that the headline will be libelous, too. But a headline can be libelous even if the article it is sitting atop is correct. Because headlines are typically written after articles are, seldom by the reporter, and often under deadline pressure, they can contain their own errors, sometimes libelous ones. Some courts have ruled that the headline has to be read in the context of the article, so that if it's incomplete but the article fills in the gaps that are not a legal problem. But that’s not the law in every jurisdiction, and a correct article can't cover for a factually incorrect head.

Pervert’s Sour Note

An Oscar-winning songwriter played up his Hollywood connections to sexually prey on starry-eyed young beauties at his apartment, one of those women charged yesterday.

This headline goes too far. The songwriter is not a pervert, as the head states, unless the claim that he lured young women to his apartment under false pretenses and forced them to have sex are true. And even then, predator would seem to be a more apt word to describe his conduct than pervert. And if the charges are never proved, there was no sour note. The fix? Start over.

House Speaker Denies Knowing Of Scheme To Kill a Bill

Christopher G. Donovan, the speaker of the Connecticut House and a candidate for Congress, strongly denied on Sunday evening that he had any knowledge of what the federal authorities say was a scheme to kill a piece of legislation.

In his first public comments about the scandal since the arrest of his campaign finance Manager, Robert Braddock Jr., in the case, Mr. Donovan said that “at no time did I know that anyone might have been trying to funnel illegal contributions to my campaign,” he said. “No one ever made a deal with me.”

This head also goes further than the copy, stating as a fact that there was a scheme to kill a bill. But if the defendant is acquitted, there was no provable scheme. If there were multiple defendants, and some were convicted and some acquitted, there was a scheme. That did not appear to be the situation here. So “Scheme” must be modified with “Alleged.” If that won’t fit in the allotted space, it’s time to start over.

SEW GROSS Worker Sues Brooks Brothers, Claims Sex Harass

There’s a wolf in sheep’s clothing sexually harassing a seamstress at the venerable Brooks Brothers factory, a lawsuit charges.

An employee there is suing the oldest clothing company in the U. S. for \$30 million, alleging that she was ogled, fondled and threatened by a lecherous supervisor.

The headline’s bank is fine. But the main head, “Sew Gross,” is a taking-sides conclusory statement that the harassment charges are true. At this point, when a suit has just been filed, that’s obviously unknowable.

Suspect Tries To Eat Drugs After Chase

A 34-year-old suspected heroin dealer swallowed his merchandise while he was being chased by Passaic County sheriff’s detectives through the city’s First Ward on Wednesday evening, authorities said.

The head does more than summarize the article. It states the drug swallowing as a fact, not as part of a police account. A fourth line, “Police Say,” cures the problem. If there’s no room for a fourth line, “Police Say” could replace “After Chase.”

Notes