

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

1997 I No.139

Royal Courts of Justice
Monday, 28th February 2000

Before:

MR. JUSTICE MORLAND

B E T W E E N :

- (1) INDEPENDENT TELEVISION NEWS LTD.
- (2) PENNY MARSHALL
- (3) IAN WILLIAMS

Claimants

- and -

- (1) INFORMINC (LM) LTD.
- (2) MICHAEL HUME
- (3) HELENE GULDBERG

Defendants

Transcribed by BEVERLEY F. NUNNERY & CO.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Telephone: (0171) 831-5627

MR. T. SHIELDS Q.C. and MR. M. BARCA (instructed by Messrs. Biddle) appeared on behalf of the Claimants.

MR. G. MILLAR and MR. A. HUDSON (instructed by Messrs. Christian Fisher Solicitors) appeared on behalf of the Defendants.

PROCEEDINGS - DAY 1

I N D E X

Page No.

SUBMISSIONS (in the absence of the jury)
re alterations to skeleton arguement/chronolgy/
jury selection

Mr. SHIELDS

1

OPENING SPEECH by Mr. SHIELDS

5

1 MR. SHIELDS: There are a few matters, my Lord. Firstly, the
2 transcript prepared of the hearing last Monday - has your
3 Lordship been sent a copy of that?
4

5 MR. JUSTICE MORLAND: It certainly has not reached me.
6

7 MR. SHIELDS: It only arrived late Friday night, so if I could
8 hand up a full transcript of that.
9

10 MR. JUSTICE MORLAND: Yes. (Same handed).
11

12 MR. SHIELDS: As your Lordship will recall, you ordered me to
13 lodge a skeleton argument of my opening speech.
14

15 MR. JUSTICE MORLAND: Yes, I am grateful for that, and I have read
16 it.
17

18 MR. SHIELDS: I am obliged. There are one or two alterations to
19 that but nothing which I would regard as of significance which
20 I need to draw your Lordship's attention.
21

22 Secondly, your Lordship will recall that we also
23 prepared a chronology which we lodged with you.
24

25 MR. JUSTICE MORLAND: Yes.
26

27 MR. SHIELDS: Having seen my client and gone through some
28 disclosed documents, it appears that I have actually got one
29 or two dates wrong. They are minor dates but I think perhaps
30 your Lordship should have a correct one.
31

32 MR. JUSTICE MORLAND: Yes. There will be copies for the jury of
33 the correct one?
34

35 MR. SHIELDS: Yes. If your Lordship wants them to be handed to
36 the jury, there will be copies. I had the trip from Budapest
37 to Belgrade being made two days before it was made. (Same
38 handed). I do not think it is in any sense prejudicial to
39 anyone that I got that wrong.
40

41 Thirdly, I thought it would be worth clarifying what
42 directions you were going to make in terms of jury selection.
43 Your Lordship will remember we had discussion on that.
44

45 MR. JUSTICE MORLAND: Yes.
46

47 MR. SHIELDS: You will find it at p.2 of the transcript. I can
48 recall but I cannot now find it, and I apologise for that,
49 that we had a subsequent discussion between us as to whether
50 we could refine the criteria for exclusion.
51

52 MR. JUSTICE MORLAND: I know there was some mention that it should
53 not be confined solely to the names in the list and the
54 various organisations but should also include close relations
55 or friends.

1 MR. SHIELDS: Your Lordship will find at p.2 the provisional
2 directions, para.C.
3
4 MR. JUSTICE MORLAND: Yes. (After a pause): Dealing with A, any
5 comments on that? Exclude anyone who has ever been employed
6 or worked for ITN Channel 3 or Channel 4 or who has a close
7 relation or friend. B, any comment about that, Mr. Shields?
8
9 MR. SHIELDS: No, my Lord.
10
11 MR. JUSTICE MORLAND: C? No. Now, D, do we want it more
12 extensive than that? I have no objection to reading out the
13 names of what are described as the key protagonists.
14
15 MR. SHIELDS: I am very happy for your Lordship to do that.
16
17 MR. JUSTICE MORLAND: Yes. You would prefer that?
18
19 MR. MILLAR: Please.
20
21 MR. JUSTICE MORLAND: Yes, certainly. I will not mention the
22 names of the translators, Misha, Mira and Nina because that
23 would be meaningless really. But other than that I will read
24 all those names out. Anything else?
25
26 MR. SHIELDS: No, that is essentially it, if your Lordship is
27 happy with the order in which I intend to take it. So I am
28 going to show the Channel 4 rushes first -- the Channel 3
29 rushes first. If your Lordship is interested, I do have a
30 timing of all those, how long it is going to take, and I think
31 it works out, after I have shown the rushes, Channel 4,
32 Channel 3, subsequently the broadcast on August 6th, I intend
33 to show the whole broadcast, because other parts of the
34 programme dealt with this so it is only right that the jury
35 see the context.
36
37 MR. JUSTICE MORLAND: Certainly.
38
39 MR. SHIELDS: And August 7th. I think they come to about three
40 hours. So looking at in the round, subject to your Lordship
41 having any break today, I envisage I will take today hopefully
42 and then Ian Williams will start first thing tomorrow.
43 I would propose, if I finished at four o'clock, that he does
44 not start until tomorrow.
45
46 MR. JUSTICE MORLAND: Certainly.
47
48 MR. SHIELDS: That would be more sensible for everyone.
49
50 MR. JUSTICE MORLAND: Yes. Thank you.
51
52 MR. SHIELDS: My learned friend Mr. Barca helpfully says should we
53 also probably exclude people with Yugoslavian origin. That
54 may be the one that we did take up last time.
55

1 MR. JUSTICE MORLAND: What do you say about that, Mr. Millar?
2
3 MR. MILLAR: I think Mr. Barca's recollection is correct. It came
4 up later on in the directions hearing. The thinking, I think,
5 was that there would be such a risk that anybody from
6 Yugoslavia would have some empathy with one side or another in
7 the conflict that they should be ----
8
9 MR. JUSTICE MORLAND: Well, do you want me to say anyone who was
10 born in Yugoslavia or whose parents were born in Yugoslavia?
11
12 MR. MILLAR: Yes.
13
14 MR. JUSTICE MORLAND: Would that satisfactory both of you? Yes.
15
16 MR. SHIELDS: One last matter, a small matter, which is this: on
17 looking at Mr. Williams' statement and going through it with
18 him, it appeared that a typographical error had occurred in
19 that, as your Lordship recalls, at the end of his witness
20 statement he goes through the article as numbered.
21
22 MR. JUSTICE MORLAND: Yes.
23
24 MR. SHIELDS: As it happened, we have obviously numbered the
25 article and picked out numbers of paragraphs. When it came to
26 be typed up, someone then just typed the paragraphs
27 sequentially, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10. So we have
28 actually corrected that. I have told my learned friend.
29 I will hand your Lordship a copy of the corrected version.
30
31 MR. JUSTICE MORLAND: Thank you very much. (Same handed).
32
33 MR. SHIELDS: It is a small matter but it just happened that way.
34 That is all I have to say to your Lordship.
35
36 MR. JUSTICE MORLAND: Thank you.
37
38 MR. SHIELDS: There is one matter that I want to mention at the
39 end of proceedings today in accordance with your direction.
40
41 MR. JUSTICE MORLAND: At the end of today?
42
43 MR. SHIELDS: Yes.
44
45 MR. JUSTICE MORLAND: That is when the jury have gone home?
46
47 MR. SHIELDS: When the jury have gone home.
48
49 10.45 a.m.
50
51 MR. JUSTICE MORLAND: Yes. Well, I apologise to people at the
52 back of the court. They will temporarily have to leave court
53 while 30 potential jurors come into court. Nobody will,
54 I hope, steal your places, but if you would not mind leaving
55 court. I think we need the two back rows, if you could be

1 good enough to leave temporarily. (After a pause): Ladies
2 and gentlemen, 12 of you are going to be selected at random to
3 try a libel case. It is a case that concerns the conflict in
4 Bosnia in 1992 and certain television news broadcasts in
5 August 1992 and certain articles written about the news
6 broadcasts a number of years later in 1997. It is of course
7 important that nobody trying the case has any personal
8 involvement with either any of the people concerned in the
9 case or the problems that arose in Bosnia in 1992.

