VOLUME 5
PAGES 5-1 through 5-120
EXHIBIT L

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL BUSINESS
No. 44706

DR. LAWRENCE STIFLER

VS

ROGER SYLVESTER

Before: Garrity, J.
Suffolk Courthouse
Room 306
September 18, 1984

Day Five

DALE MARIE CULLINAN
Official Court Reporter
5 Wendell Road
Wahant, MA 01908

THE COURT: You all stand; I'll sit down.

THE CLERK: Madam Forelady and at least 10 members of the jury, have you agreed upon a verdict?

A Yes; we have.

THE CLERK: Would you pass it to the Court Officer, please.

THE COURT: Before I even look at your verdict, I thank you for your verdict.

THE CLERK: In the matter of Civil Action Number 44706, Lawrence Stifler against Roger Sylvester, the verdict of the jury for plaintiff. Jury find for the plaintiff, Lawrence Stifler, and assess damages in the sum of $717 medical and $283 pain and suffering.

So say you Madam Forelady and at least 10 members of the jury.

The verdict is recorded.

THE COURT: It's been a pleasure working with you. This was a very, very difficult case to decide, and you're a bunch of great people.

Thanks again. Have an awfully nice day. You did credit to the system. Good bye.

(Jury Note. Marked for identification as Exhibit "L.")

(Whereupon, the trial was concluded.)

C-E-R-T-I-F-I-C-A-T-E

I, Dale Marie Cullinan, do hereby certify that the following record, pages 5-1 through 5-120, inclusive, is an accurate transcript to the best of my knowledge, skill and ability.

Dale Cullinan

Dale Marie Cullinan
Official Court Reporter

The above Certification does not apply to any reproduction of the same unless under the direct control of the Certifying Reporter.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

JULIE CHRISTOFFERSON TITCHBOURNE,

Plaintiff,

vs.

No. A7704-05134

CHURCH OF SCIENTOLOGY, MISSION OF DAVIS, a non-profit California corporation doing business in Oregon; CHURCH OF SCIENTOLOGY OF CALIFORNIA, doing business in Oregon; and L. RON HUBBARD,

Defendants.

Wednesday, May 15, 1985,

5:05 p.m.

BEFORE: The Honorable Donald H. Londer, Circuit Judge, In Chambers.

APPEARANCES: Rankin, McMurry, VavRosky & Doherty (By Messrs. Garry P. McMurry and Ronald L. Wade), of Attorneys for Plaintiff.

Kell, Alterman & Runstein (By Mr. Ted E. Runstein) and

Cooley, Manion, Moore & Jones, P.C. (By Messrs. Earle Cooley and Harry L. Manion III), of Attorneys for the Defendants.

Also Present: Mr. Thomas W. McPherson of Rankin, McMurry, VavRosky & Doherty.

FRIDAY, May 17, 1985, the trial was resumed pursuant to adjournment, at 5:12 p.m., and with all parties present the following proceedings were had:

THE COURT: Jury Foreperson please rise.

Mr. Fuhr.

JUROR NO. 11: Yes, sir.

THE COURT: Have you reached a verdict, sir?

JUROR NO. 11: Yes, we have.

THE COURT: Is your verdict unanimous?

JUROR NO. 11: I don't understand what ----

THE COURT: Have all of you voted the same way?

JUROR NO. 11: No.

THE COURT: All right. Have nine of you answered each question, the same nine answered each question?

JUROR NO. 11: Yes, sir.

THE COURT: All right, hand it to the clerk please.

I will read the verdict.

"1. Were the courses and services offered to plaintiff by the Church of Scientology offered to her on a wholly non-religious basis?"

Answer: "Yes."

"2. Do you find, by clear and convincing evidence, that the statements made to plaintiff were fraudulent as defined by the Court?"

Answer: "Yes."

"3. Did Plaintiff suffer general damages?"

Answer: "Yes."

"4. If your answer to Question 3 is 'yes,' wh
is the amount of Plaintiff's damages?

Church of Scientology, Mission of Davis
$3,253.20

Church of Scientology of California $3,253.20

L. Ron Hubbard $3,253.20

5. Is any Defendant guilty of wanton misconduc
justifying an assessment of punitive damages against
that Defendant?

Church of Scientology, Mission of Davis Yes

Church of Scientology of California Yes

L. Ron Hubbard Yes

6. If your answer to Question 5 is 'yes' as to
any Defendant, you may enter punitive damages against
that Defendant.

Church of Scientology, Mission of Davis
$1,500,000

Church of Scientology of California $17,000,000

L. Ron Hubbard $20,000,000

8. We find Plaintiff's claim against Church of
Scientology of California is time barred by the two
year statute of limitations."

Answer: "No."

"9. We find our verdict in favor of Plaintiff and assess damages as set fourth in Questions 4 and 6."

Answer: "Yes."

"Dated this 17th day of May, 1985." By "Joseph Fuhr Jury Foreperson"

MR. COOLEY: On behalf of defendants I request the jury be polled before the verdict is recorded and that they be polled on each question.

THE COURT: You understand what we are going to do now. We are going to ask you which of you voted as to each question.

No. 1 that question with the courses and services offered to plaintiff by the Church of Scientology offered to her on a wholly non-religious basis.

If your answer is "Yes," please raise your hand.

That is unanimous.

MR. COOLEY: May I see the show of hands again.

THE COURT: Did I see -- yes, I see 12 hands.

MR. RUNSTEIN: Thank you.

THE COURT: No. 2, "Do you find, by clear and convincing evidence, that the statements made to plaintiff were fraudulent as defined by the Court?"

The answer to that was "Yes." How many voted that way?

That is unanimous.

No. 3, "Did Plaintiff suffer general damages?"

Hands please.

Yes, unanimous.

No. 4, "If your answer to Question 3 is 'yes,' what is the amount of Plaintiff's damages?

Church of Scientology, Mission of Davis $3,253.00" and the same for the Church of Scientology of California; the same for L. Ron Hubbard.

That is unanimous.

No. 5, "Is any Defendant guilty of wanton misconduct justifying an assessment of punitive damages against that Defendant?

Church of Scientology, Mission of Davis"

It's unanimous.

"Church of Scientoloty of California"

Unanimous.

"L. Ron Hubbard"

Unanimous.

"If your answer to Question 5 is 'yes' as to any Defendant, you may enter punitive damages against that Defendant.

Church of Scientology, Mission of Davis $1,500,000"

Nine.

"Church of Scientology of California $17,500,

Nine.

"L. Ron Hubbard $20,000,000"

Unanimous.

"We find Plaintiff's claim against Church of Scientology of California is time barred by the two year statute of limitations."

Answer is "No."

Your answer was "No" it was not barred by the statute of limitations. Your answer was "No."

That is unanimous.

MR. MANION: No, it's not.

THE COURT: Il, excuse me.

And the last one "We find our verdict in favor of Plaintiff and assess damages as set forth in Questions 4 and 6."

Nine.

The verdict is in order.

Members of the jury, I know this has been extreme difficult for you and I want to just take a moment after 11 weeks and say to you how much we appreciate you spending 11 weeks with us. And more than that the attention you have given to and consideration you have given to all of us during the course of this trial to the lawyers, to the Court.

We have all watched you carefully, and I know

each one of us feel that you have been an outstanding jury. You have been under hardships, we worked you long and hard so I want to just take this opportunity to thank you for the service you have performed as jurors. You indeed have performed a public service.

I hope you will realize some day down the line when you get home and maybe when this is all behind you, you will recognize that you have also performed somewhat of a service for yourselves -- and I say this for this reason, probably a lot of you have not thought too much about what goes on down in this building and how the jury system works and why it is such an important part, not only of our civil jurisprudence, but our criminal justice system.

While it is not perfect it is still the finest system devised by the minds of men. You have seen lawyers at their finest and I am referring to all of them. I just hope that you can remember that.

Once again I thank you for being here. You are excused from your service as jurors.

(At 5:21 p.m. the jury left the courtroom.)

MR. COOLEY: I take it court is adjourned?

THE COURT: Court is adjourned.

(At 5:22 p.m. the trial of the above-entitled cause concluded.)

STATE OF OREGON,)
) ss.
County of Multnomah.)

I, PATRICIA R. DAVIS, Official Reporter for Department No. 4 of the Fourth Judicial District of the above-entitled court, hereby certify that I reported in Stenotype the oral proceedings had upon the trial of the above-entitled cause on May 14, 15 and 16, 1985 before the Honorable Donald L. Londer, Judge of said court; that I have subsequently caused my Stenotype notes so taken to be reduced to typewriting, and that the foregoing transcript, pages 1 to 84, both inclusive, constitutes a full, true and accurate record of the oral proceedings as set out above in the above-entitled cause.

DATED at Portland, Oregon, this 22nd day of May, 1985.

Patricia R. Davis
Official Reporter

ENTERED IN JOURNAL

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CIVIL

JMM

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

JULIE CHRISTOFFERSON,

Plaintiff,

vs.

CHURCH OF SCIENTOLOGY MISSION OF DAVIS; CHURCH OF SCIENTOLOGY OF CALIFORNIA; and L. RON HUBBARD,

Defendants.

CASE NO. A7704-05184

ORDER GRANTING MOTION FOR MISTRIAL

The Court hereby grants a mistrial in this action on the following grounds:

1. Plaintiff's counsel's closing argument was improper and prejudicial to Defendants and unable to be cured by a curative or limiting instruction;

2. In light of the question submitted to the Court by the jury during it's deliberation, the Court's giving of Instruction No. 28 in which the Court ruled that certain presentations were wholly secular in nature, were tantamount to directing a verdict in favor of Plaintiff.

Accordingly, the delivery of that instruction was erroneous and prejudicial to the Defendants.

For the foregoing reasons, the Court hereby declares a mistrial and orders a new trial to be held on all issues.

DATED this 16 day of July, 1985.

Donald H. Londer
Circuit Court Judge

CERTIFICATE — TRUE COPY

I hereby certify that the foregoing copy of ORDER FOR MISTRIAL is a complete and exact copy of the original.

Dated July 16, 19 85

Attorney(s) for Defendants

ACCEPTANCE OF SERVICE

Due service of the within ..... is hereby accepted on ....., 19....., by receiving a true copy thereof.

Attorney(s) for .....

CERTIFICATES OF SERVICE

Personal

I certify that on ....., 19 ....., I served the within ..... on ..... attorney of record for ..... by personally handing to said attorney a true copy thereof.

Attorney(s) for .....

At Office

I certify that on July 16, 19 85, I served the within Order for Mistrial on Garry P. McMurry attorney of record for Plaintiff by leaving a true copy thereof at said attorney's office with his/her clerk therein, or with a person apparently in charge thereof, at 1600 Benjamin Franklin Plaza, One S.W. Columbia, Portland Oregon.

Attorney(s) for Defendants

Mailing

I certify that I served the foregoing ..... on ..... attorney(s) of record for ..... on ....., 19 ....., by mailing to said attorney(s) a true copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney(s) at said attorney(s) last known address, to-wit: ..... and deposited in the post office at ....., Oregon, on said day.

Dated ....., 19.....

Attorney(s) for .....

KELL, ALTERMAN & RUNSTEIN
ATTORNEYS AT LAW
1300 First Bank of California Tower
Portland, Oregon 97205
Telephone 222-3531

BACKING SHEET

57 Or.App. 203

Julie CHRISTOFFERSON, Respondent,

v.

CHURCH OF SCIENTOLOGY OF PORTLAND, an Oregon nonprofit corporation, Church of Scientology, Mission of Davis, a nonprofit California corporation doing business in Oregon, Delphian Foundation, an Oregon nonprofit corporation, and Martin Samuels, Appellants.

No. A7704-06184; CA 15952.

Court of Appeals of Oregon.

Argued and Submitted Sept. 8, 1981.

Decided May 3, 1982.

Reconsideration Denied June 10, 1982.

Plaintiff brought action against religious corporations and others to recover for the tort of outrageous conduct and fraud. The Circuit Court, Multnomah County, Robert P. Jones, J., entered judgment for plaintiff, and defendants appealed. The Court of Appeals, Gillette, P. J., held that: (1) evidence was insufficient as a matter of law to establish the tort of outrageous conduct; (2) plaintiff could not recover on fraud claim from religious corporation which did not employ individuals who allegedly made misrepresentations to plaintiff; (3) plaintiff could not recover on fraud claim from nonprofit educational institution on basis of misrepresentations allegedly made by agents and employees of religious corporation; (4) evidence was sufficient for jury on the issue of whether misrepresentations allegedly made by agents and employees of one of religious corporations were made for a wholly nonreligious purpose so as not to come within the rule that the truth or falsity of religious beliefs and doctrines may not be submitted for determination by jury in action for fraud; and (5) defendant religious corporation was entitled to the protection of the First Amendment for statements regarding its religious beliefs and practices unless it were shown that statements made were part of an offer of those services to the public on a wholly secular basis; because trial court erroneously instructed jury in that regard, judgment against one of religious organizations would be reversed and cause would be remanded for retrial.

Reversed as to certain defendants; reversed and remanded for new trial as to other defendants.

1. Damages ⇐208(5)

In outrageous conduct action, although it is ordinarily for trier of fact to determine not only historical facts, but also whether offensiveness of defendant's conduct exceeds any reasonable limit of social toleration, it is for trial court to determine, in the first instance, whether defendant's conduct may reasonably be regarded as too extreme and outrageous as to permit recovery.

2. Damages ⇐50.10

It is only by proof of conduct that is beyond the limits of social toleration that plaintiff may recover in an action for outrageous conduct, no matter what defendant may have intended and no matter what the effect on plaintiff may have been.

3. Damages ⇐50.10

In action brought against religious organization and others by former member of the organization, evidence was insufficient, as a matter of law, to establish the tort of outrageous conduct during time that plaintiff was associated with defendants, since plaintiff joined the religious organization voluntarily, there was no evidence that plaintiff was threatened or forced to remain involved in the religious organization, and no evidence that during her association with the organization, plaintiff was afraid to terminate her involvement or feared defendants in any way.

4. Damages ⇐50.10

In action brought against religious organization and others by former member of the organization, evidence was insufficient to establish tort of outrageous conduct occurring subsequent to plaintiff's deprogramming, since fact that libel action had been filed by certain of defendants against plaintiff did not establish outrageous conduct, there was no evidence that defendants

informed plaintiff that she had been declared a "suppressive person" subject to organization's alleged policy of retribution, and defendants' issuance of document forbidding persons associated with defendants from communicating with plaintiff was issued after plaintiff's attorney had demanded that defendants not contact plaintiff.

5. Fraud ⇐38

Plaintiff could not recover on her cause of action for fraud against religious corporation, since acts of individuals who allegedly made misrepresentations to plaintiff was claimed to have been as agent or employee of the religious corporation, and fact that the religious corporation and another religious corporation which employed individuals who allegedly made the misrepresentations were organizations of the same religious movement did not by itself provide a sufficient link to hold defendant religious corporation liable for what may have been done by the other religious corporation.

6. Corporations ⇐1.6(13)

Plaintiff could not recover on her fraud claim from nonprofit educational institution on the basis of alleged misrepresentations made by agents and employees of religious corporation, since evidence that the two entities shared a corporate officer and shared facilities did not support "piercing the corporate veil" so as to permit treating the educational institution and the religious corporation as one, and there was no evidence that educational institution had any right to control the actions of the religious corporation or had any actual control over those actions.

7. Fraud ⇐64(3)

In fraud action brought against religious corporation, its president, and others, evidence on issue of whether religious corporation's president had knowledge of misrepresentations allegedly made by religious corporation's employees and agents was sufficient for jury.

8. Fraud ⇐38, 64(1)

To establish fraud, plaintiff must ordinarily prove that representations made were false, but when religious beliefs and doctrines are involved, the truth or falsity of religious beliefs or doctrines may not be submitted for determination by jury.

9. Fraud ⇐64(1)

In action for fraud brought against religious corporation and others, trial court was required to determine the religious character of alleged misrepresentations only if it could do so as a matter of law, that is, if there were only one conclusion to be drawn from the evidence. U.S.C.A. Const.Amend. 1.

10. Constitutional Law ⇐84

For purposes of rule providing that the truth or falsity of religious beliefs or doctrines may not be submitted for determination by jury in action for fraud; while beliefs relating to the existence of, and man's relationship to, a God are religious, belief in a traditional, or any, "god" is not a prerequisite to a finding that a belief is religious. U.S.C.A.Const.Amend. 1.

11. Constitutional Law ⇐84

Fact that religion is of relatively recent origin does not mean that it is not entitled to the protection of the First Amendment. U.S.C.A.Const.Amend. 1.

12. Constitutional Law ⇐84

Organization which was incorporated as a tax-exempt religious organization, which had ordained ministers and characterized itself as a church, and which had a system of beliefs, or creed, which encompassed beliefs that were religious in character was a religious organization entitled to invoke the protection of the free exercise clause. U.S.C.A.Const.Amend. 1.

13. Fraud ⇐38

A religious organization, merely because it is such, is not shielded by the First Amendment from all liability for fraud: if statements by agents of religious organization do not concern the religious beliefs and practices of the organization, the free exercise clause provides no defense to action for fraud. U.S.C.A.Const.Amend. 1.

14. Constitutional Law ⇐84

In the context of the establishment clause, the characterization of religious organization's activity as nonreligious is not a determinative factor, but the characterization of beliefs as religious by one seeking the protection of the free exercise clause is not determinative either. U.S.C.A.Const. Amend. 1.

15. Fraud ⇐64(1)

In action for fraud brought against religious corporation, evidence was sufficient for jury on the issue of whether misrepresentations allegedly made by religious corporation's agents and employees were made for a wholly nonreligious purpose so as not to come within the rule that the truth or falsity of religious beliefs and doctrines may not be submitted for determination by jury in action for fraud.

16. Appeal and Error ⇐1177(3)
Constitutional Law ⇐84

In fraud action brought against religious corporation and others, in which evidence established that defendant was a religious organization and that courses which plaintiff was induced to participate in were part of religious beliefs and practices of the religion, religious corporation was entitled to First Amendment protection for statements regarding its religious beliefs and practices unless it were shown that statements made were part of an offer of those services on a wholly secular basis; because trial court erroneously instructed that a determination should be made for each of alleged misrepresentations as to whether it was religious was not accurate, judgment against religious organization would be reversed and cause remanded for retrial.

17. Fraud ⇐13(2)

State of mind of one accused of making fraudulent representations is at issue when one of the elements to be shown is speaker's knowledge of the falsity of the representation being made.

18. Fraud ⇐64

In action for fraud brought against religious corporation and others, trial court erred in excluding three exhibits offered to show the good faith of one of the individuals who made an alleged misrepresentation to plaintiff, since the exhibits were relevant to the issue of the state of mind of the one accused of making fraudulent representations.

19. Fraud ⇐65(4)

In action for fraud brought against religious corporations and others, trial court's instruction that, in order to find for plaintiff, jury was required to find that plaintiff, having a right to do so, reasonably relied upon representation and did not know it was false, adequately and accurately stated applicable law, and therefore, trial court did not err in denying defendant's requested instruction defining "justifiable reliance."

20. Fraud ⇐65(1)

In action for fraud brought against religious corporation and others, trial court erred in refusing to submit defendant's requested instruction defining "material fact," since that term constituted an element of the action.

21. Trial ⇐260(6)

In action for fraud brought against religious corporation and others, trial court did not err in failing to instruct jury that "fraud is never presumed," since, within context of the instructions as a whole, jury was adequately instructed in that regard.

22. Fraud ⇐65(1)

In action for fraud brought against religious corporation and others, trial court did not err in failing to give defendants' requested instructions containing the specific language of the federal and state constitutional provisions establishing religious freedom. U.S.C.A.Const.Amends. 1, 14; Const.Art. 1, §§ 2, 3.

23. Fraud ⇐65(1)

In action for fraud brought against religious corporation and others, record established, as a matter of law, that the beliefs practiced by defendants constituted a religion, and defendants were entitled to jury instruction to that effect.

24. Fraud ⇐61

Punitive damages are not unavailable for fraud merely because the fraudulent representations are "speech." U.S.C.A. Const.Amend. 1.

25. Fraud ⇐61

In action for fraud brought against religious corporations and others, plaintiff was not precluded from recovering punitive damages, since there is no constitutional requirement that religious organizations should not be made liable for punitive damages because they are religious organizations, even if the content of the statement which they are alleged to have made is not religious. U.S.C.A.Const.Amend. 1.

Charles J. Merten, Portland, and Emily M. Bass, New York City, argued the cause for appellants. On the briefs was Charles J. Merten, Portland.

Garry P. McMurry, Portland, argued the cause for respondent. With him on the brief were Patric J. Doherty, Ronald L. Wade, Rankin, McMurry, VavRosky & Doherty, William T. Powers and Powers & Powers, Portland.

Elden M. Rosenthal and Leslie M. Roberts, Portland, filed a brief amicus curiae for Cooperating Counsel for the American Civil Liberties Union of Oregon.

James E. Hoppe, Portland, Lee Boothby, and Robert W. Nixon, Washington, D. C., filed a brief amicus curiae for Americans United for Separation of Church and State.

Before GILLETTE, P. J., YOUNG, J., and ROBERTS, J. Pro Tem.

GILLETTE, Presiding Judge.

Defendants appeal from the judgment entered on a jury verdict in favor of plaintiff in her action for fraud and intentional infliction of emotional distress ("outrageous conduct").[1] Plaintiff's fraud cause of action alleged 14 misrepresentations which induced her to pay some $5,000 to defendants. Her cause of action for outrageous conduct alleged in two counts a scheme to gain control of her mind and to force her into a life of service to defendants and a course of retaliatory conduct after plaintiff disassociated herself from defendants. Defendants interposed various defenses, including a defense based upon the Free Exercise Clause of the First Amendment. The jury awarded compensatory and punitive damages. We reverse and remand.

THE PARTIES AND THE FACTUAL BACKGROUND

Plaintiff is a young woman who moved to Portland from Eureka, Montana, in July, 1975, shortly after she graduated from high school, intending to obtain some work experience before going to college in the fall to study civil engineering. When she first arrived, she stayed for a few days with a friend from Montana, Pat Osler, and then moved into an apartment with a young woman she met through Osler. She soon found a job with an engineering firm and worked there full-time.

Defendants are the Church of Scientology of Portland (COSOP), a religious corporation; the Church of Scientology, Mission of Davis (the Mission), also a religious corporation; the Delphian Foundation (Delphian), a non-profit educational institution not expressly organized as a church-related school; and Martin Samuels, an ordained minister of the Church of Scientology and the president of the Mission and Delphian.

The beliefs of Scientology were summarized in *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1151–52, (D.C. Cir.1969), in a manner which appears to be accurate according to the record before us in this case:

> "The movement apparently rests almost entirely upon the writings of one man, L. Ron Hubbard, an American who maintained the headquarters of the

[1] Plaintiff's complaint also contained a cause of action for Unlawful Trade Practices against all defendants. The jury found that the action was barred by the statute of limitations as to all defendants except the Church of Scientology of Portland. As to the Church, it awarded no damages on that claim, and we are not asked to review that verdict.

movement in England at the time this action was brought. In the early 1950's, Hubbard wrote tracts elucidating what he called 'Dianetics.' Dianetics is a theory of the mind which sets out many of the therapeutic techniques now used by Scientologists. * * *.

"The basic theory of Dianetics is that man possesses both a reactive mind and an analytic mind. The analytic mind is a superior computer, incapable of error, to which can be attributed some of the human misjudgments which create moral problems and much individual suffering. These are traceable rather to the reactive mind, which is made up of 'engrams,' or patterns imprinted on the nervous system in moments of pain, stress or unconsciousness. These imprinted patterns may be triggered by stimuli associated with the original imprinting, and may then produce unconscious or conditioned behavior which is harmful or irrational.

"Dianetics is not presented as a simple description of the mind, but as a practical science which can cure many of the ills of man. It terms the ordinary person, encumbered by the 'engrams' of his reactive mind, as a 'preclear,' by analogy to a computer from which previously programmed instructions have not been erased. The goal of Dianetics is to make persons 'clear,' thus freeing the rational and infallible analytical mind. The benefits this will bring are set out in considerable and alluring detail. All mental disorders are said to be caused by 'engrams,' as are all psychosomatic disorders, and that concept is broadly defined.

"A process of working toward 'clear' is described as 'auditing.' This process was explicitly characterized as 'therapy' in Hubbard's best-selling book *DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH* (1950). The process involves conversation with an 'auditor' who would lead the subject or 'preclear' along his 'time track,' discovering and erasing 'engrams' along the way. Though auditing is represented primarily as a method of improving the spiritual condition of man, rather explicit benefits to bodily health are promised as well. Hubbard has asserted that arthritis, dermatitis, asthma, some coronary difficulties, eye trouble, bursitis, sinusitis and sinusitis are psychosomatic and can be cured, and further that tuberculosis is 'perpetuated by engrams.'

* * * *

"The Hubbard Electrometer, or E-meter, plays an essential, or at least important, part in the process of auditing. The E-meter is a skin galvanometer, similar to those used in giving lie detector tests. The subject or 'preclear' holds in his hands two tin soup cans, which are linked to the electrical apparatus. A needle on the apparatus registers changes in the electrical resistance of the subject's skin. The auditor asks questions of the subject, and the movement of the needle is apparently used as a check of the emotional reaction to the questions. According to complex rules and procedures set out in Scientology publications, the auditor can interpret the movements of the needle after certain prescribed questions are asked, and use them in diagnosing the mental and spiritual condition of the subject." (Footnotes omitted).

From Dianetics developed Scientology, which incorporates Dianetics, but includes broader concepts. As characterized in *Founding Church, supra*:

"With Scientology came much of the overlay which lends color to the characterization of the movement as a religious one. Hubbard has claimed kinship between his theories and those espoused by Eastern religions, especially Hinduism and Buddhism. He argues that man is essentially a free and immortal spirit (a 'thetan' in Scientological terminology) which merely inhabits the 'mest body' ('mest' is an acronym of the words matter, energy, space, time). Man is said to be characterized by the qualities of 'beingness,' 'havingness,' and 'doingness.' The philosophical theory was developed that the world is constructed on the relationships of 'Affinity,' 'Reality' and 'Communication,' which taken together are de-

nomenated "the ARC Triangle." 408 F.2d at 1152. (Footnotes omitted).

The thetan is said by Hubbard to be immortal: it is the spirit controlling the body, through the mind. After the death of the body, the thetan "exteriorizes" and returns in another body. The thetan does not care to remember the life just lived when separated from the body and mind, but because each individual comes back, he is responsible for what goes on today because he will experience it tomorrow.

Plaintiff became involved with Scientology[1] almost immediately upon arriving in Portland. Her friend Osler was taking courses from the Mission and, on his advice, she enrolled in a communications course offered by the Mission. As part of the enrollment process, she also applied for membership in the Church of Scientology. Because she was not yet 18 years old, she was told that she must obtain her mother's consent to receive the services offered by the Mission. She telephoned her mother and dictated a consent form which her mother typed, signed and returned.

Plaintiff paid $80 for the communications course and began attending classes at the Mission every evening after work and at least one day on the weekends. Before completing the communications course, she signed up for another course and continued to participate in courses and services offered at the Mission until the beginning of October, 1973.

In early September, plaintiff applied to become a provisional staff member at Delphian, located at Sheridan, Oregon. She informed her parents that she had decided not to attend college that fall. Moving to Delphian in early October, she worked as a provisional staff member until the beginning of December. At that time, she was asked to leave Delphian until she could convince her mother to stop opposing her involvement in Scientology. Plaintiff moved from Sheridan back to Portland and worked as a waitress. While there, she worked with a staff member of the Mission, attempting to convince her parents not to interfere with Scientology.

Plaintiff went home for Christmas and then returned to Portland in the early part of January, 1974. She lived with several people, mainly Scientologists, and continued to work as a waitress. She did not participate in courses or programs at the Mission, but continued to work on "handling" her parents. In April, 1974, plaintiff went to her parents' home in Montana to "handle" them, that is, to convince them to accept her involvement in Scientology, or else to "disconnect" from them. When she reached home, she was locked in the house and "deprogrammed." She did not return to her involvement with Scientology and, in fact, became active in anti-Scientology activities and participated in "deprogramming" others. She filed this action in 1977.

Defendants raise 32 assignments of error, covering nearly every phase of the proceedings from pretrial to post-verdict. Organization of the issues is somewhat complicated by the various causes of action and the various defendants. Several assignments involve the First Amendment defense raised by defendants. However, before reaching the constitutional issues which must be decided in this case, we first consider non-constitutional challenges to the outrageous conduct cause of action.

OUTRAGEOUS CONDUCT

Plaintiff alleged two counts of outrageous conduct. The first alleged a scheme to gain control of her mind and to force her into a life of service to defendants. The allegations in this count involve actions committed by defendants during the time that plaintiff was involved with Scientology. At the close of the case, defendants moved for directed verdicts on this cause of action, arguing that, as a matter of law, plaintiff had not proved acts that exceeded the limits of social toleration.[2]

2. References to "Scientology" refer to plaintiff's involvement with the movement in general and do not refer to plaintiff's relationship with any particular defendant.

3. The motions below was directed to both

The tort of intentional infliction of emotional distress, or outrageous conduct, is still in the process of developing in this state. For example, there remain some questions as to what state of mind is required in particular situations to subject a defendant to liability. *See Brewer v. Erwin*, 287 Or. 435, 454–58, 600 P.2d 396 (1979); *compare Turman v. Central Billing Bureau*, 279 Or. 443, 568 P.2d 1382 (1977), *with Rockhill v. Pollard*, 280 Or. 54, 485 P.2d 28 (1971).

A "special relationship" between the parties has played a role in every case in this state involving this tort.[4] The tort was characterized in *Turman v. Central Billing Bureau*, *supra*, as "* * * an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests. * * *." 279 Or. at 446, 568 P.2d 1382. *See also Brewer v. Erwin*, *supra* (landlord and tenant); *Rockhill v. Pollard*, *supra* (doctor and patient); *Fitzpatrick v. Robbins*, 51 Or.App. 897, 626 P.2d 918, *rev. den.* 291 Or. 151 (1981) (landlord and tenant); *Bodewig v. K-Mart*, 54 Or.App. 480, 635 P.2d 657 (1981), *rev. den.* 292 Or. 460 (1982) (employer-employe).[5] The role of that relationship has recently been explored in *Hall v. May Department Stores Co.*, 292 Or. 131, 637 P.2d 126 (1981), a case involving an employer-employe relationship, in which the court stated:

> "The character of the relationship bears on the mental element required to impose liability, *compare Rockhill* with *Turman* and *Brewer*, and also on the next issue, the offensiveness of conduct that crosses the threshold of potential liability, *see Fuhrer v. Clark*, [253 Or. 113, 453 P.2d 682 (1969)]." 292 Or. at 137, 637 P.2d 128.

A plaintiff's particular susceptibility to distress has also played a part in certain of the cases. *See Rockhill v. Pollard*, *supra* (plaintiff already distraught because of automobile accident and injury to child); *Turman v. Central Billing Bureau*, *supra* (plaintiff blind and suffering from glaucoma, requiring treatment by clinic for which bill was being collected); *Fitzpatrick v. Robbins*, *supra* (plaintiffs aged and virtually disabled).

Part of the uniqueness of this case lies in the absence of both of the considerations just discussed. At the close of the evidence, plaintiff withdrew the portion of her complaint which alleged a special relationship between her and defendants. Neither does she argue on appeal that she was in any way particularly susceptible to the infliction of emotional distress.[6]

The type of conduct for which liability may be imposed for infliction of emotional distress, absent physical injury, is not well defined. *Rockhill v. Pollard*, *supra*, rejected

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> causes of the outrageous conduct claim. On appeal, defendants argue that there was no outrageous conduct as a matter of law as to Count II. As to Count I, defendants do not make that precise argument, but make several other arguments, including the argument that the actions are protected by the First Amendment. We decide the issue as to both counts on the non-constitutional basis rather than reach the constitutional issue as to Count I.

4. *Brewer* specifically did not decide whether there could be recovery in a situation in which there was no special relationship and where only recklessness was shown. One of defendants' assignments of error concerns an instruction which informed the jury that plaintiff could recover if defendants acted recklessly. Plaintiff had previously withdrawn portions of her complaint which alleged a special relationship between her and defendants. We do not reach the issue of the instruction because we dispose of the outrageous conduct claims on other grounds.

5. *Bodewig* involved one party defendant who had no special relationship to the plaintiff. However, even in that case, some of the acts necessary to establish the tort were committed only by the employer-defendant, albeit with the other party defendant's encouragement.

6. Plaintiff was 17 years old when she first enrolled in the communications course but turned 18 soon after. She does not contend that her age or the fact that she was living on her own for the first time made her particularly susceptible to the infliction of emotional distress.

the description in Restatement (Second) of Torts § 46 (1965)[7] and decided:

> "We need a simpler test and think it best for this case to merely hold that the conduct must be outrageous in the extreme. It is our impression that the test for liability in these cases can only be worked out on a case by case basis. Here we must determine whether defendant's conduct was so extreme as to warrant the imposition of liability for any severe emotional distress caused thereby." 259 Or. at 59–60, 485 P.2d 28.

