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Publisher May Be Held Liable for Republication of Libel When Grossly Irresponsible Acts Were Committed in Course of Original Publication

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deed, the lack of post-*Harris* authority precluding the use of illegally obtained evidence on the basis of trustworthiness indicates that its significance is rather limited. Though the trustworthiness proviso may be available as a bridge between the impeachment process and the constitutional mandate to protect the accused, its parameters remain undefined after *Washington.* Thus, the Court of Appeals perpetuates rather than clarifies the uncertainty engendered by *Harris* regarding legal standards of trustworthiness.

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Publisher may be held liable for republication of libel when grossly irresponsible acts were committed in course of original publication

The liability of a corporate media employer who publishes a libel[215] against a private person is founded upon imputation to the employer[216] of its employees' grossly irresponsible conduct.[217] It

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at trial in which the defendant's constitutional right to counsel had been violated could not be used to impeach his credibility as a witness when he testified on his own behalf in a separate and unrelated criminal trial. Loper v. Beto, 405 U.S. 473 (1972). Although the "trustworthiness" of such a conviction would appear to be in issue, the *Loper* Court did not address that issue in reaching its result. This omission in *Loper,* as well as the vagueness in *Harris* and *Washington,* suggest that perhaps the term "trustworthiness" has not yet been clearly defined because the courts are trying to protect the rights of defendants while attempting to insure that the most reliable evidence is introduced. *See generally* Nokes, AN INTRODUCTION TO EVIDENCE 294 (3d ed. 1962). Indeed, it appears that the degree of police misconduct, rather than the trustworthiness of the statements, is the crucial factor in the determination of admissibility. *Id.*

[215] Libel has been defined as a defamatory writing containing "words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society." Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933). Complete defenses to an accusation of libel include truth, Dolcin Corp. v. Reader's Digest Ass'n, 7 App. Div. 2d 449, 454, 183 N.Y.S.2d 342, 347 (1st Dep't 1959), and privilege. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 114 at 776 (4th ed. 1971). Retraction and introduction of evidence tending to establish the plaintiff's preexisting bad reputation, although not complete defenses, can serve to mitigate damages. *Id.* at 799-801. For a brief discussion of the history of libel law see Curtis Publishing Co. v. Butts, 388 U.S. 130, 151-53 (1967).

[216] The individual author, the corporate publisher, and other persons involved in the publication of libel may be held jointly accountable. *See* Macy v. New York World-Telegram Corp., 2 N.Y.2d 416, 141 N.E.2d 566, 161 N.Y.S.2d 55 (1957); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920); Rinaldi v. Viking Penguin, Inc., 73 App. Div. 2d 43, 425 N.Y.S.2d 101 (1st Dep't 1980). The liability of a corporate publisher for the acts of

had been unclear, however, whether suspension of the employees' liability for such conduct also shielded the employer-publisher.[218] Recently, in *Karaduman v. Newsday, Inc.*,[219] the Court of Appeals held that a corporate publisher may be liable for republication of

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those in its employ has been premised on several theories. *E.g.*, Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920) (agency principles of notice and knowledge); *cf.* Cantrell v. Forest City Publishing Co., 419 U.S. 245, 253 & n.6 (1974) (respondeat superior).