10
11 Now, I am first of all going to ask you if any of you
12 by any chance have ever worked for or been employed by ITN,
13 Channel 3 or Channel 4, or who have close relations or friends
14 that have worked for or been employed by ITN, Channel 3 or
15 Channel 4. If there is any such person could they be good
16 enough to put their hands up. Thank you.

17
18 Now, by any chance have any of you been either born or
19 have your parents been born in what was called Yugoslavia?
20 No.

21
22 Have any of you visited Yugoslavia in the past 10
23 years? Would you mind giving your name to the jury usher?
24 That includes anybody who has served in the Forces or in any
25 relief organisation of course in Yugoslavia or has any close
26 relation or friend who has done so.

27
28 The next question is, have any of you ever worked for
29 or written for or been employed by a company called Informinc,
30 LM Magazine or a magazine called Living Marxism, or have any
31 of you worked for or worked with either Mr. Michael Hume who
32 is a journalist and editor, or Miss Helene Guldberg, who is a
33 publisher? No. Thank you.

34
35 Now I am going to read out slowly the names of some of
36 the likely principal witnesses in the case and if any of you
37 think you have met any of these people or have close friends
38 and relations who worked for or are acquainted with these
39 people, would you put your hands up? The first name is
40 Mr. Stuart Purvis who was the editor in chief of ITN. Then
41 various people who worked for Channel 4: Mr. Ian Williams, a
42 reporter. Mr. Chris Heys, a sound recordist. Mr. James
43 Nicholas, a cameraman video tape editor. Mr. Andrew Brudell,
44 a producer. Sue English, a foreign editor. William or Bill
45 Dunlop who is another editor. Nick Gowing, who is a
46 diplomatic editor. Garren Baines, who is an editor or deputy
47 editor of Channel 4 News. Richard Tate, an editor on Channel
48 4. And then on Channel 3: Penny Marshall, a reporter.
49 Jeremy Irvin, a cameraman. Michael Lawrence, a sound
50 recordist. William or Bill Frost, a video tape editor. Nigel
51 Banker, a programme editor. Michael Jeremy, head of foreign
52 news, Channel 3. David Manion, an editor on ITN. Victoria
53 Knight, a news editor. Finally, Mr. Thomas Deichman, who is a
54 German author and journalist. None of those names ring a bell
55

1 with any of you in the sense of knowing them? Thank you very
2 much.

3
4 The cards will be shuffled and 12 of you will be
5 selected to be the jury in this case.

6
7 (The jury were sworn)

8
9 MR. JUSTICE MORLAND: Ladies and gentlemen, the first thing I want
10 to say to you is this: you decide the facts in this case and
11 you try this case on the evidence given in this court. It is
12 of the utmost importance that you do not allow anyone to
13 discuss this case with you. You do not discuss this case
14 yourself with anyone, and the time and the place to discuss
15 the case is when all 12 of you are together in the privacy of
16 your retirement room. When I say you decide this case on the
17 evidence given in this court, it may be - I know not - that in
18 the media, in the press or radio or television there may be
19 some mention of this case. That is not the evidence in this
20 case. You decide it on the evidence given here and in this
21 court.

22
23 This case will last possibly three weeks. It may be
24 less than that. It may be, conceivably, a day or two longer
25 than that. Probably less rather than longer.

26
27 Our sitting times will be quarter past ten in the
28 morning until one o'clock, two o'clock until about half past
29 four. We will have each day a break of about a quarter of an
30 hour in the middle of the morning and probably a similar break
31 in the afternoon. Certainly if we are going to sit to 4.30 we
32 will. If we have a short afternoon we probably will not.

33
34 The case will begin with Mr. Shields, who is leading
35 counsel for the claimants, to open the case to you and that
36 will take certainly today. It will involve, as you can see,
37 you looking at various television films, rushes, programmes
38 and so forth.

39
40 I think perhaps the jurors in waiting should now
41 depart. Thank you for coming here. Your services may be
42 required elsewhere. I know not.

43
44 Mr. Shields, all those who have departed will want to
45 come back to their seats before you start.

46
47 MR. SHIELDS: Yes, my Lord. (After a pause):

48
49 MR. JUSTICE MORLAND: If there are no seats, I would prefer that
50 people sat in the gallery - there are a few seats in the front
51 row of the gallery - rather than standing at the back. Yes,
52 Mr. Shields.

53
54 MR. SHIELDS: Members of the jury, in this action the claimants,
55 that is the parties bringing the action, seek damages for

1 libel, that is for damage to their reputation in respect of a
2 press release and article from the editorial published in a
3 magazine called Living Marxism in February 1997. The
4 claimants are Independent Television News Ltd., who I will
5 probably call ITN for convenience from now on - the news
6 company which brings you the news on ITV and Channel 4; and
7 two journalists employed by ITN, Ian Williams for Channel 4 -
8 he sits in front of me here - and Penny Marshall who works on
9 Channel 3 and she sits in front of me here.

10
11 It is their case that the press release, the article
12 and the editorial which accompanied it, amounted to a highly
13 damaging attack upon their respective reputations and their
14 professional integrity.

15
16 The defendants are a Mr. Michael Hume who is the
17 editor of Living Marxism, and its joint publishers, Informinc
18 LM Ltd. and Helene Guldberg. Now, they are represented by my
19 learned friend Mr. Gavin Millar, who sits here, together with
20 Mr. Anthony Hudson who sits there at the end of the row.

21
22 Members of the jury, one of your most important tasks
23 in this trial is to decide what the press release, the article
24 and the accompanying editorial meant, how they would have been
25 understood by reasonable, sensible people back in 1997. But
26 before I invite you to read them, and it may well be that it
27 will be some time this afternoon, it is necessary that we
28 travel together back in time to 1992 to the country formerly
29 known as the Socialist Federal Republic of Yugoslavia. Sadly,
30 by 1992 Yugoslavia, which had since 1946 comprised of six
31 separate republics, was undergoing inner turmoil amongst its
32 citizens. In particular in Bosnia what might be described as
33 near civil war was raging between Bosnian Serbs and Bosnian
34 Muslims.

35
36 My Lord, it is not for us in the course of this trial
37 to pass judgment on the merit of that conflict, save that, as
38 in any such conflict, it gave birth to further examples of
39 man's inhumanity to man. The leader of the Bosnian Serbs was
40 a man called Radovan Karadich. According to the Bosnian
41 Muslims, the Serb leaders had embarked upon a policy called
42 ethnic cleansing. That is, it was aimed at rooting out
43 Muslims from their homes and driving them out of the territory
44 which the Serbs claimed as their own. It was the contention
45 of the Bosnian Muslims in mid 1992 that many Muslims were
46 being held in concentration camps run by their opponents. Not
47 surprisingly, there was considerable worldwide interest
48 whether such an allegation could be substantiated or whether
49 in fact it was just another piece of propaganda - false or
50 distorted information put out to mislead or confuse the
51 public.

