Libel by Implication

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For the libel defense bar, the most persistent and pesky issue of the day is that of "libel by implication." This article will define the problem, identify how courts have addressed it, and review several recent pertinent decisions.[1]

Defining the Problem

The term "libel by implication" has become a catchword for any claim of defamatory meaning that goes beyond what the words themselves denote. The issue of defamatory meaning in libel cases "turn[s] upon words and punctuation only because words and punctuation express meaning,"[2] as do pictures, paintings, and cartoons. In any libel action, defamatory meaning is found when a plaintiff's reputation tends to be harmed by the meaning of an expression (as apparently intended by the publisher), examined in light of the publication as a whole and the medium and social context in which it is published.[3]

Words, either individually or in combination, may directly imply thoughts not expressed. For example, to say that Freddie was the only sibling to stay out of trouble with the law necessarily implies that his brother Eddie had trouble.[4] Word pictures frequently convey clear but unexpressed meaning. To say that, after finding a woman with her husband, the angry wife shot the woman implies that the other woman and the husband were having an adulterous affair.[5]

The meaning of words, as apparently intended by the author, may also vary from their literal meaning when considered in the context in which they are uttered. The term "context" encompasses a broad range of factors, including the whole of the communication, the medium, the social and cultural context, and the probable expectations of the audience based upon all of these factors.[6]

Defamation is "implied" when published words carry no defamatory meaning on their face but may be defamatory when considered in light of some extrinsic fact known to some in the audience. The classic example is that of a false report that a woman has given birth to a child when it is known that she is unmarried, implying that the birth was out of wedlock. Such an implication, generated by resort to facts extrinsic to the publication (the "inducement"), is referred to as an "innuendo" in the common law of libel. Where the subject of the publication is of public concern, the First Amendment requires that the plaintiff meet the applicable standard of fault with respect to the defendant's failure to learn of the facts that render the published statements defamatory or to use appropriate care to avoid falsity with respect to that meaning.[7]

Arguably, an even stronger standard must be applied because the "danger to reputation" is not apparent from the face of the publication, leaving the publisher unaware of any need to avoid such harm.[8] Fortunately, such cases are rare. Much more common are claims based upon facts extrinsic to the publication that are unknown to the audience, and it is by omitting those exculpatory facts that a publisher may create a false defamatory meaning.

Facts extrinsic to the publication also give rise to defamation by implication when the publication expresses an opinion. During the late 1970s and 1980s, claims for libel by implication frequently arose when a statement, in the form of an opinion, was claimed to imply the existence of unstated defamatory facts that served as the basis for the stated opinion. This recurring scenario was a byproduct of the formulation of the "opinion privilege" recognized by the *Restatement (Second) of Torts.*[9] The drafters of the *Second Restatement* distinguished between "pure" opinion, which was absolutely protected by the First Amendment, and a "hybrid" opinion, which implied the existence of unstated false and defamatory facts as the basis of the opinion (in which case the implied facts, but not the opinion, are actionable).

The question of whether unstated facts are implied by the expression of an opinion has been supplanted by the "statement of fact" analysis prescribed by *Milkovich v. Lorraine Journal*.[10] The *Milkovich* Court held that statements that do not contain "a provably false factual connotation" are protected by the Constitution.[11] The analysis of whether a statement is reasonably understood as conveying a "provably false factual connotation" makes unnecessary any separate consideration of whether an opinion implies an unstated factual proposition.[12]

However, such an analysis, made in light of the social and linguistic context of the statement, requires courts to determine the reasonable meaning of the statement, i.e., its "gist." As demonstrated below, courts have applied a version of the *Milkovich* analysis in making a threshold determination of the meaning of statements in issue for purposes of addressing claims of libel by implication.

The Real Problem

The raging controversy over libel by implication has been generated by fact patterns that are not only common but arguably present in every unflattering news publication. They are facilely summarized in the 1984 edition of *Prosser & Keeton on Torts,* which explains that defamation by implication occurs when a defendant

> (1) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts, [such that] he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct.[13]

Unquestionably, the poster child for libel by juxtaposition and omission is Ruth Ann Nichols. In 1971, the *Memphis Press-Scimitar* reported that Mrs. Nichols received a gunshot wound when another woman shot her and the second woman's husband after she "arrived at the Nichols' home and found her husband there with Mrs. Nichols."[14] According to Mrs. Nichols's allegation, the article implied that she and the woman's husband were having an adulterous affair and were caught by the jealous wife, when in fact Mr. Nichols

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and two neighbors were also present. Although it was not clear why the woman was shooting at her husband, the motive did not involve an affair with Mrs. Nichols. The Tennessee Supreme Court held that there could be liability for the false implication if it were shown that the defendant met the negligence standard in failing to ascertain the falsity and defamatory character of the article before publishing it.[15] The *Nichols* result is not particularly startling because it involved an implication readily apparent from the face of the article, and omission of facts that would have fully negated the defamation.

The more typical claim of libel by implication arises when the defendant publishes truthful facts that raise questions of possible wrongdoing. Because of limitations of time and space, reporting inevitably involves juxtaposition and omission of facts, which typically is the focus of the ensuing libel claim. Here are some real-life examples:

- The defendant reports that a district attorney gave favorable plea bargains to alleged spouse beaters, and the plaintiff (the district attorney) claims that the defendant's report failed to disclose the mitigating circumstances of the cases and thus falsely implies misfeasance.[16]
- A newspaper article that questioned whether a judge hearing an appeal of an environmental case should have disclosed to all parties that he attended an outing sponsored by the defendant's industry in a limousine provided by the law firm representing the defendant. The judge claimed that the article implied that he had been improperly influenced to concur in the opinion favoring the defendant.[17]
- In an article that emphasized lack of government monitoring to see whether funds were being used as represented in grant applications, the defendant reported on the plaintiff's receipt of a government grant and inability to account for how the money was spent, due in part to the destruction of the plaintiff's records in a fire. The plaintiff alleged that the article implied that she misappropriated the funds.[18]
- The defendant published a detailed piece on the financing of the plaintiff's low-income housing project with a loan from the city made while plaintiff's brother served as councilman and mayor pro tem. The plaintiff claimed that the article implied that he was a bad credit risk who could not get a loan at arm's length.[19]

These claims are frequently submitted to juries, and juries frequently find for the plaintiffs, because the defendant, while able to show that it was plausible to suspect the defamatory inference suggested by the facts truthfully reported, must acknowledge that the defendant was and is not in a position to prove the truth of that inference.

Juxtaposition versus Omission

Is there a meaningful distinction between juxtaposing truthful facts in a manner that falsely implies a defamatory connection between the two, and omitting facts that would tend to negate an implied defamatory meaning?

Some courts have taken the position that liability for defamatory inferences from truthfully reported facts saddles the media with the intolerable burden of anticipating all potential defamatory interpretations, but that the media are better equipped to guard against liability for material omissions.[20] Others say just the opposite, that liability for omitted facts is more dangerous to a free press than liability for implications that arise from stated facts, because the media "should not be required to report the results of investigative journalism with a precision establishing an exhaustive, literal picture of what transpired,"[21] and because questions of editorial selection and omission should not be the business of judges and juries unless the end product paints a materially false and defamatory factual picture.[22]

Yet the distinction between juxtaposition of stated facts and omission of facts has no practical significance, because the impact of every allegedly defamatory implication or inference can arguably be lessened or even negated by including more information, if nothing more than to state the absence of direct support for the possibly defamatory inference. Conversely, factual omissions can almost always be said to create or contribute to the impact of a defamatory implication that may be drawn from facts truthfully reported.