In later cases, the type of conduct which would subject a defendant to liability has been characterized as "beyond the limits of social toleration." *Brewer v. Erwin*, supra, 287 Or. at 458, 600 P.2d 398; *see also, Hall v. May Department Stores Co.*, supra, 292 Or. at 137, 637 P.2d 126.

[1] Although it is ordinarily for the trier of fact to determine not only the historical facts, but also "whether the offensiveness of the defendant's conduct exceeds any reasonable limit of social toleration," *Hall v. May Department Stores Co.*, supra, 292 Or. at 137, 637 P.2d 126,

> "[i]t [is] for the trial court to determine, in the first instance, whether the defendants' conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. If the minds of reasonable men would not differ on the subject the court [is] obliged to grant an order of involuntary nonsuit * * *." *Pakos v. Clark*, supra, 253 Or. at 132, 453 P.2d 682.

The trial court here erred in denying defendants' motions for a directed verdict as to count I of the outrageous conduct cause of action. We find no conduct both alleged and proved under that count that could subject defendants to liability for the tort. Plaintiff's first count alleges:

> "That the above misrepresentations and other unlawful practices were part of a scheme to gain control of Plaintiff's mind and force her into a life of service to the Defendants. She was intentionally alienated from her family and friends. Plaintiff's ability to direct her life and form reasonable judgments was intentionally impaired by Defendants through the use of a crude polygraph, intense peer pressure and other covert means. She was coerced into performing labor for which she was not paid. She was held up to ridicule, humiliated, and forced under threat of retribution and physical harm to follow the dictates of the Defendants, and caused to give Defendants all the monies she had or could beg or borrow from others.
>
> "As part of the above scheme, Defendants caused Plaintiff to believe and fear that she would be subject to severe punishment should she ever bring suit against Defendants, voice her disapproval of Defendants' practices, testify against Defendants, demand a return of money from Defendants or commit any other act Defendants determined to be against their interests."

[2] In this pleading, defendants' intent, their conduct and the effect on plaintiff are interwoven. However, this intervening should not be permitted to obscure the fact that each of the three elements—intent, conduct which is outrageous or beyond the limits of social toleration, and resultant severe emotional distress—must be proved. In the present case, defendants made no

7. The Restatement describes the conduct which gives rise to liability as follows:

> "* * * * It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" Restatement (Second) of Torts § 46, comment d (1965), quoted in *Kentzler v. Pollard*, supra, 259 Or. at 59–60, 485 P.2d 28.

argument concerning intent, but they maintain that there is not sufficient evidence of either of the last two elements—the outrageous conduct and the resultant distress—to permit the case to go to a jury. We agree that there is no sufficient evidence of the resultant severe emotional distress. However, that specific basis for taking the case from the jury was not argued to the trial court and we therefore decline to reverse the court on that basis. This brings us to a consideration of the evidence concerning defendants' conduct. It is only by proof of conduct that is "beyond the limits of social toleration" that plaintiff may recover in an action for outrageous conduct, no matter what defendants may have intended and no matter what the effect on plaintiff may have been.[4]

With respect to the well-pleaded allegations, the evidence, viewed in the light most favorable to plaintiff, is as follows. Plaintiff enrolled in the communications course on the advice of her friend Pat Osler. She paid $50 and began the course almost immediately. In signing up for the course, plaintiff filled out forms which stated that she was applying for membership in the Church of Scientology and which explained that Scientology was a religion. Because she was 17 years old at the time, she was required to get permission from her mother to take the course and did so. Plaintiff did not pay any attention to the explanations of the religious nature of the courses because she was told that she had to fill out the forms in order to be allowed to take the communications course, and that was all she was interested in.

Plaintiff found a job working full-time in an engineering office in Portland and was living with a non-Scientologist roommate. She testified that she would go to work until 5 p. m. or 6 p. m. and then attend class every evening from about 7 p. m. until between 10 p. m. and midnight. She also attended class at least one full day, and often both days, on weekends. This schedule continued from July 13, when she began the communications course, until the beginning of October, when she moved to Delphian. At the same time, plaintiff maintained contact with family members and friends in the Portland area, visiting them a number of times and corresponding regularly with her mother.

The communications course in which plaintiff first enrolled consisted of a set of "drills" which were practiced on an individual basis with a supervisor. As part of each drill plaintiff would read bulletins which described the theory of the particular drill to be undertaken. She was then "checked out" on that information to be certain that she understood what she had read. Then she would practice the drill "to a win," that is, until she could complete the drill as prescribed. After completing each of eight drills, plaintiff repeated each on a more difficult level until a final pass was achieved.

The drills were described by plaintiff at trial. The first drill involved reading a bulletin entitled "How to Study" and being checked out on it. The second drill involved reading the prescribed bulletin and then sitting across from another person with eyes closed and attempting to clear her mind of all thoughts and to eliminate all outside influences or distractions. She testified that she practiced this drill for "a couple of hours" before her supervisor indicated that she had completed it to a win. The third drill involved the same procedure except that she sat across from her supervisor with her eyes open.

The fourth drill is called "bullbaiting." Plaintiff described it as follows:

> * * * You're sitting with your eyes open facing another person. The other person, while you're sitting there staring at them, tries to distract you by telling you jokes, making fun of you, pointing at

4. It may well be that much of the effect on plaintiff that is alleged is not "emotional distress" either, but we need not consider here whether recovery for such effects may be had in an action for outrageous conduct. We note that the misrepresentations which are challenged are the same misrepresentations which form the basis for the fraud claim. Those representations are not separately sufficient to be actionable as outrageous conduct.

you, touching you, making faces at you, trying anything that they can to make you laugh or twitch or cry or frown—make any sort of acknowledgment that you heard what he said or saw what he did.

"And the objective is to be able to sit there while that person says anything to you and does anything around you without thinking about what they're doing, and without getting mad—making any gestures.

"Q: How was it practiced on you?

"A: Well, first of all they started by just telling me jokes and I like a good joke and I would laugh. And they would say: Frank, you laughed. And they would start you all over again on the same drill and they would tell the same jokes until they reached a point that you no longer laughed at it.

"They would make fun of me. * * * Well, they teased me about my religion; they teased me about sex; they teased me about my looks. Some of them made gestures toward me like coming up close to me as if they were going to kiss me or touch me. * * * As soon as they found an area that caused me to laugh more or to frown or to cry, they would go into that area in depth and * * * try and get me embarrassed or to cry or make some sort of reaction.

"Q: Did they use obscene words or any foul language?

"A: Yes, they did. I was embarrassed by obscene words and they used obscene words a lot. Every obscene word that I ever heard was used.

"Q: Were you refused to leave?

"A: Yes, I was, at times.

"Q: How long did the bullbaiting thing go on?

"A: I was bullbaited several different times during the communications course, through three weeks."

After plaintiff was able to complete the bullbaiting drill, she participated in teaching it to other people.[3]

The next drill required that plaintiff read sentences from Lewis Carroll's *Alice in Wonderland* and *Through the Looking Glass* until she was able to read without any inflection. After that drill plaintiff participated in a drill which was described as "learning to acknowledge someone."

"And in that drill the person that's acting as coach would * * * ask you a question and all you were supposed to do is acknowledge them by saying: 'Good,' or 'Yes.' And you weren't supposed to put again any inflection in your voice. You were supposed to just say it. * * * There was no specific meaning to it or anything; just to get the person to know that you heard what they said.

"Q: What type of questions were asked?

"A: There were two questions; one was * * * I don't think they were all questions. I think the person just read phrases out of the books 'Through the Looking Glass' and 'Alice in Wonderland.'"

The next drill was learning how to receive an acknowledgment from a person.

"And what that was there were two questions. The first one was 'do fish swim' and the second one was 'do birds fly.' * * * [Y]ou get seven from the coach and you say to him: Do fish swim. And the coach tries to ignore you and you try to say it in as much of a forceful manner that you get an acknowledgment from him. And he will sit there and laugh at what you're doing, or totally ignore you. And you're supposed to just sit there and stare right at him and clear your head of all thoughts and ask him this question with such force that he feels he has to answer you.

"And then, as another step up from that same drill, the coach, instead of just ignoring you or laughing, will begin to make remarks just like in the bullbaiting drill. You will say: Do birds fly. He

3. There was other testimony regarding the experiences of others in bullbaiting or other exercises when plaintiff was not present. However, in considering defendants' conduct toward this plaintiff, we consider as relevant only what plaintiff experienced.

will say: I don't know, what do you think. And then you're supposed to just repeat the question 'Do birds fly' until you get him to answer. And he will—sometimes the person will say that they have a headache or that they want a drink of water and you're supposed to say—you're supposed to get them to forget that they have a headache or that they need something and to answer your question for you."

Plaintiff's memory was not clear on four further drills, called "upper indoctrination" drills. One involved reading a bulletin entitled "What is Control," which plaintiff remembered as "telling you how to control people and how to achieve the response and the actions that you want to achieve from the other person." Another involved learning commands, such as "Look at the wall, walk over to that wall, touch that wall, turn around." In another drill,

> "• • • you give a command to [an] ashtray as you hold it in front of you. I can't remember what the commands were, but they were something like • • • 'Rise up,' or something. And you raise the ashtray up and you do this drill over and over until you are convinced that you have told the ashtray to move and it has moved." [8]

Plaintiff completed the communications course in about one month. However, on July 26, 1973, less than two weeks after she started that course, she signed up for another, known as the Student HAT course, for which she paid $250 to the Mission. While she was taking the communications course she was also approached by the Mission staff about receiving "auditing," for which certain claims were made that are included among the misrepresentations alleged in the fraud action. When she was approached about "auditing" by a staff member, he told her everyone has "hang-ups" that inhibit communication and asked if she would like to get rid of all of her hangups and improve herself. Plaintiff signed up for auditing because the staff member told her it was the best thing she could do for herself, she was convinced that it was, and she wanted to develop herself to her fullest potential. On July 26, plaintiff paid $750 and on July 31, she paid an additional $1100 for a number of hours of auditing.

Because she did not have the money to pay for the hours of auditing she was told she would need, plaintiff was coached by Mission staff members to borrow money from friends and family. The staff members helped her to call people and ask to borrow money. A staff member would tell her the type of conversation to use and sit there while she called, giving her ideas and suggestions. In the evenings when she went to the Mission she would take courses for a while and then be asked to come to a staff member's office to make phone calls. She borrowed $700–800 from friends and family and another $500 from Freedom Federal Credit Union, which is operated by Scientologists.

Plaintiff began the Student HAT course and the auditing right after completing the communications course, approximately in mid-August. She took the course on weekends and participated in auditing in the evenings during the week. As explained above, the purpose of auditing is claimed to be to relieve the negative effects of past experiences. This is accomplished by the use of an "E-meter," which is a crude galvanometer. The individual receiving the auditing holds what are described as two tin cans, one in each hand. The cans are connected to a device which has a needle which reacts in some manner to the responses made." [11]

10. There was some other testimony concerning the type of services involved in the "upper indoctrination" drills. Although somewhat more detailed, it is substantially the same as plaintiff's descriptions.

11. The E-meter was described in *United States v. Article or Device, etc.*, 333 F.Supp. 267 (D.D.C.1971):

> "The E-meter is essentially a simple galvanometer using two tin cans as electrodes. It is crude, battery-powered, and designed to measure electrical skin resistance. It is com-

Plaintiff testified that the auditor would ask a question, such as "Do you have any problems with your parents?" She would describe a particular argument, and he would ask if there were earlier, similar times she had had arguments with her parents. She testified that he would take her back earlier and earlier until he decided she had related the earliest incident and her "needle was floating." The auditor would then go on to another question.

The time spent on auditing varied. Plaintiff testified:

"I spent at least two hours, and often as many as five or six hours in auditing. If a point was reached, after a couple of hours, where I was pretty happy, then the auditor would end the session. But if during the course of the questions he asked me, I became very upset and cried or wouldn't answer his questions, he would keep asking me questions over and over again until I reached a point where he felt it was safe to end the session.

"There was a rule that in auditing that the auditor could never let the person leave when they were upset. And so I remember a number of times that I became real upset and just wanted to leave and go home and get out of the place, but he said: No, just sit down. The way out is the way through, was the phrase he used. What upsets you the most by talking about it more with me will help you overcome it."

The Student HAT course involved listening to tapes of lectures by L. Ron Hubbard, the founder of Scientology, and reading various bulletins, after which plaintiff would be examined to determine whether she knew the material contained in each one. These materials concerned proper study habits and methods and the values of auditing.

> plainly harmless and ineffective in itself. A person using the meter for treatment holds the tin cans in his hands during an interview with the operator who is known as an auditor and who purports to read reactions from the galvanometer needle as a means reactions to questions. * * *"

In conjunction with the Student HAT course, plaintiff attended Friday evening "musters," which all students in the communication course and the Student HAT course were required to attend. According to plaintiff, the purpose of these meetings was "to discuss our progress on the course and reinforce one another, telling each other how many points we had made." [2] She described the musters as follows:

"Well, I would go into the graduation room and be seated and then someone would come in that was officiating that night. And it varied, like the person would come in and usually do something to get everybody to relax. One of the most common things they did was to say: I want everybody in here to introduce themself to two people in the room that they have never met before. And then the people would do that and they would be relaxed and then he would start talking about Scientology and Dianetics and communications course and all of these things and how we were all going to become part of clearing the planet or making sure that everyone on the planet got Dianetic auditing.

"Sometimes they did little drills like: Once a person asked us to locate a space around us that we would call ours and then everyone would sit there and do that. And he would say: Now increase that space—increase that space to include you and two people beside you, and you do that. And then he would say: Increase the space to include this room, and we did that.

"He would say: Increase the space to include the whole world, and you just bodily increased it to that spot. And he said: See what it is going to be like. We are going to increase ourselves until we get everyone on this planet clear."

12. The students received points for what they learned in the courses, and a charting system was maintained in which each student's points were recorded to show his or her progress in Scientology.

The graduates of the courses would stand up and tell the group what they had gained from the course. They would

> "... say how it had changed their lives and how they were—they had finally found meaning and finally found a way to improve themselves and rid themselves of their harmful past emotions and attitudes."

Around the end of August or the beginning of September, staff members at the Mission began to talk to plaintiff about becoming a staff member. They told her how rewarding it was, and they began to talk about Delphian. Certain of the claims made for Delphian are included as misrepresentations alleged in the fraud count. According to plaintiff's testimony, she was told that she could take courses at Delphian which could be applied toward a college degree, that she would learn about architecture and engineering "from the ground up" and that Delphian was partially funded by government grants for doing research in solar and wind energy and recycling. Plaintiff decided that going to Delphian would be the best way to combine her interests in architecture and engineering with her interest in Scientology and Dianetics. She informed her parents that she would not be going to college that fall as she had planned; instead, she applied to Delphian as a provisional staff member. After visiting her parents' home in Montana in September, she moved to Delphian at the beginning of October.

Plaintiff was assigned to live in a room with two other women and two children. She had a small space for her belongings. She worked harvesting crops for a couple of weeks after she arrived and then helped to move an old garbage dump on the property. In the evenings, she worked indoors cleaning floors, washing dishes and other such tasks. Her work day extended from 8:30 a. m. to 11 p. m. or later. After three or four weeks, she was assigned to care for small children of other staff members. She was given instructions on using Scientology methods in caring for the children. She worked as a "nanny" until she left Delphian. She received wages of a few dollars a week.

Visitors were not encouraged at Delphian, and plaintiff was instructed that two-weeks notice was necessary if visitors were coming. She described one incident that occurred around Halloween when she was reprimanded because her mother and one of her friends from Montana came to visit unannounced. Plaintiff's mail was sometimes opened before she received it at Delphian.

Beginning in October and continuing into November, plaintiff reported to Delphian staff members that her mother was very concerned about her involvement with Scientology. She had been told that she must report that kind of activity, because if it was upsetting to her it would inhibit her progress in Scientology. Plaintiff eventually became aware that her mother had hired a lawyer to find a way to get her away from Delphian. She informed the staff of this action and that her mother had also gone to the media.

Plaintiff was told that this kind of activity was bad for Scientology and that it would give Delphian and Scientology a bad reputation. She was told that she would have to leave Delphian until she could "handle" her parents, which meant that she must convince them to sign a statement that they would not sue, attack or embarrass Scientology or Delphian.

Plaintiff left Delphian in late November or early December and returned to Portland. She began working as a waitress in an hotel and lived in a house with several other people, including her friend Osler, who had also been at Delphian during the time plaintiff was there and had left when she did. Plaintiff went to the Mission and saw staff member Jim Brooks, who was to help her handle her parents. She was told that she could not take any classes or auditing until she could handle them. She was informed that in order to continue in Scientology she had to handle her parents or "disconnect," i.e., cut off all relations with them.

Brooks coached her on what to say in letters to her parents to convince them to allow her to continue in Scientology without interference. Plaintiff obtained permission from Brooks to go home for Christmas to attempt to handle her parents. She rode home with her brother, who lived near Portland. Her parents would not agree to plaintiff's requests, and plaintiff returned to Portland with Osler.

Under the direction of Brooks, plaintiff wrote her parents a letter on January 5, 1976, informing them that she was no longer involved with Scientology. Although that was not true, Brooks told her it would help her family "deprogramming." She continued to report her parents' activities to Brooks, including an unsuccessful attempt to hold plaintiff in an hotel for "deprogramming." Brooks coached plaintiff in writing letters to her parents, either asking that they not interfere with her involvement in Scientology or "good road, fair weather" letters avoiding the subject of Scientology.

Plaintiff also met with Kay Wilson from COSOP, who told her that if she wanted to continue in Scientology she would have to disconnect from her parents. Regarding that conversation, plaintiff testified:

> "We were discussing my mother and I told Kay Wilson that my mother had hired an attorney and that she had told me all these things about Scientology I had never heard about. My mother mentioned something about a Fair Game Law and I said that to Kay Wilson. And she said: Oh, that policy letter has been cancelled. However, the treatment of suppressive persons is still the same."

A "suppressive person" is one who attempts to damage or interfere with Scientology. The Fair Game policy was proclaimed by L. Ron Hubbard in a policy letter of October 18, 1967. It stated that suppressive persons "[m]ay be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued, lied to or destroyed." [2] Plaintiff testified that she had been shown several policy letters regarding treatment of "suppressive persons." Plaintiff had been told that her mother was suppressive.

Plaintiff did not want to disconnect from her parents, but she did want to continue in Scientology. She asked for permission from Brooks to go back to Montana to persuade her parents to agree not to sue, attack or embarrass Scientology and not to interfere with her involvement in it. She made the trip in April, 1976. When she arrived at her parents' home, she was locked in the house and "deprogrammed." As a result, plaintiff decided that she did not want to return to her involvement in Scientology, and she did not.

[3] Whether viewed as individual acts or taken together as a "scheme," we find nothing in this record which constitutes conduct which is "beyond the limits of social toleration." There is no evidence that plaintiff was threatened or forced to remain involved in Scientology. To the contrary, she maintained many contacts with non-Scientologists. She had a full-time job both before and after her stay at Delphina. The record shows that she visited with relatives living in the Portland area periodically while she was there. She maintained correspondence with her parents and went back to Montana twice before her visit in April when she was "deprogrammed." Her parents or her mother visited her several times in Portland or at Delphina. Plaintiff became involved and maintained her involvement because she desired to do so. If misrepresentations were made regarding the benefits or the nature of Scientology which gave rise to that desire, her remedy would be for fraud, not outrageous conduct.

Plaintiff was recruited and indoctrinated into the Church of Scientology. That recruitment and indoctrination, as far as this record discloses, were not so very different than might be used by any number of organizations. She joined the group volun-

12. Defendants maintain that this policy had been cancelled. There was conflicting evidence as to the status of the policy and its meaning. We need not resolve these conflicts because the mere existence of the policy does not constitute outrageous conduct as to this plaintiff.

tarily, albeit as she claims on the basis of misrepresentations made to her. However, she continued to participate and maintained her involvement for whatever reason without reasonable threats or coercion by defendants.

The drills plaintiff was subjected to as part of the communications course she initially signed up for were not in themselves outrageous. Plaintiff studied the theory behind each drill before participating in it. She returned day after day to participate in the course, although she had daily contact with non-Scientologists in her job and at her apartment with her non-Scientologist roommate. The most that can be said is that plaintiff was convinced by defendants to accept what they were teaching; unless the means involved more than persuasion, that is not outrageous. Whether or not we find any merit in defendants' teachings, plaintiff apparently did find merit in them during the time she was associated with Scientology. The fact that she was later convinced of their invalidity does not make defendants' conduct outrageous *post hoc*.

The only evidence which supports the allegation that plaintiff was caused "to believe and fear that she would be subject to severe punishment should she ever bring suit against Defendants, voice her disapproval of Defendants' practices, testify against Defendants, demand a return of money from Defendants or commit any other act Defendants determined to be against their interests" is the testimony regarding the Fair Game policy. Plaintiff testified that after she was "deprogrammed" she was fearful of retaliation by defendants. There is no evidence that *during* her association with Scientology plaintiff was afraid to terminate her involvement or feared defendants in any way. The fact that she was informed of a policy known as Fair Game is not outrageous conduct.

We hold that the evidence presented under Count I of the outrageous conduct cause of action does not, as a matter of law, establish conduct that is outrageous in the extreme or beyond the limits of social toleration.

[4] Count II of the outrageous conduct action [14] alleges that:

"Subsequent to Plaintiff's deprogramming, Defendants have pursued a course of conduct against Plaintiff that is designed to threaten, humiliate, and intimidate Plaintiff and cause her fear, anguish and mental distress. Defendants on June 7, 1977, filed suit against Plaintiff without cause and for the purpose of intimidating Plaintiff; Defendants have, in June of 1976 and April of 1977, declared Plaintiff to be a suppressive person subject to Defendants continuing 'fair game' policy of retribution which directs Defendants' organizations and other Scientology organizations and their members to trick, lie to or destroy Plaintiff. Defendants have, beginning in June of 1976 and continuing to the present, forbid, through threats of mental and physical harm, any friends of Plaintiff connected with Defendants from communicating with Plaintiff; Defendants have caused and continue to cause the mailing of materials to Plaintiff and Plaintiff's family subsequent to Plaintiff's request that such mailings cease."

Defendants moved for a directed verdict on this count as well, on the basis that the conduct proved was not such that it could subject them to liability.

The evidence established, first, that a libel action was filed by certain of the defendants against plaintiff after a press conference in which plaintiff participated. That matter was still pending at the time of the trial of this action. We said in *Erlandson v. Pullen*, 46 Or.App. 467, 472, 608 P.2d 1168 (1980):

"Without necessarily suggesting that it could never be so, we note that it would be a rare case in which the bringing of a

14. This count was withdrawn as to defendant Dole was at the close of the evidence. COSOP and defendant Services contend that no involvement by them was shown. Because of our disposition of this count on other grounds, we need not reach that issue. We use the term "defendants" here without determining whose involvement was shown.

lawsuit would fit the definition of outrageous conduct. This tort has been reserved for 'intentional acts of a flagrant character under most unusual facts and circumstances * * *' *Waites v. Salem*, 282 Or. 731, 736, 580 P.2d 1019 (1978)."

Here the record reveals nothing about the other case except that it was an action for libel. We do not know, nor can we infer from this record, that it was without foundation. Such proof would not even support an action for abuse of process without evidence that plaintiff had prevailed. *Erlandson v. Fullen*, *supra*. Filing such a suit is not outrageous conduct.

There is evidence that plaintiff was declared a suppressive person by certain individuals connected with the Mission. Plaintiff testified at trial that she knew she had been declared suppressive because that is what is done. At her deposition, she testified that someone had told her that she had been declared suppressive. However, there is no evidence that defendants informed plaintiff that she was declared suppressive and subject to the Fair Game policy, or knew or intended that she be so informed.[18]

The only evidence that defendants forbade, "through threats of mental and physical harm, any friends of Plaintiff connected with Defendants from communicating with Plaintiff" is a document issued June 7, 1976:

> "All staff are hereby notified not to attempt to contact or interfere with JULIE CHRISTOFFERSON or PATRICK OSLER in any manner. These two persons have attacked the Church of Scientology so I repeat, they are not to be communicated to for any reason.
>
> "If either of these two contact any one in the Church, or if any associates of theirs try to contact any one of the Church, report this action * * * immediately."

This directive followed a letter sent on June 6, 1976, by an attorney on behalf of plaintiff and Osler. That letter said:

> "This office represents Julie Christofferson and Patrick Osler, formerly members of your group. Enclosed are photocopies of affidavits to the effect that they have both been deprogrammed, and that they request legal assistance should you make any effort to induce them back into the cult. Naturally, a large civil action would be an expected element of any such legal assistance. Therefore you are hereby on notice that any attempt to contact them, or to interfere with them in any manner, will result in most grave consequences to you."

In addition, a former staff member of the Mission testified that they were told at a staff meeting not to communicate or associate with plaintiff or Osler under any conditions, or if they did so, to write it up immediately.

Following, as the directive had, the letter from plaintiff's attorney demanding that defendants not contact plaintiff in any way, the orders that plaintiff's demand be met can in no way be considered outrageous conduct. There is no evidence that any threats of mental or physical harm were made to enforce the prohibition on contact with plaintiff.

The mailings of which plaintiff complains were, with one exception, from the American Saint Hill Foundation (known as ASHO) in California, a Scientology organization. Several personal letters to plaintiff, signed by individuals she did not know, asked about her progress in Scientology. Some of these letters contained brochures on Scientology. In addition, two editions of a newsletter entitled *Causa*, also published by ASHO, were received by plaintiff. Finally, plaintiff received one form letter with brochures from COSOP. Plaintiff does not seem to contend that the contents of the letters were offensive, but she testified that she was made fearful by the fact that she received mail from Scientology or-

18. At her deposition, plaintiff testified that she did not know whether she had been declared suppressive. Later, however, she said she had been told by someone that she had been declared suppressive. She stated that she could not remember who had told her, but thought it was someone who left Scientology after she did.

ganizations at all. Certain of the mailings were addressed to plaintiff's last Portland address and were forwarded to her in Montana. Others were addressed to the post office box which was her Eureka, Montana, address.

Mailing letters, brochures on Scientology and a newsletter which were in themselves innocuous cannot constitute outrageous conduct. There was nothing sinister in any of the material plaintiff received. Neither was there anything mysterious about the fact that plaintiff's forwarding address was obtained, for it is clear that certain of the items were forwarded by the post office and that the envelopes contained an "address correction requested" imprint.

In addition to what was alleged in her complaint, plaintiff also presented evidence at trial, without an objection that it was outside the scope of the pleadings, of three incidents which made her fearful. Once, a couple of months after she left Scientology, she was in Portland and was walking down the street with Osler near the house in which she was staying. They noticed a car parked about a block from the house, and Osler recognized the person in the car as a Scientologist. They walked up to the car and asked the person what he was doing. He did not answer but started the car and drove away. Later that afternoon plaintiff noticed a van parked about a block from the house and, as they approached the van, it drove away. Osler recognized the person driving as a Scientologist.

Finally, in June, 1976, plaintiff and Osler were out walking and noticed two Scientologists behind them. They walked into the library and were followed into one of the library rooms. There the two Scientologists sat down at a table and stared at them while they looked at books. When they started to leave, the Scientologists got up, but plaintiff and Osler left quickly and did not see them after that. These three incidents, either singly or taken as a group, cannot reasonably be called outrageous conduct.

We have reviewed the record as it relates to the conduct which plaintiff claims to be outrageous. We recognize that plaintiff does not claim that any particular action, by itself, would constitute outrageous conduct, but rather contends that the actions together rise to the level of actionable conduct. We find as a matter of law that the conduct shown is not actionable as outrageous conduct, whether viewed as individual acts or as a course of conduct. Defendants' motions for directed verdicts on the cause of action for outrageous conduct should have been granted.

FRAUD

We turn to plaintiff's cause of action for fraud. Plaintiff's complaint contained the following allegations:

"VII

"Between July, 1975 and April, 1976, in Oregon Defendants Church of Scientology, Mission of Davis, Church of Scientology, Portland, and the Delphian Foundation made the following misrepresentations regarding the standard, quality, grade, sponsorship, status, characteristics, ingredients, uses, benefits, character or qualities of the courses or goods offered by Defendants when they knew or should have known that such representations were false:

"STUDENT HAT AND COMMUNICATIONS COURSE

"(1) * * * the Church of Scientology Communication Course would provide more knowledge of the mind than is possessed by any psychologist or psychiatrist.

"(2) * * * the communication course was completed and endorsed by Father Pat Flanagan of Boys' Town, Omaha, Nebraska. * * *

"(3) * * * the communication course would help the Plaintiff in college work and that the course was offered on a money back guaranteed basis. * * *

"(4) * * * [the] student HAT course enabled a student to understand any subject better and more accurately. * * * the Student HAT Course was offered on a money back guaranteed basis.

"PLAINTIFF WAS FURTHER INDUCED TO ENGAGE IN A PROGRAM KNOWN AS AUDITING BY THE FOLLOWING REPRESENTATIONS:

"(8) * * * auditing relieves the effects of past experiences. * * * through auditing she would have more knowledge of the mind than any psychiatrist or psychologist and more knowledge of the bodily processes than any doctor.

* * * *.

"(a) Auditing develops creativity;

"(b) Auditing increases I.Q. scores;

"(c) Auditing cures neuroses, criminality, insanity, psychosomatic ills, homosexuality and drug dependence;

"(d) Auditing allows one to control his own emotions and the physical universe; and

"(e) Auditing was offered on a money back guaranteed basis.

* * * *.

"PLAINTIFF WAS INDUCED TO ENGAGE IN THE STUDY OF 'DIANETICS' BY THE FOLLOWING REPRESENTATIONS:

"(8) * * * Dianetics is scientifically provable and that it cures asthma, arthritis, rheumatism, ulcers, toothaches, pneumonia, colds, and color blindness. * * *

"(9) * * * L. Ron Hubbard, the creator of auditing, is an engineer and nuclear physicist and has a degree from Princeton University and an honorary degree from Sequoia University and is a graduate of George Washington University who revealed Dianetics to mankind as a service to humanity, with no intent to profit therefrom. * * *

"(10) * * * L. Ron Hubbard had a civil engineering degree; a 'B.S.' degree and was a nuclear physicist, a graduate of George Washington University, and had received an honorary degree from Sequoia University and Princeton University;

"DEFENDANTS FURTHER INDUCED PLAINTIFF TO QUIT HER JOB AND LIVE AND WORK AT THE DELPH ON FOUNDATION BY MAKING THE FOLLOWING REPRESENTATIONS:

"(11) * * * Delphian Foundation was funded by government grants for developing education and alternative energy sources; further that Plaintiff could take courses at the Delphian Foundation that could be applied by an accredited college toward a college degree.

"(12) * * * L. Ron Hubbard was a graduate of George Washington University, was an engineer and nuclear physicist and had an honorary degree from Sequoia University and that the Delphian Foundation was nearing accreditation and had almost been accredited in September of 1975; further that in the Spring of 1976 Plaintiff could take courses at the Delphian Foundation that could be applied by an accredited college toward a college degree.

"(13) * * * [Plaintiff] could attend school at the Delphian Foundation and, after such study, be able to obtain college credit hours in architecture or engineering at any college in the country merely by taking a test.

"(14) * * * [Plaintiff] would obtain at the Delphian Foundation an education superior to any University in the world.

* * * *."[6]

[5] We first consider the motions for directed verdict made by each of the parties on other than constitutional grounds. COSOP moved for a directed verdict on the ground that plaintiff had not shown that any of its agents or employes had made any of the misrepresentations alleged. COSOP argues on appeal that that motion should have been granted.

Plaintiff's complaint alleged that the misrepresentations were made by specific individuals who were agents or employes of the Mission or Delphian. None of the individuals named is claimed to have been an agent or employe of COSOP. The complaint did

16. Defendants do not argue that these alleged statements may not be fraudulent, at least un-

der some circumstances.

allege that the misrepresentations were repeated by various employees of defendants and that they were contained in literature provided to plaintiff by COSOP. However, at trial, plaintiff did not introduce any evidence that the statements were made by employees of COSOP or that she was provided with any literature by COSOP.

There is evidence that plaintiff paid $75 to COSOP for a "Lifetime HASI" on July 30, 1973. HASI is an acronym for Hubbard Association of Scientology International. HASI membership entitles one to a 10 percent discount on purchases from all Scientology organizations. Plaintiff contends that COSOP may be held liable for the misrepresentations made by employees of the Mission, because it received money from plaintiff while knowing about the fraudulent practices employed by the Mission. She does not contend that actual knowledge was shown, but only that COSOP had constructive knowledge of the marketing practices of the Mission and of the claims that were made for the courses offered.