52
53 In late July 1992 Mr. Karadich, the Bosnian Serb
54 leader, visited London. He gave a press conference. It was
55 attended by a representative of ITN. The representative

1 challenged Mr. Karadich as to whether such camps existed.
2 Mr. Karadich's response was to deny their existence and to
3 invite ITN to Yugoslavia to investigate for themselves.
4 Mr. Karadich having thrown down the gauntlet, ITN duly picked
5 it up. You will hear how it was decided to send two separate
6 teams out there - one representing the Channel 4 News arm of
7 ITN, the other Channel 3.
8

9 Now, the first team to go was the Channel 4 team. Ian
10 Williams, then based as Channel 4's correspondent in Moscow,
11 had covered the Gulf War, conflicts in Georgia and ... on the
12 borders of Russia. He was told by Sue English, the senior
13 foreign editor, to fly to Budapest in Hungary where he was to
14 join other members of his team. His brief was this: it was
15 to visit those camps on the list and to find out what was
16 there.
17

18 In Budapest he was joined by Andy McDowell who was to
19 act as producer; James Niklen a much travelled cameraman and
20 editor, and Chris Heys a sound recordist. They also had their
21 equipment - hard helmets, flak jackets, edit pack, supplies of
22 food and water and of course their camera. Its total weight
23 was something like 200 kilograms.
24

25 Whilst in Budapest, Ian Williams was faxed from London
26 with the list - the list I have just referred you to - of
27 those camps which the Bosnian Muslims were alleging were
28 concentration camps. You are now going to be handed up a
29 bundle of documents and, with his Lordship's permission, you
30 will have one bundle between two people. So two of you will
31 have to share a bundle each. (Same handed). If you look at
32 that bundle you will see in tab 1 there is some manuscript
33 writing:
34

35 "Attn - Mr. Jim Akhurst
36

37 "ITN - Foreign News."
38

39 Below it will you will see in English -- there are some
40 foreign words first and then below it says:
41

42 "L I S T
43

44 "of prisons - concentration camps controlled by the
45 aggressor."
46

47 That list has been issued by the Bosnian Muslims, and the
48 "aggressors" is obviously how they refer to the Serbians. So
49 if you have got that, below that, members of the jury, you
50 will see a list and it says "Place" and it says "Approx.
51 number", that is approximate number of people kept within
52 those camps. You turn over the page and you will see at the
53 bottom, go down to number 57, and you will notice there,
54 because we are going to come across this later, 54 and 55,
55

1 Trnopolje and Omarska. You will see those two particular
2 names there.
3

4 We are now back in Budapest and I will return to the
5 list later, members of the jury. On 30th July the Channel 4
6 team left Budapest where they had rendezvoused and travelled
7 by train to Belgrade. Now, Belgrade was the old capital of
8 Yugoslavia and had become the capital of Serbia. They booked
9 into a hotel there. Here they were joined the next day by a
10 team representing Channel 3 News. It was led by Penny
11 Marshall, who I have already introduced to you, who was
12 accompanied by Jeremy Irvin, a cameraman, and Mickey Lawrence,
13 and his role was to act as what is called soundman and
14 assistant to Jeremy Irvin, the cameraman. Now, unlike the
15 Channel 4 team they did not have their own editor with them.
16 You will come to understand in the course of the trial what
17 the role of the editor is. He is the person who essentially
18 produces the film which is broadcast to you on the news at
19 night.
20

21 You will hear from them as to what happened in
22 Belgrade but during those three days they made two important
23 discoveries. Firstly, that the camps they visited near
24 Belgrade which had been stigmatised in that list by the
25 Bosnian Serb Muslims as concentration camps were in reality
26 refugee camps and, secondly - this is their second discovery -
27 that contrary to the apparent open-spirit of Mr. Karadich's
28 invitation, there was a considerable reluctance on the part of
29 the Serbian authorities to allow them to travel to north west
30 Bosnia, that is west of Belgrade, where they understood, they
31 had been told, the worst camps to be.
32

33 In the event their persistence and their determination
34 to go there brought some limited reward. At 6.00 a.m. on the
35 morning of 3rd August they were flown by helicopter. That is
36 the team from ITN, together with two interpreters and a Mr. Ed
37 Vulliamy from the Guardian newspaper, together with two
38 Serbian soldiers to Pale. Now, that is an hour's flight away.
39 I said limited reward was brought through their perseverance
40 because Pale, which is a former ski resort outside Sarajevo,
41 was south of Belgrade, whereas the camps they wanted to visit
42 were in north west Bosnia.
43

44 So that you get a picture of where we are travelling,
45 we have prepared a map. If you turn to index tab 2, we will
46 be able to see together where we are. At the top of the map
47 you will see Budapest where they met. You will know they
48 travelled south to Belgrade. From Belgrade they have taken
49 the flight down to Pale and that is where we are. We will
50 refer to that in the course of this opening speech so you know
51 exactly where we are heading.
52

53 Now they are in Pale, and you might wonder what
54 happened next. Well, after a fruitless morning waiting at the
55 headquarters of the Bosnian Serbs there, they met

1 Mr. Karadich. You remember I have already referred to
2 Mr. Karadich. It was he who made the invitation for ITN to
3 come out and see whether the Muslim allegations were true or
4 false. What Mr. Karadich did for his part was to warn them
5 that the area they wanted to visit was unsafe, but for their
6 part they reminded him of his promise made on television and
7 said that they were prepared to take the risk.
8

9 They spent that night in Pale not knowing whether they
10 were going to be allowed to visit the camps up north or not.
11 The next day they travelled, however, in a military bus to
12 Banja Luka where again they spent the night. Now, if you
13 would like to go back to your maps, we can plot their
14 progress. We see down there Pale, and they have travelled in
15 a bus through the day up to Banja Luka.
16

17 The following morning -- I am sorry, they then
18 travelled to Prijedor. You see Prijedor is the end of the row
19 - there is Omarska, Trnopolje and we will see Prijedor. So
20 they travelled the following day to Prijedor. That is the
21 morning of 5th August. While at Prijedor, I think it is
22 outside the town hall, they see and they talk to and they film
23 queues of Bosnian women. It appears that they are there
24 waiting for papers to enable them to move away from the area.
25 Now, where were their husbands, it was asked, and the
26 whispered response came Omarska. The ITN team was taken into
27 the town hall at Prijedor where, surrounded by armed men, they
28 met and filmed the town's leadership. Once again, they had to
29 overcome a certain resistance to their stated intention to
30 visit those camps at Omarska and Trnopolje. But, once again,
31 their persistence prevailed and that same day they were taken
32 to Omarska travelling, in the case of the Channel 4 team - and
33 remember I think there are four of them plus an interpreter -
34 in a green military bus but they have Serbian guards with
35 them; in the case of the Channel 3 team, in a red mini bus
36 which they had hired.
37

38 Now, members of the jury, in the course of this trial
39 you will hear from the ITN teams in great detail about what
40 they saw at Omarska and, perhaps more importantly, what they
41 sensed and what they felt about what was happening there, the
42 atmosphere of fear, the haunted looks on the faces of the
43 inmates as they eat their rations of soup and bread, and of
44 the menacing presence of the guards, and perhaps most poignant
45 of all of the camp commander's resolute refusal to give them
46 free access to where the inmates were being kept, where they
47 were sleeping.
48

49 Unwelcomed at Omarska they drove on until they
50 approached Trnopolje. Seeing lots of people collected behind
51 a fence, the Channel 3 team and the ITN van insisted on
52 stopping. Penny Marshall, Mickey Lawrence and Jeremy Irvin,
53 the Channel 3 team, took the most direct route to that fence.
54 Among the sights that was to greet them there was that of an
55 emaciated man, stripped to the waist in the hot sun, behind

1 barbed wire. Ian Williams, leading the Channel 4 team, headed
2 off deliberately in a different direction but towards the same
3 wire in order to divert the presence of the armed guards who
4 were escorting them. As you will hear, Ian Williams was
5 struck by the poor physical condition of the men who were
6 packed in the field, patrolled by armed guards and, as far as
7 he could see, penned in by barbed wire and chicken wire.
8

9 Members of the jury, this morning and this afternoon
10 you will hear and see footage of the appalling physical
11 condition of some of those men. You will see footage of the
12 armed guards who were there. You will also see how all those -
13 and you will hear from all of them - who visited both those
14 camps were shocked by what they saw. After about an hour they
15 left Trnopolje. They carried with them not only their film of
16 the camp but also an undeveloped role of film. One of those
17 who Penny Marshall had interviewed while she was in Trnopolje
18 was a doctor, Dr. Idriz Merdzanic. He had told her of the
19 terrible physical condition of some of those who had been
20 brought to that camp, of torture, of beatings and of rape.
21 Now he had handed her a camera containing the film which he
22 had secretly taken of inmates at that camp.
23