With increasing ferocity, the plaintiff's bar has used *Prosser & Keeton*'s summary of libel by implication to exploit the media's decisions (1) to include facts that imply defamatory connections with other facts reported, and (2) to omit facts that arguably would lessen the impact of defamatory statements or implications. According to one successful plaintiff's lawyer, "counsel must be given broad latitude in examining the reporter/author/broadcaster in an effort to develop facts to support arguments that even truthful or privileged facts or statements were used because they are inflammatory and create the implication of wrongdoing."[23] Translated, this means that plaintiff's counsel will seek "latitude" to endlessly cross-examine the defendant on issues of fairness in editorial selection of facts to report and omit. It is doubtful that the muddle and prejudice created by such an examination can be cleared by a jury charge at the close of the case.

The problem of omitted information is most apparent in cases involving the electronic media in which the plaintiff has the benefit of outtakes obtained through discovery. In print media cases (except in cases of magazines for which elaborate "proof" records are kept), evidence of omitted material is usually filtered through a written description provided by a reporter. For the electronic media, the omitted material is presented at trial in the form of vivid audio/visual display, oftentimes proving the validity of the old saw, "a [talking] picture is worth a thousand words." When they are available and admitted as evidence, outtakes enable an effective plaintiff's advocate to encourage jurors to play editor and to urge that the defendant's omission of footage favorable to the plaintiff was deliberate distortion. A defendant is rarely able to exclude evidence of outtakes or other omitted material on issues of falsity and fault.

Mounting a Defense

How can the scourge of libel by implication be avoided or successfully defended against? When all or substantially all of the expressed and defamatory statements in an article or broadcast are true, a number of legal doctrines have displaced the *Prosser & Keeton* statement mentioned previously. Indeed, the *Prosser & Keeton* treatise has been rewritten by Professor Dan Dobbs, who in the 2001 edition declared that since *Prosser & Keeton* last revised the treatise, "the law has changed a good deal," requiring a complete rewriting of the seminal horn-

book.[24] Indeed, Professor Dobbs deleted the above-quoted *Prosser & Keeton* passage on libel by implication, and instead included the courts' responses to the unacceptable risk that libel by implication presents for publishers.

The Solutions

We discuss below four different lines of authority that may be used to defeat a libel by implication claim that: (1) eliminate or limit liability for implied defamation; (2) treat the alleged implication as opinion; (3) require actual knowledge on the part of the defendant that the alleged implication would be communicated; and (4) require a threshold inquiry into whether the publication communicates that the publisher intended or endorsed the implication.

Eliminate or Limit Liability

The strongest responses to the problem of libel by implication have come from state supreme and appellate courts. Because the prerogatives of these courts in shaping the common law are not limited by rules of federalism, they have not hesitated to use broad strokes to curtail the cause of action for implied defamation. State courts of Louisiana,[25] Massachusetts,[26] and Minnesota[27] have held that in public figure cases, there can be no libel by implication based upon truthfully reported facts. Later, the Louisiana Supreme Court held that even in private plaintiff cases, "adequate protection of freedom of the press at least requires that the plaintiff prove that the alleged implication is the principal inference a reasonable reader or viewer will draw from the publication as having been intended by the publisher."[28]

Another line of cases takes the same view but affords an exception where the author has, as in the *Nichols* case, omitted material facts that would negate the defamation.[29] Some of these cases have used unfortunate language to describe the omission exception, e.g., omission of facts that would "change the tone" of the article, which could result from almost any factual omission. However, the holdings make clear that it is not enough that inclusion of additional facts would present the plaintiff in a more favorable light; the omitted fact(s) must be such that, if included, they would have negated or substantially precluded the defamatory inference or implication.[30] The Michigan Supreme Court took the same approach but focused on the issue of falsity rather than defamatory meaning, finding no implications that were false or omission of facts that "would have rendered [the publication] nondefamatory."[31]

Treat the Alleged Libel as Opinion

Prosser & Keeton's summary of libel by implication due to juxtaposition or omission contained a caveat for a defamatory implication that "qualifies as opinion."[32] Because the implication is usually an inference or deduction that follows from truthfully reported facts, it is logical to urge that the alleged "implication" is an opinion.

This position was embraced by the Eighth Circuit in *Janklow v. Newsweek*,[33] which held that an alleged implication that Janklow had undertaken a criminal prosecution for revenge, an inference that could be drawn from truthfully reported facts, was the opinion of the writer that was not to be second-guessed by a court or jury. The court acknowledged that "there can be omissions serious enough to take what is ostensibly an opinion and convert it to fact," but emphasized that courts should be most hesitant to intrude upon editorial choices on what information to omit or to include.[34]

The *Janklow* opinion is limited by the subsequent holding of the U.S. Supreme Court in *Milkovich,* but only in the sense that the question of whether an implication that qualifies as an opinion requires the two-part analysis prescribed by *Milkovich:* whether the implied assertion purports to be one of fact, and if so, whether it is verifiable and thus disprovable.[35] Numerous post-*Milkovich* decisions have held that claimed implications from statements of facts or rhetorical hyperbole are not sufficiently verifiable, or are clearly based upon stated facts so that they do not themselves purport to be statements of fact.[36]

Use the Standard of Fault

The Tennessee Supreme Court held that the Memphis Publishing Co. could be liable for the false implication that Mrs. Nichols, a private figure, was involved in an adulterous affair if the jury found it guilty of ordinary negligence in failing to "exercise reasonable care and caution in checking on the truth or falsity and the defamatory character of the communication before publishing it."[37] When the fact finder, with the benefit of hindsight, concludes that defamation by juxtaposition or omission has occurred, it seems virtually inevitable that a jury will return a verdict that the publisher was negligent in not ascertaining the truth of the defamatory character of the statement, or in failing to investigate and discover the additional facts that would render it not defamatory. While the defamatory meaning in *Nichols* was obvious, it is easy to see that in most cases a publisher is powerless to protect itself from liability under such a negligence standard, particularly when the content of the publication is not such as to "warn a reasonably prudent editor or broadcaster of its defamatory potential."[38]

In cases involving a public figure or public official, when the meaning of a published statement is disputed, courts have not hesitated to require that the plaintiff prove not only subjective awareness of falsity of the defamatory implication, but also actual knowledge that the defamatory implication would be conveyed by the publication.[39] In *Newton v. National Broadcasting Co., Inc.*,[40] the court agreed that the rule requiring public figures to establish knowing or reckless falsity is meaningless if defendants can be found liable for the falsity of something that they never even intended to say. The court recognized that liability for unstated implications is much more unpredictable than that for statements directly made, and held that defendants must be more than subjectively reckless in conveying the unstated defamatory implication; they must actually intend it.[41]

The scienter requirement has been applied in numerous public plaintiff cases,[42] and some courts have applied the same scienter requirement in cases that would otherwise be governed by a negligence standard.[43] The West Virginia Supreme Court, in a case involving a public official, held that when the alleged implication results from the omission of facts that would negate the defamation, the plaintiff must prove that the defendant intentionally omitted the information to create the false factual impression.[44]

Apply a Threshold Inquiry

In principle, a safe harbor seems to be provided by the requirement that the defendant know of a defamatory implication conveyed by his publication, in addition to meeting the applicable standard

of fault in failing to determine its falsity. However, unless it is successfully urged that the claimed implication does not convey a provably false factual connotation, the question of implied meaning frequently embroils the defendant in protracted and costly discovery. In such situations, the plaintiffs dig deep to find any hint that the defendant actually knew of or suspected the factual implication in issue. In order to cull implied meaning claims that should not be permitted to proceed into the discovery stage, should there be a threshold inquiry by the judge that goes beyond the common law defamatory meaning analysis?

