

Royal Courts of Justice
Tuesday, 14th March 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

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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.

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DISCUSSION re summing-up (in the absence of the jury)

Mr. SHIELDS

15

Mr. MILLAR

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SUMMING-UP, Continued

15

1 MR. JUSTICE MORLAND: Members of the jury, let us now move ahead
2 to Thursday, 6th August, to Budapest, where the teams are
3 preparing for the news broadcasts which will be sent out by
4 ITN either on Channel 3 or Channel 4 from London, and the
5 position also in London in ITN headquarters.

6 In Budapest it involved the developing of Dr. Idriz's
7 photographs, the editing of the rushes, the writing of the
8 scripts and the preparing of the interviews of Penny Marshall
9 and Ian Williams to be transmitted to London. Let us consider
10 it first from the London end. At 2.00 a.m. Penny Marshall
11 telephoned from Belgrade before she left for Budapest to
12 Michael Jermeý, the head of foreign news at ITN in London, and
13 he despatched Nigel Baker and Bill Frost to Budapest to assist
14 in her editing. Michael Jermeý told you that that morning he
15 had a meeting with Stewart Purvis, who was the editor in chief
16 of ITN, and with David Mannion, who was his immediate boss as
17 the editor of ITN programmes on ITV.

18 Mr. Jermeý said he gave them an account of a
19 conversation he had had with Penny overnight and told them
20 that he had despatched Nigel Baker and Bill Frost and they
21 noted that conversation. What he said of the meeting was that
22 Penny Marshall had said that she did not consider the camps
23 had been concentration camps and Stewart Purvis had said:
24 "We must be careful therefore with our terminology." Stewart
25 Purvis made the decision that the sensible thing to do was to
26 broadcast the first full version of the story on Channel 4
27 news at 7 o'clock and a full version for the ITV team at 10
28 o'clock in the evening on News at Ten. But there would be

1 some earlier footage shown on the early evening news at 5.40.
2 He was asked: "Would you personally have any input into what
3 Penny Marshall put in her story out in Budapest?" He said
4 that he said to her: "Just report it in a straightforward
5 way." He said that so far as completing the programmes in
6 London, Penny Marshall would not have any say in what ITN did
7 at the London end.

8 David Mannion was responsible for the actual
9 programmes that were sent out on the Channel 3 news on 6th
10 August and he said that the first pictures that he saw were
11 from the clip reel that was sent over for the 5.45 p.m.
12 bulletin. He was asked: "Who would decide what order those
13 clips would be shown that came in from the clip reel?" and his
14 reply was, "Well, typically that decision would be made by the
15 programme editor, the editor of that particular programme,
16 the 5.45 p.m., but we were obviously massively interested in
17 everything that came over from Budapest so we took a look at
18 it as well." He was then asked this: "When you saw the clip
19 reel, as you say, at 5.15, did you make any decision in
20 relation to how ITN should treat the 10 o'clock broadcast?"
21 His reply was:

22 "With care, with balance and with fairness and to
23 take great care. In a sense I didn't have to say this
24 because the journalists who were involved, if you like
25 below me and those on the ground, were well aware of
26 this anyway, that this story had potential and we had
27 to take great care about what we said, what we had
28 seen and also to some degree what we were unable to
29 see or verify. So the overall balance of the piece
30 we would regard as fair and accurate."

1 Were the news programmes transmitted by ITN balanced?
2 It is for you to judge. No suggestion in this case is made by
3 Michael Hume that ITN in London "fooled the world"; his attack
4 is solely against Penny Marshall and Ian Williams. They were
5 the people who actually saw the Trnopolje camp on 5th August.