Assuming without deciding that COSOP could be held liable on such a basis, we find no evidence, nor has plaintiff pointed to any, to indicate that COSOP was aware on July 30, 1973, when plaintiff paid $75 for the HASI membership, that plaintiff had had any contact with the Mission at all. The only evidence regarding the $75 payment to COSOP is a receipt. Plaintiff did not testify to the circumstances surrounding that payment and, in fact, testified mistakenly that she had not paid any money to COSOP. The fact that both COSOP and the Mission are Scientology organizations does not by itself provide a sufficient link to hold COSOP liable for what may have been done by the Mission. Neither does the fact that policy letters and bulletins written by L. Ron Hubbard are espoused by both COSOP and the Mission make COSOP liable to this plaintiff.

Plaintiff has not shown that the Mission acted as an agent for COSOP, nor does she claim that such a relationship existed. She has shown no basis upon which COSOP may be held vicariously liable for the actions of the Mission. We conclude that the motion of COSOP for a directed verdict on plaintiff's action for fraud should have been granted.

[6] Delphian's motion for directed verdict was on the ground that none of the statements alleged by plaintiff were made by any of its agents or employees and that plaintiff had already paid the $8,000 she claims was procured by fraud long before she went to Delphian. Although the complaint alleges that certain of the misrepresentations were made or repeated by employees of Delphian, plaintiff appears to concede in her brief that there is no evidence to support that allegation. Plaintiff argues, however, that Delphian should be held liable because 1) the relationship between the Mission and Delphian was such that Delphian should be held liable; 2) Delphian reaffirmed certain of the misrepresentations regarding its funding, structure and courses in a data sheet given to plaintiff to read to acquaint her with Delphian when she arrived; and 3) Delphian did receive some money from plaintiff, apparently for books, and also received free labor from plaintiff while she was there.

Plaintiff does not state the theory behind her contention that the relationship between Delphian and the Mission is such that Delphian should be held liable for misrepresentations made by the Mission. The evidence she points to in support of her contention is as follows:

"* * * Mission of Davis has a branch at Sheridan on the Foundation premises * * *, the management of Mission of Davis is centered at Sheridan * * *, and that Mission of Davis, Delphian Foundation and the Sheridan Mission all co-exist on the same property to such an intertwined extent that a memorandum was necessary to prevent confusion in writing out purchase receipts * * *. The two organizations have a common president, Martin Samuels * * *, who lives at Sheridan * * *.

"Additionally, [the Mission's] representations were not made coincidentally, but as part of a policy calculated to induce

members who had spent all their available funds for courses in auditing at the Mission, to work at the Delphian Foundation in return for further courses and auditing * * *."

It is not clear whether plaintiff is suggesting that the Mission acted as the agent for Delphian in making the representations or that the two corporations are in reality one entity, i.e., an alter ego theory.[17] The evidence adduced at trial does not support "piercing the corporate veil" so as to permit treating the two corporations as one or as the alter ego of defendant Samuels. The memorandum to which plaintiff refers shows only that the affairs of the corporations were maintained separately. One shared corporate officer and shared facilities are not enough to permit such an approach. *See Howes Leasing Corp. v. Oregon Lumber Export Co.*, 283 Or. 225, 228, 582 P.2d 4 (1978); *Schlecht v. Equitable Builders*, 272 Or. 92, 535 P.2d 86 (1975); *Wakeman v. Paulsen*, 257 Or. 542, 480 P.2d 434 (1971); *A. J. Rose & Son, Inc. v. Bd. of Funeral Dir.*, 31 Or.App. 537, 570 P.2d 1008 (1977).[18]

We also find no evidence to support a finding that the Mission was acting as the agent of Delphian in making the alleged misrepresentations.[19] Our responsibility at this stage of the proceedings is to decide whether there is any evidence which would support a reasonable inference of agency between the Mission and Delphian. *Briggs v. Morgan*, 262 Or. 17, 496 P.2d 17 (1972). One essential feature of agency is the right of the principal to control over the agent. "A business organization which operates in its sole and unlimited discretion is not an agent but a principal." *Kuhns et ux. v. State Tax Com.*, 228 Or. 547, 555, 365 P.2d 869 (1960); *and see* Restatement (Second) of Agency §§ 1, 14 (1958). There is nothing in the record before us to support an inference that Delphian had any right to control the actions of the Mission or had actual control over those actions; therefore, there could be no finding of agency.

Plaintiff contends that Delphian may be held liable on the basis of the following statements contained in the data sheet which was given to plaintiff to read when she arrived at Delphian, because these statements "confirmed" the misrepresentations made by the Mission:

> "That some 'external' students be accepted for tuition in accordance with our school and university structure.
>
> * * * *
>
> "That funding shall be by donations and endowments and by grants for specific projects, and that the full definition of allowable income routes be obtained and used.
>
> * * * *
>
> "That apprenticeships be a standard part of any educational program.
>
> * * * *
>
> "That there be a designated faculty, both for primary/secondary school and for the University.
>
> * * * *
>
> "That the formal structure of a university be created and maintained, and a program leading to accreditation be developed.
>
> * * * *
>
> "That special attention be given to the maintenance of ethical relationships and

17. Plaintiff's brief responds to Delphian's argument as follows:

> "Defendants' argument presumes, erroneously, that since these misrepresentations were made by someone from 'Mission of Devi' rather than from 'Delphian Foundation,' Delphian is insulated from liability no matter how blatant the misstatements."

Plaintiff then recites the facts quoted above and concludes: "Any claim of no relationship between Mission and Delphian is absurd and contrary to all the evidence." This misses the point—the issue is not whether there was a relationship; the issue is whether that relationship was so close as to give rise to joint or vicarious liability.

18. Because of our disposition of this case we need not consider whether the doctrine of "piercing the corporate veil" should be applied differently, or if it may be applied at all, to religious corporations.

19. Plaintiff does not specifically claim that there was an agency relationship.

exchanges among the dynamics of TDF; this shall be the guiding principle behind decisions as to techniques and orientations in architecture, agriculture, forestry, utilities, etc. * * * *

The statements quoted above are contained under a heading "Policies." Plaintiff does not seem to claim that these are misrepresentations in themselves, and they could not fairly be construed as such. There is no evidence to suggest that they were not the policies of Delphian; neither do the statements show a connection between Delphian and the Mission sufficient to permit a finding of agency or an alter ego situation. They do not aid plaintiff.

Finally, plaintiff argues from the fact that Delphian received some money from plaintiff and also received the benefit of her free labor that Delphian can be held liable for misrepresentations made by the Mission. As with the COSOP motion, we need not decide if that is a viable theory of recovery because, at the close of all the evidence, the trial court struck plaintiff's claim that Delphian had received free labor and was paid money by plaintiff. Plaintiff has not contended here that that was error.

We conclude that there is no basis in this record for holding Delphian liable for any misrepresentations made to plaintiff and that its motion for directed verdict should have been granted.[20]

[7] Defendant Samuels' motion for directed verdict was based on the ground that he had not participated in the alleged fraud and could not be held liable to plaintiff merely because he is the president of the Mission. The Oregon Supreme Court held in *Osborne v. Hay*, 234 Or. 138, 148–44, 380 P.2d 674 (1978), that

> * * * * in order to hold the officer of a corporation personally liable for fraud by an agent or employee of the corporation it is necessary to show that the officer had knowledge of the fraud, either actual or imputed, or that he personally participated in the fraud. *See McFarland v. Carlsbad Sanitarium Co.*, 68 Or. 530, 536–537, 137 P. 200 (1914), and *Hoff v. Peninsula Drainage Dist.*, 172 Or. 630, 643, 143 P.2d 471 (1943)." *And see McDonough v. Jones*, 48 Or.App. 785, 617 P.2d 948 (1980), *rev. den.* 290 Or. 519 (1981).

There is evidence in the record from which a jury could have found that Samuels had knowledge of at least some of the alleged misrepresentations. It was not error to deny his motion for directed verdict on that basis.[21]

The Mission asserted only constitutional grounds for its motion. Not all of the alleged representations are claimed to be religious and therefore the motion was properly denied.[22]

FREE EXERCISE CLAUSE DEFENSE

We now consider the appropriate procedures for dealing with a defense to an action for fraud based on the Free Exercise Clause of the First Amendment.[23] Defend-

20. Delphian argues that plaintiff had already paid all the money she claims to have paid before she had any contact with Delphian and that, therefore, there is no causative link between plaintiff's damages and anything Delphian may have done. Plaintiff did buy some books while at Delphian, but it is not clear whether the amount she spent for these books is included in the amount of damages she claims. Plaintiff's complaint claimed that she was induced to pay the defendants $3,000.00. The receipts that plaintiff introduced at trial add up to something more than that figure.

21. Samuels is alleged to be liable only because he is president of the Mission and Delphian. His liability, therefore, is limited by the liability of the Mission. In the remainder of this opinion the term defendants refers to the Mission and Samuels.

22. Defendants claim that the statements regarding the communications course, the Student HAT course, Dianetics and auditing are protected. They do not claim that the statements concerning Delphian or the statements regarding Hubbard's educational background are religious.

23. Defendants rely on both the United States and the Oregon constitutions for their defense. They do not, however, argue that the scope of the Oregon constitution differs materially from that of the federal constitution and, therefore, we refer only to the First Amendment of the federal constitution in discussing this defense.

ants made a pretrial motion to exclude from the trial "any evidence regarding the validity or sincerity of defendants' religious beliefs and practices." In the alternative, they asked for a hearing

> "* * * to determine whether the courses, training, studies, and counseling constitute a part of the religious beliefs and practices of defendants' religious organizations and are thus protected from inquiry as to their validity or sincerity by the Oregon and United States constitutions and applicable law interpretive thereof."

That motion was denied. At the close of the evidence, defendants moved to strike on various grounds certain of the specifications of fraudulent statements. As part of that motion, defendants moved to strike and withdraw from the jury all allegations regarding the communications course, the Student HAT course, auditing and Dianetics on the ground that they constitute religious practices of the defendants. That motion was also denied. Defendants assign error to the denial of both motions. As we will explain hereafter, the pretrial motion was premature, but the motion at the close of all the evidence properly presented the question for the trial court's consideration.

[8] A defense based on the Free Exercise Clause presents particular difficulties in an action for fraud. To establish fraud, a plaintiff must ordinarily prove that the representations made were false. *See Meader v. Francis Ford, Inc.*, 256 Or. 451, 586 P.2d 420 (1978). However, when religious beliefs and doctrines are involved, the truth or falsity of such religious beliefs or doctrines may not be submitted for determination by a jury. *See United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944). The Supreme Court there stated:

> "* * * Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education v. Barnette*, 319 U.S. 624 [63 S.Ct. 1178, 87 L.Ed. 1628]. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if these doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake the task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. *Murdock v. Pennsylvania*, 319 U.S. 105 [63 S.Ct. 870, 87 L.Ed. 1292];

As stated in *Davis v. Beason*, 133 U.S. 333, 342 [10 S.Ct. 299, 300, 33 L.Ed. 637], "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with." 322 U.S. at 86–87, 64 S.Ct. at 886–887.

Defendants here were asking by both motions that the trial court determine which of the alleged misrepresentations were religious and withdraw from the jury the issue of the truth or falsity of those statements. Rather than make that determination, the trial court submitted to the jury the question of whether the statements were religious, with instructions that it was not to determine the truth or falsity of any statements it found to be religious.[24]

Defendants and amici argue that it is the responsibility of the trial court to determine in the first instance the religious character of statements alleged to be fraudulent and that, if it is determined that the statements relate to religious beliefs or practices, further inquiry is forbidden. They argue that submission of the question to a jury makes the determination one that is not reviewable after a general verdict, leaving the possibility that a defendant's adherence to unpopular or unorthodox religious beliefs could be made the basis for liability. Plaintiff argues, on the other hand, that it is appropriate for the trial court to determine which statements are religious only if it can do so as a matter of law. She contends that, if the determination requires resolution of questions of fact, that resolution is for the jury. Plaintiff further contends that the courses and practices in which she participated were held out to her as secular and that she therefore is entitled to have a jury consider the allegedly fraudulent statements because they were not religious in the context in which they were made.

Courts have had little occasion to consider the application of a Free Exercise Clause defense in an action for fraud in a jury trial. By far the majority of the cases in this area have been non-jury cases. We have found no cases which have considered this specific issue, and none have been cited to us. In fact, there has been little discussion in even a general way of whether an action or statement is religious is a question of law or of fact. In practice, the issue has been treated as one of fact by many courts, without discussion. *See, e.g., Fiedler v. Marumsco Christian Sch.*, 631 F.2d 1144 (4th Cir. 1980); *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977); *United States v. Carroll*, 567 F.2d 955 (10th Cir. 1977), *but see United States v. Silberman*, 464 F.Supp. 866 (M.D. Fla.1978); *People v. Mullins*, 80 Cal.App.3d 61, 128 Cal.Rptr. 201 (1978).

In *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C.Cir.1969), a false labeling case, the court directed that, if a new trial were to follow its remand of the case to district court,

> "* * * it is incumbent on the trial judge to rule in the first instance whether each item of alleged false labeling makes religious claims and hence cannot be submitted to the jury for the factual determination of whether it is a label for the device in question and whether it is false." (Footnote omitted.) 409 F.2d at 1165.

On remand, the district court interpreted this admonition to mean that the trial court should remove from the jury's consideration only those items which made "purely religious" appeals.

> "* * * reserving a presentation of the other literature for determination under instructions differentiating the secular from the religious." *United States v. An-*

24. Defendants also assign error to the instruction given on the Free Exercise defense and to the failure of the trial court to give certain requested instructions. We consider these arguments *infra*.

Hale ex Devon Etc., 338 F.Supp. 357, 361 (D.D.C.1971).

We agree with and adopt this approach.[28]

[9] The jury is the usual trier of fact in tort cases such as the one before us. Disputes in the evidence should be resolved by the trier of fact. We conclude that the trial court was required to determine the religious character of the alleged misrepresentations only if it could do so as a matter of law, that is, if there was only one conclusion to be drawn from the evidence. We now turn to that question.

The fundamental qualification for protection based on the Free Exercise Clause of the First Amendment is that that which is sought to be protected must be "religious." *Wisconsin v. Yoder*, 406 U.S. 205, 215–16, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). The Mission claims that Scientology is a religion and that statements regarding its beliefs and practices are protected.[29] Plaintiff does not contend that Scientology is not a religion, but instead concentrates on the particular representations at issue. She contends that those representations are not religious statements, no matter what the status of Scientology, and that the statements are therefore not protected by the First Amendment.

Plaintiff's approach to this case has been to treat the alleged statements by defendants *in vacuo*, but we do not believe that it is constitutionally permissible to approach them that way. In this case, the issue of whether the allegedly fraudulent statements are entitled to the protection of the First Amendment involves several questions. Statements made by religious bodies must be viewed in the light of the doctrines of that religion. Courts may not sift through the teachings of a religion and pick out individual statements for scrutiny, deciding whether each standing alone is religious. While plaintiff has stipulated past the issue of whether Scientology is a religion, we do not believe we can do so, because the answer to that question is pertinent to, although not dispositive of, the determination of whether the statements made by the agents of the Mission are religious.

The Supreme Court stated in *Wisconsin v. Yoder*, *supra*,

> "* * * Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." 406 U.S. at 215–16, 92 S.Ct. at 1533. (Footnote omitted.)

And, as noted by the court in *Founding Church of Scientology v. United States*, *supra*:

> "* * * Though litigation of the question whether a given group or set of beliefs is or is not religious is a delicate business, our legal system sometimes requires it so that secular enterprises may not unjustly enjoy the immunities granted to the sacred. When tax exemptions are granted to churches, litigation concerning what is or is not a church will follow. When exemption from military service is granted to those who object on religious grounds, there is similar litigation. When otherwise proscribed substances are permitted to be used for purposes of worship, worship must be defined. The law has provided doctrines and definitions, unsatisfactory as they may be, to deal with such disputes. * * *" 409 F.2d 1160.

28. Although in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), the Supreme Court seemed to undertake to determine on its own, from the record in the case, whether the Amish parents who refused to send their children to secondary school were acting on the basis of religious conviction, 406 U.S. at 215–16, 92 S.Ct. at 1533, the good faith religious belief of the parents was not questioned by the state. There was no fact dispute to be resolved.

29. Because defendant Samuels is only sought to be held liable only as president of the Mission, we look to the protections afforded the Mission. Samuels may be held only to the extent the Mission is liable.

[10, 11] Without attempting an "unprecedented definition of religion," *Malnak v. Yogi*, 440 F.Supp. 1284, 1320 (D.N.J.1977), *aff'd*, 592 F.2d 197 (3d Cir. 1979), we draw guidance from the case law. We find that, while beliefs relating to the existence of, and man's relationship to, a God are certainly religious, belief in a traditional, or any, "god" is not a prerequisite to a finding that a belief is religious. *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961); *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392 (1947); *Washington Ethical Soc. v. District of Columbia*, 249 F.2d 127 (D.C.Cir.1957); *Malnak v. Yogi*, *supra*; *Fellowship of Humanity v. County of Alameda*, 153 Cal.App.2d 673, 315 P.2d 394 (1957). Neither does the fact that Scientology is of relatively recent origin mean that it is not entitled to the protection of the First Amendment. *See Leaney v. Scurr*, 474 F.Supp. 1186 (S.D.Iowa 1979); *Malnak v. Yogi*, *supra*; *Remmers v. Brewer*, 361 F.Supp. 537 (S.D.Iowa 1973); *see also United States v. Ballard*, *supra*; *Founding Church of Scientology v. United States*, *supra*. On the other hand,

> "[a] way of life, however, virtuous and admirable, [is not entitled to First Amendment protection] if based on purely secular considerations.
>
> . . . .
>
> "Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses." *Wisconsin v. Yoder*, *supra*, 406 U.S. at 215–16, 92 S.Ct. at 1533; *see also*, *United States v. Seeger*, 380 U.S. 163, 176, 85 S.Ct. 850, 859, 13 L.Ed.2d 733 (1965); and *see Welsh v. United States*, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970).

Courts may not, of course, judge the "truth" or "falsity" of the beliefs espoused by a group in determining its status as a religion; the inquiry here is simply whether the teachings of Scientology are of the type that qualify for the protection of the Free Exercise Clause. The record in this case demonstrates indisputably that they are. Although certain of the theories espoused by Scientology appear to be more psychological than religious, we cannot dissect the body of beliefs into individual components. It seems clear that if defendants sought to teach Scientology in the public schools in this country, they would be prohibited from doing so by reason of the Establishment Clause of the First Amendment. *See Malnak v. Yogi*, *supra*; *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). The theories of Hubbard are interrelated and involve a theory of the nature of the person and of the individual's relationship with the universe. *See Founding Church of Scientology v. United States*, 409 F.2d at 1160.

[12] The Mission is incorporated as a tax-exempt religious organization; it has ordained ministers and characterizes itself as a church. It has a system of beliefs, or creed, which encompasses beliefs which are religious in character. We conclude that Scientology is a religion and that the Mission is a religious organization entitled to invoke the protection of the Free Exercise Clause.

[13] The second inquiry to be made in determining whether the statements at issue are protected is whether these statements relate to the religious beliefs and practices of the Mission. It is clear that a religious organization, merely because it is such, is not shielded by the First Amendment from all liability for fraud. *See Founding Church of Scientology v. United States*, *supra*; *see also Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). If the statements involved here do not concern the religious beliefs and practices of the Mission, the Free Exercise Clause provides no defense to plaintiff's action. Defendant presented evidence that

the courses and auditing in which plaintiff participated, and about which the alleged misrepresentations were made, were part of the religious beliefs and practices of Scientology. Plaintiff did not, and does not, contest that fact.

The final inquiry involved in determining whether the alleged misrepresentations are protected by the First Amendment is whether the statements, although made on behalf of a religious organization and having a religious character, were nonetheless made for a wholly secular purpose. Although we find that it has been established in this record that Scientology is a religion, that the Mission is a religious organization and that the statements which are claimed to be religious relate to religious beliefs and practices of Scientology, plaintiff did present evidence that the courses and auditing she received were offered to her on an entirely secular basis for self-improvement, thereby creating a jury issue as to that matter. Plaintiff testified that she was told that the term "religion" and "church" were used only for public relations purposes. She also presented testimony from a former Mission staff member that the staff was instructed to avoid the issue of religion when attempting to interest someone in Scientology and that, if pressed, they were to say that it is not a religion.[27]

[14] There is, on the other hand, evidence that plaintiff joined the Church of Scientology and that she was told that the courses and practices were religious in nature. Many of the materials which she read contained a statement inside the front cover which indicated that Scientology is a religion, that auditing is a religious practice and that the E-meter is a religious artifact.[28]

In *United States v. Article or Device, Etc.*, *supra*, 338 F.Supp. at 363–365, the district court, sitting without a jury, found that Scientology services were offered on both a religious and a secular basis and that the E-meter was misbranded because much of the literature explaining its use and expounding on its value was presented in an entirely non-religious context. The court recognized that complete condemnation of the E-meter would encroach upon the religious freedom of those who used the device as a religious artifact. It therefore ordered the device condemned with the provision that it could be distributed only for use in bona fide religious counseling. This case

27. It is suggested in Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 Yale L.J. 593, 604 (1964), that

> "Because religion can be in conflict with other disciplines, because it cuts across everyday life, we can only know that a claim is based on religion when we are told that it is. The legal basis for stating that a claim is in the religious domain can be that it is held out as being religious in nature.
>
> • • • •
>
> "Since the Constitution prohibits defining an area of belief as 'religious,' a man must make it clear that the beliefs he represents are 'religious' if he wants to be free to express them under the constitutional warrant of freedom of religious belief. He has the burden of communicating that he speaks only from the authority of religion. But, once such a burden has been met, then we cannot attack the particular aspects of his faith as fraudulent.
>
> • • • •
>
> "What a man presents as a religious claim, then, cannot be attacked. It is only when he makes a representation beyond religious authority that we can apply laws of fraud."

As attractive as this analysis may be, we do not believe that it has been the approach taken by the courts in considering claims for protection under the First Amendment. As in *Werth v. United States*, *supra*, and *Malnak v. Yogi*, *supra*, the proponents of a particular doctrine may unwittingly fail to define as "religious" what is, in fact, constitutionally protected as such.

28. It is clear that in the context of the Establishment Clause the characterization of the activity as non-religious is not a determinative factor. *See Malnak v. Yogi*, *supra*; *see also Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601, 86 A.L.R.2d 1285 (1962); *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961); *Welsh v. United States*, *supra*. On the other hand, the characterization of beliefs as religious by one seeking the protection of the Free Exercise Clause is not determinative either. *See Wisconsin v. Yoder*, *supra*, 406 U.S. at 215–16, 92 S.Ct. at 1533; *Founding Church of Scientology v. United States*, *supra*; *People v. Woody*, 40 Cal.Rptr. 69, 394 P.2d 813 (1964); *United States v. Kuch*, 288 F.Supp. 439 (D.D.C.1968).

differs from *United States v. Article or Device, Etc.*, supra, in that the court there pointed out that there were organizations other than the Founding Church of Scientology that were using the E-meter and offering auditing services. It was the use of the E-meter by the secular organizations which the court forbade. The court did not consider whether use by the Church could be on a secular as well as on a religious basis. We believe that such a possibility exists.

There are certainly ideas which may only be classified as religious. Statements regarding the nature of a supreme being, the value of prayer and worship are such statements. There are also, however, statements which are religious only because those espousing them make them for a religious purpose. The statements which are alleged by plaintiff to be misrepresentations in this case are not of the type which must always and in every context be considered religious as a matter of law.

[15] We have found that it is established in this case that the Mission is a religious organization and that Scientology is a religion. Plaintiff does not dispute the claim that the courses and auditing she received are part of the religious beliefs and practices of Scientology. It is also uncontroverted that plaintiff applied to join the Church of Scientology, Mission of Davis, before taking any of the courses offered. These facts may be highly persuasive evidence of the contention that the courses and auditing plaintiff received were religious in nature and that the statements made regarding their nature and efficacy were religious statements. There is, however, conflicting evidence which the jury was entitled to consider. Plaintiff presented evidence from which it could be concluded that the courses and auditing were also offered on a wholly secular basis. Because the statements were not *necessarily* religious, plaintiff was entitled to have a jury consider, under proper instructions, the question of whether the statements were made for a wholly non-religious purpose. The trial court was correct, therefore, in refusing to rule before trial as to whether these alleged statements were religious. It was likewise correct in refusing to withdraw the statements from the jury's consideration.

We turn now to the question of the proper instructions to be given the jury in considering the allegations of fraud in this context.

FIRST AMENDMENT INSTRUCTION

[16] Defendants objected to the giving of the following instruction regarding the First Amendment defense:

"The defendants have asserted as an affirmative defense that the Constitutions of the United States and the State of Oregon provide that religious beliefs and doctrines may not be questioned for truth or falsity. To establish this defense, defendants must prove that each of the acts or representations complained of were religious in nature and were held out as such to plaintiff.

"They must further prove that if the acts and representations complained of were held out as religious in nature, that they were held out by defendants as good faith religious beliefs and doctrine. Therefore, if you find that the acts or representations complained of were acts or representations religious in nature and held out as such, and held in good faith belief, then you may not inquire into the truth or falsity of such acts or representations. Your inquiry must end and your verdict shall be for the defendants. However, should you determine that any of the acts or representations complained of were not religious in nature or were not held out as such to the plaintiff, or were not held to be such in good faith, then you may determine the truth or falsity of such acts or representations."

We find the instruction to be an inaccurate statement of the law as it applies to this case and conclude that reversal of the judgment on the fraud cause of action is required.

Defendants first object to the submission to the jury of the question of the religious

nature of the statements. That submission was not error. However, the directions for determination of that issue were erroneous. This record establishes that Scientology is a religion and that the Mission is a religious organization. It also establishes that the courses and auditing which plaintiff was induced to participate in are part of the religious beliefs and practices of Scientology. The Mission is, therefore, entitled to the protection of the First Amendment for statements regarding its religious beliefs and practices unless it is shown that the statements made were part of an offer of those services to the public on a wholly secular basis. The reasonable inferences to be drawn from the instruction as given is that a determination should be made for each of the alleged misrepresentations as to whether it was religious and whether it was held out to plaintiff as religious in nature. This fragments the inquiry inappropriately. The question which the jury was required to decide in this case was whether, even though the Mission is a religious organization, it offered the services in question here on a wholly non-religious basis. *See Founding Church of Scientology v. United States, supra.* It is only upon an affirmative finding on that issue that liability can attach for the statements made in this case. The jury was not correctly instructed in that regard.

In addition, the instruction that the statements must be held out as religious in good faith is not accurate. The question of "good faith" belief is quite complicated in this case, for the defendants charged with fraud are not the individuals who made the representations, but the religious organizations themselves. It is true that in many cases in which free exercise protection has been sought, courts have looked to whether the one seeking the protection is "sincere" in his or her belief in the doctrine at issue. *See, e.g., People v. Woody, supra; Tetered v. Burns*, 522 P.2d 357 (9th Cir. 1975). These cases, however, involve the sincerity of the *individual* claiming the protection.

United States v. Ballard, supra, has been cited to us for the proposition that the sincerity of the proponents of religious belief is a proper subject for inquiry in an action for fraud. We do not read *Ballard* as to hold. In *Ballard*, a criminal action for mail fraud, the parties agreed in the trial court that the issue of the truth or falsity of the statements at issue would not be submitted to the jury, but only the question of whether the defendants honestly and sincerely believed the statements they made. After a jury verdict finding them guilty, the defendants contended that it was improper to withdraw from the jury the question of whether the statements made were true or false. The Circuit Court of Appeals agreed and reversed the conviction. On appeal, the Supreme Court held that "* * * * the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of [the defendants]." The Court then noted that the defendants urged other grounds for supporting the reversal of the convictions, but it refused to consider those contentions before giving the circuit court an opportunity to consider the issues first. 322 U.S. at 88, 64 S.Ct. at 887. *Ballard* did not address the question of the propriety of submitting the issue of the defendants' sincerity to the jury. In addition, the defendants in *Ballard* were the very individuals accused of actually making the statements at issue. The liability of a religious organization for the statements of its agents was not discussed.

In the situation presented here, it is difficult to determine *whose* sincerity or good faith the jury could be asked to determine. Is the religious organization to be held liable if one of its ministers is less than a true believer? Or is it to be saved from liability if the individual who makes the statement truly believes, but others in the church do not?

In *Founding Church of Scientology v. United States, supra*, the court suggested that liability might attach if it were shown

"* * * * that an item (book, pamphlet, advertising flier) makes out a self-sufficient non-religious claim for Scientology services, *to which a religious appeal has*

been merely tacked on." 409 P.2d at 1168. (Emphasis supplied.)

As we have indicated, defendants could be held liable if the jury found that the courses and services offered by the Mission to plaintiff were offered for a wholly secular purpose. A wholly secular purpose means that, at the time they were made to this plaintiff, the statements were made for a purpose other than inducing plaintiff to join or participate in defendants' religion. A wholly secular purpose, in this regard, would include, but not be limited to, the intention solely to obtain money from plaintiff. On this record it would have been proper to instruct the jury that it is possible to find that the services were offered on a wholly secular basis, notwithstanding the fact that plaintiff was required to join the Church of Scientology in order to participate and that the materials she was given to read stated that Scientology is a religion. A jury could find that the courses and services were offered on a secular basis and that a religious denomination had been merely "tacked on." Phrasing the issue as one of good faith was therefore misleading and erroneous.

Defendants also contend that the instruction improperly placed on them the burden of proof on the question of the religious nature of the representations. They contend that it was improper to require that they prove the statements were religious when it was plaintiff's burden to prove knowledge of falsity to recover for fraud. Defendants confuse the burden of proving fraud with the burden of proving the affirmative defense of freedom of religion. As this instruction indicates, it is appropriate for the jury to consider the matter of the defense first, before reaching the issue of the truth or falsity of the statements for deciding the issue of fraud. That approach makes good sense in this context.

In summary, we conclude that the motions of all defendants for directed verdicts on the claims for outrageous conduct should have been granted. The motions of COSOP and Delphian for directed verdicts on plaintiff's action for fraud should have also been granted. The instruction which was given regarding the Free Exercise defense asserted by the remaining defendants was erroneous and requires reversal.

Because of the disposition we have made of the causes of action and counts, this case will have to be retried. We now turn to the assignments of error which raise issues which are likely to arise on re-trial.

EXHIBITS

[17, 18] Defendants assign error to the exclusion of three exhibits offered to show the good faith of the individual who informed plaintiff that L. Ron Hubbard had an honorary degree from Sequoia University and a degree from Princeton University. These exhibits were photocopies of a telegram and two certificates. Plaintiff objected to the exhibits on the grounds of lack of authentication and hearsay. The objections were sustained. Those objections were not well taken. The exhibits were offered to show the state of mind of the individual who made the representations regarding Hubbard's background to plaintiff. That individual testified that he had seen the exhibits before talking with plaintiff and believed them to be true. Neither the truth of the matter contained in the exhibits nor their authenticity was asserted by defendants. The state of mind of the one accused of making fraudulent representations is clearly at issue where one of the elements to be shown is the speaker's knowledge of the falsity of the representation being made. *See Liesbaugh v. Portland Mortgage Co.*, 116 Or. 1, 239 P. 196 (1925); *Seaside, City of v. Randles*, 92 Or. 650, 180 P. 319 (1919). The exhibits were relevant to that state of mind, and their exclusion was error.

INSTRUCTIONS

[19] Defendants assign error to the giving of certain instructions and the failure to give other instructions. The first assignment we consider is the failure of the trial court to give defendants' requested instruction defining "justifiable reliance" as follows:

"A party claiming to have been defrauded by a false representation must not only have acted in reliance thereon, but must have been justified in such reliance, that is, the situation must have been such as to make it reasonable for him, in the light of the circumstances and his intelligence, experience and knowledge, to accept the representation without making an independent inquiry or investigation."

The court instructed the jury that to find for plaintiff it must find that "* * * * the plaintiff having a right to do so, reasonably relied upon the representation and did not know it was false." We believe the instructions given by the trial court "adequately and accurately state[d] the applicable law." *Bowles v. Taggwell Pontiac*, 245 Or. 86, 88, 419 P.2d 414 (1966); *see also Yardley v. Rucker Brothers Trucking, Inc.*, 42 Or.App. 239, 600 P.2d 485 (1979), *rev. den.* 288 Or. 385 (1980). It was not error for the trial court to refuse to give the instruction requested by defendants.

[20] Defendants also assign error to the failure to give their requested instruction defining "material fact." The court instructed the jury that there must have been "a false representation of material fact" in order to find for the plaintiff on her fraud claim. Defendants requested the following instruction defining "material fact":

"A fact is material if a reasonably prudent person under the circumstances would attach importance to it in determining his course of action."