[217] Traditionally, New York followed a rule of strict liability in libel. *See* Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 63-64, 126 N.E. 260, 262 (1920); Triggs v. Sun Printing and Publishing Ass'n, 179 N.Y. 144, 155, 71 N.E. 739, 742-43 (1904); Dall v. Time, Inc., 252 App. Div. 636, 639, 300 N.Y.S. 680, 683 (1937), *aff'd*, 278 N.Y. 635, 16 N.E.2d 297 (1938). In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court supplanted the strict liability in libel standard, as it applied to public officials, with one requiring proof of "actual malice." *Id.* at 283. The actual malice standard was subsequently applied to libel of a public figure. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). Finally, the Supreme Court abolished strict liability in libel actions by private persons against media defendants. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In *Gertz*, the Supreme Court directed the states to develop a fault standard to measure the liability of defendants who had allegedly libeled private persons. *Id.* at 347. Accordingly, New York adopted a "gross irresponsibility" standard to govern in this situation. Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975). The *Chapadeau* Court held that, in light of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the liability of a media defendant for libel of private persons involved in matters of public interest required proof "by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Id.* at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64. In applying the *Chapadeau* standard, New York courts have held that matters of public interest within the rule include the health and safety of elderly people, Cottom v. Meredith Corp., 65 App. Div. 2d 165, 411 N.Y.S.2d 53 (4th Dep't 1978), *leave to appeal denied*, 46 N.Y.2d 711, 389 N.E.2d 841, 416 N.Y.S.2d 1025 (1979), judicial proceedings involving real estate, Wehringer v. Newman, 60 App. Div. 2d 385, 400 N.Y.S.2d 533 (1st Dep't), *leave to appeal denied*, 44 N.Y.2d 641, 376 N.E.2d 205, 404 N.Y.S.2d 1025 (1978), and allegedly deceptive practices by vocational schools, Commercial Programming Unlimited v. CBS Inc., 50 App. Div. 2d 351, 378 N.Y.S.2d 69 (1st Dep't 1975). "Gross irresponsibility" has been found when the defendants had broadcasted a television interview which included unsubstantiated accusations of the plaintiff's medical malpractice. Greenberg v. CBS Inc., 69 App. Div. 2d 693, 419 N.Y.S.2d 988 (2d Dep't 1979). Another court found "gross irresponsibility" when the defendant had aired a television report which, without substantiation, accused the plaintiff of charging usurious interest rates, incorrectly reported that the plaintiff school was not approved by the New York State Department of Education, incorrectly reported that the Federal Trade Commission had brought suit against the plaintiff, and presented a distorted interview with the Commissioner of Consumer Affairs. Commercial Programming Unlimited v. CBS Inc., 50 App. Div. 2d 351, 378 N.Y.S.2d 69 (1st Dep't 1975).

[218] *See* Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977); Rinaldi v. Viking Penguin, Inc., 73 App. Div. 2d 43, 425 N.Y.S.2d 101 (1st Dep't 1980). In both *Holt, Rinehart* and *Viking Penguin*, the courts, although presented with the issue, declined to decide whether the employees' immunity from liability also shielded the employer-publisher.

[219] 51 N.Y.2d 531, 416 N.E.2d 557, 435 N.Y.S.2d 556 (1980), *aff'g in part, rev'g in part*, 71 App. Div. 2d 411, 422 N.Y.S.2d 426 (1st Dep't 1979).

its employees' defamatory articles, even though the employees themselves escaped liability due to the running of the statute of limitations.[220]

In *Karaduman,* one of the defendants, Newsday, had published a series of reports which traced the path of the international narcotics trade from Europe and Asia to the United States.[221] A year later, the New American Library (NAL), pursuant to an agreement with Newsday and with the assistance of a Newsday editor, republished the series in pocketbook form.[222] Subsequent to the republication, the plaintiff, implicated in the series as a narcotics smuggler, commenced a libel action against, *inter alios,* Newsday.[223] The plaintiff's first cause of action alleged libel in the original publication of the series.[224] Because more than 1 year had elapsed between the publication and the interposition of the claim, it was dismissed as not timely.[225] The causes of action based upon republication of the series, however, were deemed timely.[226] Claiming that the plaintiff's evidence failed to raise a triable issue of fact whether the defendants were grossly irresponsible, the defendants moved for summary judgment.[227] The Supreme Court, Special

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[220] *Id.* at 553-54, 416 N.E.2d at 568, 435 N.Y.S.2d at 567-68.

[221] *Id.* at 536, 416 N.E.2d at 558, 435 N.Y.S.2d at 558. Newsday published "The Heroin Trail" between February 1 and March 4, 1973. *Id.* The series was the result of a 13 month investigation by three Newsday reporters. *Id.* at 536, 416 N.E.2d at 558-59, 435 N.Y.S.2d at 558. Although the Pulitzer prize-winning series implicated over 300 people as being involved with international heroin smuggling, *Karaduman* appears to be the only defamation suit arising from its publication. *Id.* at 536-37, 416 N.E.2d at 559, 435 N.Y.S.2d at 558.

[222] *Id.* at 537, 416 N.E.2d at 559, 435 N.Y.S.2d at 558. NAL and Newsday signed a licensing agreement on March 11, 1973, and NAL republished the series in June 1974. *Id.* The agreement provided that defendant Forst, the Newsday editor who had edited the original series, would assist NAL in republishing the series.