6 Bill Dunlop was the programme editor for the Channel 4
7 news at 7.00 p.m. and he told you that the first pictures that
8 he saw were those fed for the 5.40 news on ITV. "So I saw
9 them", he said, "as they came in before the 5.40 news
10 bulletin." He saw the picture of Fikret Alic at the fence and
11 he said this about it: "The most striking thing for me was
12 actually the fact that the man was so thin that his ribs were
13 protruding, that his arms were extremely thin, and it struck
14 me as being a very powerful image indeed." He was then asked
15 this: "Who made the decision to use that picture on Channel 4
16 news as part of the headlines?" "I made that decision." He
17 was asked this: "You picked the image that we have seen on
18 the introduction of the broadcast with the shot of Alic's body
19 and the barbed wire fence. Was that enhanced in any way for
20 use as a background?" His reply was: "Certainly not, no."
21 He was asked about the caption, which was "Inside the camps",
22 that went with that photograph and he was asked: "Did you
23 pick that caption?" He said: "Yes, I would have done. Yes."
24 It was said to him: "The image might be seen as an image
25 reminiscent of a concentration camp shot from the Second World
26 War?" This was his answer: "Well, it is up to people to make
27 what they will of that image. That image for me was chosen
28 because it was a very powerful single image showing a very

1 emaciated man. It did have the barbed wire too. Those two
2 elements made it a singularly powerful image."

3 Bill Dunlop's superior was Garron Baines and he said
4 this to you:

5 "The gravity of the story and my own conviction
6 that it would arouse considerable interest was such
7 that we went to great pains to ensure that we did
8 not overstate or embroider the strength of the
9 visual images which I knew had been collected and
10 that we would put it in a full context. The context
11 was for us very important, both the way that the
12 pictures are edited together to be a fair
13 representation of what was seen, the accompanying
14 script of the reporter to match those pictures and
15 give the same contextualisation, and indeed the
16 contextualisation of the programme which the programme
17 editor, Bill Dunlop, would have been responsible for.
18 Although I discussed it in outline with him, some of
19 the reaction that would be required in terms of a
20 request of the Foreign Secretary for an interview" --

21 Do you remember, Linda Chalker came on, who was the Deputy
22 Foreign Secretary? --

23 "alerting our office in Washington so that they
24 could put calls through to the State Department to see
25 if there would be any American response. Probably
26 most importantly of all, to enable Dr. Karadzic, who
27 had given us the authority in the first place, the
28 right to reply to the reports that we were to screen
29 on this particular programme; and something that was
30 exceptional in this circumstance was that we
31 facilitated a return video path to enable Dr. Karadzic
32 to see the pictures as opposed to just hearing the
33 words."

34

1 You will remember Dr. Karadzic actually saw the programme
2 as it was being broadcast and then was asked to give his
3 response, having seen the programme. That was to make it fair
4 to Dr. Karadzic.

5 Let us now consider what brief Ian Williams and Penny
6 Marshall had. Sue English said this about the Channel 4 team:

7 "I was very keen that Ian Williams and Andrew Braddel
8 should go because they were a good, strong team.
9 James Nicholas was one of the best cameramen/editors
10 that I had ever worked with. It was also because he
11 was able to edit as well. I knew he would be able to
12 shoot the pictures and edit them, which is a big
13 advantage, and Chris Hease was a sound man who had
14 worked with James in Bosnia on many occasions. These
15 four people would together constitute the kind of team
16 that I felt absolutely confident both journalistically
17 and also in terms of their own safety in sending out
18 to what was obviously going to be a very difficult
19 situation."

20 Then speaking of her brief to Ian Williams, she said this:

21 "To my recollection, I faxed him a list that I had
22 been given by the Red Cross, which listed a number of
23 camps where they were concerned. They put it no more
24 strongly than that; that they were concerned there
25 were reports of maltreatment of prisoners. I also
26 sent him, I believe, the most recent articles from the
27 Guardian and the International Herald Tribune. My
28 brief to him was very simple, it was this: 'We have
29 been offered the chance to go in with Dr. Karadzic's
30 blessing. You're going to have to push to get him to
31 deliver on that.' But what I and the rest of the
32 programme team wanted was for Ian to go and report
33 what he found on the ground. I wanted to know what
34 the truth of the rumours were. If he found no

1 evidence in these camps of any maltreatment then that
2 is what we wanted to know and that is what we would
3 broadcast."