24 The ITN team returned to Prijedor and from Prijedor
25 they travelled together in the Channel 3 minibus back to
26 Belgrade. In Belgrade they reported the ITN staff in London
27 and they told them they had managed to visit the camps and
28 that they felt they had a powerful story. It was agreed that
29 the two teams, but without Mr. Lawrence and Mr. Irvin -- it is
30 very hard to remember all these names, Mr. Lawrence was the
31 sound recordist and Mr. Irving was the cameraman on Channel
32 3's team, and Mr. Heys was the sound recordist on the Channel
33 4 team. Apart from them, they should travel to Budapest the
34 next day and prepare items to be broadcast on ITV Channel 3
35 and on Channel 4 that night. So this is August 5th making
36 preparations for August 6th. As I mentioned to you, there was
37 no editor with the Channel 3 team. There was Mr. Irving,
38 there was Mr. Lawrence, and there was Penny Williams. So a
39 decision was made in London to fly out to Budapest two
40 editors, a Mr. Frost and a Nigel Baker to edit the film and
41 prepare the item to be broadcast.
42

43 Now, members of the jury, you probably appreciate that
44 what you see on your screen, a news item which may sometimes
45 last 30 seconds, which may sometimes last, particularly on
46 Channel 4, three or four or five minutes, is the product of a
47 much longer and involved process. Based on the first-hand
48 evidence of the reporter and the film shot by the cameraman or
49 cameramen, judgments have to be made as to what should be
50 broadcast and what commentary should accompany it. You have
51 already heard how both these teams were sent out with
52 instructions to take up Mr. Karadich's invitation, and their
53 task as they saw it was to report back on what they had seen
54 and found out. It is important that you understand and
55

1 remember this. They were sent out to take up that invitation
2 and report back on what they had seen and found out.
3

4 That day in Budapest, August 6th, they set about
5 discharging the final element of that task. Now, for Ian
6 Williams, Andy Brudell and James Nicholas for Channel 4 it was
7 an opportunity to see for the first time the film they had
8 shot, because, as you appreciate, they are at the camps and
9 the film is being shot. This is going to be the first time
10 they have a chance to see that film, and that film is known by
11 a technical term - it is called rushes. You will hear that
12 term again and again in this trial, rushes. It is the
13 unedited film. This might be an appropriate moment then for
14 us to see that film together now. So with your Lordship's
15 leave, I propose to show the Channel 4 rushes. So you know
16 where we begin. We begin on the day of August 6th and we are
17 going to begin with film at Prijedor. So if you look at your
18 maps, members of the jury, index 2, we are beginning on August
19 5th at Prijedor, and then we are going to go from Prijedor to
20 Omarska and then Trnopolje. This is the unedited film.
21

22 (Video recording played)
23

24 12.20 p.m.
25

26 MR. SHIELDS: Members of the jury, it had been agreed back in
27 London that the first major broadcast was to take place in the
28 Channel 4 news at 7 p.m. that night and the Channel 4 team had
29 to produce an item for broadcast for about four to five
30 minutes left. You will hear in the course of the trial what
31 discussions took place between Mr. Williams, Andy Prudel and
32 James Nicholas and how, having chosen the picture images they
33 wished to incorporate, Ian Williams then began drafting the
34 script, the script which will accompany the images which are
35 broadcast that night. He had a deadline that was 6.30 that
36 evening to feed (that is, to transmit) the material from
37 Budapest through to London.
38

39 Meanwhile, a similar process was being undertaken by
40 the Channel 3 news team. They started somewhat later than
41 their Channel 4 counterparts because they had technical
42 difficulties with the editing equipment. Penny Marshall
43 briefed Nigel Baker and Bill Frost. Those are the two editors
44 who had flown over from London to help them prepare and edit
45 the broadcast. She briefed them as to what she had seen at
46 the camps and what her own impressions were because, of
47 course, she had been there and she had seen both Omarska she
48 had seen Trnopolje. Together they reviewed the rushes. This
49 is the film shot by the Channel 3 cameraman Jeremy Irving.
50 You are going to see those rushes now but it is right that you
51 should know that they are not complete because, after their
52 return to London in 1992, one tape went missing. What is
53 missing is the last part of their visit to Omarska (that is,
54 the first camp) and the first part of their visit to Trnopolje
55 (that is, the second camp). So you are going to see those

1 tapes which survived. They will take, I think, about 25/30
2 minutes and should take us conveniently to the midday
3 adjournment.
4

5 (Video recording played)
6

7 MR. JUSTICE MORLAND: Would that be convenient? We will break off
8 until 2 o'clock, members of the jury.
9

10 (Adjourned for a short time)

1 MR. JUSTICE MORLAND: Yes, Mr. Shields?
2

3 MR. SHIELDS: Members of the jury, we have just seen Channel 3....
4 In addition to preparing a film to be broadcast that night for
5 News at Ten, Penny Marshall also gave a brief telephone
6 interview for the lunchtime news which was broadcast that day
7 and she also prepared a short piece to be transmitted at 5.40
8 on the Channel 3 news, where again you will see she gave a
9 further interview.

10
11 As you can imagine, it was an intense and frantic
12 period, that day, August 6th, in Budapest. Although the teams
13 worked separately, Channel 4 decided to incorporate some of
14 the material obtained by Channel 3 in its own report to be
15 broadcast at 7 o'clock. Some of that material, I should tell
16 you, is material which was on the rushes which have been lost,
17 which is why, when you see the broadcast, you will not have
18 seen it before. One is an image of a body of a Muslim. His
19 name is Fikret Alic, and I will repeat that name, and it will
20 be repeated to you many times in the course of this trial. He
21 is the emaciated man whom Penny Marshall had seen standing
22 behind barbed wire when she arrived at the Trnopolje camp.
23 You may recall I told you about that.
24

25 The other material which was incorporated in the
26 Channel 4 broadcast which came from Channel 3 was some
27 photographs. You also may recall I told you how, when they
28 left Trnopolje, Penny Marshall had with her a camera, a camera
29 containing film which had been handed to her by the doctor.
30 He was a doctor you may also recall having seen in the rushes.
31 He was in his -- I call it his surgery for convenience. You
32 may remember the camera panning in on the table containing
33 some few humble pieces of medicine. Penny Marshall had
34 arranged for that film to be developed that morning in
35 Budapest. Not all of the photographs came out, but it is only
36 right you should see those that they had, as developed that
37 day in Budapest.
38

39 If you could turn to tab 3 you will see with me those
40 photographs. You will see there what obviously appears to be
41 a photograph of -- I will call it a camp. Over the page
42 another photograph would appear to be of the camp, and another
43 one would appear to be of the camp. Then we go over the page
44 to a photograph which is fairly meaningless, but it is deemed
45 to come out. Then we turn over again to another picture which
46 should have a yellow lorry in it, turning over at the same
47 rate. I turn over again to another picture of the tree, and
48 over once more and in the middle of the picture there is a
49 man with a hat on askew. Then we turn over and we see a
50 slightly different type of photograph. It is the image of a
51 man and you will see the back of his body is badly, badly
52 bruised. Then you turn over the page and you will see another
53 picture of the back of a man. These were pictures taken by
54 the doctor and handed to Penny Marshall at the camp, and the
55 film which she had developed. Over the page you see a picture

1 of blood below a basin. Then again another picture of a basin
2 with blood on the floor and on the wall. Then you will see
3 the next photograph is the back of a man, an emaciated man,
4 taken from behind. Then the final photograph is that same man
5 and you will see his back.
6

7 Those, members of the jury, are the photographs which
8 had come from that camera containing that film which had been
9 in effect smuggled out of Trnopolje.
10