[223] *Id.* In addition to Newsday, other defendants named by the plaintiff were the three Newsday reporters who had authored the original series, the Newsday editor who assisted in the republication of the series, and NAL. *Id.*

[224] *Id.*

[225] *See id.* The period within which a plaintiff must commence a suit for libel is 1 year. *See* CPLR 215(3) (1972).

[226] 51 N.Y.2d at 537, 416 N.E.2d at 559, 435 N.Y.S.2d at 558.

[227] *Id.* In support of their motion for summary judgment, the defendants submitted affidavits outlining the detailed procedures that the authors had followed to insure the substantive accuracy of their work. *Id.* at 537-38, 416 N.E.2d at 559, 435 N.Y.S.2d at 558. In addition, the affidavits stated that the plaintiff's link to the Euro-Asian narcotics smuggling trade had been established through interviews with individuals who were in a position to know of the plaintiff's alleged smuggling activities. *Id.* at 538, 416 N.E.2d at 559, 435 N.Y.S.2d at 558. The defendant authors submitted independent affidavits which asserted that, even if a triable question of fact was presented regarding their gross irresponsibility in publishing the original series, no triable issue could arise with respect to it since they were

Term, granted the motion, but the Appellate Division, First Department, reversed.[228]

On appeal, the Court of Appeals unanimously reversed, granting summary judgment to all defendants except Newsday.[229] With respect to Newsday, a divided Court voted to affirm the order denying summary judgment.[230] Writing for the majority,[231] Judge Jones reasoned that although a corporate publisher is liable for the gross irresponsibility of its reporters, such liability would independently "carry forward" should the publisher participate in the republication of the defamatory material.[232] Indeed, Judge Jones noted that since Newsday's "carry forward" liability was direct, not vicarious, it existed irrespective of whether Newsday's reporters had been shielded from liability by the running of the statute of limitations.[233]

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not involved in the republication. *Id.* at 538, 416 N.E.2d at 559, 435 N.Y.S.2d at 558-59. In opposition to the defendant's motion, the plaintiff submitted affidavits by the reporters' alleged sources wherein they denied having communicated with the defendant authors and having implicated the plaintiff in the international narcotics trade. *Id.* at 538, 416 N.E.2d at 560, 435 N.Y.S.2d at 559.

[228] Karaduman v. Newsday, Inc., 71 App. Div. 2d 411, 415, 422 N.Y.S.2d 426, 429 (1st Dep't 1979), *aff'd in part, rev'd in part,* 51 N.Y.2d 531, 416 N.E.2d 557, 435 N.Y.S.2d 556 (1980).

[229] 51 N.Y.2d at 540-41, 416 N.E.2d at 561, 566, 435 N.Y.S.2d at 560, 565. All judges concurred in parts I, II and IV of the opinion authored by Judge Gabrielli. In Part I, the Court granted summary judgment to the three reporters because no triable question of fact had been raised as to whether "the reporters 'published, participated in, authored [or] permitted' the publication of the book." *Id.* at 540, 416 N.E.2d at 561, 435 N.Y.S.2d at 560. In Part II, the Court dismissed the plaintiff's claims against defendant Forst, the Newsday editor who assisted in the republication of the original series, holding that summary judgment was proper because no triable issue of fact was raised as to whether he "personally" performed his duties concerning the republication in a grossly irresponsible manner. *Id.* at 541, 416 N.E.2d at 561, 435 N.Y.S.2d at 560. In Part IV, the Court dismissed the cause of action asserted against NAL, reasoning that no triable question of fact existed to show that NAL had reason to question the accuracy of the series or the validity of the reporters' work. *Id.* at 550, 416 N.E.2d at 556, 435 N.Y.S.2d at 565-66. The Court also reasoned that NAL was entitled to rely on Newsday's adherence to adequate journalistic practices. *Id.* at 551, 416 N.E.2d at 567, 435 N.Y.S.2d at 566.

[230] *Id.* at 552, 416 N.E.2d at 567, 435 N.Y.S.2d at 567.

[231] Judge Jones authored the opinion in which Judges Jasen, Fuchsberg and Meyer concurred. Chief Judge Cooke and Judge Wachtler concurred in a dissent authored by Judge Gabrielli which appears as Part III of the main opinion.

[232] 51 N.Y.2d at 553, 416 N.E.2d at 568, 435 N.Y.S.2d at 567.