4 Ian Williams himself described his brief in these
5 words:

6 "My brief was to travel as speedily as I could to
7 Budapest, on to Belgrade, to make contact with
8 Karadzic's people in Belgrade with a view to going
9 to establish the truth or the falsity of the
10 allegations that had been made."

11 That evidence of Sue English and Ian Williams, if you accept
12 it, is important because if you accept it it may rebut the
13 suggestion in the article that Penny Marshall and Ian Williams
14 were under orders from managing editors or were under some
15 intense pressure, in effect encouraging a distortion of the
16 truth for a scoop.

17 What did those in Budapest have to say to you about
18 the contents of the news programmes and the use of the visual
19 images? Ian Williams said:

20 "We would as a team have made our partners at Channel
21 3 aware of what we had and I cannot recall the precise
22 mechanics of the edit in Budapest. We were editing
23 close together and at some point during the afternoon
24 I or members of my team would have made Penny or
25 members of her team aware of the material that we had
26 and which we were putting into our Channel 4 news
27 report."

28 He explained to you how the Alic and Dr. Idriz footage came
29 from Jeremy Irving's footage from the Channel 3 team. He said
30 this:

1 "The Alic clip was a different sort of clip to the
2 doctor. The doctor was very much a sequence within
3 his medical centre, which we were using to make the
4 point about the brutality that had existed and existed
5 within this particular camp. Alic's image was a
6 strong image which I felt epitomised what I had seen
7 at Trnopolje and would be an important addition to the
8 other powerful images which I was using from Trnopolje
9 camp. I was looking at many images, some of which
10 I regarded as equally, if not more powerful, than that
11 one image, particularly from Omarska camp. At no time
12 did I sit down, look at Fikret Alic and say: 'This is
13 reminiscent of a Second World War concentration
14 camp.' "

15 He told you of conversations with Penny Marshall and the
16 others on the drive from Belgrade to Budapest. He said this:

17 "We knew we had seen some examples of inhumanity.
18 We knew we had seen people who had been made to
19 suffer in terrible ways and we knew we had first-hand
20 evidence of that. We also knew that there had been
21 talk of concentration camps and we also discussed the
22 importance, as we felt it, of not using that term in
23 the context of what we had seen because although we
24 had clearly seen examples of suffering and inhumanity
25 we could not say that we had seen Nazi-style
26 concentration camps and we were very sensitive about
27 representing what we had in a responsible way. The
28 very power of the images that we had had encouraged us
29 to treat them in a cautious and responsible way and we
30 agreed that it was important to treat them -- putting
31 reports together we felt we should be doing it in a
32 way that told no more than what we could, than what we
33 had seen and what we had been told. We both agreed we
34 should be extremely cautious in the way we presented
35 them. We should not call them concentration camps.
36 By definition you are not going to be able to
37 illustrate a killing, a rape or a beating, so it is

1 necessary to show footage of people who are in a
2 pretty bad way."

3 He was asked this: "The decision to use the Alic clip at that
4 point in that way, was it because it sat as a symbol or image
5 of awful atrocity comparable with 150 people being killed in
6 the camp? Ian Williams's answer was:

7 "I was describing allegations that had been made to me
8 of atrocities and it was appropriate to show people
9 who were in a very poor physical condition and clearly
10 had been subjected to inhuman treatment."

11 Mr. Braddel, the producer in the Channel 4 team, said
12 he was absolutely positive they did not look at the pictures
13 until they got to Budapest. Do you remember it was suggested
14 by Mr. Millar that there may have been a monitor in Belgrade
15 and they looked at the pictures before they got to Budapest?
16 Mr. Braddel described the Alic image as "a symbol of
17 emaciation and a symbol of incarceration." "That is what
18 we found at Trnopolje." The decision to use the clip of
19 Alic in that way was the joint decision of himself (that is
20 Mr. Braddel), James Nicholas and Ian Williams. He said they
21 were at pains to point out they had found no evidence of
22 concentration camps, they had only found detention camps.

23 James Nicholas, the Channel 4 cameraman, saw the Alic
24 image when going through the pictures in the Channel 3 edit
25 suite, and he said this:

26 "As soon as I saw it, I thought that was a picture
27 which had to be in the piece. This was just a great
28 picture and summed up everything."