White v. Fraternal Order of Police

The D.C. Circuit imposed and applied such a threshold inquiry in *White v. Fraternal Order of Police*.[45] The media defendants in this case had accurately reported that the plaintiff police officer, being considered for promotion, failed a routine drug test for marijuana, and that a second sample, which had tested negative, had been taken and transported under "irregular circumstances." The plaintiff alleged that the juxtaposition of these facts implied that he had used an illegal drug and bribed his way to a promotion. He also alleged that the defendants omitted facts that would have "negated" the defamatory inference: that the first sample was also sent to the second lab for a second test. The second lab was specifically authorized to do all confirmatory testing and found that both samples were untainted. The court noted that libel by implication claims are "fraught with subtle complexities" requiring courts to be "vigilant not to allow an implied defamatory meaning to be manufactured from words not reasonably capable of sustaining such meaning."[46]

Relying upon common law principles and First Amendment defamation decisions, the court reached the following holding: Even if the publication of true facts would permit a reader or viewer to draw a reasonable defamatory inference, that is insufficient to establish a claim for libel or false light invasion of privacy; the case will survive a preliminary motion only if the language or manner of communication conveys that the defendant "intends or endorses the defamatory inference, and, therefore, the communication will be deemed capable of bearing a defamatory meaning."[47] The court made it clear that "endorsement" could not be inferred from the "dramatic intonations" of a broadcast announcer, nor from the fact that there was no apparent point in reporting these facts unless the publisher's intent was to create suspicion that the plaintiff was guilty of wrongdoing.[48]

Requiring the element of perceived or apparent endorsement makes sense when, as in *White,* the facts reported permit an innocent as well as a defamatory inference. On the other hand, when the defendant not only omits facts that arguably negate the defamatory inference, but also leaves a factual picture that virtually compels that inference, *Nichols* holds that it may be actionable without any requirement of apparent endorsement (which was clearly absent from the publication involved in that case). As phrased by the Louisiana Supreme Court, if the inference complained of is not endorsed, it must at least be the "principal inference" posited by the publication.[49]

The *White* court also addressed the question of omitted facts. The court noted that while omission of facts was what rendered false the publication in *Nichols,* such omissions are not relevant to the court's determination of whether the publication conveyed a defamatory meaning (and are only relevant to determine falsity). Although the court declined to address the issue of when omitted facts can render false an unendorsed defamatory implication, it held that the defendant's omissions did not "create a substantially inaccurate portrait of the facts at hand as was the effect in" *Nichols.*[50] The court added, "reporters should not be expected to present an exhaustive literal picture of what transpired."[51] In this respect, the court expressed the same sentiment about factual omissions claimed to create a defamatory factual inference as the *Janklow*[52] court with respect to omissions that might change the reader's perception of the reasonableness of an implied opinion.

Chapin v. Knight-Ridder

Chapin v. Knight-Ridder[53] involved an article in which the author raised questions about Roger Chapin's charitable program of delivering junk food "Gift Pacs" to Gulf War soldiers, after they were sold to American consumers who then donated the Gift Pacs they purchased. The court held that when a claim of libel is based upon an allegedly false and defamatory implication from truthful statements, a "plaintiff must make an especially rigorous showing where the expressed facts are literally true."[54] Citing *White,* the court declared that "the language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference."[55] Chapin claimed that the article's statement that he was charging "hefty markups on goods [he] ships" to G.I.s implied that he was making a large profit and pocketing it. The court noted that the term "hefty" was too subjective to be proved false, and that the term "markup" (which means gross profit) instead of "profit" does not purport to account for overhead and expenses, and thus leaves ample room to accommodate Chapin's innocent explanation of its "heftiness."

In addressing other statements, the court was careful to reject claims of implication that involved nondisprovable opinions, or unwarranted defamatory meanings. Notably, the court also ruled that the statement that Chapin declined an interview did not imply fraudulent concealment, agreeing with the district court that "people in the public routinely decline interviews" so that a reported refusal to comment "has been reduced to insignificance."[56] After considering each challenged statement individually, the court recognized the need to consider the gist of the article as a whole, and concluded that the story was constructed around questions, not conclusions, and advanced alternative answers to the questions it raised, both favorable and unfavorable.

Scope of the Threshold Inquiry

In applying the requirement that an implied defamatory meaning be one that is apparently endorsed by the publisher, both *Chapin* and *White* recognize a need for "an especially rigorous showing" where the expressed facts are literally true, and the only arguable defamation is by implication.[57] Both courts drew upon the common law test for defamatory meaning, as apparently intended by the publisher (i.e., the judicial determination whether a publication is reasonably susceptible of a defamatory meaning). In addition, each engaged in a thorough analysis of the gist of individual statements, as well as the publication as a whole, that transcends the traditional

allocation of roles between judge and jury. Such a judicial role is fully consistent with *New York Times v. Sullivan,*[58] in which the court, as an alternative basis for the holding, found that the publication could not reasonably be understood as ascribing the alleged police misconduct to Police Commissioner Sullivan. In *Greenbelt Cooperative Publishing Co. v. Bressler*[59] and *Letter Carriers v. Austin*,[60] the court determined that the epithets "blackmail" and "traitor" were not to be taken literally, and went further to determine that the gist of the statements embodying these terms was merely a nonactionable expression of disapproval of the plaintiff's conduct. In *Masson v. New Yorker Magazine*,[61] the court determined the gist of the meaning conveyed by altered quotations attributed to the plaintiff to determine whether any departure from the truth was material.

Even after *Milkovich*,[62] in which the Supreme Court recognized that statements of opinion may be actionable on the basis of a provably false factual connotation, courts routinely analyze the gist of the statement to determine whether it satisfied the *Milkovich* standard.[63] Indeed, it can be argued that *Milkovich* encourages courts to make this "meaning-driven inquiry" at the outset of a case.[64] To the extent that a "gist" analysis involves some degree of factual inquiry, it is appropriate for the court to undertake it as part of its independent review function, because, "[u]nlike other factual findings, ascertaining the gist does not depend on resolving credibility issues."[65] Although neither *White* nor *Chapin* acknowledge that the "especially rigorous" inquiry is driven by the First Amendment rather than the common law, that conclusion is hard to avoid.

In addition, neither case suggests that the apparent endorsement requirement is limited to public official or public figure cases. A number of courts have declared, albeit in dictum, that the requirement applies as well in private plaintiff cases.[66]

License for the Artful Defamer?