Plaintiff does not contend that this instruction is an incorrect statement of the law, but only that it was unnecessary to instruct the jury on the meaning of the term material because that term was used in its usual and conventional sense. We disagree that the instruction was unnecessary. The term "material fact," as it is used as an element of an action for fraud, involves the kind of objective standard included in the requested instruction. *See Millikes v. Green*, 283 Or. 281, 583 P.2d 548 (1978). The dictionary definition of "material," "being of real importance or great consequence," Webster's Third International Dictionary, does not contain that objective element. Defendants were entitled to have the jury instructed on the definition of the term which constitutes an element of the action against which they were defending.

[21] Defendants also contend that the trial court erred in failing to instruct the jury that "fraud is never presumed." Within the context of the instructions as a whole, *see Yardley v. Rucker Brothers Trucking, Inc.*, *supra*, we believe the jury was adequately instructed in that regard, and the failure to give the instruction was not error.

[22] Defendants assign error to the failure to give their requested instructions containing the specific language of the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 3 of the Oregon Constitution.[2] The refusal to give such instructions was not error. The language of the constitutional provisions is not by itself a statement of the law which was necessary or even particularly helpful to the jury in resolving the issues

2. Defendants' requested instructions were as follows:

"The First Amendment to the United States Constitution provides that: 'Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.'

"The Fourteenth Amendment to the United States Constitution provides that: '* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws.'

"Article I, Section 2 of the Oregon Constitution provides under Freedom of Worship: 'All men shall be secure in the natural right, to worship Almighty God according to the dictates of their own consciences.'

"Article I, Section 3 of the Oregon Constitution under Freedom of Religious Opinion provides: 'No law shall in any case whatever, control the free exercise, and enjoyment of religious opinions, or interfere with the rights of conscience.'"

in this case. Although it might not have been error to give such an instruction, neither was it error to refuse to do so.

[25] Finally, defendants assign error to the refusal to give the following instruction:

"The parties have stipulated that Scientology is a religion. I instruct you that for all purposes in this case Scientology is a religion and the Church of Scientology, Mission of Davis, and Church of Scientology of Portland are religious institutions."

The first portion of their requested instruction is not correct. Plaintiff did not stipulate that Scientology is a religion. She chose to approach the problems presented in this litigation on the basis that it did not matter whether Scientology is a religion, because the defendants could be liable in any event. That does not amount to a stipulation that Scientology is a religion. However, we have determined that the record in this case establishes, as a matter of law, that Scientology is a religion. The jury should have been so informed.

PUNITIVE DAMAGES

The final assignment of error we consider [30] is the failure of the trial court, on motion by defendants, to withdraw from the jury the claim for punitive damages. In the trial court and in this court defendants rely on *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979), for the proposition that imposition of punitive damages is constitutionally impermissible in the context of free speech.[31] Defendants contend that that proposition also applies to the area of free exercise of religion and that statements arguably religious should not subject one to liability for punitive damages because of the "chilling effect" such awards could have on the practice of religion. They make only constitutional arguments and do not argue that the case is otherwise inappropriate for an award of punitive damages.

After the briefs in this case were submitted, the Oregon Supreme Court decided *Hall v. May Department Stores Co.*, supra, in which it held that punitive damages are not available in an action for outrageous conduct in which the only conduct which subjects the defendant to liability is "speech." The court stated:

"When the cause of defendant's liability is his 'abuse' of speech and expression, as in the case of defamation, *Wheeler v. Green* holds that the 'responsibility for the abuse' is confined to civil liability for compensation only. Here the injury was to plaintiff's person rather than her reputation, but as long as it resulted from an 'abuse' of speech only, the principle is the same." 292 Or. at 146, 637 P.2d 126.

It might well be argued on the basis of the above language that any fraud which involves an abuse of speech or expression is similarly exempt from the imposition of punitive damages. The Supreme Court has, however, recognized the possibility of an award of punitive damages in cases involving fraud in several recent opinions. See, e.g., *Schmidt v. Pine Tree Land Dev.*, 291 Or. 462, 631 P.2d 1378 (1981); *Millikan v.*

30. Defendants' other assignments of error are either mooted by our disposition of the issues we have discussed, were not preserved in the trial court, or are, in our estimation, unlikely to arise again on retrial.

31. *Wheeler v. Green*, supra, is based on the Oregon Constitution. Defendants also rely on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), for the proposition that punitive damages are constitutionally impermissible for defamation. *Gertz*, however, does not hold that punitive damages may never be awarded for defamation. The Court was concerned with the self-censoring of media defendants which might result from the possibility of punitive damage awards under state laws requiring less than a showing of actual malice. The Court stated:

"We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. * * * In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412 (1964), that is 'actual malice' may recover only such damages as are sufficient to compensate him for actual injury." 418 U.S. at 350, 94 S.Ct. at 3012.

Gross, supra; Gross v. Uncle Dee's Mobile City, 279 Or. 425, 568 P.2d 1378 (1977). Although we are not certain just what the analytical distinction is, given the broad language in *Hall*, we do not believe that the Supreme Court intended to prohibit the award of punitive damages in all cases of fraud, and we decline to do so here.

Defendants, arguing without "benefit" of *Hall*, do not claim that all fraud is exempt from the imposition of punitive damages, but that "* * * in the sensitive area of First Amendment freedoms, a plaintiff can recover only compensatory damages." They contend that the imposition of punitive damages would have a chilling effect, not only on the exercise of free speech and association, but on the free exercise of religion as well.

[24, 25] As we have stated, we do not agree that punitive damages are unavailable for fraud merely because the fraudulent representations are "speech." Defendants suggest that because the actions giving rise to this cause of action occurred in the context of a religious organization of which plaintiff was a member, the free exercise of religion would be chilled by the possibility of a punitive damage award. We do not believe that such a chilling effect is a threat to the free exercise of religion. In order to be actionable at all, the statements alleged must be found to have been non-religious as made. Defendants' argument seems to lead to the conclusion that religious organizations should not be made liable for punitive damages because they are religious organizations, even if the content of the statements which they are alleged to have made is not religious. We find no constitutional requirement for such an exemption. The free exercise of religion is sufficiently protected by the broad scope of what is protected as religious belief and practice and the fact that the truth or falsity of such religious beliefs may not be determined in an action for fraud. The trial court properly denied defendants' motion to strike the claim for punitive damages.

Reversed as to defendants Church of dation; reversed and remanded for a new trial as to defendants Samuels and Church of Scientology, Mission of Davis.

57 Or.App. 281

STATE of Oregon, Appellant,

v.

Frank J. THOMPSON, Respondent.

No. 80362; CA A20277.

Court of Appeals of Oregon, In Banc.

Argued and Submitted Aug. 10, 1981.

Taken In Banc April 7, 1982.

Decided May 12, 1982.

State appealed from an order of the Circuit Court, Columbia County, Dalbert R. Mayer, J., dismissing charge of criminal trespass in the second degree on double jeopardy grounds after defendant was convicted of contempt and fined for the same conduct which had resulted in the criminal charge. The Court of Appeals, Thornton, J., held that defendant's punishment for an indirect contempt resulting from his disobedience of a restraining order did not bar prosecution for criminal trespass in the second degree involving the same facts.

Reversed and remanded.

Van Hoomissen, J., dissented and filed an opinion in which Joseph, C. J., Richardson and Buttler, JJ., joined.

1. Contempt ⇐4

In a "civil contempt" the contemnor violates a decree or order of the court made for the benefit of an adverse party litigant.

See publication Words and Phrases

JMM

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

JULIE CHRISTOFFERSON,

Plaintiff,

vs.

CHURCH OF SCIENTOLOGY MISSION OF DAVIS; CHURCH OF SCIENTOLOGY OF CALIFORNIA; and L. RON HUBBARD,

Defendants.

CASE NO. A7704-05184

ORDER GRANTING MOTION FOR MISTRIAL

The Court hereby grants a mistrial in this action on the following grounds:

1. Plaintiff's counsel's closing argument was improper and prejudicial to Defendants and unable to be cured by a curative or limiting instruction;

2. In light of the question submitted to the Court by the jury during it's deliberation, the Court's giving of Instruction No. 28 in which the Court ruled that certain presentations were wholly secular in nature, were tantamount to directing a verdict in favor of Plaintiff.

Accordingly, the delivery of that instruction was erroneous and prejudicial to the Defendants.

For the foregoing reasons, the Court hereby declares a mistrial and orders a new trial to be held on all issues.

DATED this 16 day of July, 1985.

Donald H. Londer
Circuit Court Judge

CERTIFICATE — TRUE COPY

I hereby certify that the foregoing copy of ORDER FOR MISTRIAL is a complete and exact copy of the original.

Dated July 16, 19 85.

Attorney(s) for Defendants

ACCEPTANCE OF SERVICE

Due service of the within ..... is hereby accepted on ....., 19....., by receiving a true copy thereof.

Attorney(s) for .....

CERTIFICATES OF SERVICE

Personal

I certify that on ....., 19....., I served the within ..... on ..... attorney of record for ..... by personally handing to said attorney a true copy thereof.

Attorney(s) for .....

At Office

I certify that on July 16, 19 85, I served the within Order for Mistrial on Garry P. McMurry attorney of record for Plaintiff by leaving a true copy thereof at said attorney's office with his/her clerk therein, or with a person apparently in charge thereof, at 1600 Benjamin Franklin Plaza, One S.W. Columbia, Portland, Oregon.

Attorney(s) for Defendants

Mailing

I certify that I served the foregoing ..... on ..... attorney(s) of record for ..... on ....., 19 ....., by mailing to said attorney(s) a true copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney(s) at said attorney(s) last known address, to-wit: ..... and deposited in the post office at ....., Oregon, on said day.

Dated ....., 19.....

Attorney(s) for .....

KELL, ALTERMAN & RUNSTEIN
ATTORNEYS AT LAW
[illegible] Bank of California Tower
Portland, Oregon 97205
Telephone 223-3624

BACKING SHEET

FORM No. 1075—STEVENS-NESS LAW PUB. CO. PORTLAND, ORE.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 55 HON. RONALD SWEARINGER, JUDGE

LARRY WOLLERSHEIM,

Plaintiff,

vs. NO. C 332 027

CHURCH OF SCIENTOLOGY OF CALIFORNIA, a corporation, et al.,

Defendants.

REPORTERS' DAILY TRANSCRIPT

July 22, 1986

APPEARANCES:

For Plaintiff: GREENE, O'REILLY, BROILLET, PAUL, SIMON, McMILLAN, WHEELER & ROSENBERG
BY: CHARLES O'REILLY and LETA SCHLOSSER

For the Defendants: PAUL F. MOORE

COOLEY, MANION, MOORE & JONES
BY: EARLE C. COOLEY

OVERLAND, BERKE, WESLEY, GITS, RANDOLPH & LEVANAS
BY: ROBERT BERKE

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VOLUME 99

Pages 14865 to 14878.

JOANNE EKERLING, CSR #2250
CAROLYN F. LAMPKIN, CSR
OFFICIAL COURT REPORTERS

LOS ANGELES, CALIFORNIA, TUESDAY, JULY 22, 1986, 3:11 P.M.

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THE COURT: Let's go on the record noting that the jury and alternates are present. The parties are represented.

We understand, ladies and gentlemen, you have arrived at a verdict.

THE FOREMAN: Yes, sir.

THE COURT: Who is your foreman? Would you deliver the verdict to the court attendant.

(The foreman handed the verdict to the court attendant and the court attendant handed the verdict to the judge.)

THE COURT: I will ask the clerk to read the verdict. (Handing verdict to the clerk.)

THE CLERK: Title of court and cause:

"We, the jury in the above entitled action find with regard to intentional infliction of emotional distress that the plaintiff, Lawrence Dominic Wollersheim discovered or should he have discovered the facts which he alleges constituted intentional infliction of emotional distress before July 28, 1979?

"Answer: No."

"With regard to negligent infliction of emotional distress did the plaintiff Lawrence Dominic Wollersheim discover or should he have discovered the facts which he alleges constituted negligent infliction of emotional

distress before July 28, 1979?

"Answer: No.

"Dated July 22, 1986.

"Andre Anderson, Foreman."

Title of court and cause:

"We, the jury in the above-entitled action find for the plaintiff, Lawrence Dominic Wollersheim and against the defendant CHURCH OF SCIENTOLOGY OF CALIFORNIA as follows:

"Check the appropriate box.

"(a) On the third cause of action, intentional infliction of emotional distress," box is checked.

"(b) On the fourth cause of action, negligent infliction of emotional distress," box is checked.

"We assess compensatory damages in the sum of $5 million. We assess punitive damages as to the third cause of action, intentional infliction of emotional distress, in the sum of $25 million."

MR. COOLEY: Request that the jury be polled.

THE CLERK: Excuse me, your Honor.

THE COURT: Just a moment.

THE CLERK: "Dated: July 22, 1986.

"Signed by Andre Anderson, Foreman."

Ladies and gentlemen of the jury is this your verdict?

THE JURORS: Yes.

THE COURT: I am going to question you individually now and answer yes or no as to the following questions whether or not the verdict that was found in regard to the special findings with regard to the statute of limitations was your finding.

I will inquire of you on that issue now, Mr. Cattani.

MR. CATTANI: Yes.

THE COURT: And Ms. Kingsbury.

MS. KINGSBURY: Yes.

THE COURT: And Mr. Anderson.

MR. ANDERSON: Yes.

THE COURT: And Ms. Yakushiji.

MS. YAKUSHIJI: Yes.

THE COURT: And Ms. Vaughn.

MS. VAUGHN: Yes.

THE COURT: And Mr. Henderson.

MR. HENDERSON: Yes, sir.

THE COURT: And Ms. Reuter.

MS. REUTER: Yes.

THE COURT: And Mr. Lenard.

MR. LENARD: Yes.

THE COURT: Mr. Bermudez.

MR. BERMUDEZ: Yes.

THE COURT: Mrs. Silver.

MRS. SILVER: Yes, sir.

THE COURT: Mrs. Artison.

MRS. ARTISON: Yes.

THE COURT: And Miss Harris.

MS. HARRIS: Yes.

THE COURT: So that verdict that's just been read with regard to the statute of limitations on intentional infliction of emotional distress, negligent infliction of emotional distress, you have just indicated to me, all 12 of you, that your finding was no on both of those issues? All right.

Anybody -- is that correct?

(All answered yes.)

THE COURT: Now, let's go to the cause of action for intentional infliction of emotional distress.

When I call your name indicate by answering yes or no whether or not that is your verdict for plaintiff and against the defendant on the third cause of action of intentional infliction of emotional distress.

Miss Clerk.

THE CLERK: Yes.

THE COURT: Mr. Cattani.

MR. CATTANI: Yes.

THE COURT: Ms. Kingsbury.

MS. KINGSBURY: Yes.

THE COURT: Mr. Anderson.

MR. ANDERSON: Yes.

THE COURT: Ms. Yakushiji.

MS. YAKUSHIJI: Yes.

THE COURT: Miss Vaughn.

MS. VAUGHN: Yes.

THE COURT: Mr. Henderson.

MR. HENDERSON: Yes.

THE COURT: Ms. Reuter.

MS. REUTER: Yes.

THE COURT: Mr. Lenard.

MR. LENARD: Yes.

THE COURT: Mr. Bermudez.

MR. BERMUDEZ: Yes.

THE COURT: Mrs. Silvers.

MRS. SILVER: Yes.

THE COURT: Mrs. Artison.

MRS. ARTISON: Yes.

THE COURT: Mrs. Harris.

MRS. HARRIS: Yes.

THE COURT: Okay.

Now, the next question as to the finding on the fourth cause of action, negligent infliction of emotional distress, advise by answering yes or no whether or not the verdict that was just read was your verdict and we will start again with you, Mr. Cattani.

MR. CATTANI: Yes.

THE COURT: Miss Kingsbury.

MS. KINGSBURY: Yes.

THE COURT: Mr. Anderson.

MR. ANDERSON: Yes.

THE COURT: Miss Yakushiji.

MS. YAKUSHIJI: Yes.

THE COURT: Mr. Vaughn.

MR. VAUGHN: Yes.

THE COURT: Mr. Henderson.

MR. HENDERSON: Yes, sir.

THE COURT: Ms. Reuter.

MS. REUTER: Yes, sir.

THE COURT: Mr. Lenard.

MR. LENARD: Yes.

THE COURT: Mr. Bermudez.

MR. BERMUDEZ: Yes.

THE COURT: Mrs. Silver.

MRS. SILVER: Yes.

THE COURT: Mrs. Artison.

MRS. ARTISON: Yes.

THE COURT: And Mrs. Harris?

MRS. HARRIS: Yes.

THE COURT: Now, with regard to the compensatory damages of $5 million, would you answer yes or no as to whether or not that finding was yours?

Mr. Cattani.

MR. CATTANI: Yes.

THE COURT: Ms. Kingsbury.

MS. KINGSBURY: Yes.

THE COURT: Mr. Anderson.

MR. ANDERSON: Yes.

THE COURT: Ms. Yakushiji.

MS. YAKUSHIJI: Yes.

THE COURT: Miss Vaughn.

MS. VAUGHN: Yes.

THE COURT: Mr. Henderson.

MR. HENDERSON: Yes, sir.

THE COURT: Mr. Reuter.

MR. REUTER: Yes.

THE COURT: Mr. Lenard.

MR. LENARD: Yes.

THE COURT: Mr. Bermudez.

MR. BERMUDEZ: Yes.

THE COURT: Mrs. Silver.

MRS. SILVER: Yes, sir.

THE COURT: Mrs. Artison.

MRS. ARTISON: Yes.

THE COURT: Mrs. Harris.

MRS. HARRIS: Yes.

THE COURT: All right.

Now, I am going to ask with regard to the finding of $25 million as punitive. Answer yes or no as to whether or not the finding that was just read was yours.

Mr. Cattani.

MR. CATTANI: Yes.

THE COURT: Ms. Kingsbury.

MS. KINGSBURY: Yes.

THE COURT: Mr. Anderson.

MR. ANDERSON: Yes.

THE COURT: Ms. Yakushiji.

MS. YAKUSHIJI: Yes.

THE COURT: Miss Vaughn.

MISS VAUGHN: Yes.

THE COURT: Mr. Henderson.

MR. HENDERSON: Yes, sir.

THE COURT: Miss Reuter.

MS. REUTER: Yes.

THE COURT: Mr. Lenard.

MR. LENARD: Yes.

THE COURT: Mr. Bermudez.

MR. BERMUDEZ: Yes.

THE COURT: Mrs. Silver.

MRS. SILVER: Yes, sir.

THE COURT: Mrs. Artison.

MRS. ARTISON: Yes.

THE COURT: Mrs. Harris.

MRS. HARRIS: Yes.

THE COURT: Does counsel desire any further inquiry --

MR. COOLEY: No, your Honor.

THE COURT: -- by the court?

Record the verdict.

Ladies and gentlemen, we appreciate your long service in this case. It has been almost six months here, I guess, and so the thing to do, I think you have to check out with the jury assembly room clerk, make arrangements for your mileage and, of course, for your compensation, so forth.

Now, the attorneys, I am sure, would like to talk to you and you are perfectly free to talk to them on any subject concerning the case if that's your desire.

You don't have to talk to them if you don't want to. If you feel like talking to them, fine. No problem at all.

I think what we will probably do is we will do that inquiry here in the courtroom and I will just leave the bench and we will go off the record and then those of you who want to stick around and talk to the attorneys, go ahead. The rest of you should go down to the jury assembly room and check out.

How many of you would like to stick around and talk to the attorneys a bit?

How many of you would be willing to stick around and talk to the attorneys?

Well, I am sure they would like to talk to you.

The rest of you who do not propose to remain and talk to the attorneys, why don't you leave at this time? And turn your notebooks in to the court attendant now.

COURT ATTENDANT: I have them, your Honor.

THE COURT: You got them?

COURT ATTENDANT: Yes, sir.

THE COURT: The verdict is recorded.

All right. Fine, ladies and gentlemen, at this time, then, we will go off the record and go into recess and give you all an opportunity to talk to the attorneys and the court attendant has got your notebooks now?

We really appreciate your service in this case.

MR. COOLEY: We will be presenting post-trial motions, your Honor.

THE COURT: Yes.

Okay.

(At 3:21 p.m. an adjournment was taken.)

employment.[5] By this reasoning heart disease "manifests itself" when it produces symptoms indicative of its presence that are capable of being discerned by medical tests regardless whether they are in fact discerned. This reading is untenable. We cannot say that a symptom manifests itself when it has not in fact been revealed to anyone.[6]

Moreover, this alternative reading of "manifests itself" is no more plausible than that the term means to give evidence that is detected leading to a medical diagnosis. If such a construction were semantically permissible, the statute would be ambiguous.[7] In that event, we would be constrained to accept the application of the language that favors Smith. "Although the employee bears the burden of proving that his injury was sustained in the course of his employment, the established legislative policy is that the Workmen's Compensation Act must be liberally construed in the employee's favor (Lab.Code, § 3202), and all reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of the employee." (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317, 90 Cal.Rptr. 355, 475 P.2d 451.)

Disposition

The only tenable reading of section 3212.5 applicable to this case shows that Smith was entitled to the presumption afforded by the section. The Board's decision was based upon the contrary view. The decision of the Board is annulled and the case is remanded to the Board for proceedings consistent with this opinion.

SPARKS and DAVIS, JJ., concur.

5. We imply no view on the latter premise.

6. However, if there is evidence which shows the time when the disabling heart trouble first produced undetected signs capable of detection and that time precedes the applicable period of employment the presumption should be unavailing. That circumstance does not entail the view that heart trouble which is first detected during the applicable period of employment has not "manifested itself" during that period. Rather, in such a case the presumption is "controverted by other evidence" which allows the Board to find the presumption has been overcome. (See § 3212.5.)

7. The question of meaning is framed by the competing claims of the parties regarding the application of the [contested] language to the material facts of the case. (Citations.) [¶] These claims must then be tested against the permissible uses of the language upon which the claims are founded, for the meaning of language is to be found in its usage and the occasion of a usage is an application of the language to particular circumstances." (*National Auto. & Cas. Ins. Co. v. Contreras* (1987) 193 Cal.App.3d 831, 836, 238 Cal.Rptr. 627.) Thus a material ambiguity appears only if the semantically permissible applications of the language to the material facts of the case reveal a conflict of significance to its outcome. In such case some rule of resolution must be applied as a tie-breaker.

212 Cal.App.3d 872

Larry WOLLERSHEIM, Plaintiff and Respondent,

v.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, Defendant and Appellant.

No. B023193.

Court of Appeal, Second District, Division 7.

July 18, 1989.

Review Denied Oct. 26, 1989.

Former member of religious organization brought action against organization alleging intentional and negligent infliction of severe emotional injury. The Superior Court, Los Angeles County, Ronald Swearinger, J., entered jury verdict in amount of $30,000,000 in favor of former member and organization appealed. The Court of Appeal, Johnson, J., held that: (1) practices inflicted upon former member were conducted in coercive environment and thus were not qualified as voluntary religious practices entitled to constitutional protec-

tion; (2) member could not maintain action for negligent infliction of emotional distress; and (3) compensatory and punitive damage awards were excessive.

Reversed in part, affirmed in part as modified.

1. **Damages ⇐50.10**

Prima facie case of intentional infliction of emotional distress requires outrageous conduct by defendant, intention by defendant to cause, or reckless disregard of probability of causing, emotional distress, severe emotional distress and actual and proximate causation of emotional distress.

2. **Damages ⇐50.10**

Conduct by religious organization met criteria for prima facie case of tort of intentional infliction of emotional distress; organization's conduct in coercing member into continuing "auditing" although his sanity was threatened, compelling him to abandon his family, and subjecting him to financial ruin were manifestly outrageous, which if not wholly calculated to cause emotional distress unquestionably constituted reckless disregard for likelihood of causing such distress, and which caused severe emotional distress to former member.

3. **Constitutional Law ⇐84(1)**

Establishment Clause of First Amendment guarantees government will not use its resources to impose religion upon us while Free Exercise Clause guarantees that government will not prevent its citizens from pursuing any religion they choose. U.S.C.A. Const.Amend. 1.

4. **Constitutional Law ⇐84(1)**

In order for governmental policies which have effect of promoting religion to pass scrutiny under Establishment Clause of First Amendment, they must have secular purpose, their primary effects must be ones which neither advance nor inhibit religion and they must avoid any excessive entanglements with religion. U.S.C.A. Const.Amend. 1.

5. **Constitutional Law ⇐84(2)**

Under free exercise clause of First Amendment, government may not constitutionally burden any belief no matter how outlandish or dangerous but it may burden expression of belief which adversely affects significant societal interests. U.S.C.A. Const.Amend. 1.

6. **Constitutional Law ⇐84(2)**

In order for government to burden expression of religious belief without violating Free Exercise Clause of First Amendment, government must be seeking to further important state interest, burden on expression must be essential to further state interest, type and level of burden imposed must be minimum required to achieve state interest, and measure imposing burden must apply to everyone, not merely to those who have religious belief. U.S.C.A. Const.Amend. 1.

7. **Constitutional Law ⇐84(2)**

Only most compelling of state interest, such as preservation of life or state itself will justify outright ban on important method of expressing religious belief. U.S.C.A. Const.Amend. 1.

8. **Constitutional Law ⇐84(1)**

Less significant state interest may be enough to justify burden on form of expression of religion where burden is less direct or form of expression less central to exercise of particular religion. U.S.C.A. Const.Amend. 1.

9. **Constitutional Law ⇐84(1)**

In order to be entitled to constitutional protections under Freedom of Religion Clauses, system of thought to which course of conduct relates must qualify as "religion" rather than philosophy or science or personal preference, course of conduct must qualify as expression of that religion and not just activity that religious people happen to be doing, and religious expression must not inflict so much harm that there is compelling state interest in discouraging practice which outweighs values served by freedom of religion. U.S.C.A. Const.Amend. 1.

10. Constitutional Law ⇐84.5(7)

Evidence before trial court justified judge's determination that Scientology qualifies as religion within meaning of freedom of religion clauses of Federal and California Constitutions. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, § 4.

11. Constitutional Law ⇐84.5(7)

Assuming that retributive conduct known as "fair game" was core practice of religious organization, it did not qualify as "religious practice" for constitutional protection; former member did not suffer his economic harm as unintended byproduct of former religionists' practice of refusing to socialize with him but instead was bankrupted by campaign his former religionists carefully designed with specific intent to create financial ruin. U.S.C.A. Const. Amend. 1.

12. Constitutional Law ⇐84.5(7)

"Auditing" involving one-on-one dialogue between religious organization's auditor and student is constitutionally protected religious practice if conducted in noncoercive environment, but is not protected where conducted under threat of economic, psychological and political retribution; voluntary "auditing" is similar to techniques other religions use to motivate "sinners" to change behaviors.

13. Constitutional Law ⇐84.5(7)

"Auditing" as practiced against religious organization's former member was coerced and thus was not protected religious activity under First Amendment; church member was threatened with accumulated debt of between $10,000 and $50,000 under organization's "freeloader debt" policy if he left organization, as well as financial ruin in his business under "fair game" policy and further, some auditing was accepted by former member under threat of physical coercion. U.S.C.A. Const.Amend. 1.

14. Constitutional Law ⇐84.5(7)

Practice of "disconnect" of religious organization which required member to cease contact with his family, including wife and parents, was not protected religious practice given coercive environment imposed upon member; "disconnect" policy was imposed on member by organization with knowledge that member was psychologically susceptible and would suffer severe emotional injury as result. U.S.C.A. Const.Amend. 1.

15. Constitutional Law ⇐84.5(7)

Religious organization's improper disclosure of information which former member gave during confidential religious sessions was not religious expression immunized from liability by Constitution. U.S.C.A. Const.Amend. 1.

16. Damages ⇐49.10

Former member of religious organization could not prevail in action for negligent infliction of emotional injury against organization; organization owed no duty to members or former members with respect to negligent acts which might inadvertently cause psychological or economic injury.

17. Damages ⇐216(10)

Religious organization was not entitled to jury instruction which restated elements of former member's cause of action for intentional infliction of emotional distress or outrageous conduct with slant favoring organization's position by implication that jury was to disregard evidence of organization's acts which did not fit precisely under courses of conduct as they defined them; some of evidence introduced at trial related to acts relevant to issues of organization's state of mind and whether former member was voluntarily participating in organization's practices or was doing so within coercive environment and thus, instruction as requested would have been misleading.

18. Trial ⇐261

Religious organization was not entitled to jury instruction requiring jury to disregard evidence presented which was relevant to nonsuited fraud counts in action brought by former member which alleged intentional and negligent infliction of emotional injury; requested instruction was stated in overbroad terms and unduly slanted in organization's direction which could have misled jury into believing that it must disregard evidence which provided context

for intentional infliction count or which went to presence or absence of coercion and organization's state of mind.

19. **Damages** ⇐178

Relevancy of evidence regarding actions religious organization took toward third persons was not overwhelmed by prejudicial effect and thus admission of such evidence was proper in former member's action alleging intentional and negligent infliction of emotional injury; evidence was highly relevant to show network of sanctions and coercive influences with which organization had surrounded former member.

20. **Damages** ⇐130(1)

Compensatory damage award in amount of $5,000,000 in favor of former member of religious organization against organization was excessive, and evidence only justified award of $500,000; former member's psychological injury although permanent and severe was not totally disabling and organization's conduct only aggravated preexisting psychological condition but did not create it.

21. **Appeal and Error** ⇐1004.1(10)
Damages ⇐94

In reviewing punitive damages award, appellate court applies standard similar to that used in reviewing compensatory damages; court inquires whether after reviewing entire record in light most favorable to judgment, award was result of passion or prejudice.

22. **Damages** ⇐94

Factors to be considered in reviewing propriety of punitive damage award include degree of reprehensibility of defendant's conduct, relationship between amount of award and actual harm suffered, and relationship of punitive damages to defendant's net worth.

23. **Damages** ⇐94

Punitive damage award in amount of $25 million against religious organization for intentional infliction of emotional distress upon former member was excessive and required reduction to $2 million; award constituted 150% of organization's net worth and conduct by organization did not reach level of outrageousness to justify such award.

Jar-Rabinowitz, Boudin, Standard, Krinsky & Lieberman and Eric M. Lieberman and Terry Gross, New York City, Lenske, Lenske & Heller and Lawrence E. Heller, Woodland Hills, and Michael Lee Hertzberg, New York City, for defendant and appellant.

Greene, O'Reilly, Broillet, Paul, Simon, McMillan, Wheeler & Rosenberg, Los Angeles, and Charles B. O'Reilly, Santa Monica, for plaintiff and respondent.

Boothby, Ziprick & Yingst and William F. Ziprick, San Bernardino, Lee Boothby, Washington, D.C., and James M. Parker, Newport Beach, as amicus curiae on behalf of defendant and appellant.

JOHNSON, Associate Justice.

This appeal arises after a jury awarded $30 million in compensatory and punitive damages to a former member of the Church of Scientology (the Church). The complaint alleged appellants intentionally and negligently inflicted severe emotional injury on respondent through certain practices, including "auditing," "disconnect," and "fair game." Since the trial court granted summary adjudication that Scientology is a religion and "auditing" is a religious practice, the trial proceeded under the assumption they were. We conclude there was substantial evidence to support a factual finding the "auditing," as well as other practices in this case, were conducted in a coercive environment. Thus, none of them qualified as "*voluntary* religious practices" entitled to constitutional protection under the First Amendment religious freedom guarantees. At the same time, we conclude both the compensatory and punitive damages the jury awarded in this case are excessive. Consequently, we modify the judgment to reduce both of these damage awards.

FACTS AND PROCEEDINGS BELOW

Construing the facts most favorably to the judgment, as we must, respondent Larry Wollersheim was an incipient manic-depressive for most of his life. Appellants Scientology and its leaders were aware of Wollersheim's susceptibility to this mental disorder. What appellants did to him during and after his years in Scientology aggravated Wollersheim's mental condition, driving him into deep depressive episodes and causing him severe mental anguish. Furthermore, Scientology engaged in a practice of retribution and threatened retribution—often called "fair game"—against members who left or otherwise posed a threat to the organization. This practice coerced Wollersheim into continued participation in the other practices of Scientology which were harming him emotionally.

Wollersheim first became acquainted with Scientology in early 1969 when he attended a lecture at the "Church of Scientology of San Francisco." During the next few months he completed some basic courses at the San Francisco institution. He then returned to his home state of Wisconsin and did not resume his scientology training for almost two years.

When Wollersheim did start again it was at the appellant, Church of Scientology of California, headquartered in Los Angeles. From 1972 through 1979 Wollersheim underwent "auditing" at both the basic and advanced levels. In 1973 he worked several months as a staff member at the Church of Scientology Celebrity Center located in Los Angeles. In 1974, despite his repeated objections, Wollersheim was persuaded to participate in auditing aboard a ship maintained by Scientology. While on the ship, Wollersheim was forced to undergo a strenuous regime which began around 6:00 A.M. and continued until 1:00 the next morning. Further, Wollersheim and others were forced to sleep nine deep in the ship's hold. During his six weeks under these conditions, Wollersheim lost 15 pounds.