1 The two editors, you will remember, who were sent out from
2 London to Budapest to help Penny Marshall were Nigel Baker and
3 Bill Frost. Nigel Baker said:

4 "Penny said that her view was that Omarska obviously
5 appeared quite a sinister place. Obviously she had
6 had hearsay reports of possible atrocities there but
7 no proof. She had filmed the men in the canteen and
8 was very concerned about what was going on at the
9 camp. She also said that at the camp at Trnopolje
10 there were some men who were not in a marvellous way
11 but she said that obviously there were also people who
12 appeared to be refugees there as well."

13 He was asked this: "Which of the images did you take the view
14 was more powerful?" This was Nigel Baker's answer:

15 "I was quite open about this. I thought that the
16 images actually to the outside world of Trnopolje were
17 the most powerful and that was for one reason and one
18 reason only, that you could see the skeleton forms of
19 the men involved, particularly Fikret Alic. Bill Frost
20 said that the shot of Alic at the barbed wire fence
21 was 'the most powerful shot'. I think three or four
22 shots put together in Omarska were also a powerful
23 image."

24 I do not propose to remind you of the evidence of
25 Mr. Hume and Mr. Deichmann for this reason; they were not
26 at Trnopolje on 5th August, or in Budapest on 6th August,
27 when the news programmes were being edited. They cannot give
28 you evidence of the state of mind, the knowledge and the
29 intentions of Penny Marshall and Ian Williams on those days
30 seven and a half years ago. If you are not satisfied that the
31 defendants, upon whom is the burden of proof, have established
32 that Penny Marshall and Ian Williams compiled the television

1 footage which deliberately represented the emaciated Fikret
2 Alic as being caged behind a barbed wire fence at the Serbian
3 run Trnopolje camp on 5th August 1992 by the use selectively
4 of video shots of him you will find for Penny Marshall and Ian
5 Williams.

6 Assuming you have found that the press release, the
7 article and the editorial are defamatory of ITN as a company,
8 you then have to consider the amount of damages you should
9 award each claimant separately. Clearly each of the claimants
10 would be entitled to substantial damages.

11 I will now give you my direction in law as to the
12 correct approach for the assessment of damages. What are the
13 general principles of law and the legal guidelines that you
14 must apply? In assessing damages the underlying principle
15 to bear in mind is that an award of damages is intended to
16 compensate for the loss suffered as a result of the defamation
17 with the object of repairing that loss and vindicating the
18 claimants' reputation so far as money can. In assessing
19 damages, consider these matters.

20 First, consider the effect of the libels on the
21 claimants' reputations in the context and the extent of their
22 publication. In this case you have a press release by the
23 defendants put on the Press Association wire so that the
24 article in the magazine would in effect be trailed among t.v.
25 stations, radio stations, the press and journalists generally;
26 and of course the claimants are ITN, part of the media, and
27 Penny Marshall and Ian Williams, journalists. Then you have
28 the magazine published in February 1997. Although apparently

1 only printing 10,000 copies, it was promoted by a press
2 conference and although only 10,000 copies may have been
3 printed you will have regard to the number of people,
4 particularly in the world of journalism, who will have read
5 either the whole or part of the press release or the magazine
6 article and the editorial.

7 Secondly, the damages must be sufficient to vindicate
8 the true reputation of the claimants so that it is restored to
9 what it was before the libels were published.

10 Thirdly, in the cases of Penny Marshall and Ian
11 Williams consider the effect of the libels on their feelings,
12 the humiliation, the stress and the upset it must have caused
13 them. Ian Williams was in Hong Kong at the time but Penny
14 Marshall, you will remember, was in London on maternity leave.
15 When you have collectively reached a provisional sum for
16 damages then go on to consider whether or not, in the cases of
17 Penny Marshall and Ian Williams, that sum should be increased
18 because it has been established that there is an entitlement
19 to what is called "aggravated damages" or "increased damages".