When the claimed defamatory implication is neither the principal inference posited by the publication nor one that the publication shows was endorsed by the publisher, why should publishers avoid liability if, in fact, they subjectively intended and desired that the defamatory implication be understood and believed by the audience? After all, the common law has always held defendants responsible for intended consequences of their actions, even when the results are not reasonably foreseeable.[67] The common law has likewise held that publishers should be responsible for meanings that they in fact intend, even if such intentions are not apparent on the face of the publication.[68]

None of the cases that have embraced the threshold inquiry has suggested that actual intent may trump the absence of apparent intent, and some have suggested that the publisher's actual intent is irrelevant.[69] This is consistent with established libel law that deems nonactionable statements that are not reasonably understood as conveying a provably false factual connotation (even if the publisher may have intended the assertion to be understood factually).[70] Similarly, under the analogous First Amendment doctrine that limits proscription of inciteful speech, the test for distinguishing between protected and unprotected speech requires an objective analysis of the speech in issue, focusing on the apparent tendency and effect of the words used, regardless of the speaker's actual subjective intent.[71]

Under the *New York Times* standard, a publisher's subjective attitude towards the plaintiff is deemed an insufficient basis for liability.[72] Similarly, liability should not turn on a jury's assessment of a publisher's subjective beliefs concerning whether adverse inferences are warranted from truthful factual statements. Such a basis for liability provides jurors with the ready means to punish an unpopular speaker or point of view, and a convenient vessel into which to pour resentment of perceived biases by the media.

Reporting Allegations Without Endorsing Them

If the absence of apparent endorsement of an unstated inference protects a publisher from liability, could this protection extend to a publisher that reports defamatory allegations by others, but also reports that the allegations are unproven and disputed, and takes no position on their truth? Is such a publication defamatory? Arguably the principle of the *White* and *Chapin* cases should require a negative answer if there is no apparent endorsement of the allegations, but we are aware of no court that has applied *White* and *Chapin* in this way.

Perhaps the more pertinent question is whether such a publication is false. Appeals courts in Texas and Colorado and, most recently, the Fifth Circuit applying Texas law, have addressed this question and determined that such publications are true. In *Green v. CBS, Inc.*,[73] the Fifth Circuit considered a broadcast that focused on the lives of Lotto millionaires, quoting one who claimed that his ex-wife had fabricated charges that he had sexually assaulted her daughter (his stepdaughter) to extort a greater share of the Lotto winnings. The court recognized that the only facts reported were true; that the further allegations were accurately reported; that under Texas law the report was therefore true; and that, in any event, viewers would take the allegations as the opinions of the speakers.

Ms. Green argued that CBS omitted other pertinent facts, including that a medical examination proved that her daughter had been raped, and that the stepfather had failed one of two polygraph examinations. Ms. Green claimed that inclusion of these facts would have substantially lessened the credibility of the allegation that she had fabricated the sexual assault charges. The court agreed that "the inclusion of more facts may have resulted in a more balanced broadcast," but concluded that "the broadcast as a whole did not misrepresent the story."

Implied Meaning in False Light Cases

A number of states recognize liability for false publicity, as an alternative to the defamation tort, under the theory known as false light invasion of privacy, as recognized in the *Restatement (Second) of Torts.*[74] The most significant difference between false light and defamation is that the former requires, instead of a false statement tending to harm the plaintiff's reputation, that substantial falsity in the publication be highly offensive to a reasonable person.

Unfortunately, the language used in the *Restatement*—that the expression is actionable if it "placed the plaintiff before the public in a false light"—has led some courts to declare that the false light tort does not require a false statement of fact, only a statement placing the plaintiff in a "false light," declaring open season for claims based upon implied meaning.[75] This unfortunate mud-

dle is illustrated by the recent case of *Howard v. Antilla.*[76] Howard, CEO of a publicly traded company, sued Antilla, a *New York Times* reporter, for an article that reported the existence of a persistent rumor that Howard was in fact Howard Finkelstein, an infamous felon. The rumor was depressing the price of the company's stock, and the SEC proclaimed itself unable to confirm or deny the truth of the rumor.

The plaintiff, apparently in anticipation of the emerging limitations on libel by implication in cases such as *Green*, pleaded the case not as one involving republication of a false rumor, but as a report of a newsworthy rumor that the author allegedly endorsed or implied was true. The case was tried to a jury without any party suggesting that issues of meaning and falsity were different for purposes of false light versus defamation. The court charged the jury that to find liability for defamation, it must find that the article conveyed the false implication that plaintiff was Howard Finkelstein, and that the defendant published "with the intent to convey or endorse" that implication. On the false light claim, the court required Howard to prove that the article "placed the plaintiff in a false light," with "intent to place the plaintiff in a false light," and with knowledge or recklessness as to whether the article so placed plaintiff. The jury found for the defendant on the defamation claim, but awarded $480,000 on the false light claim.

In post-trial motions, the trial judge affirmed the judgment notwithstanding the apparent inconsistency of the verdicts, explaining that while the jury might have agreed that the article did not imply that the rumor was true, as would be necessary to sustain the defamation claim, it could have determined that the article implied that the rumor "poses an open and reasonably debatable proposition," when the reporter "easily could have discovered had she not turned a blind eye" that the rumor was baseless. The *New York Times* appealed the case to the First Circuit, which heard oral arguments on February 5, 2002.

Allowing liability for failure of the *Times* to negate any possibility that the rumor was true is inconsistent with the emerging doctrine protecting editorial decisions concerning the juxtaposition and omission of material. It is also clear that the tendency to treat issues of implied meaning and falsity differently in false light as opposed to defamation cases should be resisted by judges and guarded against in charging juries. In the words of Judge Sack:

> The term "false light" is an unfortunate one insofar as it may suggest that proof of a specific false statement of fact is unnecessary for liability to attach; it is required. Unfairness, improper tone, or unfounded implication or innuendo, even though they might sound as though they fit the phrase "false light," will no sooner support a recovery for false light invasion of privacy than for defamation, and a jury ought to be properly instructed that a false statement of fact is a prerequisite to recovery.[77]

The cases are in general agreement that the issue of implied meaning is to be treated no differently in false light cases than in defamation cases.[78]

Disallowing Claims of Implied Libel

In November 2001, the Eleventh Circuit affirmed the dismissal of a libel case, brought by Richard Rubin against U.S. News & World Report, Inc., based upon an article, in which Rubin was quoted, that discussed the laundering of drug money through the gold market.[79] Rubin claimed that the article implied that he was involved in money laundering, tax fraud, smuggling, and other crimes. Saying it did not need to address the *Chapin-White* type of "First Amendment" problem,[80] the court rejected Rubin's claim, finding that the statements did not create the impression that he was knowingly involved in any unlawful or improper conduct.

In a footnote, the *Rubin* court also rejected one of the more common libel by implication claims: inclusion of the plaintiff's photo implied that he was involved in the illegal activity that is the subject of the article. The court cited the fact that it is common practice (and generally understood as such) for magazines to show photos of those they quote merely for visual effect.[81]

Oprah Has a Beef

In the highly publicized case of *Texas Beef Group v. Winfrey,*[82] Oprah Winfrey was sued for a program she hosted on "dangerous food" in which Howard Lyman, an animal rights activist, made inflammatory statements about the threat of mad cow disease in the United States, and suggested that an epidemic here could "make AIDS look like the common cold."