[233] *Id.* The majority reasoned that no case support existed for shielding a corporate publisher from liability in defamation simply because "participating corporate personnel" were free from liability concerning the particular publication. *Id.* at 554, 416 N.E.2d at 568, 435 N.Y.S.2d at 567-68. *But see* RESTATEMENT (SECOND) OF AGENCY § 180 (1958) which states that "[a] disclosed or partially disclosed principal is entitled to all defenses arising out of a transaction between his agent and a third person." *Id.*

Dissenting, Judge Gabrielli stated that Newsday could not be vicariously liable for its reporters' gross irresponsibility in authoring the original series since the reporters' liability had been "extinguished."[234] Hence, the dissent reasoned, Newsday's alleged republication liability necessitated a second incident of gross irresponsibility.[235] Moreover, the dissent posited that such a second incident could not properly be premised upon imputation of the alleged guilty knowledge of the reporters, since in libel cases the unimpeded exercise of first amendment rights is of preeminent importance.[236] The dissent concluded by noting that only the acts and knowledge of Newsday employees who had participated in the republication effort could be imputed to Newsday to constitute a second incident of gross irresponsibility.[237]

It is submitted that the *Karaduman* decision subjects corporate publishers to an unjustifiably strict standard of liability for the republication of defamatory material. By holding the corporate republisher indefinitely liable[238] for its primary publication culpable conduct[239] and by carrying forward such culpable conduct as a

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[234] 51 N.Y.2d at 546, 416 N.E.2d at 564, 435 N.Y.S.2d at 563 (Gabrielli, J., dissenting).

[235] *See id.* (Gabrielli, J., dissenting). Judge Gabrielli conceded that Newsday might have been liable for the original publication under a respondeat superior theory. *Id.* (Gabrielli, J., dissenting).

[236] *Id.* at 548-49, 416 N.E.2d at 565, 435 N.Y.S.2d at 565 (Gabrielli, J., dissenting). Although the dissent was "theoretically tempt[ed]" to impute the "guilty knowledge" of the reporters to their employer for the purpose of determining its accountability in libel, it deemed this approach improper. *Id.* at 546-47, 416 N.E.2d at 564, 435 N.Y.S.2d at 563-64 (Gabrielli, J., dissenting). The dissent reasoned that, when dealing with libel actions, the imputation of knowledge should be used sparingly. *Id.* at 547, 416 N.E.2d at 564, 435 N.Y.S.2d at 564 (Gabrielli, J., dissenting).

[237] *Id.* at 549-50, 416 N.E.2d at 566, 435 N.Y.S.2d at 565 (Gabrielli, J., dissenting). Judge Gabrielli considered Newsday's participation in the republication to be a separate business venture "conceptually unrelated" to Newsday's function as a newspaper publisher. *Id.* at 547, 416 N.E.2d at 565, 435 N.Y.S.2d at 564 (Gabrielli, J., dissenting). Accordingly, the dissent interpreted Supreme Court dictates to require actual fault in the republication. *Id.* at 547, 416 N.E.2d at 564, 435 N.Y.S.2d at 564 (Gabrielli, J., dissenting).

[238] In contradiction to the maintenance of latent rights of action sanctioned by the *Karaduman* majority, it is a general rule that statutes of limitations cannot be extended by the courts. CPLR 201 (1972); *see* Caffaro v. Trayna, 35 N.Y.2d 245, 319 N.E.2d 174, 360 N.Y.S.2d 847 (1974). Nevertheless, statutory tolls and extensions operate to extend the time within which an action may be commenced. *E.g.*, CPLR 207 (1972); CPLR 208 (McKinney Supp. 1980-1981); CPLR 209 (1972); CPLR 210 (1972).

[239] 51 N.Y.2d at 553, 416 N.E.2d at 568, 435 N.Y.S.2d at 567. Although republication liability in *Karaduman* is dependent upon actions which were part of the original publication, the Court's holding is consistent with the "single publication rule" which provides that when one impression or printing is used, there is a single publication, irrespective of how many copies are distributed or how many people view the libel. *See* Gregoire v. G.P. Put-

basis for republication liability,[240] the *Karaduman* Court converts the corporate publisher into a "no-fault" insurer of its employees' acts.[241]

Indeed, such a "no-fault" liability standard appears to contravene the Supreme Court's holding that media liability for the defamation of private persons requires a showing of fault.[242] Another consequence of "no-fault" republication liability is that the exercise of first amendment rights might be chilled, because the publisher is faced either with reviving potential liability or refraining from republishing.[243] The publisher is further constrained since even a thorough reinvestigation of its reporters' work may not exculpate it from liability.[244]