11 That day, particularly that night, Channel 4 and
12 Channel 3 broadcast long news reports based in part on what
13 was being transmitted from Budapest. Now I am going to show
14 you first the Channel 4 broadcast, then I am going to show you
15 the Channel 3 broadcast. What you will see from the Channel 4
16 broadcast on August 6th is News at Ten, and then you will see
17 the Channel 3, and I think you see a lunchtime short
18 broadcast, and then a 5.45 broadcast, and then the principal
19 broadcast which took place that night on News at Ten. We will
20 have the 7 o'clock Channel 4 to start with, and then the other
21 three as I told you.
22

23 (Video Recording played)
24

25 3.05 p.m.
26

27 MR. SHIELDS: Members of the jury, those broadcasts captured world
28 attention and aroused strong emotions. Although you may have
29 noticed that a number of reports filed by Penny Marshall and
30 Ian Williams contain the words "concentration camps" that was
31 as a result of a decision taken by both teams, both on the
32 ground there and by the editorial team in London. The media,
33 both broadsheet and tabloid, displayed their repugnance and
34 disgust in strong and even emotive language.
35

36 The next day's broadcasts on both ITV and Channel 4
37 contained yet further reports and interviews with Ian Williams
38 and Penny Marshall, and I think it is only right for
39 completeness that you should see them now. I do not know if
40 your Lordship wanted to have a short break before that. They
41 are about 40-odd minutes in length.
42

43 MR. JUSTICE MORLAND: Would you like a short break, members of the
44 jury? Yes. We will have a short break. We will say a
45 quarter of an hour break because there is, I think, tea and
46 coffee making machinery in your room. I do not think there
47 are any other alternatives.
48

49 (Adjourned for a short time)
50

51 MR. JUSTICE MORLAND: Yes, Mr. Shields?
52

53 MR. SHIELDS: My Lord, we will now watch the Channel 4 and Channel
54 3 broadcasts the next day, August 6th. It takes about 45
55 minutes.

1 MR. JUSTICE MORLAND: Yes. We will not go beyond that probably,
2 will we?
3

4 MR. SHIELDS: My Lord, I definitely will read the press release
5 after that.
6

7 MR. JUSTICE MORLAND: You would like to do that?
8

9 MR. SHIELDS: I would definitely like to do that.
10

11 MR. JUSTICE MORLAND: Yes, right.
12

13 MR. SHIELDS: I am sorry, but we had to show these and they do
14 take time.
15

16 MR. JUSTICE MORLAND: Yes.
17

18 (Video recording played)
19

20 4.10 p.m.
21

22 MR. SHIELDS: Members of the jury, a week later Penny Marshall in
23 fact did return and you will see footage of her meeting with
24 Dr. Merdzanic - you remember the doctor who took the film -
25 and you will hear how the barbed wire had by then been taken
26 down and how conditions at the camp had suddenly improved.
27

28 Now, members of the jury, we must go forward in time
29 to 1997 and come to the words of which complaint is made. If
30 you turn to tab 4 in your bundle you will see there, and I am
31 now going to read it to you, a press release issued on 24th
32 January 1997 by Living Marxism, and this was sent to a number
33 of media organisations, a substantial number of media
34 organisations, on that day, no doubt with a view to it being
35 picked up and its contents reported. Let us look at what it
36 says together in bold type:
37

38 **"Journalist exposes the truth behind Bosnia 'death-**
39 **camp' photograph**
40

41 "The picture that came to symbolise the Bosnian war
42 has been condemned by an expert witness to the UN War
43 Crimes Tribunal at The Hague. German journalist
44 Thomas Deichmann says that the image of an emaciated
45 Bosnian Muslim caged behind barbed wire was created by
46 'camera angles and editing'.
47

48 "The picture provoked an international outcry and was
49 seen by much of the world as proof that the Bosnian
50 Serbs were running Nazi-style 'concentration camps'.
51 But Deichmann in an exclusive article published in
52 February's LM magazine insists that 'the image is
53 misleading and has fooled the world'.
54
55

1 "The picture of Fikret Alic was taken from videotape
2 shot at Trnopolje on 5 August 1992 by an award-winning
3 British television team led by Penny Marshall (ITN)
4 with her cameraman Jeremy Irvin, accompanied by Ian
5 Williams (Channel 4) and Guardian reporter Ed
6 Vulliamy.
7

8 "Deichmann has revisited Trnopolje and has also seen
9 unused video footage that shows how this powerful
10 image was created. He found that
11

12 "● there was no barbed wire fence surrounding the
13 Trnopolje camp.
14

15 "● the camp was a collection centre for refugees, not
16 a prison.
17

18 "● the refugees in the picture were not surrounded by
19 barbed wire. The barbed wire surrounded the news team
20 who were filming from inside a small enclosure next to
21 the camp.
22

23 "Thomas Deichmann says
24

25 "'I am shocked that over the past four and a half
26 years, none of the journalists involved has told the
27 full story about that barbed wire fence which made
28 such an impact on world opinion. The photograph has
29 been taken as proof that Trnopolje was a Nazi-style
30 concentration camp, but the journalists knew that it
31 was no such thing.'
32

33 "Mick Hume, LM editor, says
34

35 "'If they are not very careful, journalists who have
36 some kind of emotional attachment in a conflict can
37 end up seeing what they want to see, rather than what
38 is really there. Taking sides cannot be an excuse for
39 taking liberties with the facts."
40

41 Members of the jury, you will see the references there in
42 unequivocal terms to Penny Marshall, to Ian Williams and the
43 reference beside Penny Marshall's name to ITN, and we say that
44 anyone reading that would be under no illusion as to what was
45 being alleged against those two journalists and the company
46 that employed them and broadcast those images.
47

48 **"Journalist exposes the truth behind Bosnia 'death-**
49 **camp' photograph"**
50

51 The third paragraph down:
52

53 "Deichmann has revisited Trnopolje and has also seen
54 unused video footage that shows how this powerful
55 image was created. He found that

1 "● there was no barbed wire fence surrounding the
2 Trnopolje camp.

3
4 "● the camp was a collection centre for refugees, not
5 a prison.

6
7 "● the refugees in the picture were not surrounded by
8 barbed wire. The barbed wire surrounded the news team
9 who were filming from inside a small enclosure next to
10 the camp."
11

12 You see, what we say, and anyone reading that press release
13 that day would have understood it to mean, is this: the
14 claimants, ITN, Penny Marshall and Ian Williams, had
15 fabricated and broadcast distorted television footage which
16 deliberately misrepresented and sensationalised the treatment
17 of Bosnian Muslims at Trnopolje, that - and you might think
18 this is just as grave a charge - they had set out to distort
19 the truth because they had taken sides. We say it bears that
20 meaning, which we say is an extremely serious meaning to
21 allege against this company and its journalists, these
22 reporters, when you look at what Mr. Hume says in that final
23 paragraph
24

25 "If they are not very careful, journalists who have
26 some kind of emotional attachment in a conflict can
27 end up seeing what they want to see, rather than what
28 is really there. Taking sides cannot be an excuse for
29 taking liberties with the facts'."

30
31 Well, what does that convey, or would that have conveyed to
32 someone reading it at the time? A false picture, a
33 distortion, that they have taken sides. And if you take
34 sides, the danger of taking sides is, according to Mr. Hume,
35 that you see what you want to see. That is his indictment of
36 their conduct. And, to make matters worse, what they also
37 allege is that they have kept quiet about this deception for
38 over four and a half years.