[1,2] Wollersheim attempted to escape from the ship because he felt he "was dying and losing [his] mind." His escape was thwarted by Scientology members who seized Wollersheim and held him captive until he agreed to remain and continue with the auditing and other religious practices taking place on the vessel. One of the psychiatric witnesses testified Wollersheim's experience on the ship was one of five cataclysmic events underlying the diagnosis of his mental illness and its cause.

At another stage Scientology auditors convinced him to "disconnect" from his wife and his parents and other family members because they had expressed concerns about Scientology and Wollersheim's continued membership. "Disconnect" meant he was no longer to have any contact with his family.

There also was evidence of a practice called "freeloader debt." "Freeloader debt" was accumulated when a staff member received Church courses, training or auditing at a reduced rate. If the member later chose to leave, he or she was presented with a bill for the difference between the full price normally charged to the public and the price originally charged to the member. Appellants maintained a "freeloader debt" account for Wollersheim.

During his years with Scientology Wollersheim also started and operated several businesses. The most successful was the last, a service which took and printed photographic portraits. Most of the employees and many of the customers of this business were Scientologists.

By 1979, Wollersheim's mental condition worsened to the point he actively contemplated suicide. Wollersheim began experiencing personality changes and pain. When the Church learned of Wollersheim's condition, Wollersheim was sent to the Flag Land Base for "repair."

During auditing at Flag Land Base, Wollersheim's mental state deteriorated further. He fled the base and wandered the streets. A guardian later arranged to meet Wollersheim. At that meeting, the guardian told Wollersheim he was prohibited from ever speaking of his problems with a priest, a doctor or a psychiatrist.

Ultimately Wollersheim became so convinced auditing was causing him psychiat-

nic problems he was willing to risk becoming a target of "freeloader debt" and "fair game." Evidence was introduced that, at least during the time relevant to Wollersheim's case, "fair game" was a practice of retribution Scientology threatened to inflict on "suppressives," which included people who left the organization or anyone who could pose a threat to the [1360] organization. Once someone was identified as a "suppressive," all Scientologists were authorized to do anything to "neutralize" that individual —economically, politically, and psychologically.

After Wollersheim left the organization Scientology leaders initiated a "fair game" campaign which among other things was calculated to destroy Wollersheim's photography enterprise. They instructed some Scientology members to leave Wollersheim's employ, told others not to place any new orders with him and to renege on bills they owed on previous purchases from the business. This strategy shortly drove Wollersheim's photography business into bankruptcy. His mental condition deteriorated further and he ended up under psychiatric care.

Wollersheim thereafter filed this lawsuit alleging fraud, intentional infliction of emotional injury, and negligent infliction of emotional injury. At the law-and-motion stage, a trial court granted summary adjudication on two vital questions. It ruled Scientology is a religion and "auditing" is a religious practice of that religion.

During trial, Wollersheim's experts testified Scientology's "auditing" and "disconnect" practices constituted "brain-washing" and "thought reform" akin to what the Chinese and North Koreans practiced on American prisoners of war. They also testified this "brain-washing" aggravated Wollersheim's bipolar manic depressive personality and caused his mental illness. Other testimony established Scientology is a hierarchical organization which exhibits near paranoid attitudes toward certain institutions and individuals—in particular, the government, mental health professions, disaffected members and others who criticize the organization or its leadership. Evidence also was introduced detailing Scientology's retribution policy, sometimes called "fair game."

After the evidence was heard, the trial judge dismissed the fraud count but allowed both the intentional and negligent infliction of emotional injury counts to go to the jury. The jury, in turn, returned a general verdict in favor of plaintiff on both counts. It awarded $5 million in compensatory damages and $25 million in punitive damages. The motion for new trial was denied and appellants filed a timely appeal.

DISCUSSION

Appellants raise a broad spectrum of issues all the way from a technical statute of limitations defense to a fundamental constitutional challenge to this entire species of claims against Scientology. If the narrower grounds of appeal had merit and disposed of the case we could avoid confronting the [1361] difficult constitutional questions. But since they do not we must consider Scientology's religious freedom claims.

I. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT WOLLERSHEIM'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The cause of action for intentional infliction of emotional injury formed the centerpiece of the case which went to the jury. This claim actually cumulates four courses of conduct which together allegedly inflicted severe emotional damage on the psychologically weak Wollersheim. These courses of conduct are: (1) subjecting Wollersheim to forms of "auditing" which aggravated his predisposition to bipolar mania-depression; (2) psychologically coercing him to "disconnect" from his family; (3) "disclosing personal information" Wollersheim revealed during auditing under a mantle of confidentiality; and, (4) conducting a retributive campaign ("fair game") against Wollersheim and particularly against his business enterprise.

[1] The tort of intentional infliction of emotional distress was created to punish conduct "'exceeding all bounds usually tolerated by a decent society, of a nature which is especially calculated to cause, and

does cause, mental distress.' " (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946, 160 Cal. Rptr. 141, 603 P.2d 58.) A prima facie case requires: (1) outrageous conduct by the defendant; (2) an intention by the defendant to cause, or the reckless disregard of the probability of causing, emotional distress; (3) severe emotional distress; and (4) an actual and proximate causation of the emotional distress. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 300, 253 Cal.Rptr. 97, 763 P.2d 948.)

"Behavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress." (*Agarwal v. Johnson, supra*, 25 Cal.3d at p. 946, 160 Cal.Rptr. 141, 603 P.2d 58.)

[2] There is substantial evidence to support the jury's finding on this theory. First, the Church's conduct was manifestly outrageous. Using its position as his religious leader, the Church and its agents coerced Wollersheim into continuing "auditing" although his sanity was repeatedly threatened by this practice. (See pp. 344–346, *infra*.) Wollersheim was compelled to abandon his wife and his family through the policy of disconnect. When his mental illness reached such a level he actively planned his suicide, he was forbidden to seek professional help. Finally, when Wollersheim was able to leave the Church, it subjected him to financial ruin through its policy of "fair game".

Any one of these acts exceeds the "bounds usually tolerated by a decent society," so as to constitute outrageous conduct. In aggregate, there can be no question this conduct warrants liability *unless it is privileged as constitutionally protected religious activity*. (See pp. 338–340, *infra*.)

Second, the Church's actions, if not wholly calculated to cause emotional distress, unquestionably constituted reckless disregard for the likelihood of causing emotional distress. The policy of fair game, by its nature, was intended to punish the person who dared to leave the Church. Here, the Church actively encouraged its members to destroy Wollersheim's business.

Further, by physically restraining Wollersheim from leaving the Church's ship, and subjecting him to further auditing despite his protests, the Church ignored Wollersheim's emotional state and callously compelled him to continue in a practice known to cause him emotional distress.

Third, Wollersheim suffered severe emotional distress. Indeed, his distress was such that he actively considered suicide and suffered such psychiatric injury as to require prolonged professional therapy. (See *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397, 89 Cal.Rptr. 78 [severe emotional distress "may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry"].)

Finally, there is substantial evidence the Church's conduct proximately caused the severe emotional distress. Wollersheim's bankruptcy and resulting mental distress was the direct result of the Church's declaration that he was fair game. Additionally, according to the psychiatric testimony auditing and disconnect substantially aggravated his mental illness and triggered several severe depressive episodes.

In sum, there is ample evidence to support the jury's verdict on Wollersheim's claim for intentional infliction of emotional distress. This, however, does not conclude our inquiry. As we discuss below, Wollersheim's action may nonetheless be barred if we conclude the Church's conduct was protected under the free exercise clause of the First Amendment.

II. CONSTITUTIONAL RELIGIOUS FREEDOM GUARANTEES DO NOT IMMUNIZE SCIENTOLOGY FROM LIABILITY FOR ANY OF THE ACTIONS ON WHICH WOLLERSHEIM'S INTENTIONAL INFLICTION OF EMOTIONAL INJURY CAUSE OF ACTION IS BASED

Scientology asserts all four courses of conduct comprising the intentional inflic-

tion claim are forms of religious expression protected by the Freedom of Religion clauses of the United States and California Constitutions. We conclude some would not be protected religious activity even if Wollersheim freely participated. We further conclude none of these courses of conduct qualified as protected religious activity in Wollersheim's case. Here they occurred in a coercive atmosphere appellants created through threats of retribution against those who would leave the organization. To explain our conclusions it is necessary to examine the parameters and rationale of the religious freedom provisions in some depth.

A. *The Basic Principles of the "Free Exercise" Clause*

Religious freedom is guaranteed American citizens in just 16 words in the First Amendment. "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise* thereof; . . ." (U.S. Const., Amend. I, italics added.[1])

When it was adopted, the First Amendment only applied to the federal government, not the states. (U.S. Const., 1st Amend. ["*Congress* shall make no law . . ."], emphasis added; see *Permoli v. First Municipality* (1845) 44 U.S. (3 How.) 589, 609, 11 L.Ed. 739.) However, following ratification of the Fourteenth Amendment, the First Amendment protections became enforceable against the states via the Fourteenth Amendment's due process clause. (*California v. Grace Brethren Church* (1982) 457 U.S. 393, 396 fn. 1, 102 S.Ct. 2498, 2501 fn. 1, 73 L.Ed.2d 93; *Everson v. Board of Education* (1947) 330 U.S. 1, 8, 67 S.Ct. 504, 508, 91 L.Ed. 711.)

"[T]he application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power. When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred." (*Paul v. Watchtower Bible & Tract Soc. of New York* (9th Cir.1987) 819 F.2d 875, 880; accord *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1114, 252 Cal.Rptr. 122, 762 P.2d 46 ["judicial sanctioning of tort recovery constitutes state action sufficient to invoke the same constitutional protections applicable to statutes and other legislative actions"]; see *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 277, 84 S.Ct. 710, 724, 11 L.Ed.2d 686.)

[3] As can be seen, the First Amendment creates two very different protections. The "establishment clause"—actually an "*anti*-establishment clause"—guarantees us the government will not use its resources to impose religion on us. The "free exercise clause," on the other hand, guarantees us government will not prevent its citizens from pursuing any religion we choose.

[4] The "establishment clause" comes into play when a government policy has the effect of promoting religion—as by financing religious schools or requiring religious prayers in public schools, and the like. These policies violate the establishment clause unless they survive a three-part test. They must have a secular purpose. Their primary effects must be ones which neither advance nor inhibit religion. And they must avoid any excessive entanglements with religion. (*Lemon v. Kurtzman* (1971) 403 U.S. 602, 612–613, 91 S.Ct. 2105, 2111–2112, 29 L.Ed.2d 745; see also *Committee for Public Education v. Nyquist* (1973) 413 U.S. 756, 773, 93 S.Ct. 2955, 2965, 37 L.Ed.2d 948; *Abington School Dist. v. Schempp* (1963) 374 U.S. 203, 222, 83 S.Ct. 1560, 1571, 10 L.Ed.2d 844.) The "free exercise clause," in contrast to the "establishment clause," was adopted without debate or comment when the First Congress deliberated the Bill of Rights. (Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1978).) Thus the courts have turned to other writings by those responsible for the Bill of

1. All discussion in this opinion as to the freedom of religion provisions of the U.S. Constitution applies also to appellants' claims under article I, section 4 of the California Constitution which guarantees "[f]ree exercise and enjoyment of religion without discrimination or preference."

Rights, especially James Madison and Thomas Jefferson, to divine the meaning of "free exercise of religion."

[5, 6] The subsequent cases interpreting these four words make it clear that while the free exercise clause provides absolute protection for a person's religious *beliefs*, it provides only limited protection for the *expression* of those beliefs and especially *actions* based on those beliefs. (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 303–304, 60 S.Ct. 900, 903–904, 84 L.Ed. 1213.) Freedom of belief is absolutely guaranteed, freedom of action is not. Thus government cannot constitutionally burden any belief no matter how outlandish or dangerous. But in certain circumstances it can burden an expression of belief which adversely affects significant societal interests. To do so, the burden on belief must satisfy a four-part test: First, the government must be seeking to further an important—and some opinions suggest a compelling—state interest. Secondly, the burden on expression must be essential to further this state interest. Thirdly, the type and level of burden imposed must be the minimum required to achieve the state interest. Finally, the measure imposing the burden must apply to everyone, not merely to those who have a religious belief; that is, it may not discriminate against religion.

A straightforward exposition of three prongs of this test is found in *United States v. Lee* (1981) 455 U.S. 252, 257–258, 102 S.Ct. 1051, 1055–1056, 71 L.Ed.2d 127 where the Supreme Court held: "The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. (Citations omitted.)" All four are mentioned in *Braunfeld v. Brown* (1961) 366 U.S. 599, 607, 81 S.Ct. 1144, 1148, 6 L.Ed.2d 563: "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid.... But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." (See also *Thomas v. Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 717–718, 101 S.Ct. 1425, 1431–1432, 67 L.Ed.2d 624; *Wisconsin v. Yoder* (1972) 406 U.S. 205, 220, 92 S.Ct. 1526, 1535, 32 L.Ed.2d 15; *Gillette v. United States* (1971) 401 U.S. 437, 462, 91 S.Ct. 828, 842, 28 L.Ed.2d 168; *Sherbert v. Verner* (1963) 374 U.S. 398, 402–403, 83 S.Ct. 1790, 1793–1794, 10 L.Ed.2d 965; *Cantwell v. Connecticut, supra*, 310 U.S. at pp. 304–305, 60 S.Ct. at pp. 903–904.)

[7] A review of the Supreme Court's "free exercise" rulings also makes it apparent the four critical factors are interrelated. Roughly speaking, the heavier the burden the government imposes on the expression of belief and the more significant the particular form of expression which is burdened, the more important the state interest must be. Or to put it the other way around, the more important the interest the state seeks to further, the heavier the burden it can constitutionally impose on the more important forms of expressing religious belief. Thus, only the most compelling of state interest—such as the preservation of life or of the state itself—will justify an outright ban on an important method of expressing a religious belief. (See, e.g., *Reynolds v. United States* (1878) 98 U.S. 145, 164, 25 L.Ed. 244 [polygamy can be outlawed even though a central religious tenet of the Mormon religion because it "has always been odious among the northern and western nations of Europe, ... and from the earliest history of England has been treated as an *offence against society.*" [Italics added.]]; *Prince v. Massachusetts* (1943) 321 U.S. 158, 170, 64 S.Ct. 438, 444, 88 L.Ed. 645 [parents can be prohibited from allowing their children to distribute religious literature even though this is a religious duty required in order to avoid "everlasting destruction at Armageddon" where necessary to protect the health and safety of youth]; *Jacobson v. Massachusetts* (1904) 197 U.S. 11, 26, 25 S.Ct. 358, 361, 49 L.Ed. 643 [adults and children can be compelled to be vacci-

nated for communicable diseases even though their religious beliefs oppose vaccination because as was observed in *Prince v. Massachusetts, supra*, 321 U.S. at pp. 166–167, 64 S.Ct. at pp. 442–443, "[T]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death"].)

[8] But a less significant state interest may be enough where the burden is less direct or the form of expression less central to the exercise of the particular religion. (See, e.g., *Goldman v. Weinberger* (1986) 475 U.S. 503, 509–510, 106 S.Ct. 1310, 1314–1315, 89 L.Ed.2d 478 where the military's apparently rather marginal interest in absolutely uniform attire was enough to justify an outright ban against a Jewish officer's apparently rather marginal form of religious expression in wearing a yarmulke [a religious cap] indoors.) In *Bowen v. Roy* (1986) 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735, disapproved on other grounds in *Hobbie v. Unemployment Appeals Commission* (1987) 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190, the U.S. Supreme Court found the Federal government's interest in administrative convenience in preventing fraud in a benefit program was enough to justify the minimal burden of denying benefits to those who because of religious beliefs refuse to obtain and reveal social security numbers. *Braunfeld v. Brown, supra*, 366 U.S. 599, 605, 81 S.Ct. 1144, 1146 [governmental interest in prohibiting economic activity on Sundays is enough to justify imposing the burden of an economic loss on those orthodox Jews who choose to exercise their religious belief that they not work on Saturdays and thus lose two rather than only one day's opportunity to earn money. "[T]he case before us ... does not make *unlawful* any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs *more expensive*"], (italics added.)

[9] We now apply the above principles to the four courses of conduct alleged in Wollersheim's intentional infliction of emotional injury cause of action. To be entitled to constitutional protections under the Freedom of Religion clauses any course of conduct must satisfy three requirements. First, the system of thought to which the course of conduct relates must qualify as a "religion" not a philosophy or science or personal preference. Thus, it is unlikely a psychiatrist could successfully shield himself from malpractice by asserting he was merely practicing the "religion" of psychotherapy and following the "religious" teachings of Freud and Jung. Secondly, the course of conduct must qualify as an expression of that religion and not just an activity that religious people happen to be doing. Thus, driving a Sunday School bus does not constitute a religious practice merely because the bus is owned by a religion, the driver is an ordained minister of the religion, and the bus is taking church members to a religious ceremony. (See *Malloy v. Fong* (1951) 37 Cal.2d 356, 373, 232 P.2d 241 [religious organization held liable for employee's negligent driving]; *Meyers v. S.W. Reg. Con. Ass'n. of Seventh Day Adv.* (1956) 230 La. 310, 88 So.2d 381, 386 [First Amendment does not bar minister's workers' compensation action against church for injuries arising from auto accident which occurred when minister was traveling to church conference].) And, thirdly, the religious expression must not inflict so much harm that there is a compelling state interest in discouraging the practice which outweighs the values served by freedom of religion. Thus, the fact polygamy was a central practice of the Mormon religion was not enough to qualify it for constitutional protection from state governments which desired to ban this practice.

This means we must first ask three questions as to each of the four courses of conduct Wollersheim alleged against Scientology. (1) Does Scientology qualify as a religion? (2) If so, is the course of conduct at issue an expression of the religion of Scientology? (3) If it is, does the public nevertheless have a compelling secular interest in discouraging this course of conduct even though it qualifies as a religious

expression of the Scientology religion? After answering these three questions, however, the special circumstances of this case require us to ask a fourth. Did Wollersheim participate in this course of conduct voluntarily or did Scientology coerce his continued participation through the threat of serious sanctions if he left the religion?

The threshold question for all four courses of conduct is whether Scientology qualifies as a religion. As will be recalled, at the law-and-motion stage, a judge granted summary adjudication on this issue. That court ruled Scientology indeed was a religion. And at the trial stage, another judge reinforced this ruling by submitting the case to the jury with an instruction that Scientology is a religion.

[10] As a result of the law-and-motion judge's decision on this question, evidence was not introduced at trial on the specific issue of whether Scientology is a religion. Given that vacuum of information, it would be presumptuous of this court to attempt a definitive decision on this vital question. We note other appellate courts have observed this remains a very live and interesting question. (See *Founding Church of Scientology v. United States* (D.C.Cir. 1969) 409 F.2d 1146, 1160–1161; *Founding Church of Scientology v. Webster* (D.C.Cir. 1986) 802 F.2d 1448, 1451 ["whether Scientology is a religious organization, a for-profit private enterprise, or something far more extraordinary [is] an intriguing question that this suit does not call upon us to examine...."].) However, we have no occasion to go beyond a review of the summary adjudication decision the trial court reached at the law-and-motion stage. In reviewing this decision, we find that on the evidence before the court the judge properly ruled Scientology qualifies as a religion within the meaning of the Freedom of Religion Clauses of the United States and California Constitutions.

This brings us to the remaining three questions as to each of the four courses of conduct: Is the conduct a "religious practice"? If so, is there a compelling secular interest in requiring compensation for the injuries attributable to that practice? If the constitutional immunity is not overridden by a compelling state interest in the ordinary situation, is it nevertheless stripped away here because the religion coerced the injured member into continuing his participation in the practice?

B. *Even Assuming the Retributive Conduct Sometimes Called "Fair Game" Is a Core Practice of Scientology It Does Not Qualify for Constitutional Protection*

[11] As we have seen, not every religious expression is worthy of constitutional protection. To illustrate, centuries ago the inquisition was one of the core religious practices of the Christian religion in Europe. This religious practice involved torture and execution of heretics and miscreants. (See generally Peters, Inquisition (1988); Lea, The Inquisition of the Middle Ages (1961).) Yet should any church seek to resurrect the inquisition in this country under a claim of free religious expression, can anyone doubt the constitutional authority of an American government to halt the torture and executions? And can anyone seriously question the right of the victims of our hypothetical modern day inquisition to sue their tormentors for any injuries—physical or psychological—they sustained?

We do not mean to suggest Scientology's retributive program as described in the evidence of this case represented a full-scale modern day "inquisition." Nevertheless, there are some parallels in purpose and effect. "Fair game" like the "inquisition" targeted "heretics" who threatened the dogma and institutional integrity of the mother church. Once "proven" to be a "heretic," an individual was to be neutralized. In medieval times neutralization often meant incarceration, torture, and death. (Peters, Inquisition, *supra*, pp. 57, 65–67, 87, 92–94, 98, 117–118, 133–134; Lea, The Inquisition of the Middle Ages, *supra*, pp. 181, 193–202, 232–236, 250–264, 828–829.) As described in the evidence at this trial the "fair game" policy neutralized the "heretic" by stripping this person of his or her economic, political and psychological power. (See, e.g., *Allard v. Church of Scientology*

(1976) 58 Cal.App.3d 439, 444, 129 Cal. Rptr. 797 [former church member falsely accused by Church of grand theft as part of "fair game" policy, subjecting member to arrest and imprisonment].)

In the instant case, at least, the prime focus of the "fair game" campaign was against the "heretic" Wollersheim's economic interests. Substantial evidence supports the inference Scientology set out to ruin Wollersheim's photography enterprise. Scientologists who worked in the business were instructed to resign immediately. Scientologists who were customers were told to stop placing orders with the business. Most significantly, those who owed money for previous orders were instructed to renege on their payments. Although these payments actually were going to a factory not Wollersheim, the effect was to deprive Wollersheim of the line of credit he needed to continue in business.

Appellants argue these "fair game" practices are protected religious expression. They cite to a recent Ninth Circuit case upholding the constitutional right of the Jehovah's Witness Church and its members to "shun" heretics from that religion even though the heretics suffer emotional injury as a result. (*Paul v. Watchtower Bible & Tract Soc. of New York, supra*, 819 F.2d 875.) In this case a former Jehovah's Witness sued the church and certain church leaders for injuries she claimed to have suffered when the church ordered all other church members to "shun" her. In the Jehovah Witness religion, "shunning" means church members are prohibited from having any contact whatsoever with the former member. They are not to greet them or conduct any business with them or socialize with them in any manner. Thus, there was a clear connection between the religious practice of "shunning" and Ms. Paul's emotional injuries. Nonetheless, the trial court dismissed her case. The Ninth Circuit affirmed in an opinion which expressly held "shunning" is a constitutionally protected religious practice. "[T]he defendants, ... possess an affirmative defense of privilege—a defense that permits them to engage in the practice of shunning pursuant to their religious beliefs without incurring tort liability." (*Id.* at p. 879.)

We first note another appellate court has taken the opposite view on the constitutionality of "shunning." (*Bear v. Reformed Mennonite Church* (1975) 462 Pa. 330, 341 A.2d 105.) In this case the Pennsylvania Supreme Court confronted a situation similar to *Paul v. Watchtower Bible & Tract Soc. of New York*. The plaintiff was a former member of the Mennonite Church. He was excommunicated for criticizing the church. Church leaders ordered that all members must "shun" the plaintiff. As a result, both his business and family collapsed. The appellate court reversed the trial court's dismissal of the action, holding: "In our opinion, the complaint, ... raises issues that the 'shunning' practice of appellee church and the conduct of the individuals may be an excessive interference within areas of 'paramount state concern,' i.e., the maintenance of marriage and family relationship, alienation of affection, and the tortious interference with a business relationship, which the courts of this Commonwealth *may* have authority to regulate, even in light of the 'Establishment' and 'Free Exercise' clauses of the First Amendment." (*Bear v. Reformed Mennonite Church, supra*, 341 A.2d at p. 107, emphasis in original.)

We observe the California Supreme Court has cited with apparent approval the viewpoint on "shunning" expressed in *Bear v. Mennonite Church, supra*, rather than the one adopted in *Paul v. Watchtower Bible & Tract Soc. of New York, supra*. (See *Molko v. Holy Spirit Assn., supra*, 46 Cal.3d 1092, 1114, 252 Cal.Rptr. 122, 762 P.2d 46.) But even were *Paul v. Watchtower Bible & Tract Soc. of New York* the law of this jurisdiction it would not support a constitutional shield for Scientology's retribution program. In the instant case Scientology went far beyond the social "shunning" of its heretic, Wollersheim. Substantial evidence supports the conclusion Scientology leaders made the deliberate decision to ruin Wollersheim economically and possibly psychologically. Unlike the plaintiff in *Paul v. Watchtower Bible & Tract Soc. of New York*, Wollersheim did

not suffer his economic harm as an unintended byproduct of his former religionists' practice of refusing to socialize with him any more. Instead he was bankrupted by a campaign his former religionists carefully designed with the specific intent it bankrupt him. Nor was this campaign limited to means which are arguably legal such as refusing to continue working at Wollersheim's business or to purchase his services or products. Instead the campaign featured a concerted practice of refusing to honor legal obligations Scientologists owed Wollersheim for services and products they already had purchased.

If the Biblical commandment to render unto Caesar what is Caesar's and to render unto God what is God's has any meaning in the modern day it is here. Nothing in *Paul v. Watchtower Bible & Tract Soc. of New York* or any other case we have been able to locate even implies a religion is entitled to constitutional protection for a campaign deliberately designed to financially ruin anyone—whether a member or non-member of that religion. Nor have we found any cases suggesting the free exercise clause can justify a refusal to honor financial obligations the state considers binding and legally enforceable. One can only imagine the utter chaos that could overtake our economy if people who owed money to others were entitled to assert a freedom of religion defense to repayment of those debts. It is not unlikely the courts would soon be flooded with debtors who claimed their religion prohibited them from paying money they owed to others.

We are not certain a deliberate campaign to financially ruin a former member or the dishonoring of debts owed that member qualify as "religious practices" of Scientology. But if they do, we have no problem concluding the state has a compelling secular interest in discouraging these practices. (See pp. 338–340, *supra*.) Accordingly, we hold the Freedom of Religion guarantees of the U.S. and California Constitutions do not immunize these practices from civil liability for any injuries they cause to "targets" such as Wollersheim.

C. *"Auditing" Is a Constitutionally Protected Religious Practice Where It Is Conducted in a Non-coercive Environment But Is Not Protected Where Conducted Under a Threat of Economic, Psychological and Political Retribution as It Was Here*

[12] Auditing is a process of one-on-one dialogue between a Scientology "auditor" and a Scientology student. The student ordinarily is connected to a crude lie detector, a so-called "E-Meter." The auditor asks probing questions and notes the student's reactions as registered on the E-Meter.

Through the questions, answers, and E-meter readings, the auditor seeks to identify the student's "n-grams" or "engrams." These "engrams" are negative feelings, attitudes, or incidents that act as blockages preventing people from realizing their full potential and living life to the fullest. Since Scientology holds the view people actually have lived many past lives over millions of years they carry "engrams" accumulated during those past lives as well as some from their present ones. Once the auditor identifies an "engram" the auditor and the student work to surface and eliminate it. The goal is to identify and eliminate all the student's engrams so he or she can achieve the state of "clear." Students can pass through several levels of "auditing" en route to ever higher states of "clear."

Auditing performs a similar function for Scientology as sermons and other forms of mass persuasion do for many religions. In those religions, ministers, priests or other clergy preach to the multitude in order to bring their adherents into line with the religion's principles. Scientology instead emphasizes a one-on-one approach—the "auditing" process—to accomplish the same purpose.

At the law-and-motion stage, the trial court granted summary adjudication that "auditing" is a "religious practice" of Scientology. Once again, our review of the trial court decision reveals that on the basis of the evidence before the court on that occasion, the ruling is correct. Thus for

purposes of this appeal we find "auditing" qualifies as a "religious practice" just as Scientology qualifies as a "religion."

Having found for purposes of this appeal that Scientology is a religion and auditing is a religious practice, we must next ask whether the state has a "compelling interest" in awarding compensation for any harm auditing may cause which outweighs the values served by the religious expression guarantees of the constitution.

We first note we have already held there was substantial evidence to support a jury finding that what happened during the "auditing" process, along with Scientology's other conduct toward Wollersheim, caused this particular adherent serious emotional injury. We further found substantial evidence Scientology leaders were aware of Wollersheim's psychological weakness and yet continued practices during auditing sessions which caused the kinds of psychological stress that led to his mental breakdown. Thus, there is adequate proof the religious practice of auditing caused real harm in this instance to this individual and that appellants' outrageous conduct caused that harm. Furthermore, there is sufficient evidence to support a conclusion that despite their knowledge auditing was aggravating Wollersheim's serious psychological problems appellants deliberately insisted he not seek help from professional psychotherapists. None of this, however, means auditing represents such a threat of harm to society that the state has a compelling interest in awarding compensation which overcomes the values served by the religious expression guarantees of the constitution.

To better understand why we conclude *voluntary* auditing may be entitled to immunity from liability for the emotional injuries it causes, consider some analogies. Assume Wollersheim were not a former Scientologist, but a former follower of one of the scores of Christian denominations. Further assume he sued on grounds a preacher's sermons filled him with such feelings of inferiority and guilt his manic-depressive condition was aggravated to the same degree Wollersheim contends auditing aggravated his mental illness in this case. Or assume another Wollersheim sued another church for a similar emotional injury on grounds his mental illness had been triggered by what a cleric told him about his sins during a confession—or series of confessions. It is one of the functions of many religions to "afflict the comfortable"—to deliberately generate deep psychological discomfort as a means of motivating "sinners" to stop "sinning." Whether by "hell fire and damnation" preaching, "speaking in tongues," private chastising, or a host of subtle and not so subtle techniques religion seeks to make us better people.

Many of these techniques are capable of inflicting emotional distress severe enough that it is foreseeable some with psychiatric problems will "crack" or be driven into a deep depression. But the constitution values the good religion does for the many more than the psychological injury it may inflict on the few. Thus, it cannot tolerate lawsuits which might chill religious practices—such as auditing, "hell fire and damnation" preaching, confessions, and the like—where the only harm which occurs is emotional injury to the psychologically weak.

[13] There is an element present in the instant case, however, that reduces the religious value of the "auditing" practiced on Wollersheim and increases its harm to the community. This is the element of coercion. Scientology, unlike most other religions or organizations claiming a religious purpose, uses various sanctions and the threat of sanctions to induce continued membership in the Church and observance of its practices. These sanctions include "fair game", "freeloader debt" and even physical restraint. There was nothing in the evidence presented at this trial suggesting new recruits and members undergoing lower-level "auditing" were subject to sanctions if they decided to leave. Nor was there evidence these recruits or "lower level" auditors would be aware any program of sanctions even existed and thus might be intimidated by it. But there was evidence others, like Wollersheim, who rose

to higher levels of auditing and especially those, like Wollersheim, who became staff members—the rough equivalent of becoming a neophyte priest or minister—were aware of these sanctions and what awaited them if they chose to "defect." Thus, their continued participation in "auditing" and the other practices of Scientology was not necessarily voluntary.

Wollersheim was familiar with the whole spectrum of sanctions and indeed was the target of some during and after his affiliation with Scientology. He first learned of one of these forms of retribution, "fair game," in 1970. He also knew that, despite the Church's public rejection of the fair game practice, it continued to use fair game against targeted ex-Scientologists throughout the 1970's. Under Scientology's "fair game" policy, someone who threatened Scientology by leaving the church "may be deprived of property or injured by any means by a Scientologist.... [The targeted defector] may be tricked, sued or lied to or destroyed."

Wollersheim feared "fair game" would be practiced against him if he refused further auditing and left the Church of Scientology. As described in the previous section, those fears proved to be accurate. Scientology leaders indeed became very upset by his defection and retaliated against his business.

But "fair game" was not the only sanction which Scientology held over Wollersheim's head during his years as an "upper level" auditor and occasional staff member. Scientology also used a tactic called "freeloader debt" as a means of coercing Wollersheim's continued participation in the church and obedience to its practices. "Freeloader debt" was devised by Scientology founder L. Ron Hubbard as a means of punishing members who, inter alia, chose to leave the Church or refused to disconnect from a suppressive person.

"Freeloader debt" was accumulated when a staff member received Church courses, training or auditing at a reduced rate. The Church maintained separate records which listed the discounts allowed. If the member later chose to leave, he or she was presented with a bill for the difference between the full price normally charged to the public and the price originally charged to the member.[2] A person who stayed in the Church for five years could easily accumulate a "freeloader debt" of between $10,000 and $50,000. Wollersheim was familiar with the "freeloader debt" policy as well as the "fair game" policy. He also knew the Church was recording the courses and auditing sessions he was receiving at the discounted rate. The threat of facing that amount of debt represented a powerful economic sanction acting to coerce continued participation in auditing as the core religious practice of the Church of Scientology.