20 Aggravated damages, that is increasing your award,
21 may be awarded because of the conduct of the libeller, that
22 is the defendants, in particular Mr. Hume, or his solicitors,
23 or his barristers, other than the publication of the libels
24 themselves; and of course it has to be after the publication.
25 It is something that rubs salt into the wound inflicted by
26 the libel. If Penny Marshall and Ian Williams - and the
27 burden is on them to establish it on the balance of

1 probabilities - have established that the conduct of the
2 defendants after publication continuing right up to today
3 has aggravated the injury done to them, the injury to their
4 feelings in particular, you should increase the damages that
5 you would otherwise have awarded them; not in order to punish
6 the defendants but in order to award them fair and reasonable
7 compensation for the injury done to them aggravated by the
8 defendants' conduct. You will remember the length of time
9 that Ian Williams and Penny Marshall were in the witness box
10 and the time that was spent by Mr. Millar in cross-examining
11 them. Both Ian Williams and Penny Marshall were each cross-
12 examined for over a day. They were accused in the witness box
13 of deliberately misrepresenting the position of Fikret Alic
14 and the other men surrounded by barbed wire, accused of a
15 distortion of the facts, and of course there has never been
16 a hint of an apology. But always remember that your award
17 of damages must be proportionate to the injury done.

18 It is your province to decide what amount to award by
19 way of damages. It is not for me to indicate to you what the
20 actual amount of your award of damages should be. However, it
21 is right that I should give you some guidance as to what that
22 figure should be so that it is proportionate to the injury
23 suffered and adequate to vindicate reputation.

24 Let us consider by way of comparison awards made to
25 victims who have suffered physical injuries through somebody's
26 negligence, for example in a factory, or in a hospital, or in
27 a road accident. You may have heard on television or read in
28 newspapers of awards of damages well in excess of £1 million.

1 Those reports are misleading. Often 90% or more of such
2 awards are to provide for the cost of a lifetime's nursing or
3 hospital care or the loss of a lifetime's earnings. The
4 percentage of such awards as compensation for the physical
5 injuries is often only 10%, or thereabouts, of the total
6 award. A percentage of such awards as compensation for the
7 physical injuries, even if it includes permanent brain damage,
8 may be very small. Even the most grievously injured people
9 (for example, the totally blinded, or deafened, paralysed in
10 both arms and legs, brain damaged, unable to speak or
11 communicate) are most unlikely to be awarded as much as
12 £150,000 as compensation for the pain, suffering, disability
13 and loss of enjoyment of life. A person who has had both arms
14 amputated, for example, at the shoulder blades is unlikely to
15 be awarded more than £100,000 for pain, suffering, disability
16 and the loss of enjoyment of life. Of course he would get a
17 huge award for loss of earnings and the need for somebody to
18 look after him, and so forth. No doubt you would agree that
19 damages for the most grievous physical injuries should not be
20 less than damages for defamation.

21 So far as Penny Marshall and Ian Williams are
22 concerned, the professional integrity of each of them as
23 television journalists has been attacked and you may think
24 it is a major aspect of their lives and their personalities.
25 Bear that in mind in your assessment of damages if you decide
26 to find for them.

27 You must treat the position of ITN differently from
28 Penny Marshall and Ian Williams. They obviously are human

1 beings with feelings and emotions. They, if you find against
2 the defendants, are entitled, as I have said, to damages for
3 injury to their feelings caused by the publication of the
4 libels and aggravated by the defendants' conduct thereafter.
5 ITN as a company has no feelings or emotions. It can only be
6 awarded damages for injury to its trading reputation and good
7 will as the provider of news services; an injury which has
8 left its reputation unvindicated until today over three years
9 after the publication of the libels. With regard to ITN, if
10 you find for them your award should be substantial enough to
11 vindicate ITN's reputation but no more than that.

12 Your award should be substantial enough to vindicate
13 the reputations of Penny Marshall and Ian Williams and
14 additionally the injury to their feelings and the aggravation
15 of the injury to their feelings by the way the defence has
16 been conducted. As I have said, it is not for me to suggest
17 to you what figure you should award by way of damages but I do
18 make this suggestion; that your separate awards of damages
19 should be substantial but that more than £150,000 each would
20 be excessive.