39
40 Now, just pause there and think what serious
41 allegations there are that are being made against them.
42

43 Now, not surprisingly, you might think, they did not
44 take very kindly to having their reputations assailed
45 completely out of the blue in this way. Not a word of notice
46 beforehand that these allegations are going to be made against
47 them. They caused a letter to be written on 24th January 1997
48 because all they wanted was to stop this magazine being
49 published maintaining this attack upon them. If you turn to
50 tab 5, it is the last thing I think I can do tonight, I can
51 read that letter. It is addressed to Mr. Mick Hume. He is
52 the editor of Living Marxism and is the person whose quote
53 I have just read out to you that comes at the end of the press
54 release.
55

1 "Dear Sir
2

3 "The picture that fooled the World - Living Marxism
4 February 1997
5

6 "We represent Independent Television News Limited
7 (ITN), Penny Marshall and Ian Williams, both ITN
8 journalists.
9

10 "On Thursday 23 January 1997 you put out (through UNS)
11 a presentation release headed 'Journalist exposes the
12 truth behind Bosnia "death camp photograph"' which was
13 seriously defamatory of our clients.
14

15 "The press release incorrectly alleged that the ITN
16 reports on Channel Four News and News at Ten on 6
17 August 1992 (by Ian Williams and Penny Marshall
18 respectively) were misleading and fooled the world.
19 It was suggested that the image of an emaciated
20 Bosnian moslem was created (by implication fabricated)
21 by 'camera angles and editing'. Your press release
22 asserted that ITN and its journalists saw what they
23 wanted to see rather than what was really there, took
24 sides, took liberties with the facts and, shockingly
25 you claim, failed to tell the full story about
26 Trnopolje Camp.
27

28 "These allegations are repeated in the article due to
29 be published, we understand, on Thursday next week, in
30 the February edition of Living Marxism.
31

32 "These defamatory allegations are wholly false. They
33 must be withdrawn immediately and an appropriate
34 apology made. The article must be withdrawn from the
35 February edition and any existing copies pulped. Our
36 clients are also entitled to compensation for the
37 publication of such bogus claims.
38

39 "As a result of the press release our client has
40 already received inquiries from media organisations
41 about the proposed story and we note that the press
42 release invites editors to contact the editor of
43 Living Marxism and German journalist Thomas Deichmann
44 via your press officer. Clearly it has been decided
45 to seek to obtain the maximum publicity from peddling
46 these false allegations of which you did not see fit
47 to inform ITN prior to publication and give our
48 clients an opportunity to rebut the untrue assertions
49 set out in the press release and article.
50

51 "Anyone who saw the news reports, which were fair and
52 impartial, could not reasonably have drawn the
53 conclusions you published. We require that you
54 preserve all drafts of the article and other documents
55 relating to it and the press release so that the

1 motives for inventing such allegations can, if
2 appropriate, be examined in due course.

3
4 "On behalf of our clients we therefore require:-

5
6 "1. The publication of an appropriate, agreed apology
7 on UNS, PA and such other news services which carried
8 your press release.

9
10 "2. An undertaking not to repeat the allegations
11 contained in the press release and article complained
12 of.

13
14 "3. The destruction of all copies of Living Marxism
15 containing the article complained of.

16
17 "4. Damages for libel.

18
19 "5. Payment of our clients' reasonable legal costs.

20
21 "We look forward to hearing from you, or your
22 solicitors, by return. The seriousness of the
23 defamatory allegations you make means that unless they
24 are withdrawn immediately our clients will commence
25 proceedings for libel."

26
27 Well, members of the jury, they were not withdrawn.
28 The article was published and if you turn over the tab to tab
29 6, you will see it there, LM 97. There is the picture which
30 by now you are familiar with.

31
32 "It became the symbol of the horrors of the Bosnian
33 war. But it is not quite what it seems.

34
35 "Exclusive

36
37 "The picture that fooled the world."

38
39 That is quite a long article and it, as we say, repeating in
40 much more detail the allegations which I have already touched
41 on in the press releases. If his Lordship is happy, I would
42 suggest that tomorrow morning we begin the proceedings by you
43 reading it to yourselves, and I will make some comments about
44 it.

45
46 MR. JUSTICE MORLAND: Members of the jury, would you like to leave
47 now and be back here at quarter past ten. Would you be good
48 enough to leave all your notes and your ring binders here.
49 No-one will look at them. Any notes you make will not be
50 looked at by anybody. It is very important that notes in
51 court do not get out accidentally through being left behind on
52 the tube or a bus or in a taxi, so if you could leave your own
53 personal notes here I can assure you the court is locked and
54 nobody will look at them. If you would like to go now, I have
55

1 got a few administrative matters to deal with and we will
2 continue tomorrow morning at quarter past ten.

3
4 (The jury left the court)

5
6 MR. JUSTICE MORLAND: Before members of the media leave I repeat
7 what I said at the pre-trial review or the management
8 conference. Of course, nothing can be reported that is said
9 in the absence of the jury until the verdict is given. Yes,
10 Mr. Shields?

11
12 MR. SHIELDS: My Lord, your Lordship will recall that at the PTR
13 my learned friend indicated that he intended to cross-examine
14 on the basis of footage shot by Serbian cameramen who were
15 also present at the camp.

16
17 MR. JUSTICE MORLAND: Yes.

18
19 MR. SHIELDS: And he rightly took the point against me that as no
20 objection had been made to their authenticity he would be
21 freely entitled to do so. If your Lordship would pick up the
22 transcript, your Lordship will see at p.8 how he put his case
23 in relation to that footage.

24
25 MR. JUSTICE MORLAND: Yes.

26
27 MR. SHIELDS: Your Lordship will see at the bottom:

28
29 "One of the difficulties in a sense of managing the
30 trial and managing the justification defence, which
31 involves proof of the layout of the camp, is that
32 there are out-takes, video footage from two crews, two
33 ITN crews on the day plus some footage from a third
34 crew, a Serbian film crew who were filming, as it
35 were, and that footage was not taken for the purpose
36 of making it clear to the jury ten years' later what
37 the layout of the camp is. It was taken for other
38 purposes. So what one sees on the footage is a series
39 of parts of shots or clues. They are a de-constructed
40 film from which as a total exercise one can, as
41 Mr. Deichmann says he did, construct a clear picture
42 of the layout of the camp".

43
44 What we are going to invite the jury to look at are the rushes
45 from that point of view, and no doubt as well from other
46 points of view as well, and it seemed to us it would make
47 sense if that happened at an early stage of the trial, for
48 them to do the viewing. As I understand it, he is going to
49 use the Serbian footage to that end.

50
51 My learned friend also, during some stage last week,
52 and I apologise I cannot remember the exact day, sent us a
53 transcript of the Serbian tape. Can I hand up the transcript
54 he has sent us?
55

1 MR. JUSTICE MORLAND: Yes.

2
3 MR. SHIELDS: (Same handed) Your Lordship may recall -- I quite
4 understand if your Lordship does not -- standing next to
5 Fikret Alic is another man, a slightly better nourished man,
6 and the Serb transcript tape contains an interview of him by
7 Penny Marshall. Of course, that image is not part of the ITN
8 rushes because if it was, it would form part of the rushes
9 which are no longer available. He kindly sent me this
10 transcript of the Serb tape and I would like your Lordship to
11 look at it. Would your Lordship like to read it to yourself?

12
13 MR. JUSTICE MORLAND: Yes. (After a pause) Yes, I have read
14 that.

15
16 MR. SHIELDS: Your Lordship has read that. I am assuming it is
17 intended to put that piece of transcript to Penny Marshall.
18 I ask myself this somewhat rhetorically: Your Lordship will
19 recall what the particulars of justification are and your
20 Lordship will find them, if your Lordship still has your PTR
21 bundle, in volume 1, if one looks at p.33, 34, and 35.

22
23 MR. JUSTICE MORLAND: Yes.

24
25 MR. SHIELDS: Your Lordship will see, if one turns to, say, for
26 example, the one that reminds oneself what the meanings are,
27 that is at 32(a), and then one looks at 34 for the particular
28 which is supporting that. I invite your Lordship to look at,
29 particularly, subparagraphs (7), (8) and (9), which we would
30 say would appear to be the sting of the defence.

31
32 MR. JUSTICE MORLAND: Yes.