There also was evidence Wollersheim accepted some of his auditing under threat of *physical* coercion. In 1974, despite his repeated objections, Wollersheim was induced to participate in auditing aboard a ship Scientology maintained as part of its Rehabilitation Project Force. The Church obtained Wollersheim's attendance by using a technique dubbed "bait and badger." As the name suggests, this tactic deployed any number of Church members against a recalcitrant member who was resisting a Church order. They would alternately promise the "bait" of some reward and "badger" him with verbal scare tactics. In the instant case, five Scientologists "baited and badgered" Wollersheim continuously for three weeks before he finally gave in and agreed to attend the Rehabilitation Project Force.

But these verbal threats and psychological pressure tactics were only the beginning of Wollersheim's ordeal. While on the ship, Wollersheim was forced to undergo a strenuous regime which began around 6:00 A.M. and continued until 1:00 the next morning. The regime included mornings of

2. During the 1970's a staff member was paid approximately $17 per week for an expected 50 hours of work. In 1973, Wollersheim earned between $10 to $18 per week when he worked at the Celebrity Center as a staff member. This salary was augmented by an occasional $10 bonus.

menial and repetitive cleaning of the ship followed by an afternoon of study or co-auditing. The evenings were spent working and attending meetings or conferences. Wollersheim and others were forced to sleep in the ship's hole. A total of thirty people were stacked nine high in this hole without proper ventilation. During his six weeks under these conditions, Wollersheim lost 15 pounds.

[1a][1b]Ultimately, Wollersheim felt he could bear the regime no longer. He attempted to escape from the ship because as he testified later: "I was dying and losing my mind." But his escape effort was discovered. Several Scientology members seized Wollersheim and held him captive. They released him only when he agreed to remain and continue with the auditing and other "religious practices" taking place on the vessel.

One of the psychiatric witnesses testified that in her opinion Wollersheim's experience on the ship was one of five cataclysmic events underlying her diagnosis of his mental illness and its cause. As the psychiatrist reported, following this incident, Wollersheim felt the Church "broke him." In any event, this episode demonstrated the Church was willing to physically coerce Wollersheim into continuing with his auditing. Moreover they were willing to do so even when it was apparent this practice was causing him serious mental distress and he preferred to cease or at least suspend this particular religious practice. Not only was the particular series of auditing sessions on the ship conducted under threat of physical compulsion, but the demonstrated willingness to use physical coercion infected later auditing sessions. The fact the Church was willing to use physical coercion on this occasion to compel Wollersheim's continued participation in auditing added yet another element to the coercive environment under which he took part in the auditing process.

There was substantial evidence here from which the jury could have concluded Wollersheim was subjecting himself to auditing because of the coercive environment with which Scientology had surrounded him. To leave the church or to cease auditing he had to run the risk he would become a target of "fair game", face an enormous burden of "freeloader debt", and even confront physical restraint. A religious practice which takes place in the context of this level of coercion has less religious value than one the recipient engages in voluntarily. Even more significantly, it poses a greater threat to society to have coerced religious practices inflicted on its citizens.

There are important analogies to *Molko v. Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092, 252 Cal.Rptr. 122, 762 P.2d 46. In *Molko* the California Supreme Court held a religious organization could be held civilly liable for using deception and fraud to *seduce* new recruits *into the church*.[3] In that case the church concealed from new recruits the fact they were enlisting in the Unification Church. The plaintiffs argued the Unification Church psychologically and physically coerced them into accepting the Church and, therefore, they were unable to refuse formally joining once the Church's true identity was revealed. (*Id.* at pp. 1108–1109, 252 Cal.Rptr. 122, 762 P.2d 46.) The Supreme Court agreed and further concluded there was no constitutional infirmity to bar the action.

"We conclude, ... that although liability for deceptive recruitment practices imposes a marginal burden on the Church's free exercise of religion, the burden is justified by the compelling state interest in protecting individuals and families from the substantial threat to public safety, peace and order posed by the fraudulent induction of unconsenting individuals into an atmosphere of coercive persuasion." (*Id.* at p. 1118, 252 Cal.Rptr. 122, 762 P.2d 46.)

3. In *Molko*, two plaintiffs brought actions against the Unification Church for, inter alia, fraud and intentional infliction of emotional distress based upon the Unification Church's initial misrepresentations concerning its religious affiliation. The Supreme Court held the First Amendment did not bar the plaintiffs' claims to the extent they were based upon actual coercive conduct by the Unification Church as opposed to merely the threat of divine retribution should the plaintiffs leave.

Here Scientology used *coercion*—"fair game," "freeloader debt," and in this instance, at least, physical restraint, along with the threat one or more of these sanctions will be deployed—to prevent its members from *leaving* the Church. This coercion is similar to the coercion found in *Molko* and far different from the threats of *divine* retribution our Supreme Court held was non-actionable. (*Id.* at pp. 1120, 1122, 252 Cal.Rptr. 122, 762 P.2d 46 ["To the extent the claims are based merely on threats of divine retribution if [the plaintiffs] left the church, they cannot stand"].) Instead, Scientology promised—and in this case delivered—retribution in the here and now.

In *O'Moore v. Driscoll* (1933) 135 Cal. App. 770, 28 P.2d 438 cited with approval by the California Supreme Court in *Molko v. Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092, 1114, 252 Cal.Rptr. 122, 762 P.2d 46, a Catholic priest sued a Catholic organization and an ordained priest for false imprisonment when the plaintiff was restrained in an asylum run by the Catholic Church to compel his confession to criminal acts. The practice of confessing one's sins is an established religious practice of the Catholic church. But that did not immunize the defendants from liability for harm the plaintiff suffered where the religious practice was imposed on him in a coercive environment. (*Id.* at p. 774, 28 P.2d 438.)

In the instant case except for the experience on the ship the coercion was more subtle than physical restraint. Yet the threat of "fair game" and "freeloader debt" and even the possibility of future physical restraint loomed over Wollersheim whenever he contemplated leaving Scientology and terminating auditing or the other practices of that religion.

It is not only the acts of coercion themselves—the sabotage of Wollersheim's business and the episode of captivity on the ship—which are actionable. These acts of coercion and the threat of like acts make the Church's [illegible] other harmful conduct actionable as well. No longer is Wollersheim's continued participation in auditing (or for that matter, his compliance with the "disconnect" order) merely his *voluntary* participation in Scientology's religious practices. The evidence establishes Wollersheim was coerced into remaining a member of Scientology and continuing with the auditing process. Constitutional guarantees of religious freedom do not shield such conduct from civil liability. We hold the state has a compelling interest in allowing its citizens to recover for serious emotional injuries they suffer through religious practices they are coerced into accepting. Such conduct is too outrageous to be protected under the constitution and too unworthy to be privileged under the law of torts.

We further conclude this compelling interest outweighs any burden such liability would impose on the practice of auditing. We concede as the California Supreme Court did in *Molko* that allowing tort liability for this conduct imposes some burden on appellants' free exercise of this religion.[4] Despite the possibility of liability Scientologists can still *believe* it serves a religious purpose to impose and threaten to impose various sanctions on staff members or upper level auditors who might leave the church or cease its core religious practices. But it does place a burden on Scientologists should they act on that belief. Scientology would be subject to possible monetary loss if someone suffers severe psychological harm during auditing where that auditing is conducted under the threat of these sanctions. Likewise, Scientology may lose some staff members and upper level auditors who would not continue in the Church or continue to submit to the core practice of auditing except for their fears of retribution.

4. "While such liability does not impair the Church's right to believe in recruiting through deception, its very purpose is to discourage the Church from putting such belief into practice by subjecting the church to possible monetary loss for doing so. Further, liability presumably impairs the Church's ability to convert nonbelievers, because some potential members who would have been recruited by deception will choose not to associate with the Church when they are told its true identity." (*Molko v. Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092, 1117, 252 Cal.Rptr. 122, 762 P.2d 46.)

Like the Supreme Court in *Molko*, however, we find these burdens "while real, are not substantial" and, moreover, are the minimum required to achieve the state interest. To borrow from the high court's language in *Molko*: "Being subject to liability [for coerced auditing] does not in any way or degree prevent or inhibit [Scientologists] from operating their religious communities, worshipping as they see fit, freely associating with one another, selling or distributing literature, proselytizing on the street, soliciting funds, or generally spreading [L. Ron Hubbard's] message among the population. It certainly does not, ... compel [Scientologists] to perform acts 'at odds with fundamental tenets of their religious beliefs.' [Citation omitted.]" (*Molko v. Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092, 1117, 252 Cal.Rptr. 122, 762 P.2d 46.)

Most significantly, by imposing liability in the instant case we "in no way or degree prevent or inhibit" Scientology from continuing the free exercise of the religious practice of auditing. Returning to the words of the Supreme Court: "At most, it potentially closes one questionable avenue for coercing certain members to remain in the church and to continue its core practices such as auditing." (46 Cal.3d at p. 1117, 252 Cal.Rptr. 122, 762 P.2d 46.)

D. *The "Disconnect" Policy Is Not a Constitutionally Protected Religious Practice in the Circumstances of This Case*

[14] Substantial evidence supports the conclusion Scientology encouraged Wollersheim to "disconnect" from family members, including his wife and parents. Furthermore, substantial evidence supports the conclusion Scientology has a general policy of encouraging members to "disconnect" from non-Scientologists who oppose Scientology or express reservations about its teachings.

The first question is whether the "disconnect" policy qualifies as a "religious practice" of Scientology. The trial court did not grant summary adjudication on this factual issue. Nonetheless, we find the evidence supported the conclusion disconnect is a "religious practice." "Disconnect" is similar in purpose and effect to the "shunning" practiced by Jehovah's Witnesses and Mennonites, among others. It also shares some attributes with the remote monasteries common to many other religions. All of these practices serve to isolate members from those, including family members, who might weaken their adherence to the religion. Courts have held these policies qualify as "religious practices" of other religions. (See, e.g., *Paul v. Watchtower Bible & Tract Soc. of New York*, *supra*, 819 F.2d 875, 879–880; *Rasmussen v. Bennet* (Mont.1987) 741 P.2d 755 [Church statements condemning plaintiffs' conduct and calling for shunning were privileged under the First Amendment].) We see no justification for treating Scientology's "disconnect" policy differently and thus hold it is a "religious practice".

We recognize the "shunning" cases have involved claims brought by former church members *whom other family members were ordered to shun*. The instant case, in contrast, involves a cause of action brought by a former church member *ordered to shun the rest of his family* not the other way around. In the circumstances of this case this is a distinction without a difference. Here appellants caused Wollersheim to isolate himself from his parents, wife and other family members even though appellants had reason to know it would inflict serious emotional injury on him. The injury to him and to the family was just as severe as if his family had "shunned" him.

We need not and do not reach the question whether the practice of "disconnect" is constitutionally protected religious activity in ordinary circumstances. (Contrast *Paul v. Watchtower Bible & Tract Soc. of New York*, *supra*, 819 F.2d 875 [religion cannot be held civilly liable to shunned former member because "shunning" is constitutionally protected] with *Bear v. Reformed Mennonite Church*, *supra*, 341 A.2d 105 [religion may be civilly liable to shunned former member because "shunning" must yield to compelling state interest in promoting family relations].) Wheth-

er or not the "disconnect" policy is constitutionally protected when practiced in a voluntary context it is not so protected if practiced in the coercive environment appellants imposed on Wollersheim. The reasons are the same as apply to "auditing." (See p. 337, *supra*.) Substantial evidence supports the finding Scientology created this coercive environment and Wollersheim continued to submit to the practices of the church such as "disconnect" because of that coercion. Furthermore, the evidence in the instant case is sufficient to support a factual finding appellants imposed the "disconnect" policy on Wollersheim with the knowledge he was psychologically susceptible and therefore would suffer severe emotional injury as a result. Accordingly, in the circumstances of this case, the free exercise clause did not immunize appellants from liability for the "disconnect" policy practiced on respondent.

E. *Scientology's Improper Disclosure of Information Wollersheim Gave During Confidential Religious Sessions Is Not Religious Expression Immunized From Liability by the Constitution*

There is substantial evidence Wollersheim divulged private information during auditing sessions under an explicit or implicit promise the information would remain confidential. Moreover, there is substantial evidence Scientology leaders and employees shared this confidential information and used it to plan and implement a "fair game" campaign against Wollersheim. Scientology argues there also is substantial evidence in the record supporting its defense that Scientology leaders and employees shared this confidential information only in accordance with normal procedures and for the purpose of gaining the advice and assistance of more experienced Scientologists in evaluating Wollersheim's auditing sessions. However, the jury was entitled to disregard this innocent explanation and to believe Wollersheim's version of how and why Scientology divulged information he had supplied in confidence.

[15] The intentional and improper disclosure of information obtained during auditing sessions for non-religious purposes can hardly qualify as "religious expression." To clarify the point, we turn once again to a hypothetical situation which presents a rough analogy under a traditional religion. Imagine a stockbroker had confessed to a cleric in a confessional that he had engaged in "insider trading." Sometime later this same stockbroker leaves the church and begins criticizing it and its leadership publicly. To discredit this critic, the church discloses the stockbroker has confessed he is an insider trader. This disclosure might be said to advance the interests of the cleric's religion in the sense it would tend to discourage former members from criticizing the church. But to characterize this violation of religious confidentiality as "religious expression" would distort the meaning of the English language as well as the United States Constitution. This same conclusion applies to Scientology's disclosures of Wollersheim's confidences in the instant case. And, since these disclosures do not qualify as "religious expression" they do not qualify for protection under the freedom of religion guarantees of the constitution. (See Discussion at pp. 340–341, *supra*.)

III. THE CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL INJURY MUST BE REVERSED

[16] For reasons set forth in section II, we have concluded Scientology is not constitutionally immunized from civil liability for its cumulative course of conduct to intentionally inflict emotional injury on Wollersheim. However, this course of conduct does not supply a suitable predicate for a cause of action based on *negligent* infliction of emotional injury. These actions are potentially actionable only when they are driven by an animus which can properly qualify them as "outrageous conduct." That is, they must be done for the purpose of emotionally injuring the plaintiff, or at the least with reckless disregard about their adverse impact on plaintiff's mental health. (*Nally v. Grace Communi-*

ty Church, supra, 47 Cal.3d 278, 300, 253 Cal.Rptr. 97, 763 P.2d 948; *Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1487, 232 Cal.Rptr. 668.)

We have held in the prior section that Scientology and its leaders indeed engaged in these actions with an intent to emotionally injure Wollersheim. But this intentional activity was alleged in the intentional infliction of emotional injury count and was tried under that count. The negligence count, on the other hand, of necessity alleges a lesser degree of culpability and can be sustained only if the defendant could be liable even if the emotional injuries were caused by completely unintentional, merely negligent acts or omissions. (See *Slaughter v. Legal Process Courier Service* (1984) 162 Cal.App.3d 1236, 1249, 209 Cal.Rptr. 189; 6 Witkin, Summary of Cal.Law (9th ed. 1988) Torts, § 838, p. 195.)

In this context, Scientology is responsible only if it or any other religion could be held liable where through inadvertence something it or its leaders did damaged someone's business and thereby caused the businessman emotional injury. Or if it or any other religion could be held liable where it inadvertently revealed some information a member had disclosed in confidence as part of a religious practice like auditing or a confession. Or if it or another religion could be held liable where its functionaries inadvertently said something during auditing or a sermon or a confession which triggered a listener's nascent mental illness.

At bottom, this question of duty is a matter of weighing competing public policy considerations. (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734, 69 Cal.Rptr. 72, 441 P.2d 912; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6, 224 Cal.Rptr. 664, 715 P.2d 624.)[5] On balance, the religious freedom consideration outweighs any concern about spreading the cost of emotional injury, reducing the frequency of such emotional injuries, and the like. It is one thing to say we will impose liability when a religious organization intentionally or recklessly sets out to ruin a business or to reveal confidential information or to "audit" mercilessly or to "disconnect" a psychologically weak person from his family and thereby succeeds in emotionally injuring a member or former member of that religion. It is quite another to impose liability for negligent acts which inadvertently cause the same types of injuries. (See *Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1273, 237 Cal.Rptr. 873.)

Since we hold religious organizations owe no duty to members or former members with respect to these forms of injury, the cause of action for negligent infliction of emotional injury must be reversed. We need not, however, reverse the entire judgment.

Here, the jury found the Church liable for both negligent and intentional infliction of emotional distress. As we discussed above, there is substantial evidence to support a finding on the intentional infliction theory. We may fairly presume any damages awarded on the negligence theory are subsumed in the award for intentional infliction of emotional distress. Accordingly, any error in allowing the jury to consider the negligence theory does not affect the judgment. (See *Vahey v. Sacia* (1981) 126 Cal.App.3d 171, 179–180, 178 Cal.Rptr. 559; *Bacciglieri v. Charles C. Meek Milling Co.* (1959) 176 Cal.App.2d 822, 826, 1 Cal.Rptr. 706.)

IV. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTIONS TO DISMISS FOR FAILURE TO FILE BEFORE THE STATUTE OF LIMITATIONS HAD EXPIRED ON WOLLERSHEIM'S CAUSES OF ACTION

Scientology argues on appeal, as it did at virtually every opportunity below, that Wollersheim's causes of action are barred by the statute of limitations. At each and every juncture the various trial judges

5. "'[D]uty' is not an immutable fact of nature 'but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'" [Citation.]" (*Ballard v. Uribe, supra*, 41 Cal.3d at p. 572, fn. 6, 224 Cal.Rptr. 664, 715 P.2d 624.)

who heard these arguments rejected them. These judges ruled correctly that Wollersheim's causes of action were subject to the discovery rule. (3 Witkin, Cal.Procedure (3d ed. 1985) Actions, § 356, p. 383.) The issue in each instance, thus, was *when* Wollersheim discovered, or should have discovered, all of the elements of his cause of action against Scientology. (*See Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 407–408, 163 Cal.Rptr. 711.) The trial judges properly ruled this issue, in turn, was a jury question. (*Id.* at p. 409, 163 Cal.Rptr. 711.)

On appeal, this court is bound to uphold the jury's resolution of these factual questions unless we determine the findings are not supported by substantial evidence. After a careful review of the evidence, we conclude these findings about the timeliness of Wollersheim's filing of this case are supported by substantial evidence. Consequently, we affirm the rulings by the judges below and, furthermore, we likewise affirm the factual findings the jury impliedly made that Wollersheim did not discover and should not have discovered his causes of action until a time within the statutory period.

V. THE TRIAL COURT DID NOT COMMIT INSTRUCTIONAL ERROR OR EVIDENTIARY ERROR DURING THIS FIVE-MONTH TRIAL WHICH DENIED APPELLANTS A FAIR TRIAL OR DUE PROCESS OF LAW

Appellants' final contention is that they were denied a fair trial and due process of law because of various instructional and evidentiary rulings the court made during this five-month trial. Considering the length of the trial it is surprising appellants were able to identify so few questionable rulings.

[17] Appellants first complain the trial court erroneously denied two instructions they requested. The first of these instructions restated the elements of the cause of action for intentional infliction of emotional distress or outrageous conduct with a slant favoring appellants' position.[6]

As requested the instruction implied the jury was to disregard evidence of appellants' acts which did not fit precisely under the courses of conduct as they defined them. Actually the plaintiffs' causes of action were broader in many respects than the descriptions the appellants requested. Moreover, some of the evidence introduced at the trial related to acts relevant to issues of appellants' state of mind (intent, motivation, and the like) and whether respondent was voluntarily participating in Scientology's practices or was doing so within a coercive environment. Accordingly, the instruction as requested would have been misleading to the jury. The trial court gave an instruction which set forth the elements of the cause of action. Any amplification of that instruction should have been more accurate than the one appellants requested and less misleading as to the full scope of the jury's range of inquiry. Thus it was not error to refuse to give this instruction.

[18] Appellants also complain about the refusal of one of their requested instructions ordering the jury in very specific

6. The requested instruction reads:

"Plaintiff's claim for intentional infliction of emotional distress, or outrageous conduct, is divided into several parts. [¶] First, plaintiff's claim that defendant engaged in outrageous conduct by subjecting plaintiff to its practice of auditing—which, as I shall instruct you, is the central religious practice of the religion of Scientology. [¶] Second, plaintiff claims that defendant caused plaintiff to separate from his family and friends as a condition for remaining in Scientology. [¶] Third, plaintiff claims that defendant 'attacked plaintiff's business' and induced those of his employees who were Scientologists to leave his employ. [¶] Fourth, plaintiff claims that defendant disclosed his auditing files in disregard of alleged promises of confidentiality to persons not authorized to receive them. [¶] All of these acts were allegedly undertaken to inflict severe emotional distress upon the plaintiff. [¶] The plaintiff is restricted in this case to the claims he set forth in his complaint. Evidence of any purported acts of the defendant not relating to the four categories I have just described to you may not be considered in determining whether plaintiff has established that defendant committed the tort of intentional infliction of emotional distress [App. A306–07]."

fashion to disregard evidence presented which was relevant to the non-suited fraud counts. Again, the requested instruction was stated in overbroad terms and unduly slanted in appellants' direction. For instance, as requested, it instructed the jury that "it must disregard evidence presented in this trial regarding statements purportedly made to [the plaintiff] to induce his participation in defendant church." If given, this instruction could have misled the jury into believing it must disregard evidence which provided context for the intentional infliction count or which went to the presence or absence of coercion and appellants' state of mind. So once again it was not error to refuse these instructions. (See *Wank v. Richman & Garrett* (1985) 165 Cal.App.3d 1103, 1113, 211 Cal.Rptr. 919; *Lubek v. Lopes* (1967) 254 Cal.App.2d 63, 73, 62 Cal.Rptr. 36.)

In any event, on reviewing the total evidence offered in this trial, we find that even if it were error to refuse these instructions that error was not prejudicial. (*Henderson v. Harnischfeger* (1974) 12 Cal.3d 663, 670, 117 Cal.Rptr. 1, 527 P.2d 353; *Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 489, 227 Cal.Rptr. 465; see 9 Witkin, Cal.Procedure, *supra*, Appeal, § 352, pp. 355–356.) We cannot say that the giving of these instructions would have substantially enhanced the chances appellants would have prevailed.

[19] Appellants likewise complain about evidentiary rulings. Although they mention only a handful of specific incidents, they accuse the judge of admitting a mass of prejudicial evidence about actions Scientology took toward third persons. In their brief appellants concede this evidence was admissible under Evidence Code section 1101(b) as proof of "intent" and "malice."[7] But they ask us to reverse the trial court under Evidence Code section 352 on grounds the relevance of this evidence was overwhelmed by its prejudicial effect.[8]

In reviewing the trial court's exercise of its discretion under section 352, appellate courts traditionally give great deference to the trial court's evaluation of relevance versus prejudice. (See *People v. Mota* (1981) 115 Cal.App.3d 227, 234, 171 Cal.Rptr. 212; 1 Johnson, Cal.Trial Guide (1988) § 22.40, p. 22–43.) In the instant case we do not find an abuse of discretion. Much of the evidence appellants object to was highly relevant to show the network of sanctions and coercive influences with which Scientology had surrounded Wollersheim. Much of the rest was highly relevant to show Wollersheim's state of mind while undergoing audit, disconnect and the like or appellants' state of mind, that is, their intent, malice, motives, and the like. Whatever prejudice to appellants may have accompanied introduction of this evidence it does not "substantially outweigh" the probative value of the evidence to important issues in this case.

Finally, appellants complain about the alleged prejudicial conduct of Wollersheim's counsel during the trial and closing argument. As was true of their claims of instructional and evidentiary evidence, appellants provide us with only a few examples of alleged prejudicial error and imply these are but the tip of the iceberg. They confine themselves to this handful of incidents either because no other potentially prejudicial incidents occurred or because they expect this court to do their job by scouring the 25,000 page record for other examples to bolster their claim of error. If what appellants set forth in their brief represent the only incidents they allege as prejudicial

7. "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." (Evid.Code, § 1101, sub. (b).

8. "The court in its discretion may exclude evidence if its probative value is *substantially outweighed* by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid.Code, § 352, italics added.)

conduct, we find them insufficient to justify reversal under applicable standards of prejudice. (*Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 144, 45 Cal.Rptr. 313, 403 P.2d 721 [attorney misconduct only requires reversal if "it is reasonable to conclude that a verdict more favorable to defendants would have been reached but for the error"]; see 9 Witkin, Cal.Procedure, *supra*, § 340, p. 346.) And if these brief examples were only an invitation to do 906 appellants' work in identifying prejudicial error in their opposing attorney's conduct, we decline that invitation. (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 139, 144 Cal.Rptr. 710 [" 'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment' "]; *Wint v. Fidelity & Casualty Co.* (1973) 9 Cal.3d 257, 265, 107 Cal.Rptr. 175, 507 P.2d 1383.)

VI. THE GENERAL DAMAGES AND PUNITIVE DAMAGES THE JURY AWARDED ARE EXCESSIVE FOR THE INTENTIONAL INFLICTION OF EMOTIONAL INJURY COUNT AND THUS THOSE DAMAGE AWARDS MUST BE REDUCED

In the previous section, we concluded the allegations which are supported by substantial evidence are enough to sustain a cause of action for intentional infliction of emotional injury against Scientology. But that conclusion does not determine whether the proved allegations support the level of damages the jury awarded under this cause of action. We turn to that issue now.

We are only concerned now with whether a reasonable juror could have found this level of "outrageous" conduct inflicted $5 million worth of emotional injury on Wollersheim. Similarly, we ask whether this level of "outrageous" conduct and Scientology's degree of intent in carrying it out warrant $25 million in punitive damages. We conclude these awards are excessive for the conduct alleged and proved in this case.

An award for compensatory damages will be reversed or reduced "upon a showing that it is so grossly disproportionate to any reasonable view of the evidence as to raise a strong presumption that it is based upon prejudice or passion." (*Koyer v. McComber* (1938) 12 Cal.2d 175, 182, 82 P.2d 941; accord *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919, 114 Cal.Rptr. 622, 523 P.2d 662 ["an appellate court may reverse an award only ' "When the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice" ' [Citations]"]; *Fagerquist v. Western Sun Aviation, Inc.* (1987) 191 Cal.App.3d 709, 727, 236 Cal.Rptr. 633; see 8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, § 46, p. 446.) Even under this stringent standard, it is manifest the jury's award here is excessive since it is so grossly disproportionate to the evidence concerning Wollersheim's damages.

[20] Wollersheim's psychological injury although permanent and severe is not totally disabling. Moreover, even Wollersheim admits Scientology's conduct 906 only aggravated a pre-existing psychological condition; Scientology did not create the condition. While the jury awarded Wollersheim $5 million in compensatory damages, we determine the evidence only justifies an award of $500,000.

[21] "It is well established that a reviewing court should examine punitive damages and, where appropriate, modify the amount in order to do justice." (*Gerard v. Ross* (1988) 204 Cal.App.3d 968, 980, 251 Cal.Rptr. 604; *Allard v. Church of Scientology, supra*, 58 Cal.App.3d at p. 453, 129 Cal.Rptr. 797.) In reviewing a punitive damages award, the appellate court applies a standard similar to that used in reviewing compensatory damages, i.e., whether, after reviewing the entire record in the light most favorable to the judgment, the award was the result of passion or prejudice. (*See Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 64, 118 Cal.Rptr. 184, 529 P.2d 608; *Devlin v.*

Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal.App.3d 381, 388, 202 Cal. Rptr. 204.) However, the test here is somewhat more refined, employing three factors to evaluate the propriety of the award.

[22] The first factor is the degree of reprehensibility of the defendant's conduct. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, 148 Cal.Rptr. 389, 582 P.2d 980.) "[C]learly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal." (*Ibid.*)

The second factor is the relationship between the amount of the award and the actual harm suffered. (*Ibid.*; *Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 867, 237 Cal.Rptr. 282.) This analysis focuses upon the ratio of compensatory damages to punitive damages; the greater the disparity between the two awards, the more likely the punitive damages award is suspect. (*Seeley v. Seymour, supra*, 190 Cal.App.3d at p. 867, 237 Cal.Rptr. 282; see *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal. App.3d 451, 469–470, 136 Cal.Rptr. 653.)

Finally, a reviewing court will consider the relationship of the punitive damages to the defendant's net worth. (*Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 928, 148 Cal.Rptr. 389, 582 P.2d 980; *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., supra*, 155 Cal.App.3d at p. 390, 202 Cal.Rptr. 204.) In applying this factor courts must strike a proper balance between inadequate and excessive punitive damage awards. "While the function of punitive damages will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort, the function also will not be served by an award which is larger than necessary to properly punish and deter." (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., supra*, 155 Cal.App.3d at p. 391, 202 Cal. Rptr. 204.)

[23] As to the punitive damage award, we find it is not commensurate with Scientology's conduct *in this case*. This is not a situation where the centerpiece of the case involved a Church-ordered physical beating or theft or criminal fraud against Wollersheim. The "outrageous conduct" was less outrageous and more subtle than that. We further note Wollersheim's counsel in the full flood of his emotional summation at the conclusion of this lengthy trial only deigned to urge the jury to return punitive damages of *as much as* "six or seven million dollars."

The evidence admitted at trial supported the finding the appellant church had a net worth of $16 million at the time of trial. Accepting these figures as true, the jury awarded Wollersheim *150 percent of* appellant's net worth in punitive damages alone —195 percent if compensatory damages are included. This appears not just excessive but preposterous. (*Seeley v. Seymour, supra*, 190 Cal.App.3d at p. 869, 237 Cal.Rptr. 282 [punitive damages reversed; award was 200 percent of defendant's net worth]; *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1012, 193 Cal.Rptr. 206 [punitive damages reduced; initial award was 35 percent of defendant's net worth]; *Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 824, 169 Cal.Rptr. 691, 620 P.2d 141 [punitive damages reversed; award was 58 percent of defendant's net income]; *Allard v. Church of Scientology, supra*, 58 Cal. App.3d at pp. 445–446, 453, 129 Cal.Rptr. 797 [punitive damages reversed; award was 40 percent of defendant's net worth]; compare *Devlin v. Kearny AMC/Jeep/Renault, Inc., supra*, 155 Cal.App.3d at pp. 391–392, 202 Cal.Rptr. 204 [punitive damages affirmed where award was 17.5 percent of defendant's net worth]; *Schomer v. Smidt* (1980) 113 Cal.App.3d 828, 836–837, 170 Cal.Rptr. 662 [punitive damages affirmed; award was 10 percent of defendant's net worth]; *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1100, 234 Cal. Rptr. 835 [punitive damages affirmed; award was 7.2 percent of defendant's net income].) We find it especially excessive given the nature of the "outrageous conduct" in this particular case. Accordingly

we reduce the punitive damage award to $2 million.

DISPOSITION

The judgment is reversed as to the cause of action for negligent infliction of emotional injury. The judgment as to the cause of action for intentional infliction of emotional injury is modified to reduce the compensatory damages to $500,000 and the punitive damages to $2 million. In all other respects the judgment is affirmed. Each party to bear its own costs on appeal.

LILLIE, P.J., and FRED WOODS, J., concur.

212 Cal.App.3d 139

The PEOPLE, Plaintiff and Appellant,

v.

Frank Jose TERRONES, Defendant and Respondent.

No. B037713.

Court of Appeal, Second District, Division 7.

July 18, 1989.

Review Denied Nov. 16, 1989.

Defendant's pretrial motion to quash search warrant and suppress evidence was granted by the Superior Court, Los Angeles County, John A. Torribio, Temporary Judge,* and State appealed. The Court of Appeal, Lillie, P.J., held that: (1) sufficient probable cause existed to justify issuance of warrant, and (2) even if there was insufficient probable cause, police officer relied on search warrant in good faith.

Reversed.

Johnson, J., filed dissenting opinion.

* Pursuant to Cal. Const., art. VI, § 21.

1. Searches and Seizures ⇐108

Court cannot resort to facts outside affidavit to determine whether it furnishes probable cause for issuance of search warrant.

2. Criminal Law ⇐394.6(4)

Affiant's testimony at hearing on suppression motion cannot supply probable cause for issuance of search warrant.

3. Searches and Seizures ⇐119

Affidavit submitted in support of search warrant which indicated that information was given by "citizen informants" sufficiently indicated that affiant knew informants' names and thus presumption of reliability attaching to citizen informants applied; affidavit did not characterize informants as anonymous telephone callers.

4. Searches and Seizures ⇐119

Even if characterization of informants in affidavit submitted in support of search warrant as "citizen informants" did not eliminate necessity of showing some degree of reliability, affidavit contained sufficient facts to justify inference that citizen informants were reliable thus providing probable cause for search warrant; basis of their knowledge was personal observation, there was no evidence of ulterior motives on part of informants, and statements were against informants' penal interests.

