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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.

Caroline Landau Spilberg

*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 against a private person is founded upon imputation to the employer of its employees' grossly irresponsible conduct. It 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.*

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, 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).

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

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).


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

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 538-37, 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.\(^2\)\(^2\)

On appeal, the Court of Appeals unanimously reversed, granting summary judgment to all defendants except Newsday.\(^2\)\(^2\)\(^2\)\(^2\) Writing for the majority,\(^2\)\(^3\) 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.\(^2\)\(^3\)\(^2\) 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.\(^2\)\(^3\)

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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.


\(^{229}\) 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 566-66. 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 557.

\(^{231}\) 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. \textit{But see} \textit{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.” Hence, the dissent reasoned, Newsday’s alleged republication liability necessitated a second incident of gross irresponsibility. 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. 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.

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 for its primary publication culpable conduct 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.F. 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

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).


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.


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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