33
34 MR. SHIELDS: My concern is this. If it is going to be put to
35 Mr. Williams and Penny Marshall that they were aware that
36 there was other material within their possession which would
37 indicate or show that the prisoners were not prisoners at all,
38 that people were happy there and that they had chosen to
39 distort the report by suppressing that information, that is a
40 different line of attack from the one which is presently
41 pleaded.

42
43 The sting of the defence at the moment, as
44 I understand it, is that it is the journalists who are caged
45 in by the barbed wired, not Fikret Alic, and essentially the
46 image which has been used to transmit has falsely conveyed
47 that he was in prison and caged in barbed wired. That is the
48 nub of the defence. If it is going to go further and suggest
49 that in relation to the rushes we have seen, or other rushes
50 which we no longer have, that there exists further material
51 from which that inference could be drawn, then it is a matter
52 which should have been pleaded. That may not mean your
53 Lordship will want to keep it out now. I am not saying it
54 should come in now, but if it is going to be put that way, it
55 has to be pleaded that way.

1 MR. JUSTICE MORLAND: Yes.
2
3 MR. SHIELDS: My Lord, in fairness to my learned friend we sent a
4 letter to him on Friday, but he did not get it, because it was
5 not sent until late Friday night, so he has not had a
6 opportunity to consider this in an real detail.
7
8 MR. JUSTICE MORLAND: Mr. Millar, my first view is that this point
9 of Mr. Shields is a valid one but I certainly would give leave
10 to amend if you so requested it.
11
12 MR. MILLAR: My Lord, my learned friend is right to say that this
13 issue was first raised in a letter that was faxed through at
14 7.15 on Friday night to my instructing solicitors.
15
16 MR. JUSTICE MORLAND: Yes.
17
18 MR. MILLAR: He, having gone home for the weekend, it did not come
19 to my attention until this morning.
20
21 MR. JUSTICE MORLAND: No.
22
23 MR. MILLAR: In addition^e to which when I saw it I was not entirely
24 clear what the point was that was being taken. I have, in the
25 course of the day, sought some clarification from my learned
26 friend. I think it is now clearer in the light of what he has
27 put to your Lordship what the issue is. I am obviously keen
28 to consider what he has just said overnight and the way he has
29 now put it, and I do not think there is any objection to me
30 doing that.
31
32 MR. JUSTICE MORLAND: No.
33
34 MR. MILLAR: As I understand it, what is wanted is written
35 responses to that solicitors' letter which forms an answer to
36 it, clarified as it has been by my learned friend's comments
37 now. We will endeavour to draft something tonight, but I do
38 want to understand before we go off today -- and I think we
39 probably all do -- what exactly is the extent of the
40 submission and what exactly we are arguing about here. At the
41 directions hearing the issue of the admissibility of the Serb
42 tape was raised, your Lordship will remember.
43
44 MR. JUSTICE MORLAND: Yes.
45
46 MR. MILLAR: We established that it was prima facie admissible as
47 material served under the CPR because its provenance had not
48 been disputed, it is therefore taken to be admitted, that it
49 is a tape as described on the list taken by a Serb film crew
50 at the camp on the relevant day. Your Lordship will recall
51 that you took the point, well then, presumably it also shows
52 Miss Marshall or Mr. Williams. The answer is it shows
53 Miss Marshall.
54
55 MR. JUSTICE MORLAND: Yes.

1 MR. MILLAR: Your Lordship has not seen that and were the
2 submission to be going any further than the submission that
3 has been made, which is put on the basis of the transcript,
4 I would ask your Lordship obviously to see the Serb tape
5 before being invited to make any rulings on it of any
6 importance. It seems obvious appropriate that you should do
7 that, if you have not seen it.

8
9 MR. JUSTICE MORLAND: Certainly I would not make any rulings
10 excluding the Serb tape.

11
12 MR. MILLAR: Absolutely.

13
14 MR. JUSTICE MORLAND: Or saying that you could not show it to one
15 of the claimants' witnesses or the claimants and say: "Well,
16 look at this tape. Were you present? Did you hear this
17 conversation?" and so forth.

18
19 MR. MILLAR: Precisely. My Lord, I am grateful. I am not
20 pressing your Lordship to see it now because as I understand
21 what is being put, that is not the submission. You are not
22 being invited to rule ----

23
24 MR. JUSTICE MORLAND: No.

25
26 MR. MILLAR: -- that the tape cannot be shown in the trial and
27 then I cannot put it to the jury. What my learned friend
28 wants to know is in respect of cross-examination of
29 Miss Marshall, am I going to put the transcript to her, and if
30 so, to what end, and he wants to pursue a pleading point as he
31 is entitled to, in the light of our clarification of that
32 issue. That is as I understand where we have got to.

33
34 MR. JUSTICE MORLAND: Yes.

35
36 MR. MILLAR: The reason I wanted to raise that at this stage was
37 this. It is obvious that what I want to put in cross-
38 examination to Miss Marshall is going to depend to some
39 extent, as it always does in any case, on what she says in-
40 chief.

41
42 MR. JUSTICE MORLAND: Quite.

43
44 MR. MILLAR: Any argument about how I might ultimately use that
45 transcript, if at all in cross-examination, I would not want
46 to be finally resolved one way or the other until close of her
47 examination-in-chief for that reason. My more immediate
48 concern is this, that as I understand the case being advanced
49 by the claimants from the pleading in Mr. Williams's statement
50 (who is the first witness in time, indeed I think he is the
51 first one we are going to have), his case is that at the point
52 at which that Serb film was being taken and showing
53 Miss Marshall and others at the fence, and Fikret Alic, he is
54 in a different location but at the same side of the same
55 fence.

1 MR. JUSTICE MORLAND: Yes.

2

3 MR. MILLAR: I am going to be looking with him in cross-
4 examination, as you would expect, in a little detail at his
5 movements around the camp by reference to the rushes and where
6 he and his crew are shown to be on the rushes.

7

8 MR. JUSTICE MORLAND: Yes.

9

10 MR. MILLAR: I want, in the course of that cross-examination, to
11 put to him at the appropriate chronological point that part of
12 the Serb tape, not to ask him questions about the transcript,
13 because I understand his answer would be: "That was all a
14 distance away from me and out of my earshot".

15

16 MR. JUSTICE MORLAND: Yes.

17

18 MR. MILLAR: But as part of the complete picture of the movement
19 of the two crews around the camp, in the initial stage when
20 they would go into what we say is the barbed wire compound, to
21 see in particular where they were in relation to him and to
22 the extent that he was conscious of what they were doing. Of
23 course he uses the image, as you have heard, in his report,
24 even though it is not taken by a C4 cameraman. He uses the
25 image of Alic. So that sort of cross-examination is going to
26 be pursued with Mr. Williams. If my learned friend is content
27 for that and we are not going to have to argue about that,
28 that is on the footing that I am not putting the transcript to
29 Mr. Williams because it was out of his earshot, there is not
30 going to be a problem. But if he is going to dispute my right
31 to do that then I would be grateful if that could be resolved
32 because the cross-examination of Mr. Williams is going to have
33 to start tomorrow.

34

35 MR. JUSTICE MORLAND: Yes, Mr. Shields.

36

37 MR. SHIELDS: My Lord, it is putting the cart before the horse
38 because your Lordship knows a defendant in a libel action is
39 confined to his pleaded case. The claimant deals in the
40 evidence in chief with the pleaded case. It is not a question
41 of waiting to hear how the evidence in chief develops to
42 decide whether you put an allegation or not or decide to
43 introduce an allegation or not. The reason we have to comply
44 with the particulars is that everyone knows before cross-
45 examination starts what is the case which is going to be made
46 against any particular party.