5. Criminal Law ⇐394.4(6)

Even if there had not been substantial basis for magistrate's probable cause determination in issuing search warrant, police officer relied on search warrant in good faith; officer did not seek search warrant after first informant had come forward, but obtained four different, but mutually supporting, sources of information concerning their narcotics activities at defendant's residence.

Ira Reiner, Dist. Atty., Maurice H. Oppenheim, Eugene D. Tavris, and Donald J. Kaplan, Deputy Dist. Attys., for plaintiff and appellant.

1

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., petitioner, v. David T. JORDAN. No. 88-1483.

Case below, 861 F.2d 172.

March 18, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032, — L.Ed.2d —— (1991).

2

RESERVE LIFE INSURANCE COMPANY, petitioner, v. Patricia Stephenson EICHENSEER. No. 89-1303.

Former decision, 110 S.Ct. 1468.

Case below, 682 F.Supp. 1355; 881 F.2d 1355; 894 F.2d 1414.

March 18, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032, — L.Ed.2d —— (1991).

3

HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, Individually and dba Gwinnett Ambulance Services, petitioner, v. R. Stanford JONES, Administrator of the Estate of William Harold O'Kelley, Deceased. No. 89-1315.

Case below, 259 Ga. 759, 386 S.E.2d 120.

March 18, 1991. On petition for writ of certiorari to the Supreme Court of Georgia. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Georgia for further consideration in light of *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032, — L.Ed.2d —— (1991).

4

CHURCH OF SCIENTOLOGY OF CALIFORNIA, petitioner, v. Larry WOLLERSHEIM. No. 89-1361.

Case below, 212 Cal.App.3d 872, 260 Cal. Rptr. 331.

March 18, 1991. On petition for writ of certiorari to the Court of Appeal of California, Second Appellate District. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of California, Second Appellate District, for further consideration in light of *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032, — L.Ed.2d —— (1991).

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LARRY WOLLERSHEIM, Plaintiff and Respondent, v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, Defendant and Appellant.	B023193 (LASC No. C332827)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald Swearinger, Judge. Affirmed in part and reversed in part with a remittitur.

Rabinowitz, Boudin, Standard, Krinsky & Lieberman and Eric M. Lieberman and Terry Gross, Lenske, Lenske & Heller and Lawrence E. Heller, and Michael Lee Hertzberg for Defendant and Appellant.

Cummins and White, Barry Van Sickle, Robert S. Horvitz, and Tina B. Fisher for Plaintiff and Respondent.

This case is on remand from the United States Supreme Court to reconsider the punitive damage award modified and approved in our earlier opinion (Wollersheim v. Church of Scientology (1989) 212 Cal.App.3d 872, rev. den. Oct. 26, 1989, cert. grtd., vac. and remd. (1991) 111 S.Ct. 1298,) in the light of the high court's decision in Pacific Mut Life Ins. Co. v. Haslip (1991) 111 S.Ct. 1032. To facilitate review of this question, we ordered supplemental briefing and heard oral argument from the parties. Upon reconsideration, we conclude the California procedures for determining punitive damage awards pass constitutional muster under Haslip. We further conclude, as we did in our prior opinion, the jury acted appropriately in imposing a punitive damage award in this case but the amount it awarded is excessive under the standards established by California law. Consequently, we affirm the judgment, subject to a remittitur.1/

I. THE PROCEEDINGS THUS FAR

The original appeal followed a jury award of $30 million in compensatory and punitive damages to

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1/ Our prior opinion dealt exhaustively with the tort, freedom of religion, evidentiary and procedural issues appellant raised in its appeal. Our rationale for and disposition of those issues remain the same. We see no virtue in repeating that discussion in this opinion. Accordingly, except as we may touch some of these topics tangentially in the course of addressing the question of the punitive damages award and its constitutionality, as to all these issues the original opinion remains and is incorporated intact and unaltered in this decision. The punitive damages section and the disposition paragraph of the original opinion, however, are replaced in their entirety by this opinion.

Larry Wollersheim (Wollersheim), a former member of the Church of Scientology (Scientology). The complaint alleged Scientology intentionally and negligently inflicted severe emotional injury on Wollersheim through certain practices, including "auditing," "disconnect," and "fair game." Since the trial court granted summary adjudication that Scientology is a religion and "auditing" is a religious practice, the trial proceeded under the assumption they were. In our original opinion we concluded there was substantial evidence to support a finding Scientology had committed the tort of intentional infliction of emotional injury against Wollersheim. We also found sufficient evidence the "auditing" and other practices in this case were conducted in a coercive environment. Thus, none of them qualified as "voluntary religious practices" entitled to constitutional protection under the First Amendment religious freedom guarantees. At the same time, we concluded both the compensatory and punitive damages the jury awarded in this case were excessive. Consequently, we reduced the compensatory damages to $500,000 and the punitive damage award to $2 million.

The California Supreme Court denied the petitions for review unanimously. (Oct. 26, 1989.) The United States Supreme Court, however, granted certiori on the punitive damages issue and held this case along with ten others (see fn. 4, infra) awaiting its disposition of the lead case on the constitutionality of punitive damages--Pacific Mut. Life Ins. Co. v. Haslip, supra, 111 S.Ct. 1032. After deciding

Haslip, the Supreme Court remanded all 11 punitive damage cases it was holding for the lower courts to review in light of Haslip.

Since the Haslip opinion was limited solely to the issue of the constitutionality of punitive damage awards, our reconsideration of our prior decision likewise is confined to that issue.[2/] We first review the procedures and standards

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2/ After this court filed its original opinion in the instant case the United States Supreme Court decided Employment Div. Dept. of Human Res. of Oregon v. Smith (1990) 110 S.Ct. 1595. In this decision, the high court altered the constitutional standard for judging whether a state law which impinges on a citizen's free exercise of religion violates the First Amendment. No longer must there be a compelling interest in applying the state law to those whose religion prohibits compliance. After Smith it is sufficient the law is a valid, neutral law of general applicability and not aimed at a specific religion or at religion in general. "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'--permitting him, by virtue of his beliefs, 'to become a law unto himself,' (citation omitted)--contradicts both constitutional tradition and common-sense." (Id. at p. 1603.)

The California Supreme Court presently has before it the issue whether the religious guarantees of the state Constitution are to fall into line with the Smith decision. Our state's highest court recently granted review of an appellate decision holding the "compelling state interest analysis still applies under state constitutional law." (Donahue v. Fair Employment & Housing Comm. (1991) 1 Cal.App.4th 387, 401, rev. gr. Feb. 27, 1992. See also People v. Woody (1964) 61 Cal.2d 716 and Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, pre-Smith decisions applying compelling interest balancing test to free exercise issues and arguably decided under California Constitution as well as United States Constitution.)

We need not reenter this particular thicket, however. To the extent we reached that step of the analysis, this court applied the compelling interest test to its review of the constitutionality of imposing tort liability on Scientology's "fair game," "disconnect," and "auditing" practices. (See Wollersheim v. Church of Scientology, supra, 212 Cal.App.3d at

(Footnote continued)

California courts apply in deciding the appropriateness and amount of punitive damage awards and determine whether that process is constitutional under Haslip. We then examine the specific punitive damage award in this case, as reduced by this court, and determine whether it passes constitutional muster.

II. THE PROCESS CALIFORNIA USES FOR DETERMINING AND REVIEWING PUNITIVE DAMAGES AWARDS IS CONSTITUTIONAL UNDER THE RECENT UNITED STATES SUPREME COURT DECISION IN PACIFIC MUTUAL INSURANCE CO. v. HASLIP.

This court and other California appellate courts already have ruled this state's procedures for determining punitive damages comply with the "due process" standards enunciated in Haslip. (Liberty Transport, Inc. v. Harry W. Gorst Co. (1991) 229 Cal.App.3d 417; Las Palmas Associates v. Las Palmas Center (1991) 235 Cal.App.3d 1220.) None of these opinions, however, had occasion to consider this question in depth. Consequently, we examine the Haslip opinion

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2/ (Continued)

pp. 887-899.) For the most part, as will be recalled, we found these activities were not constitutionally protected religious practices because Wollersheim was coerced into participating in them. Accordingly, in most instances it was unnecessary to ask the next question--whether the state had a "compelling interest" which overrode the "free exercise" concerns. Where that question was reached, however, we used the stricter, pre-Smith standard. Having upheld the constitutionality of the state's tort laws under this tougher standard, it is unnecessary to reconsider whether those laws would survive the lesser standard suggested in Smith. For the same reason, we also need not bother pondering the intriguing question whether the religious guarantees of the state Constitution will continue to impose a compelling interest test on state laws of general application even though the federal Constitution no longer does.

in some detail and the Alabama punitive damages procedures approved in that decision as background for reviewing the punitive damage award the jury levied on Scientology. As further background for our review, we also have included an appendix containing a table of appellate opinions in which California courts evaluated punitive damage awards. This table updates a similar table which appears in Devlin v. Kearney AMC/Jeep/Renault, Inc. (1984) 155 Cal.App.3d 381, 393-396.

In Haslip an insurance agent was accredited by at least one other insurance carrier as well as the defendant, Pacific Mutual. The plaintiffs were employees of a company this agent signed up for a group combined health and life insurance policy. Pacific only supplied the life insurance portion of this policy and another of this agent's companies provided the health insurance component. Later the agent embezzled premiums plaintiffs' employer had forwarded to him instead of paying them over to the insurance companies. The policies were cancelled. So when these plaintiffs became sick they suddenly and unhappily found out they had no health coverage. (111 S.Ct. at p. 1036.)

The plaintiffs sued the agent and Pacific for fraud. The other three plaintiffs only received compensatory damages, but Haslip won "general damages" in the amount of $1,040,000. (111 S.Ct. at p. 1037.) The Supreme Court concluded at least $840,000 of this represented punitive damages. (Id. at fn. 2.) Pacific appealed and the Alabama Supreme Court affirmed, including the punitive damages portion of the award, by a

divided vote. After granting certiori the United States Supreme Court also affirmed in a majority opinion signed by five Justices. Two Justices separately concurred and one dissented. (The ninth Justice did not participate in the decision.)

In assessing the constitutionality of the punitive damages award in Haslip, the United States Supreme Court traced the long history and important role of punitive damages in Anglo-American law. On the basis of this historical review, the high court ruled, "So far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process. [Citation omitted.] In view of this consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be per se unconstitutional." (Id. at p. 19.)

Having ruled punitive damages awards are constitutional in concept, the Supreme Court considered whether the specific award in the Haslip case was constitutionally acceptable. The justices set forth the general considerations that are to guide the decision of whether a specific award is constitutional. "[U]nlimited jury discretion--or unlimited judicial discretion for that matter--in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities.... [G]eneral concerns of reasonableness and adequate guidance from the court when the case is tried to a

jury properly enter into the constitutional calculus. (Id. at p. 20.)

The Supreme Court described several attributes of the Alabama process for determining punitive damage awards and, on that basis, concluded "the award here did not lack objective criteria.... [I]n this case it does not cross the line into the area of constitutional impropriety." (Id. at p. 23.) The high court did not, however, hold nor imply the Alabama process was the one and only system which accords due process. Nor did it suggest any particular attribute of the Alabama process was absolutely essential to constitutionality.3/ All the Supreme Court held was that the Alabama process achieved the constitutional requirement of "reasonableness" and "adequate guidance to the jury."4/

3/ "Other than explaining that Alabama's procedure passes constitutional muster, Haslip offers little guidance as to what would be necessary to render a different system unconstitutional." (George v. International Society for Krishna Consciousness of California, etc. (1992) ___Cal.App.3d ___, ___ (4 Cal.Rptr. 2d 473, ___, 92 D.A.R. 1593, 1611.)

4/ It is clear we are not alone in construing Haslip to allow a variety of punitive damage systems which do not necessarily mimic the Alabama system under review in that particular case. According to our research, four of the eleven cases the Supreme Court remanded after Haslip have been decided thus far and another sixteen other cases (other than those decided by California courts) have considered the constitutionality of their state punitive damages processes under the Haslip opinion.

In all four remanded cases the courts upheld the state punitive damages system under review and affirmed the particular award. Thus, the punitive damages procedures of Alabama,

(Footnote continued)

The Supreme Court found several features of the Alabama process worthy of mention. We consider each and consider how the Supreme Court's observations about Alabama criteria and

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4/ (Continued)

Georgia, and Mississippi as well as California have passed constitutional muster at least at the first level of appeal in these remanded cases. (Alabama: Southern Life and Health Insurance Co. v. Turner (Ala. 1991) 586 So.2d 854; Georgia: Hospital Authority of Gwinnett County v. Jones (Ga. 1991) 261 Ga. 613, 409 S.E.2d 501; California: George v. International Society for Krishna Consciousness of California, supra, ___ Cal.App.3d ___, 92 D.A.R. 1593); Mississippi: Eichenseer v. Reserve Life Ins. Co. (5th Cir. 1991) 934 F.2d 1377.) Of the 16 other cases evaluating the constitutionality of punitive damages awards under Haslip, 11 upheld the jurisdiction's process and the specific award outright, two upheld the process but found the specific award excessive (as we do in the instant case), and 3 found their state's process defective in some way. In total, in these 16 cases state or federal courts have applied Haslip and approved the punitive damage procedures in 10 states (in addition to California): Alabama (once again): Yamaha Motor Co. Ltd. v. Thornton (Ala. 1991) 579 So.2d 619; Killough v. Zahandarfard (Ala.1991) 578 So.2d 1041; Braswell v. Congra, Inc. (11th Cir. 1991) 936 F.2d 1169; Louisiana: Galiour v. General American Tank Car Corp. (E.D.La. 1991) 764 F.Supp. 1093; Minnesota: Bradley v. Hubbard Broadcasting, Inc. (Minn.App. 1991) 471 N.W.2d 670 [procedure approved although specific award found excessive]; Missouri: Wolf v. Goodyear Tire & Rubber Co. (Mo.App. 1991) 808 S.W.2d 868; Oregon: Oberg v. Honda Motor Co. (Or.App. 1991) 814 P.2d 517; Pennsylvania: Coyne v. Allstate Insurance Co. (E.D. Pa. 1991) 771 F.Supp. 673; South Carolina: Gamble v. Stevenson, (S.C. 1991) 406 S.E.2d 350; Texas: Glasscock v. Armstrong Cork Co. (5th Cir. 1991) 946 F.2d 1085; State Farm Mutual Auto Insurance Co. v. Zubiate (Tex.App. 1991) 808 S.W.2d 890 [procedure approved although specific award found excessive]; Wisconsin: Heideman v. American Family Ins. Group (Wis.App. 1991) 473 N.W.2d 14.; Arkansas: Robertson Oil Co., Inc. v. Phillips Petroleum Co. (W.D. Ark. (1991) 779 F.Supp. 994.

Several of these courts found procedures constitutional which deviated substantially from the Alabama punitive damage system approved in Haslip. For instance, the Fifth Circuit held the Texas procedure constitutional even though juries and courts

(Footnote continued)

procedures relate to the constitutionality of California's punitive damages process.

A. The Adequacy of Jury Instructions.

The Supreme Court observed the Alabama jury instructions adequately described the purposes of punitive damages as punishing the defendant and deterring "the defendant and others from doing such wrong in the future," rather than compensating the plaintiff. The instructions gave the jury "significant discretion" in determining punitive damages, but that discretion was limited to the amount needed to advance the "state policy concerns" of "deterrence and retribution." Moreover, the degree of discretion allowed "is no greater than that pursued in many familiar areas of the law." (The Supreme Court listed several examples including "reasonable care," "due diligence," and "appropriate compensation for pain and suffering or mental anguish.") (Id. at pp. 1044.)

4/ (Continued)

only consider three factors--nature of the wrong, degree of culpability, and extent the conduct offends propriety and justice--all of them relate solely to the reprehensibility of the defendant's conduct. (Glasscock v. Armstrong Cork Co., supra, 946 F.2d 1085.) The Pennsylvania and Missouri procedures were found to satisfy Haslip even though the jury awards are reviewed for "excessiveness" without any specific, articulated standards. (Coyne v. Allstate Insurance Co., supra, 771 F.Supp. 673; Wolf v. Goodyear Tire & Rubber Co., supra, 808 S.W.2d 868.) And, the Oregon procedure was approved even though the state Constitution severely limits the review of jury awards of punitive damages by allowing reversal only when a reviewing court finds a lack of any evidence to support the award. (Oberg v. Honda Motor Co., supra, 814 P.2d 517.)

We note in the instant case the trial court gave the standard instructions on punitive damages which reflect California law on the same basic subjects as the Alabama instructions endorsed in Haslip. Indeed the California instructions given here were, if anything, more extensive and more precise than the Alabama instructions described in Haslip. Not only did these instructions describe the purposes of punitive damages and distinguish them from compensatory damages, they also informed the jury the amount of damages awarded should bear a reasonable relation to the injury the plaintiff sustained and to the defendant's financial condition.

Scientology does not claim the trial court failed to give the instructions defining the purposes and scope of punitive damages which the Supreme Court found important in Haslip. Instead Scientology complains the trial court failed to give an instruction appellant's counsel requested which it now claims was meant to implement the corporate responsibility provision found in Civil Code section 3294, subdivision (b). This provision limits punitive damages against corporations to acts an officer, director or managing agent ordered, ratified or knew about before they happened.5/

5/ Civil Code section 3294, subdivision (b) reads in pertinent part as follows:

> "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud or malice must be on the part of an officer, director or managing agent of the corporation."

Scientology's requested instruction, however, did not address the "corporate responsibility" issue covered in Civil Code section 3294, subdivision (b). The request did not mention the clause "officer, director, or managing agent" nor suggest Scientology's liability for punitive damages was limited to actions this class of agent personally did or authorized, ratified, or knew of in advance. Instead the proposed instruction advised jurors they "may not award punitive damages against the defendant Church for the intentional oppressive or malicious acts of its members, employees, or agents, unless you find that the defendant Church of Scientology directed, authorized or ratified such intentional oppressive acts." As proffered, the requested instruction in no way even hinted only an officer, director or managing agent" could make the "defendant Church of Scientology" liable for punitive damages.

It is not absolutely clear from the record why Scientology did not request a "corporate responsibility" instruction. Perhaps it was because appellant wanted the jurors to think of it as a religious "church" and not a secular "corporation." In any event, the "corporate responsibility" instruction was not relevant to the issues framed by the pleadings or raised in the evidence. Scientology did not base its defense on a contention Wollersheim's alleged injuries were inflicted by out of control lower level employees. Instead its pleadings and evidence emphasized the harmful acts, if any,

were constitutionally protected religious practices. The evidence was undisputed the "auditing," "fair game," and "disconnect" actions taken in regard to Wollersheim were official practices of the Church of Scientology promulgated by its leaders, not some ad hoc aberrational acts of individual employees. Thus, it is not surprising Scientology did not bother to request an instruction it was only liable in punitive damages for what its "officers, directors, or managing agents" personally, authorized or ratified.

By failing to tender a "corporate responsibility" instruction, Scientology is foreclosed under California law from claiming the trial court committed "reversible error" when it neglected to give such an instruction. (Agarwal v. Johnson (1979) 25 Cal.3d 932, 951 [when defendant corporation failed to tender and the trial court failed to give a "corporate responsibility" instruction in a punitive damage case] the court concluded "[the defendants] have waived their right to complain that a qualified instruction distinguishing between ... vicarious liability for compensatory and for punitive damages should have been given".)

Despite having itself failed to propose a "corporate responsibility" instruction during trial Scientology now claims it was denied federal "due process" under Haslip because the trial court also failed to give such an instruction. That the court's failure to instruct on "corporate responsibility" is not a constitutional violation under Haslip is apparent from

the facts of that case. There the United States Supreme Court held a punitive damage award against an insurance company afforded constitutional due process even though the award was imposed for liability for punitive damages was predicated solely respondeat superior. Indeed Alabama law, specifically found to satisfy due process in Haslip, permits punitive damages to be assessed against corporations without any proof the senior corporate officials authorized or ratified the offensive conduct. (Pacific Mut. Life Ins. Co. v. Haslip, supra, 111 S.Ct. at p. 1041.) Thus, it is apparent federal due process does not prohibit the imposition of punitive damages on a corporation just because the corporation's leadership remains ignorant of the egregious acts of its lesser employees or agents. It is California law--not constitutional due process--which limits corporate liability for punitive damages to acts done, authorized, or ratified by senior corporate officials. Accordingly, the consequences for failing to give a "corporate responsibility" instruction likewise are determined under California law.

Scientology offers a further argument the failure to give this "corporate responsibility" instruction rises to the level of a federal "due process" violation. This argument likewise is without merit. It treats language in Haslip pointing out the "jury was adequately instructed" in that case as if the Supreme Court had held the failure to give any possibly relevant instruction in a punitive damages case

automatically violates the federal "due process" clause. For reasons explained above, while it may have been preferable for the trial court to have given a "corporate responsibility" instruction in the instant case, Scientology waived its right to complain by failing to request the instruction. Moreover, under the pleadings and evidence in this case "corporate responsibility" was not a significant issue. Consequently, the "jury was adequately instructed." The instructions the Supreme Court mentioned in Haslip were those the Alabama court delivered advising the jurors on the purposes of punitive damages and the criteria they were to apply in fixing the amount of those damages. The trial court in the instant case gave instructions covering those same topics. That is the most Haslip and the "due process" clause require.

Finally, after reviewing the total evidence offered in this trial and the actual issues involved, we find that even if it were error to fail to give a "corporate responsibility" instruction that error was not prejudicial. (Henderson v. Harnischfeger Corp. (1974) 12 Cal.3d 663, 670; Williams v. Carl Karcher Enterprises, Inc. (1986) 182 Cal.App.3d 479, 489; see 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 352, pp. 355-356.) There is nothing to suggest the giving of these instructions would have substantially enhanced the chances Scientology would have prevailed.

B. Evidence of Defendant's Financial Condition.

The Supreme Court noted with apparent approval Alabama

232 Cal.App.3d 1060

CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al., Plaintiffs and Appellants,

v.

Gerald ARMSTRONG, Defendant and Respondent.

Nos. B025920, B038975.

Court of Appeal, Second District, Division 3.

July 29, 1991.

Review Denied Oct. 17, 1991.

Church sued former church worker alleging he converted confidential archive materials and disseminated materials to unauthorized persons, in breach of his fiduciary duty. Former church worker cross-complained seeking damages for fraud, intentional infliction of emotional distress, libel, breach of contract and tortious interference with contract. The Superior Court, Los Angeles County, Paul G. Breckenridge, Jr., and Bruce R. Geernaert, JJ., dismissed complaint, later settled and dismissed cross action, and ordered documents returned to the church and the records sealed. Church appealed. The Court of Appeal, Danielson, J., held that: (1) successor judge's order unsealing record more than five years after order was sealed by his predecessor exceeded judge's authority, and (2) under application of conditional privilege doctrine, sufficient evidence supported finding that church worker's conversion of church documents was justified by his reasonable belief that church intended to cause him harm and that he could prevent the harm only by taking the documents.

Affirmed.

1. Appeal and Error ⇐106

An order dismissing conversion action with prejudice, rather than an interlocutory order captioned "judgment" which ordered that conversion plaintiffs take nothing by their complaint but did not resolve cross complaint, was the appealable judgment in the action.

2. Appeal and Error ⇐837(9)

Claim that opponent's testimony was impeached by testimony given in other proceeding subsequent to judgment appealed from was not cognizable on appeal.

3. Judges ⇐32

Successor judge's order on his own motion vacating predecessor judge's order sealing court records in document conversion dispute between church and former church member exceeded successor judge's authority where vacating order was entered long after time for reconsideration of sealing order had expired, and no showing was made other than that supporting motion for access to record by nonparty who was also involved with litigation with church. West's Ann.Cal.C.C.P. §§ 473, 1008.

4. Records ⇐32

Persons seeking sealing of record on appeal had to make more particularized showing of need than a mere request that their pursuit of an action for conversion of confidential church documents, brought primarily to protect privacy interests in the documents converted, should not cause disclosure of the information they sought to protect, without any limitation to any particular portions of voluminous record of trial court proceedings.

5. Torts ⇐27

Trover and Conversion ⇐40(1)

Sufficient evidence supported finding that church worker's alleged conversion of confidential church archive materials when worker delivered documents to his attorney was motivated by worker's reasonable belief that he and his wife were in danger because the church was aware of what he knew about the life of its founder, the secret machinations and financial activities of the church, and worker's dedication to the truth, and thus did not subject worker to liability for conversion and invasion of privacy under the conditional privilege doctrine.

6. Religious Societies ⇐31(5)

Trial ⇐64(1)

Trial court did not abuse its discretion in admitting documentary and testimonial

evidence concerning history of church worker's relationship with church and church practices in relation to its members, former members or critics, where record indicated court recognized that the statements were admitted for the limited purpose of proving reasonableness of worker's belief that church intended to harm him when he converted church's documents.

7. Trial ⇐397(1)

Trial court's statement of decision in church document conversion case merely reflected court's findings on elements of justification defense asserted by church worker and did not result in miscarriage of justice.

Rabinowitz, Boudin, Standard, Krinsky & Lieberman, Bowles & Moxon, Eric M. Lieberman, Timothy Bowles, Kendrick L. Moxon and Michael Lee Hertzberg, for plaintiffs and appellants.

Gerald Armstrong, In Pro. Per.

Toby L. Plevin, Paul Morantz and Michael L. Walton, for defendant and respondent.

Lawrence Wollersheim, amicus curiae, on behalf of respondent.

DANIELSON, Associate Justice.

In consolidated appeals, the Church of Scientology (the Church) and Mary Sue Hubbard (hereafter collectively "plaintiffs") appeal from an order after appealable judgment unsealing the file in Church of Scientology of California v. Gerald Armstrong (B028975), and from the judgment entered in the case (B025920). We vacate the order and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

In the underlying action, the Church sued Armstrong, a former Church worker, alleging he converted to his own use confidential archive materials and disseminated the same to unauthorized persons, thereby breaching his fiduciary duty to the Church, which sought return of the documents, injunctive relief against further dissemination of the information contained therein, imposition of a constructive trust over the property and any profits Armstrong might realize from his use of the materials, as well as damages. Mary Sue Hubbard (Hubbard), wife of Church founder L. Ron Hubbard, intervened in the action, alleging causes of action for conversion, invasion of privacy, possession of personal property *[sic]*, and declaratory and injunctive relief. Armstrong cross-complained, seeking damages for fraud, intentional infliction of emotional distress, libel, breach of contract, and tortious interference with contract.

With respect to the complaint and complaint-in-intervention, the trial court found the Church had made out a prima facie case of conversion, breach of fiduciary duty, and breach of confidence, and that Mary Sue Hubbard had made out a prima facie case of conversion and invasion of privacy. However, the court also determined that Armstrong's conduct was justified, in that he believed the Church threatened harm to himself and his wife, and that he could prevent such harm by taking and keeping the documents.

Following those determinations the court made and entered an order, entitled "Judgment," on August 10, 1984,[1] ordering and adjudging that plaintiffs take nothing by their complaint and complaint-in-intervention, and that defendant Armstrong have and recover his costs and disbursements. Plaintiffs filed notice of appeal from that order.

[1] We dismissed the appeal (B005912) because that "judgment" was not a final judgment and was not appealable; Armstrong's cross-complaint had not yet been resolved and further judicial action was essential to the final determination of the rights of the parties. (*Lyon v. Goss* (1942) 19 Cal.2d 659, 670, 123 P.2d 11.)

Armstrong's cross-action was then settled and dismissed, the subject documents

1. The "judgment" of August 10, 1984, is not included in the present record on appeal. However, it is included in the petition of plaintiffs and appellants for review by our Supreme Court of our decision (B005912) in this case, filed December 18, 1986.

were ordered returned to the Church, and the record was sealed by Judge Breckenridge pursuant to stipulation of the parties. The dismissal of Armstrong's cross-action was a final determination of the rights of the parties, and constituted a final judgment, permitting appellate review of the court's interlocutory order captioned "judgment" filed August 10, 1984.

Plaintiffs then timely filed a new notice of appeal (B025920), from the orders entitled "Order for Return of Exhibits and Sealed Documents" and "Order Dismissing Action With Prejudice," both filed December 11, 1986, and from the "Judgment" filed August 10, 1984, stating that the appeal was "only from so much of those orders and judgment which denied damages to plaintiff and plaintiff-intervenor" on their complaints. We rule that the Order Dismissing Action With Prejudice is the appealable judgment in B025920.[2]

The Unsealing Order After Judgment (B038975)

On October 11, 1988, Bent Corydon, who is a party to other litigation against the Church, moved to unseal the record in this case for the purpose of preparing for trial of his cases. He sought only private disclosure. Judge Breckenridge having retired, Corydon's motion was heard by Judge Geernaert, who made an order dated November 9, 1988, which he clarified by another order dated November 30, 1988, which opened the record not only to Corydon but also to the general public, thus vacating the earlier order made by Judge Breckenridge.

On December 19, 1988, plaintiffs Church and Hubbard filed a timely notice of appeal from those orders made after appealable judgment. That appeal, B038975, is the other of the current consolidated appeals.

On December 22, 1988, Division Four of this court issued an order staying Judge Geernaert's orders (1) unsealing the record and (2) denying a motion for reconsideration of the unsealing order, to the extent those orders unsealed the record as to the general public and permitted review by any person other than Corydon and his counsel of record. On December 29, 1988, Division Four modified this stay order by adding to it a protective order prohibiting Corydon and his counsel from disseminating copies of or disclosing the content of any documents found in the file to the public or any third party, except to the extent necessary to litigate the actions to which Corydon and the Church were parties. Corydon and his counsel were also required to make good faith efforts in Corydon's litigation to submit under seal any documents they found in the file of this case.

On this appeal, Corydon argues in favor of the trial court's order unsealing the record, as he wishes to be free of the protective orders contained in the modified stay order issued by Division Four.

The "Judgment" of August 10, 1984 (B025920)

[2] Armstrong's taking of the documents is undisputed. The evidence relating to his claim of justification, which was found credible by the trial court,[3] established that Armstrong was a dedicated member of the Church for a period of twelve years. For ten of those years, he was a member of the Sea Organization, an elite group of Scientologists working directly under Church founder L. Ron Hubbard. In 1979, Armstrong became a part of L. Ron Hubbard's "Household Unit" at Gilman Hot Springs, California.

In January 1980, fearing a raid by law enforcement agencies, Hubbard's representatives ordered the shredding of all doc-

2. We later granted the motion of appellant Church to deem the record on appeal in B005912 to be the record on appeal in B025920, which is one of the current consolidated appeals; we also take judicial notice of the entire record in B005912. Consequently the reporters' transcript, the appendices of the parties on appeal, and the parties' briefs in case No. B005912 are part of the record on appeal in B025920. The parties have also filed briefs in B025928.

3. Plaintiffs' contention that certain testimony was impeached by testimony given in other proceedings subsequent to the judgment herein is, of course, not cognizable on this appeal.

uments showing that Hubbard controlled Scientology organizations, finances, personnel, or the property at Gilman Hot Springs. In a two-week period, approximately one million pages were shredded pursuant to this order.

In the course of the inspection of documents for potential shredding, Armstrong reviewed a box containing Hubbard's early personal letters, diaries, and other writings, which Armstrong preserved.

Thereafter, Armstrong petitioned for permission to conduct research for a planned biography of Hubbard, using his discovery of the boxed materials. Hubbard approved the petition, and Armstrong, who had discovered and preserved approximately 16 more boxes of similar materials, became the Senior Personal Relations Officer Researcher. He subsequently moved the materials to the Church of Scientology Cedars Complex in Los Angeles.

Hubbard selected one Omar Garrison to write his biography. Armstrong became Garrison's research assistant, copying documents and delivering the copies to him, traveling with him, arranging interviews for him, and generally consulting with him about the project. Armstrong also conducted a genealogical study of Hubbard's family, and organized the materials he had gathered into bound volumes for Garrison's use, retaining a copy for the Church archives. The number of documents obtained by Armstrong ultimately reached 500,000 to 600,000. Within a week after commencing the biography project, Armstrong and Garrison began to note discrepancies between the information set forth in the documents and representations previously made concerning Hubbard. Then Armstrong was summoned to Gilman Hot Springs, where he was ordered to undergo a "security check" consisting of interrogation while connected to a crude lie-detector called an E-meter, to determine what materials he had delivered to Garrison and to meet charges that he was speaking out against Hubbard.

In November 1981, Armstrong wrote a report urging the importance of ensuring the accuracy of all materials published concerning L. Ron Hubbard, and relating examples of factual inaccuracies in previous publications. In December 1981, Armstrong and his wife left the Church, surreptitiously moving their possessions from the Church premises because they knew that persons attempting to leave were locked up, subjected to security checks, and forced to sign promissory notes to the Church, confessions of "blackmailable" material obtained from their personal files, and incriminating documents, and they were afraid that they would be forced to do the same. Before leaving, Armstrong and his wife copied a number of documents which he delivered to Garrison for his work on the Hubbard biography. After leaving, Armstrong cooperated with his successor, assisting him in locating documents and other items.