The trial court dismissed the claim for false disparagement of a perishable food product under the Texas "veggie libel" law.[83] The Fifth Circuit affirmed the dismissal of the statutory claim, holding that Lyman's claims were opinions based on fully disclosed facts. The court rejected the plaintiff's "libel by omission" theory, even while agreeing that the inclusion of contrary information from industry experts and Lyman's own admission that American beef is safe (all of which were recorded but edited out) would have portrayed U.S. beef in a more favorable light. The omission of this footage was insufficient to establish actionable falsity because "it is common knowledge that television shows . . . shoot more footage than necessary and edit the tape they collect down to a brief piece."[84]

The Judge's Crystal Ball

In *Dodds v. ABC, Inc.*,[85] the court considered a libel by implication claim based on a *Prime Time Live* episode concerning the apparently arbitrary behavior of California Superior Court Judge Bruce Dodds, who kept a toy crystal ball in his chambers. He admittedly, in what he claimed was a jocular stance, would demonstrate the crystal ball's support for his positions. A visual of Dodds on the bench, apparently deciding cases, was accompanied by a voiceover, "lawyers, litigants, and his former clerk all say Dodds often used the crystal ball to support his decisions." Judge Dodds claimed that the broadcast falsely implied that he actually made decisions by consulting the crystal ball. The court was willing to assume that this implication was reasonably implied by the broadcast, but reaffirmed the Ninth Circuit doctrine begun with *Newton* that "Judge Dodds must further establish that ABC intended to convey the defamatory implication—and he must do so with 'convincing clarity.' "[86] He failed to do so.

The court also rejected his claim that the broadcast implied that he was unfit to serve as a judge because that implied opinion arose from disclosed facts and therefore did not purport to be a statement of fact. Alternatively, the court held that an allegation that an elected public official was unfit to serve should be treated as opinion, even if it is verifiable.

Other Disallowed Claims

In *Jenkins v. Snyder*[87] and *Abadian v. Lee*,[88] federal judges in Virginia and

Maryland relied upon *White* and *Chapin* in dismissing claims of libel by implication based upon thoughtful analyses in which these courts concluded that the publications in issue did not suggest or convey that the publisher intended or endorsed the claimed defamatory inferences. The same rationale was used by the D.C. Court of Appeals in rejecting a claim based on an inference that the facts published were reasonable but apparently not endorsed or intended by the publisher.[89]

More recently, a federal judge in the Northern District of Georgia dismissed a libel by implication claim by a former housekeeper of John and Patsy Ramsey, who alleged that the Ramseys' book, *The Death of Innocence*, implied that she should be a suspect in the murder of JonBenét Ramsey.[90] The court's analysis cited traditional common law precedent, but resembled that employed in *White* and *Chapin.*

In *Thomas v. Los Angeles Times Communications* LLC,[91] the Central District of California granted an anti-SLAPP motion based upon the Ninth Circuit's requirement that implied defamation be intended by the publisher and alternatively a *Chapin*-analysis of apparent intent and opinion.

In *Smith v. Moldanado*,[92] the plaintiffs were applicants for a gaming license. During the permit process, their attorney was indicted on criminal charges for allegedly bribing a California legislator to prevent an opposing applicant from acquiring the license. The defendant circulated to local residents a *L.A. Times* article that accurately reported the facts of the lawyer's conviction, highlighting the paragraph that mentioned the plaintiffs by name. Even though the *L.A. Times* article did not suggest that the plaintiffs were involved in the bribery, the plaintiffs contended that the highlighting amounted to an endorsement of that plausible inference from the facts reported.

Relying exclusively on California law (with no mention of *White* or *Chapin*), the court held that "any conceivable implication that the [plaintiffs] were involved in their former attorney's alleged criminality was necessarily drawn from the true facts stated in the newspaper article," and was therefore not actionable even if a third party could interpret the emphasis as having a defamatory meaning.

In *McCormack v. County of Westchester*,[93] the *New York Times* used the photograph of an infant to illustrate an article that focused on transmission of AIDS from mothers to infants. The plaintiff sued for defamation (and misappropriation under sections 50 and 51 of New York Civil Rights Act) claiming that the article "implied that the infant and her parents were afflicted with AIDS." Without citing *Chapin* or *White,* the appellate court affirmed dismissal of the defamation claim on the grounds that "plaintiffs have failed to establish by a preponderance of the evidence that *The Times* defendants intended or endorsed such an implication."[94]

Allowing Claims of Implied Libel

Most recently, in *Van Buskirk v. Cable News Network, Inc.*,[95] CNN's principal source for the Operation Tailwinds story sued over CNN's retraction. Van Buskirk complained that CNN mentioned that he "took drugs . . . for a nervous disorder . . ." but failed to mention that he had stopped ten years before the interview and that the drug was not mind-altering.

Applying North Carolina law, the court agreed that these "statements (and omissions) . . . may have created a false impression that Van Buskirk's use of (or need for) medication was the cause of CNN's erroneous story on Operation Tailwind." The case was remanded for further proceedings.

The court did not cite *White* or *Chapin* or refer to a requirement of apparent endorsement of the alleged implication, but the court's reference to CNN's "zeal to shift all blame" for its Tailwind report would have been purely gratuitous if not a characterization of the apparent intent of the publication. Particularly in view of the many truthful statements in the publication that adversely reflected on Van Buskirk's credibility, one has to question the materiality of the possible misimpression to the gist of the defamation;[96] the court made a "see also" cite to cases that are subject to the same criticism.[97]

Fanelle v. Lojack Corp.

In *Fanelle v. Lojack Corp.,*[98] the plaintiff, who had been arrested for but acquitted of auto theft, sued Lojack Corp. for distributing a promotional package that included a *Philadelphia Inquirer* article concerning the auto theft arrest that contained the plaintiff's photograph. The court concluded that a reasonable finder of fact could determine that, the effect of the article, in a promotional package that focused upon auto theft, was "reasonably calculated to," or would "naturally engender an impression among those to whom it was circulated (car dealers) that Peter Fanelle was a thief."

The court predicted "that the Supreme Court of Pennsylvania would recognize a cause of action for defamation in a case where true facts are juxtaposed or facts are omitted in a way that gives rise to a defamatory implication" and rejected the enhanced protection of the *White-Chapin* line of cases.[99] The court's preoccupation with the cognizability of a claim of libel by implication based upon juxtaposition of true facts camouflaged the more difficult dilemma presented by the case: Is there any remedy against repeated publication of someone's arrest without disclosing that he has since been acquitted? The ruling might best be explained by the fact that Lojack's promotional package was commercial speech under Third Circuit precedent.[100]

Turner v. KTRK Television, Inc.

After years of seemingly not permitting defamation claims based on impressions,[101] in *Turner v. KTRK Television, Inc.,*[102] the Texas Supreme Court, citing the *Prosser & Keeton* summary,[103] recently held that the "gist" conveyed by the whole of a communication containing only truthful statements may nonetheless be false and defamatory as a result of "omitting or juxtaposing facts." Turner, a candidate for office, claimed that a broadcast concerning his role as an attorney in preparing a will for a client who faked his death to defraud an insurance company implied that the attorney knew of and participated in the scam.

The broadcast reported that Turner procured the appointment of a mutual friend of himself and the testator to handle the estate, but did not disclose that the will designated this person as executor, or that the will left the estate to the testator's father. The court found that this falsely suggested that Turner and his friend sought to benefit personally.

The broadcast also reported that the probate judge removed Turner from the case citing conflicts of interest, but did not mention that the only conflict was between Turner's role as attorney and witness. The court found that this sug-

gested that the "conflict" was between Turner's pecuniary interest and his duty to the estate. Moreover, reporting that the probate court had rejected Turner's fee, without disclosing that the reason was unrelated to his disqualification, reinforced that inference.