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nam's Sons, 298 N.Y. 119, 126, 81 N.E.2d 45, 49 (1948). The rule has been applied, as it was in *Karaduman,* to create one cause of action for the original distribution of a libelous written work, regardless of how many copies are distributed, and to create a second cause of action with a concomitant renewal of the statute of limitations upon a subsequent reissuance or republication of the same libelous material. *See* Gregoire v. G.P. Putnam's Sons, 298 N.Y. 119, 124, 81 N.E.2d 45, 47-48 (1948); Rinaldi v. Viking Penguin, Inc., 73 App. Div. 2d 43, 45, 425 N.Y.S.2d 101, 102 (1st Dep't 1980). In their application of the "single publication rule," however, New York courts had not, prior to *Karaduman,* based republication liability upon grossly irresponsible acts committed in the course of writing the original publication. *See* Rinaldi v. Viking Penguin, Inc., 73 App. Div. 2d 43, 45, 425 N.Y.S.2d 101, 102 (1st Dep't 1980).

[240] *See* 51 N.Y.2d at 553, 416 N.E.2d at 568, 435 N.Y.S.2d at 567. Each republication of a libel is a tort distinct from earlier publications. Hartman v. Time, Inc., 166 F.2d 127, 136 (3d Cir. 1947), *cert. denied,* 334 U.S. 838 (1948); Dodd v. Harper & Bros., 3 App. Div. 2d 548, 549, 162 N.Y.S.2d 419, 421 (1st Dep't 1957) (per curiam), *appeal dismissed,* 4 N.Y.2d 958, 151 N.E.2d 622, 175 N.Y.S.2d 826 (1958); Municipal Training Center, Inc. v. National Broadcasting Corp., 87 Misc. 2d 1044, 1045, 387 N.Y.S.2d 40, 41 (Sup. Ct. N.Y. County 1976). Thus, it appears illogical to predicate corporate liability for a republication of libelous material upon grossly irresponsible conduct arising in the course of a prior publication. Moreover, carrying forward and asserting the author's grossly irresponsible conduct against the corporate republisher seems unjustified given that the author is not liable for republication. *See* Macy v. New York World-Telegram Corp., 2 N.Y.2d 416, 422, 141 N.E.2d 566, 570, 161 N.Y.S.2d 55, 60 (1957); Rinaldi v. Viking Penguin, Inc., 73 App. Div. 2d 43, 48, 425 N.Y.S.2d 101, 104 (1st Dep't 1980).

[241] Clearly, republication defamation liability after *Karaduman* still presupposes a finding of gross irresponsibility, albeit that arising in the course of the original publication. *See* 51 N.Y.2d at 553-54, 416 N.E.2d at 568, 435 N.Y.S.2d at 567-68. Indeed, such prior culpable conduct provides the fault upon which "no-fault" republication liability is based.

[242] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964); note 217 *supra.*

[243] If a publisher has an obligation either to prove the truth of his statements or face liability in libel he will certainly practice "self-censorship." New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

[244] *See* 51 N.Y.2d at 553-54, 416 N.E.2d at 568, 435 N.Y.S.2d at 567-68. Conceivably, the managerial staff of Newsday could have performed a thorough reexamination of its re-

It is suggested, therefore, that when a publisher adheres to accepted journalistic standards and rechecks the accuracy of a reporter's work prior to republication, it should be able to republish without fear of suit.[245] Unless publishers can escape republication liability by a showing of reasonable pre-republication investigation, the consequence may be that republication of even noncontroversial material will be curtailed. Thus, it is recommended that in future cases the Court should outline viable good faith defenses to republication liability.

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porters' sources and assertions without discovering the reporters' gross irresponsibility. *Id.* at 549, 416 N.E.2d at 566, 435 N.Y.S.2d at 565 (Gabrielli, J., dissenting). Application of the *Karaduman* Court's standard would, nonetheless, subject Newsday to liability in defamation based upon the reporters' earlier gross irresponsibility.

[245] *See* Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975). The *Chapadeau* Court measured the defendant's conduct against accepted journalistic standards and did not distinguish between publications and republications. *Id.* It is submitted, therefore, that the *Chapadeau* standard should apply to republication reinvestigations.