21 I am going to break off now so that you can have
22 quarter of an hour's break for coffee before I finish off my
23 summing up. So I suggest you leave everything here. Do not
24 start discussing the case yet, just relax and enjoy your tea
25 or coffee for the next ten minutes or quarter of an hour.
26 If you would like to go out with the jury usher.

27 (In the absence of the jury)

1 MR. JUSTICE MORLAND: Mr. Shields, do you submit that I have
2 misdirected the jury in law at any stage in my summing up?
3
4 MR. SHIELDS: I do not so submit, my Lord.
5
6 MR. JUSTICE MORLAND: Do you submit that I have misstated any
7 fact?
8
9 MR. SHIELDS: No, my Lord.
10
11 MR. JUSTICE MORLAND: Mr. Millar, I put the same two questions
12 to you. I am not dealing with omissions. I put the two
13 questions again. Do you submit I have misdirected in law the
14 jury in my summing up?
15
16 MR. MILLAR: No, my Lord.
17
18 MR. JUSTICE MORLAND: Or that I have made any mistake as to any
19 matter of fact?
20
21 MR. MILLAR: No, my Lord.
22
23 MR. JUSTICE MORLAND: Thank you. What I propose to do when the
24 jury have had their break and we have all had a break is to
25 hand out the questions and give a direction on unanimity.
26 I will rise now.

27
28 (Adjourned for a short time)

29
30 (In the presence of the jury)

31
32 MR. JUSTICE MORLAND: Members of the jury, when the jury bailiffs
33 have been sworn I am going to ask you to retire and begin your
34 deliberations. I have had typed out the questions that your
35 foreman will have to answer when you have reached your
36 conclusion. The foreman can be a man or woman of your
37 choosing. Could copies of the questions be handed to the
38 jury. There should be one for each of you. (Same handed)
39 Have you all got one? Right.

40 Each of these questions has to be answered by you
41 unanimously, that is it has got to be the decision of each and
42 all of you. It has got to be unanimous, each and all of you.
43 The first question is: Have ITN established that the press
44 release, the LM article and the accompanying editorial taken

1 together are defamatory of ITN as a company? You answer that
2 yes or no.

3 The second question is: Have the defendants
4 established that Penny Marshall and Ian Williams had compiled
5 television footage which deliberately misrepresented an
6 emaciated Bosnian Muslim, Fikret Alic, as being caged behind
7 a barbed wire fence at the Serbian run Trnopolje camp on 5th
8 August 1992 by the selective use of video tape shots of him?
9 Again, yes or no.

10 Question 3 is: If (and I underline that) your answer
11 to question 1 is "Yes", how much do you award ITN by way of
12 damages?

13 Then question 4: If your answer to question 2 is
14 "No", that is the defendants have not established, etc., how
15 much do you award by way of damages to Penny Marshall? -- Ian
16 Williams? I hope that makes it clear. Now the jury bailiffs
17 will be sworn in.

18 (The jury bailiffs were sworn)

19 MR. JUSTICE MORLAND: Members of the jury, you will remember what
20 I have said in the summing up. If at any time you want to see
21 any particular programme or any part of the rushes, or the
22 whole of any rushes, just send me a note in writing and we
23 will arrange for that to be displayed. You can come back into
24 court and you will see whatever you want to see again. If at
25 lunchtime you want refreshments, give your order to the jury
26 bailiff and that will be arranged. I would suggest that if
27 you do want refreshments at lunchtime you give your order not

1 later than twenty to one. Right. Do take all your papers
2 away with you, your notes, photographs, bundles, etc.

3 (The jury retired to consider their verdict)

4 MR. JUSTICE MORLAND: I will not take the jury's verdicts between
5 1.00 and 2.00 and if they have all had lunch I will not take
6 the jury's verdicts from the time they have ordered lunch
7 until 2.00. There is no need for you to remain in the
8 building. You can be at the end of a telephone in Chambers.

9
10 MR. SHIELDS: That is right. I am obliged to my Lord.

11
12 (Adjourned for a short time)