Finally, reporting that the testator died only nine days after he had been indicted for fraud, and "three days after drawing up the will," without disclosing that Turner drafted the will weeks before it was signed, could lead "an ordinary viewer [to] believe that Turner prepared the will three days before Foster disappeared," which could reinforce the inference that "the will was more likely to be the product of a scheme to defraud insurers." The court found that "a reasonable viewer could conclude that the broadcast mischaracterized Turner's role in the Foster matter and thereby cast more suspicion on Turner's action than an accurate account would have warranted."[104]

The Texas Supreme Court expressed no willingness to require apparent endorsement of the implication or that the omission of facts reach the materiality required by the *Janklow*, *White/Chapin*, and *Strada* line of cases.[105] Nevertheless, judgment was entered in favor of the station because Turner had failed to prove that the defendant reporter published with actual malice.

The unsettling aspects of the *Turner* decision were neutralized by the decision of the Fifth Circuit Court of Appeals, applying Texas law, in *Green*.[106] The *Green* court embraced a difficult-to-meet standard of materiality for liability based upon false impressions allegedly created by omission of exculpatory facts.

Minnesota Wrestles with Issue

Some of the more curious rulings on defamation by implication issues have been made by state and federal courts in Minnesota, seemingly in search of a means to circumnavigate the barrier to the theory imposed by *Diesen v. Hessberg.*[107]

Toney v. WCCO-TV[108] involved a claim by a dog dealer who sold animals "retired from service" to the University of Minnesota for testing and experiments. The broadcast suggested that regulation of such dog dealers was lax, and that the animals frequently were stolen. The broadcast reported that Julian Toney supplied about a thousand dogs a year to the University of Minnesota, one-fifth of his business, and that Toney said he "seldom gets animals from dog pounds." The announcer immediately added "but when we checked his 1990 records, we found he was telling the U.S.D.A. just the opposite," and that the U.S.D.A. confirmed that Toney was "under investigation for falsification of records."[109]

Toney claimed that his 1990 records showed that he obtained only a small amount of dogs from pounds, and that in 1992, when he gave the interview, the records fully supported the statement attributed to him. He maintained that the report implied that he had stolen animals and lied about the source of his animals, but the trial court dismissed the claim on the ground that *Diesen* barred defamation based upon implications, and that under *Janklow* and *Price v. Viking Press*,[110] implications are to be treated as opinions. In an opinion written by the late Supreme Court Justice Byron White, who was sitting by designation, the Eighth Circuit read *Diesen* as applicable only to public plaintiffs. Justice White also disagreed with the trial court's reliance upon *Janklow* and *Price* because *Milkovich* had since held that opinions are protected only if they do not convey a materially false factual implication, and here the implication—that Toney lied to the U.S.D.A. and had stolen dogs—conveyed a provably true or false assertion.

Michaelis v. CBS

In *Michaelis v. CBS, Inc.*,[111] the Eighth Circuit court reaffirmed the holding in *Toney,* that defamation by implication is a viable cause of action by a nonpublic plaintiff in Minnesota. Michaelis was a pathologist who performed an autopsy from which she concluded that a death was suicide. Her conclusion was later questioned by CBS in a broadcast that stated, correctly, that the plaintiff was not board certified as a forensic pathologist, and that when the station attempted to talk to her about her qualifications to handle suspicious cases, "she hung up on us. Twice." The broadcast omitted the fact the plaintiff was board eligible, and the hangups were preceded by conversations (not concerning her qualifications) of several minutes. The court found that these statements, when read with others in the broadcast that were privileged or otherwise nonactionable, were capable of implying that the plaintiff was "professionally unqualified." Here, the court held the defendant accountable for fact selection that was arguably no more than unfair, and appeared to apply a more relaxed standard of materiality of omissions than the *White/Chapin* line of cases.[112]

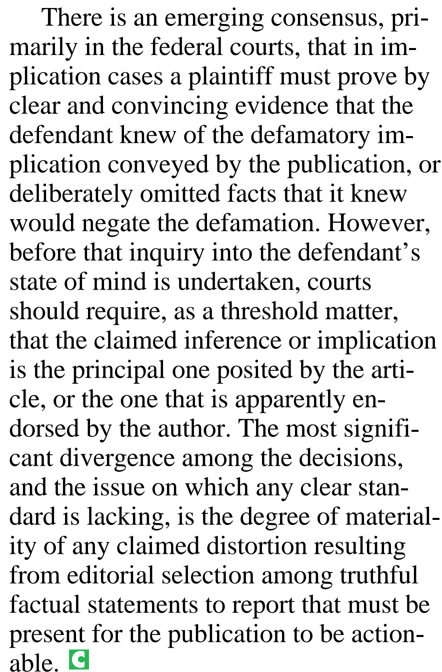
Schlieman v. Gannett

In *Schlieman v. Gannett Minnesota Broadcasting, Inc.*,[113] a Minnesota Court of Appeals case, a police officer sued a television station over a report on a shooting that the officer claimed was provoked by aggressive conduct by the victim. The television report stated that "there's some disagreement over exactly what happened," and quoted one witness as saying the victim "was not being aggressive," which the witness denied saying. The officer claimed this implied that the shooting was unjustified.

The jury found the broadcast not defamatory, after being instructed that "in considering whether a statement is defamatory as to the plaintiff, you must not consider whether the statement is an implication based upon the juxtaposition of those statements or the omission of other facts." The appellate court reversed and held that this instruction was error, and that *Diesen* was not applicable because the claim was based, not upon true statements that allegedly gave rise to a false implication, but upon the false statement that the victim was not being aggressive. In addition, the court ruled that *Diesen* precluded consideration of omitted facts only for purposes of considering falsity, and not for purposes of defamatory meaning (although it is not clear how omitted facts could have affected the meaning conveyed by what was published). The court struggled to find that the instructional error was prejudicial, but what it came down to was that it enabled defense counsel to "argue effectively" that the publication was not defamatory.[114]

Conclusion

There is a general consensus among courts and legal writers that claims of defamation by implications or inferences that arise from juxtaposition or omission of true facts present threats to a free press that are insufficiently addressed by the rule of *New York Times v. Sullivan* and its progeny. Some state courts have responded by eliminating all claims involving implied defamation by public officials and public figures, while others have limited such claims and even those



of private individuals to defamatory implications that would have been eliminated by the inclusion of additional facts. There is agreement among the courts that implications are not actionable where they do not involve provably false factual connotations.

There is an emerging consensus, primarily in the federal courts, that in implication cases a plaintiff must prove by clear and convincing evidence that the defendant knew of the defamatory implication conveyed by the publication, or deliberately omitted facts that it knew would negate the defamation. However, before that inquiry into the defendant's state of mind is undertaken, courts should require, as a threshold matter, that the claimed inference or implication is the principal one posited by the article, or the one that is apparently endorsed by the author. The most significant divergence among the decisions, and the issue on which any clear standard is lacking, is the degree of materiality of any claimed distortion resulting from editorial selection among truthful factual statements to report that must be present for the publication to be actionable.

Endnotes

1. C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of* New York Times Co. v. Sullivan, 78 IOWA L. REV. 237 (1993) (comprehensive scholarly work on libel by implication; practically every thought in this article can be traced to Dienes and Levine's seminal work).

2. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991).

3. RESTATEMENT (SECOND) OF TORTS § 614.

4. Bueno v. Denver Publ'g, Inc., 32 P.3d 491 (Colo. App. 2000), *cert. granted* (Colo. 2001). In *Bueno*, the court granted the defendants' directed verdict motion on the defamation claim but submitted the false light claim to the jury, which found liability on that claim.

5. *See* Memphis Publ'g Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1989).

6. RESTATEMENT (SECOND) OF TORTS § 614 cmt. d. The same considerations are applied to determine whether the meaning conveyed by an opinion is sufficiently literal and factual to meet the constitutionally imposed "statement of fact" requirement set forth in *Milkovich. See* NBC Subsidiary (KCNC), Inc. v. Living Will Ctr., 879 P.2d 6 (Colo. 1994).

7. RESTATEMENT (SECOND) OF TORTS § 580B.

8. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974).

9. RESTATEMENT (SECOND) OF TORTS § 566 (1977).

10. 497 U.S. 1, 20 (1990).

11. The Chief Justice's opinion for the Court left some doubt about the manageability of the statement of fact inquiry when he wrote that "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." 497 U.S. at 18–19. Nonetheless, the lower courts have fashioned the "statement of fact" inquiry as a question of law based on analysis of the linguistic and social context of the words in issue. *See, e.g.,* Phantom Touring, Inc. v. Affiliated Publ'ns, 953 F.2d 724 (1st Cir. 1992); Partington v. Bugliosi, 56 F.3d 1147 (9th Cir. 1995); NBC Subsidiary (KCNC), Inc. v. Living Will Ctr., 879 P.2d 6 (Colo. 1994).

12. Before *Milkovich,* courts applying the privilege for "pure opinion," as opposed to opinions that implied the existence of defamatory facts, limited the doctrine to opinion statements that made it reasonably clear what false and defamatory facts were implied. *See* Cole v. Westinghouse Broadcasting Co., 435 N.E.2d 1021, 1027 (1982); *see also* Oman v. Evans, 750 F.2d 970, 985 (D.C. Cir. 1984), presaging the conclusion now inherent in the post-*Milkovich* statement of fact requirement, that the analysis of a statement for a provable factual connotation fully encompasses the question of whether an opinion implies defamatory facts.

13. PROSSER & KEETON ON THE LAW OF TORTS § 116, at 117 (Dan B. Dobbs ed., Supp. 1988).

14. Memphis Publ'g Co. v. Nichols, 569 S.W.2d 412, 414 (Tenn. 1989).

15. *Id.* at 418.

16. Diesen v. Hessberg, 455 N.W.2d 446 (Minn. 1990).

17. McDermott v. Biddle, Case Nos. 262 June Term 1983, 3693 Mar. 1984 (Lavelle, J.) (Pa. Ct. C.P. Dec. 7, 1990) (jury verdict awarding $3 million in compensatory and $3 million in punitive damages), *order granting new trial aff'd,* 647 A.2d 514 (Pa. Sup. Ct. 1994), *rev'd,* 674 A.2d 665 (Pa. 1996).

18. Harrison v. Hartford Courant, Litchfield Cty. (Conn.) Sup. Ct., Case No. 0044131 (defense verdict rendered Aug. 11, 1993).

19. Robinson v. Capital Cities-ABC (KTRK-TV), Harris Cty. (Tex.) Dist. Ct. (defense verdict rendered Nov. 22, 1992), *appeal dismissed,* No. C14-93-00318-CV, 1993 Tex. App. LEXIS 2308 (Tex. App. Aug. 19, 1993).

20. *See, e.g.,* Strada v. Connecticut Newspapers, Inc., 477 A.2d 1005, 1010 (Conn. 1984).

21. White v. Fraternal Order of Police, 909 F.2d 512, 525 (D.C. Cir. 1990).

22. The basic principle of editorial autonomy recognized in *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241 (1974), is clearly at odds with the theory of libel by selection or omission. *See* NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr., 879 P.2d 6, 15 (Colo. 1994); Newton v. NBC, Inc., 930 F.2d 662, 686 (9th Cir. 1991).

23. Anthony Glassman, *The Use of Defamatory Implications*, *in* NEWSGATHERING AND LIBEL LITIG. (PLI 2000).

24. DAN B. DOBBS, THE LAW OF TORTS (2001) at vii (explaining why *Prosser & Keeton on Torts* was replaced instead of revised).

25. Schaefer v. Lynch, 406 So. 2d 185 (La. 1981).

26. Mihalik v. Duprey, 417 N.E.2d 1238 (Mass. Ct. App. 1981).

27. Diesen v. Hessberg, 455 N.W.2d 446 (Minn. 1990).

28. Sassone v. Elder, 626 So. 2d 345, 354 (La. 1993).

29. Strada v. Connecticut Newspapers, Inc., 477 A.2d 1005 (Conn. 1984); De Falco v. Anderson, 506 A.2d 1280 (N.J. Super. App. Div. 1986).

30. *Strada,* 477 A.2d at 1010; *see also* Toney v. WCCO Television, 85 F.2d 383, 387 (8th Cir. 1996).

31. Locricchio v. Evening News Ass'n, 476 N.W.2d 112, 125 (Mich. 1991).

32. *Locricchio*, 476 N.W.2d at 123, n.13.

33. 788 F.2d 1300 (8th Cir. 1986).

34. *Id.* at 1306.

35. 497 U.S. 1, 20 (1990).

36. *See* note 11*; see also* Weyrich v. New Republic, Inc., 235 F.2d 617 (D.C. Cir. 2001).

37. Memphis Publ'g Co. v. Nichols, 569 S.W.2d 412, 418 (Tenn. 1989).

38. Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974).

39. The notion that the actual malice inquiry must embrace awareness of meaning as well as falsity of that meaning was first expounded in an article by Profs. Franklin and Bussel and further developed in Dienes & Levine, *supra* note 1, at 310–23; Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity,* 25 WM. & MARY L. REV. 825, 845–47 (1984).

40. 930 F.2d 662, 686 (9th Cir. 1990).

41. *Id.* at 681.

42. Saenz v. Playboy Enters., Inc., 841 F.2d 1309, 1318 (7th Cir. 1988); Partington v. Bugliosi, 56 F.3d 1147 (9th Cir. 1995).

43. Johnson v. CBS, 10 F. Supp. 2d 1071 (D. Minn. 1998).

44. Dixon v. Ogden Newspapers, Inc., 416 S.E.2d 237 (W. Va. 1992).

45. 909 F.2d 512 (D.C. Cir. 1990).

46. *Id.* at 519–20.

47. *Id.* at 520.

48. *Id.* at 526–27.