47

48 Our submission is this. If it is going to be asserted
49 in addition to the present pleaded particulars that on the
50 basis of the Serbian footage it can be put that Miss Marshall
51 chose to ignore other relevant statements made by inmates of
52 the camp from which it can be inferred either that there was
53 no imprisonment or something in relation to the barbed wire
54 though I know not what. It undoubtedly has to be pleaded, put
55 in writing before she gives her evidence. It applies to any

1 other area of cross-examination which is going to be developed
2 which is not specifically pleaded. That is why we have
3 particulars, that is why we have further and better
4 particulars. It is quite clear from **Gatley**, at 33.9 that your
5 evidence is confined to your particulars. It is a very
6 sensible demarcation of the ambit of cross-examination.
7 I have not got up and said: "Under no circumstances, I submit
8 to your Lordship, can it be put" because your Lordship said
9 the Serbian footage can come in. But if it is going to be
10 part of the case from which the jury are going to be invited
11 to infer that as the article, we say, surely means they
12 deliberately adopted a philosophy aimed at distorting the
13 footage and carried it through then it is crucial to that
14 allegation that it be so put and so pleaded.
15

16 So what I am inviting my learned friend to do is not
17 to wait and see how it develops in cross-examination but to
18 put his hands up, in so far as he has to put them up, and say:
19 "This is it. This is the allegation which I am making against
20 you, Miss Marshall", and in so far as he is going to use it to
21 make an allegation against Mr. Williams I am entitled to know
22 what the allegation is. Because if the allegation, for
23 example, is this: "You did not make enough inquiries to find
24 out what someone else was saying and from that we can infer
25 that you deliberately chose to use that image because it
26 conveyed your journalistic attachment to the cause", it would
27 surely have to be pleaded because it is a particular from
28 which the jury are going to be invited to construe that they
29 did so behave. These are serious allegations and if they are
30 going to be made they ought just to be pleaded. So that is
31 what I am inviting now, and when they are pleaded then we can
32 look at them.
33

34 MR. JUSTICE MORLAND: Mr. Millar, the onus is on the defendants
35 to establish justification and in my judgment, subject to
36 anything you say, where you are in possession of material upon
37 which you may seek to justify a defamatory charge you must
38 plead it and not in effect keep it up your sleeve, deciding
39 whether to use it or not. This is not something which has
40 come to your attention at a late stage. Sometimes in cases
41 things emerge in evidence in chief, or indeed in cross-
42 examination, or even later in the course of a libel trial
43 which would justify an amendment to plead a particular of
44 justification. Here you should be in a position to be able to
45 particularise in writing what you are relying on by way of
46 particulars against both Penny Marshall and Ian Williams.
47

48 MR. MILLAR: My Lord, I thought I had undertaken, and I give the
49 undertaking again to do that overnight and respond in a
50 letter.
51

52 MR. JUSTICE MORLAND: Yes. It is entirely up to you whether you
53 wish to use those particulars in cross-examination but of
54 course because the charge has been made by way of particulars
55 of justification it is entirely a matter for Mr. Shields

1 whether he wishes the claimants to deal with the matter in
2 chief.
3

4 MR. MILLAR: I follow that and all I was trying to clarify at the
5 outset is what are we being asked to cover in response to the
6 letter. I think it is now clear.
7

8 MR. JUSTICE MORLAND: Yes.
9

10 MR. MILLAR: How is the film relied on as against Miss Marshall
11 in cross-examination? How is it relied on in the course of
12 cross-examination of Mr. Williams? We are not being asked
13 to engage in a formal pleading exercise at this stage, as
14 I understand it, but to indicate in writing the answers to
15 those questions.
16

17 MR. JUSTICE MORLAND: It does not matter whether it is a technical
18 pleading or not, the important thing is that it is clear in
19 writing what inferences you are drawing against the individual
20 claimants Penny Marshall and Ian Williams in relation to the
21 Serbian tape and the transcript. Furthermore, of course,
22 Mr. Shields and his instructing solicitors, and indeed Penny
23 Marshall and Ian Williams are entitled to consider together,
24 being parties, those allegations when they reach them in
25 writing before they give evidence. For example, to take a
26 perfectly proper tactical decision, whether to deal with the
27 allegation in evidence in chief or say: "We will wait and
28 hear how the cross-examination is put." But that is clearly
29 something to which both Penny Marshall and Ian Williams are
30 entitled to seek advice.
31

32 MR. MILLAR: Yes, I accept that. Having said that, in
33 circumstances where the film was disclosed in July 1999 ---
34

35 MR. JUSTICE MORLAND: Yes, I am not suggesting ---
36

37 MR. MILLAR: -- and in the past, since we intimated to the
38 claimants that we wanted to put it in and rely on it -- at
39 7.15 on the Friday night before the trial to raise the point
40 and then ask for time, I may ---
41

42 MR. JUSTICE MORLAND: I am not being unsympathetic to you but
43 I would have thought it should be possible for you to pinpoint
44 in writing what are the specific inferences you are drawing
45 from the Serbian footage and the transcript ---
46

47 MR. MILLAR: Yes, my Lord. The point I was making was ---
48

49 MR. JUSTICE MORLAND: -- and the transcript which you are putting
50 as particulars of justification against Ian Williams and Penny
51 Marshall.
52

53 MR. MILLAR: It is. The point I was making is that they have left
54 it very late to ask.
55

1 MR. JUSTICE MORLAND: That may be, and it is also getting very
2 late this afternoon. Is there anything else that we should
3 deal with?
4
5 MR. MILLAR: No, my Lord.
6
7 MR. JUSTICE MORLAND: The chronology, the organisation chart and
8 that document you chose to call "Key Protagonists", will that
9 all go before the jury before the evidence begins?
10
11 MR. SHIELDS: If you want it to, my Lord, of course. Would your
12 Lordship think it helpful?
13
14 MR. JUSTICE MORLAND: I would have thought it would be very
15 difficult for the jury to follow through all these ---
16
17 MR. SHIELDS: I agree that names are impossible, so I am happy
18 with that.
19
20 MR. JUSTICE MORLAND: Are you happy with that, Mr. Millar?
21
22 MR. MILLAR: I have no objection, my Lord.
23
24 MR. JUSTICE MORLAND: What about transcripts of the news, and so
25 forth, that we have been listening to and watching today?
26
27 MR. SHIELDS: My Lord, we have got transcripts of all the news
28 bulletins, not of the rushes. I think there may be some
29 discord as to whether they are entirely accurate but ---
30
31 MR. JUSTICE MORLAND: I think at some stage an effort should be
32 made to agree the transcripts because I would have thought the
33 question of balance may well be something that might be
34 material.
35
36 MR. SHIELDS: We intend to put the transcripts because obviously
37 I have got to call -- your Lordship will of course recall what
38 the case is. There is no plea of justification against ITN
39 and I am going to tell the jury that tomorrow.
40
41 MR. JUSTICE MORLAND: Yes.
42
43 MR. SHIELDS: So I am showing the whole broadcast because I am
44 acting out of fairness to both sides, because there is a lot
45 of reference to the publicity which followed the broadcasts on
46 the 6th and I did not want to be accused of editing it so
47 I have shown them in their entirety and tomorrow Mr. Williams
48 in chief will deal with how he wrote his particular script.
49
50 MR. JUSTICE MORLAND: Yes.
51
52 MR. SHIELDS: Because in fact what is crucial to the defendants'
53 case is to show, we would submit, that separately or acting
54 together they set out to distort the truth and produce a false
55 image of something together.

1 MR. JUSTICE MORLAND: Yes. So at some stage fairly early on
2 I hope the transcript will be agreed. Is there anything else?
3
4 MR. SHIELDS: My Lord, yes. We had been moving towards trying to
5 do that and getting a full bundle of the transcripts of all
6 the programmes that we have shown.
7
8 MR. JUSTICE MORLAND: Good.
9
10 MR. SHIELDS: I understand that is what we are now going to do.
11
12 MR. JUSTICE MORLAND: Thank you very much.
13
14 MR. SHIELDS: There was some resistance to doing that.
15
16 (Adjourned until 10.15 a.m. on Tuesday, 29th February 2000)