49. Sassone v. Elder, 626 So. 2d 345, 354 (La. 1993).

50. White v. Fraternal Order of Police, 909 F.2d 512, 525 (D.C. Cir. 1990).
51. *Id.*
52. *See* Janklow v. Newsweek, 788 F.2d 1300 (8th Cir. 1986).
53. 993 F.2d 1087 (4th Cir. 1993).
54. *Id.* at 1092–93.
55. *Id.* at 1093.
56. *Id*. at 1095.
57. *Id.* at 1092–93; *see also* White v. Fraternal Order of Police*,* 909 F.2d 512, 518 (D.C. Cir. 1990).
58. 376 U.S. 254, 288–89 (1964).
59. 398 U.S. 6 (1970).
60. 418 U.S. 264, 284–86 (1974).
61. 501 U.S. 496, 521–26 (1991).
62. Milkovich v. Lorraine J., 497 U.S. 1, 19–20 (1990).
63. *See supra* note 11.
64. *See* Dienes & Levine, *supra* note 1 at 280–82.
65. Levan v. Capital Cities/ABC, Inc., 190 F.3d 1230, 1240 (11th Cir. 1999).
66. *See* Partington v. Bugliosi, 56 F.3d 1147, 1152 n.9 (9th Cir. 1995); Rubin v. U.S. News & World Rep., 271 F.3d 1305, 1309 n.11 (11th Cir. 2000).
67. RESTATEMENT (SECOND) OF TORTS § 435A.
68. *Id.* § 563 cmt. b.
69. *See* Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1093 (4th Cir. 1993); *see also* Moldea v. New York Times Co., 22 F.3d 310, 312 (D.C. Cir. 1994).
70. *See, e.g.,* Polygram Records, Inc. v. Superior Court*,* 216 Cal. Rptr. 252, 257 n.8 (Cal. Ct. App. 1985) ("The determination whether a statement is defamatory is thus analogous to the legal question whether an allegedly libelous statement is one of fact or opinion.") (citation omitted).
71. *See* Brandenburg v. Ohio, 393 U.S. 444 (1969); Hess v. Indiana, 414 U.S. 106 (1993) (focusing on the apparent purpose of speaker and tendency of words to incite imminent lawless action).
72. New York Times v. Sullivan, 376 U.S. 254, 287–88 (1964); *see also* Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 251–52 (1974).
73. No. 01-10151, 2002 U.S. App. LEXIS 5966 (5th Cir. Apr. 3, 2002); *see also* KTRK Television v. Felder, 950 S.W.2d 100 (Tex. App. 1997); Pierce v. St. Vrain Sch. Dist., 944 P.2d 646 (Colo. Ct. App. 1997), *rev'd on other grounds,* 981 P.2d 600 (Colo. 1999). The rule of these cases resembles the doctrine of neutral reportage, but does not require that the plaintiff be controversial, prominent, or credible, and the standard of "neutrality" may be less exacting. *See* ROBERT D. SACK, SACK ON DEFAMATION: SLANDER, LIBEL AND RELATED PROBLEMS § 7.3.2.4 (3d ed. 1999).
74. RESTATEMENT (SECOND) OF TORTS § 652E (1977).
75. Godbehere v. Phoenix Newspapers, Inc., 783 P.2d 781 (Ariz. 1989).
76. 160 F. Supp. 2d 169 (D.N.H. 2001).
77. SACK, supra note 73, § 12.3.1.1.
78. White v. Fraternal Order of Police*,* 909 F.2d 512, 518 (D.C. Cir. 1990); Weyrich v. New Republic, 235 F.3d 617, 628 (D.C. Cir. 2001).
79. 271 F.3d 1305 (11th Cir. 2001).
80. *Id.* at 1309 n.11 (recognizing "that a First Amendment problem is encountered where a private figure complains that he has been defamed by implication in a communication containing only true facts").
81. *Id.* at 1308 n.10. *See also* Eastwood v. National Enquirer, Inc*.,* 123 F.3d 1249, 1256 (9th Cir. 1997) (requiring clear and convincing evidence that the defendant had intended to convey the false impression that Eastwood had given an interview to the paper).
82. 201 F.3d 680 (5th Cir. 2000),
83. TEXAS CIV. PRAC. & REM. § 96.001.
84. 113 F.3d 556, 562 (5th Cir. 1997) (per curiam) (citing S. Peter Scalamandre & Sons, Inc. v. Kaufman, 113 F.3d 556, 563–64 (5th Cir. 1997)).
85. 145 F.3d 1053 (9th Cir. 1998),
86. *Id.* at 1064. The court mistakenly cited the *White* and *Chapin* cases to support a requirement of proving actual intent, instead of apparent intent.
87. No. 00CV2150, 2001 WL 755818 (E.D. Va. Feb. 6, 2001).
88. 117 F. Supp. 2d 481 (D. Md. 2000).
89. Guilford Trans. Indus. v. Wilner, 760 A.2d 580 (D.C. App. 2000).
90. Hoffman-Pugh v. Ramsey, No. Civ. A.1:01-CV-630-TWT, 2002 WL 522713 (N.D. Ga. Apr. 5, 2002).
91. 182 F. Supp. 2d 1005 (C.D. Cal. 2002).
92. 82 Cal. Rptr. 2d 397 (Cal. Ct. App. 1999).
93. 731 N.Y.S.2d 58 (N.Y. App. Div. 2001).
94. *Id.* at 62–63.
95. No. 00–16616, 2002 U.S. App. LEXIS 4389 (9th Cir. Mar. 20, 2002).
96. *Id.* at *11 ("[W]e follow the Supreme Court's teaching that 'minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge can be justified.' ") (citing Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991)).
97. *E.g.,* Crane v. Arizona Republic, 972 F.2d 1511 (9th Cir. 1992); Turner v. KTRK Television, Inc., 38 S.W.2d 103 (Tex. 2000).
98. No. 99–4292, 2000 WL 1801270 (E.D. Pa. 2000).
99. *See id.* at *3 n.7.
100. *See* U.S. Healthcare v. Blue Cross, 898 F.2d 914 (3d Cir. 1990); *see also Lojack*, 2000 WL 1801270, at *8.
101. *See* Randell's Food Market, Inc. v. Johnson, 891 S.W.2d 640, 646 (Tex. 1995).
102. 38 S.W.3d 103 (Tex. 2000).
103. PROSSER & KEETON, *supra* note 13.
104. *Turner*, 38 S.W.3d at 120.
105. The same court made a similar disposition in *Huckabee v. Time Warner Entertainment Company L.P.,* 19 S.W.3d 413 (Tex. 2000); *see also* Crane v. Arizona Republic, 972 F.2d 1511 (9th Cir. 1992). Other courts have been more willing to find such implications to be subsidiary to the otherwise nonactionable defamatory impact of the story, or not such as to materially advance that impact. *See* Tavoulareas v. Piro, 817 F.2d 762, 787–88 (D.C. Cir. 1987) (en banc).
106. *See* Green v. CBS, Inc., No. 01-10151, 2002 U.S. App. LEXIS 5966 (5th Cir. Apr. 3, 2002); *see also* KTRK Television v. Felder, 950 S.W.2d 100 (Tex. App. 1997); Pierce v. St. Vrain Sch. Dist., 944 P.2d 646 (Colo. Ct. App. 1997), *rev'd on other grounds,* 981 P.2d 600 (Colo. 1999).
107. *See* 455 N.W.2d 446 (Minn. 1990).
108. 83 F.3d 383 (8th Cir. 1996).
109. *Id.* at 385.
110. 881 F.2d 1426 (8th Cir. 1989).
111. 119 F.3d 697 (8th Cir. 1977).
112. *Chapin,* in particular, refused to read so much into a report of the subject's refusal to answer questions concerning the defamatory charge. *See* 993 F.2d 1087, 1095 (4th Cir. 1993).
113. 637 N.W.2d 297 (Minn. 2001).
114. *Id.* at 305.