Commencing in February 1982, the international Church of Scientology issued a series of "suppressive person declares" in effect labelling Armstrong an enemy of the Church and charging that he had taken an unauthorized leave, was spreading destructive rumors about senior Church officials, and secretly planned to leave the Church. These "declares" subjected Armstrong to the "Fair Game Doctrine" of the Church, which permits a suppressive person to be "tricked, sued or lied to or destroyed ... [or] deprived of property or injured by any means by any Scientologist...."

At around the same time, the Church confiscated photographs of Hubbard and others that Armstrong had arranged to sell to one Virgil Wilhite. When Armstrong met with Church members and demanded the return of the photographs, he was ordered from the Church property and told to get an attorney. Thereafter, he received a letter from Church counsel threatening him with a lawsuit. In early May 1982, he became aware of private investigators watching his house and following him.

These events caused Armstrong to fear that his life and that of his wife were in danger, and that he would be made the target of costly and harassing lawsuits. The author, Garrison, feared that his home would be burglarized by Church personnel

seeking to retrieve the documents in his possession.

For these reasons, Armstrong took a number of documents from Garrison and sent them to his attorney.

Following commencement of the instant action, Armstrong was pushed or shoved by one of the Church's investigators. In a later incident his elbow was struck by an investigator's vehicle; still later, the same investigator pulled in front of Armstrong on a freeway and slammed on his brakes. This investigator's vehicle also crossed a lane line as if to push Armstrong off of the road. Plaintiffs' position is that the investigators were hired solely for the purpose of regaining the documents taken by Armstrong.

Trial of the complaint and the complaint-in-intervention was by the court sitting without a jury. On August 10, 1984, the court made its order, captioned "Judgment," ordering that plaintiff Church and plaintiff in intervention Hubbard, take nothing by their complaint and complaint-in-intervention and that defendant Armstrong have and recover from each of them his costs and disbursements.

DISCUSSION

The Order Unsealing The Record Must Be Reversed

[3] "Although the California Public Records Act (Gov.Code, §§ 6250 [et seq.]) does not apply to court records (see § 6252, subd. (a)), there can be no doubt that court records are public records, available to the public in general ... unless a specific exception makes specific records nonpublic. (See *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 220–222 [71 Cal.Rptr. 193]....) To prevent secrecy in public affairs public policy makes public records and documents available for public inspection by ... members of the general public.... [Citations.] Statutory exceptions exist [citations], as do judicially created exceptions, generally temporary in nature, exemplified by such cases as *Craemer, supra*, and *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190 [124 Cal.Rptr. 427] ..., which involved temporary sealing of grand jury transcripts during criminal trials to protect defendant's right to a fair trial free from adverse advance publicity. Clearly, a court has inherent power to control its own records to protect rights of litigants before it, but 'where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed.' (*Craemer, supra*, 265 Cal.App.2d at p. 222 [71 Cal.Rptr. 193]) The court in *Craemer* suggested that countervailing public policy might come into play as a result of events that tend to undermine individual security, personal liberty, or private property, or that injure the public or the public good." (*Estate of Hearst* (1977), 67 Cal.App.3d 777, 782–783, 136 Cal.Rptr. 821.)

"If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism. For this reason traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals. Thus in *Sheppard v. Maxwell* (1966) 384 U.S. 333, 350 [86 S.Ct. 1507, 1515, 16 L.Ed.2d 600, 613], the court said it is a vital function of the press to subject the judicial process to 'extensive public scrutiny and criticism.' And the California Supreme Court has said, 'it is a first principle that the people have the right to know what is done in their courts.' (*In re Shortridge* (1893) 99 Cal. 526, 530 [34 P. 227]....) Absent strong countervailing reasons, the public has a legitimate interest and right of general access to court records...." (*Estate of Hearst, supra*, 67 Cal.App.3d at p. 784, 136 Cal.Rptr. 821.)

We are unaware of any showing made before Judge Breckenridge, other than the parties' stipulation, justifying sealing by the trial court of the record in this case. However, inasmuch as the parties agreed to the sealing in December of 1986, and no third party intervened at that time to seek reconsideration or review of the court's order, the order became final long before Corydon intervened in the action almost two years later.

In *Greene v. State Farm Fire & Casualty Co.* (1980) 224 Cal.App.3d 1583, 274 Cal. Rptr. 736, the court stated at page 1588, 274 Cal.Rptr. 736: "The power of one judge to vacate an order duly made by another judge is limited. In *Fallon v. Superior Court* (1939) 33 Cal.App.2d 48, 52 [90 P.2d 858] ... we issued a writ of prohibition restraining a successor law and motion judge from vacating an order of his predecessor, stating, 'Except in the manner prescribed by statute a superior court may not set aside an order regularly made.' In *Sheldon v. Superior Court* (1941) 42 Cal. App.2d 406, 408 [108 P.2d 945] ... the Court of Appeal, Second Appellate District annulled the order of one probate judge which vacated the previously made order of another probate judge appointing an administrator, stating 'that a valid order made *ex parte* may be vacated only after a showing of cause for the making of the latter order, that is, that in the making of the original order there was (1) inadvertence, (2) mistake, or (3) fraud.' Even more on point, in *Wyoming Pacific Oil Co. v. Preston* (1958) 50 Cal.2d 736, 739 [329 P.2d 489] ... the California Supreme Court reversed the order of a second judge dismissing an action under former [Code of Civil Procedure] section 581a for failure to make service of process within three years, after a first judge had found as a fact that the affected defendant was concealing himself to avoid service of process, quoting *Sheldon*. [Citation.]" (Fn. omitted.)

In *Greene*, *supra*, Alameda County Superior Court Judge Donald McCullum issued general order 3.30, in which he found it impracticable, futile, or impossible to bring certain cases, including *Greene*, to trial within the applicable five-year limitation period (Code Civ.Proc., § 583, subd. (b)), and extended the deadline for bringing those cases to trial. Thereafter, Judge Richard Bartalini, to whom the case was assigned for trial, dismissed the action, on motion of the defendants, for failure to bring it to trial within five years. The court stated, "[D]efendants were, in effect, asking Judge Bartalini to focus on the particular facts of the case and, in light of those facts, to rethink Judge McCullum's order and to see whether he agreed with it. No statutory authority exists for such a request, and Judge Bartalini erred in granting it. [Citations.] General order 3.30 could 'not be set aside simply because "the court concludes differently than it has upon its first decision." ' [Citations.]" (*Greene v. State Farm Fire & Casualty Co.*, *supra*, 224 Cal.App.3d at p. 1589, 274 Cal. Rptr. 736.)

In our case, Corydon intervened in the action between plaintiffs and Armstrong, seeking access to the sealed record for the limited purpose of preparing his own cases involving the Church. Judge Geernaert, on his own motion, vacated Judge Breckenridge's order sealing the record. The time had long since expired for reconsideration of Judge Breckenridge's order (Code Civ.Proc., § 1008), or relief therefrom pursuant to Code of Civil Procedure section 473, and the parties had the right to rely on the sealing order. No showing was made other than that supporting Corydon's motion for access to the record.[4] We hold Judge Geernaert exceeded his authority in vacating Judge Breckenridge's order sealing the record.[5]

4. Plaintiffs do not challenge Corydon's access to the record, stating in their brief: "Corydon's access must continue to be limited by the conditions imposed thus far by this court's Modified Temporary Stay Order.... He sought access only for use in private litigation against the Church; this court's order, which permits him to use the information he obtains only in said litigations and only after making a good faith effort to have it introduced under seal, is appropriately tailored to meet his asserted need without unnecessarily invading appellants' privacy." Pursuant to the stay order issued by Division Four, Corydon has had the desired access since December 22, 1988, and the issue is moot as to him. He now seeks in this court more than he sought by his motion in the trial court.

5. Armstrong, who did not participate in the hearing on the motion below, has filed a brief claiming the record should be unsealed because the Church has failed to comply with the terms of its settlement agreement with him. His declarations to the latter effect are not properly before us on this appeal, as they were not considered by the trial court. We therefore consider neither the meaning of the portions of the settlement agreement to which he refers nor the question whether the Church has complied therewith.

law excludes any evidence of a defendant's wealth even in punitive damages cases. Thus, "the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." (Id. at p. 22.)

For good reason, Scientology does not claim the California punitive damages process violates due process because it permitted--and now mandates--evidence of a defendant's financial condition in all punitive damages cases. (Adams v. Murakami (1991) 54 Cal.3d 105.) As our Supreme Court has pointed out, the defendant's financial condition is an essential limitation on the jury's discretion in this state. The jury is instructed it may only award punitive damages which, taking account of the defendant's financial condition, are enough to punish and deter but not so high as to impair the defendant's ability to continue functioning. We do not read the United States Supreme Court opinion in Haslip to suggest a state punitive damages procedure which admits evidence of financial condition for this purpose and with these limiting instructions denies due process to defendants.

C. Review of Punitive Damages at the Trial Court Level.

In Alabama, the posttrial review of punitive damages awards at the trial court level requires the trial judge to scrutinize the amount of those awards for possible "excessiveness." The criteria the Alabama Supreme Court has set forth to guide this trial court review include "culpability

of the defendant's conduct," "desirability of discouraging others from similar conduct," and "impact on the parties."

California law likewise provides for trial court review of the possible excessiveness of punitive damage awards. The criteria guiding this review, however, are more precise in many ways than those the United States Supreme Court found "meaningful and adequate" in Haslip. As the California Supreme Court listed them in Neal v. Farmers Ins. Exchange, (1978) 21 Cal.3d 910, and as reemphasized in Adams v. Murakami, supra, 154 Cal.3d. 105, these criteria fall in three main categories--first, the relative egregiousness of the defendant's conduct, as measured by the consequences of its acts, second, whether the punitive damages award bears a reasonable relationship to the plaintiff's injury, and third, whether the punitive damages award bears a reasonable relationship to the defendant's financial condition--enough to punish and deter the egregious conduct, but not so much as to destroy the defendant. Nearly all of the individual factors the Alabama courts employ are subsumed under one or the other of the main categories the California courts use.

There is a slight difference between California and Alabama in the procedure required of trial courts after they have completed their review of a punitive damage award. According to Haslip, Alabama requires trial judges to state

their findings and reasoning on the record, whether they affirm, modify or reverse the award. (111 S.Ct. at p. 1044.) California has not had such a requirement, although trial judges frequently do so on their own.

Scientology complains the trial judge in this case denied its lengthy new trial and JNOV motions by filing a simple minute order noting those motions were "denied." Among other things, these posttrial motions raised punitive damage issues. Scientology seizes upon language in Haslip to the effect Alabama trial courts reflect "on the record" the reasons for refusing to interfere with a jury's punitive damage award. It interprets this to be a federal "due process" requirement and argues the trial court's failure to give a detailed account of its reasoning "on the record" denied Scientology its constitutional right.

We first observe that at no place in Haslip did the Supreme Court suggest a state punitive damages procedure had to match the Alabama procedure in each and every aspect if it were to satisfy federal due process requirements. (See fn. 3, supra.) It neither said nor implied it was essential every state require trial judges to state their reasons on the record.

Indeed the Supreme Court seemed to place far more importance on the existence of a set of criteria the trial court is to apply in judging whether the jury's verdict was excessive than whether the trial court places its reasoning on the record. After mentioning the fact Alabama requires judges

to reflect their reasons on the record and then listing the criteria they are to apply in evaluating punitive damage awards, the Supreme Court emphasizes: "[This] test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." (111 S.Ct. at p. 1044, italics added.)

In the instant case, the trial court patiently entertained a lengthy hearing on the new trial and JNOV motions which took several hours spread over several days. The judge fully heard Scientology's presentation challenging the punitive damages award. These arguments addressed the criteria California law establishes for evaluating the propriety and amount of these awards. A full transcript exists of the arguments made and the evidence relevant to evaluating the propriety and amount of punitive damages.[6/] Thus the record is complete and sufficient for this court on appeal to review the jury verdict on punitive damages and the trial court's

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[6/] The posttrial hearing assumes special importance in Alabama. Unlike California, some of the facts essential to meaningful review of the punitive damages award do not appear in the trial record. In particular, Alabama law does not permit either party to introduce any evidence of the defendant's financial condition at the trial itself. In contrast, California has always allowed such evidence and now requires it. (Adams v. Murakami, supra, 54 Cal.3d 105.) Trial courts in Alabama accept this sort of evidence for the first time at the posttrial hearing on excessiveness of the punitive damage award. Thus, it is only the evidence introduced at this posttrial hearing which allows Alabama's trial and appellate courts to conduct a "meaningful review" of whether the damages awarded bear a reasonable relation to defendant's conduct and financial resources.

disposition of Scientology's claim those damages were excessive. The fact the trial court found it unnecessary to set forth its reasoning on the record only means the court deviated in this one detail from the procedure Alabama apparently follows. It does not mean Scientology was denied a "meaningful and adequate review" of the punitive damage award by the trial court or that it was denied due process.

The record produced in the trial court was more than ample for purposes of that court's consideration of the punitive damage award and for appellate review by this court. We would have gained little had it reflected the trial court's reasoning. Indeed that record was sufficient for this court to determine the punitive damages award should be reduced. (See p. 3, supra.)

The trial court here did not violate California law by failing to place its reasoning on the record nor does California law run afoul of the Constitution by failing to require this particular procedural step. This is not to say it would not be a preferable practice for trial judges to do so. It is merely to conclude the failure to make a record of the reasoning behind the trial court's ruling does not deny the parties of due process under the U.S. constitution. Nor does it constitute reversible error under California law.

There is empirical evidence trial court review in California is "meaningful and adequate" which was not available or at least not mentioned by the Supreme Court in its evaluation of the Alabama process. The high court found trial court review

of punitive damages in Alabama to be "meaningful and adequate" without citing any specific examples where trial courts in that state actually had reversed or reduced punitive damages awards. (The high court, on the other hand, specifically mentioned cases where such awards had been reduced at the appellate level.) (111 S.Ct. at p. 53.) By way of contrast, the tables incorporated in Devlin v. Kearny Mesa AMC/Jeep Renault, Inc., supra, 155 Cal.App.3d 381 and the appendix to this opinion document numerous cases in which California trial courts have reduced punitive damages awards, a fact which reinforces our finding trial court review of punitive damages awards in California is at least as "meaningful and adequate" as is true in Alabama.

This conclusion is bolstered further by a recent Rand Corporation study of posttrial reductions of jury awards in selected California and Illinois courts.7/ (Shanley and Peterson, Posttrial Adjustments to Jury Awards (Rand Institute for Civil Justice (1987).) The study revealed verdicts which

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7/ The study was based on data from three jurisdictions--Cook County, Illinois, San Francisco County, California, and the ring of counties surrounding it, and "all California counties greater than 150,000 in population but outside the largest metropolitan areas." (Shanley and Peterson, Posttrial Adjustments to Jury Awards, (Rand Institute for Civil Justice, 1987) at p. 3., fn. 15.) (Despite their size, the latter category included cities as large as Sacramento and Bakersfield.) Although the study included a non-California jurisdiction, the authors report "[r]esults appear to vary little across the three locations in the study." (Id. at p. ix.) Consequently, the findings discussed in this opinion represent valid evidence of what is happening in this state.

include punitive damage awards are reduced over twice as much on average as those limited to compensatory damages--by 43 percent in those with punitive damages versus 18 percent in those without. (Id. at pp. 38-39.)8/ Furthermore, courts reduce damage awards far more drastically than they are throug posttrial settlements--by 54 percent on average compared to 33 percent. (Id. at pp. 43-46.) The study further found "[m]ore of those cases [in which courts reduced damage awards] resulte from motions to the trial court than from the appeals process. (Id. at p. 45.) Thus, this empirical data supplies strong evidence California trial courts afford "meaningful and adequate" review of punitive damages awards in practice as wel as theory.

8/ "In the 165 cases where punitive damages constituted a part of the total award, final payments were only .57 of the total. In contrast, when only compensatory damages were involved, fina payments were .82 of the total....This result is not just a function of the larger award size of punitive damage cases, but holds for all cases with verdicts greater than $100,000. ... [F]or cases with verdicts between $100,000 and $999,000, those with punitive damages paid an average proportion of .61 [a reduction of 39 percent], while those without such damages pai an average proportion of .86 [a reduction of 14 percent]. For cases exceeding $1 million, the difference is about the same. With punitive damages the payout rate was .55 [a reduction of 4 percent], while without punitive damages the payout was .76 [a reduction of 24 percent]. (Shanley and Peterson, Posttrial Adjustments to Jury Awards, supra, at p. 38.)

These findings are corroborated by another Rand study whi was confined to punitive damage cases in San Francisco, California, and Cook County, Illinois. That study reported punitive damages were reduced an average 50 percent in the sample it covered from the 1979 - 1983 period. (Peterson, San and Shanley, Punitive Damages: Empirical Findings (Rand Institute for Civil Justice (1987).)

D. Review of Punitive Damages at Appellate Level.

The United States Supreme Court also emphasized the Alabama Supreme Court conducted its own review of the possible excessiveness of the punitive damage award. California likewise provides one and sometimes two levels of appellate review of these awards.

By the time of its review of the Haslip award the list of criteria the Alabama high court applied had been refined to include the "relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred," "degree of reprehensibility" and "duration" of that conduct, "defendant's awareness" or "concealment" of the conduct, "existence and frequency of past conduct," "profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss," defendant's "financial position," "all costs of litigation," and "imposition of criminal sanctions" or "other civil awards... for the same conduct ... these also to be taken in mitigation." (111 S.Ct. at p. 1045.)

Most but not all of the above criteria are subsumed in the three major categories of criteria California appellate courts as well as trial courts apply in reviewing punitive damages awards. The United States Supreme Court did not hold or imply that each and every one of the criteria the Alabama Supreme Court now applies is essential to due process. It

merely held this particular set of criteria was sufficient to satisfy due process, not that another set would fail to do so. The nation's high court emphasized Alabama's appellate review "ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages .... Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.... [¶] The standards provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." (111 S.Ct. at pp. 1045-1046.)

Scientology complains tha California criteria do not specifically highlight two factors it deems important--"impact on innocent third parties," and "punitive damage awards imposed in prior cases for the same conduct." Nothing in Haslip suggests these two particular factors are essential to the constitutionality of a formula for reviewing punitive damage awards. But it is worthwhile to note both of them can be subsumed under the existing California formula and its overall goal of producing an award that is sufficient to punish and deter harmful conduct but not so severe it destroys the defendant. Evidence of prior punitive damage awards for the same conduct or the impact on "innocent third parties" both bear on that ultimate question and would be admissible under one or the other of the three major categories.

What the United States Supreme Court concluded about the purpose and effect of appellate review of punitive damages awards in Alabama is equally true in California. Our high court has emphasized and reemphasized both trial and appellate courts should scrutinize these awards to ensure the amount is not beyond that required to punish and deter the offending conduct. The United States Supreme Court found appellate review in Alabama had "real effect" primarily because it could point to two cases in which the Alabama Supreme Court had reduced punitive damage awards. A survey of California appellate decisions reveals many reversals and reductions of punitive damages even in cases where the trial court had refused to interfere with the jury's verdict. (See appendix, infra, and Devlin v. Kearny Mesa AMC/Jeep Renault, Inc., supra, 155 Cal.App.3d at pp. 393-396.)

Scientology complains about the standard of review this court and other California courts apply under California law--the traditional "passion and prejudice" standard. Scientology equates California's "passion and prejudice" standard with the Vermont and Mississippi standards which the Haslip opinion noted had warranted expressions of "concern" from individual Justices in other opinions. (Pacific Mutual Life Ins. Co. v. Haslip, supra, 111 S.Ct. at p. 1045, fn. 10, citing Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc. (1989) 492 U.S. 257 and Bankers Life & Casualty Co. v. Crenshaw (1988) 486 U.S. 71.)

Setting aside the fact the Haslip court only mentioned the Vermont and Mississippi formulations had raised "concerns" and in no way held they violated due process, Scientology is mixing apples and oranges in comparing California's version of a "passion and prejudice" standard with what exists in these two jurisdictions. Vermont allows punitive damages to be modified or set aside only if "manifestly and grossly excessive" while Mississippi modifies or sets aside a punitive damages verdict only if the award "evinces passion, bias and prejudice on the part of the jury so as to shock the conscience."

It is true California uses the rubric of a "presumption the jury acted out of passion and prejudice" to justify setting aside or modifying jury awards of punitive damages. But in reality, as discussed earlier, that standard now stands for a set of specific criteria, detailed jury instructions, and procedures which define "passion and prejudice" in a way which is far more precise and far less subjective than the Vermont and Mississippi formulations.2/

2/ It is interesting but not essential to our decision in this case to note a federal appellate court has held the Mississippi standard of review is constitutional under Haslip despite the expressions of "concern" reflected in that opinion. Eichenseer v. Reserve Life Ins. Co., supra, 934 F. 1377 was one of the other cases the United States Supreme Court was holding at the time it decided Haslip and remanded for reconsideration in the light of Haslip. On remand the Fifth Circuit Court of Appeal evaluated the Mississippi procedures and the specific punitive damage award. The court upheld that award even though it was 500 times compensatory damages and even though Mississippi

(Footnote continued)

Indeed as highlighted earlier, the California criteria closely parallel--and in some respects are more precise and less subjective--than the Alabama criteria found constitutional in Haslip. We find nothing in Haslip suggesting California's version of a "presumption of passion and prejudice" standard of review is unconstitutional. (Accord: Las Palmas Associates v. Las Palmas Center, supra, 235 Cal.App.3d 1220.) Accordingly, we have no reservations about applying this standard to the punitive damage award the jury imposed in the instant case.

E. The Preponderance of the Evidence Standard as Applied to Punitive Damages Issues.

The United States Supreme Court expressly approved the use of a "preponderance of the evidence" standard in deciding punitive damages issues. (Pacific Mutual Life Ins. Co. v. Haslip, supra, 111 S.Ct. at p. 1046, fn. 11.) California law has been amended to require the higher standard of "clear and convincing" evidence. (Civ. Code.) However, at the time of the trial in the instant case the standard was still "preponderance of the evidence." Yet, as the nation's high court held, "the lesser standard prevailing in

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9/ (Continued)

courts only reverse when an award evinces passion, bias, or prejudice sufficient to "shock the conscience." (Id.) "As long as there is some meaningful procedural assurance that the amount of the award is not an impulsive reaction to the wrongful conduct of the defendant, the award survives the procedural protection aspect of the due process analysis...." (Id. at p. 1385.)

Alabama--'reasonably satisfied from the evidence'--when buttressed, as it is, by the procedural and substantive protections outlined above is constitutionally sufficient." (Pacific Mutual Life Ins. Co. v. Haslip, supra, 111 S.Ct. at p. 1040, fn.11.) For reasons expressed above, California law supplies the same "buttress" of procedural and substantive protections, and did so at the time the instant case was tried. Accordingly, the use of a "preponderance of the evidence standard" in this case was constitutionally sufficient under Haslip.

III. APPLYING CALIFORNIA'S STANDARDS TO THIS CASE WE CONCLUDE THE PUNITIVE DAMAGES AWARD WAS EXCESSIVE AND MUST BE REDUCED OR RETRIED.

Having determined California punitive damages law is constitutional, we now apply that law to the punitive damages award in this case. We first review the guiding principles of California law on this subject, most of which have been mentioned in the course of the constitutional discussion.

A. Applying the California Criteria.

"It is well established that a reviewing court should examine punitive damages and, where appropriate, modify the amount in order to do justice." (Gerard v. Ross (1988) 204 Cal.App.3d.968, 980; Allard v. Church of Scientology (1976) 58 Cal.App.3d 439, 463.) In reviewing a punitive damages award, the appellate court applies a standard similar to that used in reviewing compensatory damages, i.e., whether, after reviewing the entire record in the light most favorable to the judgment,

the award was the result of passion or prejudice. (See Bertero v. National General Corp. (1974) 13 Cal.3d 43, 64; Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., supra, 155 Cal.App.3d at p. 388.) However, as discussed earlier the test here is more refined, employing three factors to evaluate the propriety of the award.

The first factor is the degree of reprehensibility of the defendant's conduct. (Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910, 928.) "[C]learly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal." (Ibid.)

The second factor is the relationship between the amount of the award and the actual harm suffered. (Ibid.; Seeley v. Seymour (1987) 190 Cal.App.3d 844, 867.) This analysis ordinarily focuses upon the ratio of compensatory damages to punitive damages; the greater the disparity between the two awards, the more likely the punitive damages award is suspect. (Seeley v. Seymour, supra, 190 Cal.App.3d at p. 867; see Little v. Stuyvesant Life Ins. Co. (1977) 67 Cal.App.3d 451, 469-470.)

Finally, a reviewing court will consider the relationship of the punitive damages to the defendant's financial condition. (Adams v. Murakami, supra, 54 Cal.3d 105; Neal v. Farmers Ins. Exchange, supra, 21 Cal.3d at p. 928; Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., supra, 155

Cal.App.3d at p. 390.) In applying this factor courts must strike a proper balance between inadequate and excessive punitive damage awards. "While the function of punitive damages will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort, the function also will not be served by an award which is larger than necessary to properly punish and deter." (Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc., supra, 155 Cal.App.3d at p. 391.)

In this case, we need not go beyond the third factor--the ratio between punitive damages and the defendant's financial condition. The evidence admitted at trial supported the finding the appellant church had a net worth of $16 million at the time of trial. Accepting these figures as true, the punitive damages award was 150 percent of appellant's net worth. Under prevailing standards established in prior appellate cases, this ratio is clearly excessive. (Seeley v. Seymour, supra, 190 Cal.App.3d at p. 869 [punitive damages reversed; award was 200 percent of defendant's net worth]; Burnett v. National Enquirer, Inc. (1983) 144 Cal.App.3d 991, 1012 [punitive damages reduced; initial award was 35 percent of defendant's net worth]; Egan v. Mutual of Omaha Insurance Co. (1979) 24 Cal.3d 809, 824 [punitive damages reversed; award was 58 percent of defendant's net income]; Allard v. Church of Scientology, supra, 58 Cal.App.3d at pp. 445-446, 453 [punitive damages reversed; award was 40 percent of defendant's net worth]; compare Devlin v. Kearney AMC/Jeep/Renault, Inc., supra,

155 Cal.App.3d at pp. 391-392 [punitive damages affirmed where award was 17.5 percent of defendant's net worth]; Schomer v. Smidt (1980) 113 Cal.App.3d 828, 836-837 [punitive damages affirmed; award was 10 percent of defendant's net worth]; Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co. (1987) 189 Cal.App.3d 1072, 1100 [punitive damages affirmed; award was 7.2 percent of defendant's net income].) Accordingly, we reverse the punitive damage award unless the plaintiff accepts a remittitur of that judgment to $2 million.10/

B. It Is Both Proper and Constitutional to Reduce Rather Than Reverse the Punitive Damage Award in This Case.

Scientology questions a court's authority to reduce a punitive damages award even under a remittitur where it has concluded the award was excessive under a "presumption of passion and prejudice" standard. According to Scientology, we should be required to reverse the entire punitive damages judgment unconditionally.

10/ In his brief on this reconsideration of the original judgment, Wollersheim claims Scientology's true net worth was several times greater than $16 million. The brief argues principally from purported revelations in other litigation rather than the record in this case. In essence, respondent's counsel claims Scientology spun off the majority of its assets to related corporations in contemplation of litigation and to put most of those assets beyond the reach of Wollersheim and other litigants. The record in this case is insufficient to support any such finding. Accordingly, for purposes of this appeal we are bound by the $16 million net worth figure in evaluating the punitive damage award. Wollersheim is not required to accept the remittitur if he is willing to retry the punitive damages phase of this case. In that retrial, he would not be bound by the record in the first trial on the question of Scientology's present net worth.

Scientology relies for this proposition on a single decision of the United States Supreme Court, Minneapolis, etc. Ry. v. Moquin (1931) 283 U.S. 520, 521. There are several grounds on which Moquin--and its holding that "no verdict can ... stand which is found to be in any degree the result of appeals to passion and prejudice"--could be distinguished. However, that is not necessary since Moquin is in no sense binding on this or any other California court. Moquin was not announcing a rule of federal due process to guide litigation in state courts. Rather this case arose in a federal action tried in state court. It sets forth a rule of federal law and is limited in its application to federal cases. Indeed the United States Supreme Court was careful to highlight the rule it was announcing had nothing to do with the rules Minnesota courts apply in state litigation. Accordingly, there is no merit to Scientology's claim Moquin supersedes the many California Supreme Court and Court of Appeal cases which have reduced punitive damage awards rather than setting them aside after finding those awards were excessive and thus "presumed to be the product of passion and prejudice." (See, e.g., (Neal v. Farmers Ins. Exchange, supra, 21 Cal.3d 910; (Gerard v. Ross, supra, 204 Cal.App.3d.968, 980; Allard v. Church of Scientology, supra, 58 Cal.App.3d at p. 453.) See also other appellate cases in which punitive awards were reduced rather than set aside in the appendix to this case and the earlier chart in Devlin v. Kearney AMC/Jeep/Renault, Inc., supra, 155

Cal.App.3d 381.) .

C. Scientology Is Not Exempt From Punitive Damages for Acts, Such as Those Involved in This Case, Which Are Not Constitutionally Protected Religious Practices.

In a final challenge, Scientology claims the First Amendment bars the imposition of punitive damages on religious organizations for their "religious expressions" or, at a minimum, the First Amendment in combination with the due process clause requires closer scrutiny of any punitive damage award than would be true for other persons or entities. To support these arguments, Scientology cites cases actually involving freedom of speech or press not freedom of religion but which it claims "express reservations" about the use of punitive damages which might inhibit First Amendment activity (i.e., (Gertz v. Robert Welch (1974) 418 U.S. 323; Electrical Workers v. Foust (1979) 442 U.S. 42.) Notably, several opinions, including one cited by Scientology, uphold punitive damage awards in private defamation actions. (Gertz v. Robert Welch, supra; 418 U.S. 323; Dun & Bradstreet v. Greenmoss Builders, Inc. (1985) 472 U.S. 749; Curtiss Publishing Co. v. Butts (1967) 388 U.S. 130.)

The first of Scientology's arguments ignores the fact this court found the patterns of activities which justified punitive damages in this case were either found not to qualify as "religious expression" at all (i.e., "fair game") (Wollersheim v. Church of Scientology, supra, 212 Cal.App.3d at pp. 891-899) or were found not to be constitutionally

protected because forced on participants like Wollersheim through emotional, economic and physical coercion (i.e., "auditing," "disconnect.") (Id. at pp. 891-899.) Thus, the imposition of punitive damages for this conduct does not impinge on constitutionally protected religious expression. It only punishes and deters reprehensible activities which visit serious harm on others in society. Under California law, punitive damages could be imposed on other individuals and entities which engaged in this conduct. Therefore, such damages can be imposed on those who claim to have done these constitutionally unprotected actions out of religious motivation. (Employment Div. Dept. of Human Res. of Oregon v. Smith, supra, 494 U.S. 872.)

The "heightened scrutiny" argument merely resurrects the contention and many of the authorities Scientology marshalled in support of its earlier position the court must closely scrutinize liability claims based on actions which may constitute "religious expression." Once again, the cases cited involve freedom of speech not free exercise of religion (i.e., Young v. American Mini Theatres (1976) 427 U.S. 50; New York Times Co. v. United States (1971) 403 U.S. 713; Speiser v. Randall (1958) 357 U.S. 513.) Moreover, these cases focus on the process the court uses in determining whether the speech involved qualifies for constitutional protection at all, not whether it warrants a punitive damage award.

Nonetheless, setting these problems aside, the

fundamental problem with Scientology's argument is that we already have applied this "heightened scrutiny" to the activities for which Scientology claims constitutional protection. We found those activities did not qualify as "voluntary religious expression" or in some instances did not qualify as "religious expression" at all. (See Wollersheim v. Church of Scientology, supra, 212 Cal.App.3d at pp. 891-899.) We already subjected these activities to "heightened scrutiny" and found them to lack constitutional protection under the free exercise of religion clause. Consequently, there is no reason to subject them to another round of "heightened scrutiny" in order to determine whether they are immune from punitive damages. The reason for "heightened scrutiny" of the punitive damage award evaporated with the finding the acts themselves were not constitutionally protected.

Alternatively, even if we follow Scientology's request and subject the punitive damage award in this case to "heightened scrutiny" we arrive at the same conclusion as when we subjected the acts themselves to "heightened scrutiny." There is a compelling state interest in punishing and deterring this constitutionally unprotected, harmful conduct just as there is a compelling state interest in compensating the victims.

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DISPOSITION

The judgment is reversed as to the cause of action for negligent infliction of emotional injury. The judgment as to the cause of action for intentional infliction of emotional injury is affirmed with the exception the compensatory damage award and the punitive damage award are set aside, unless the plaintiff agrees to a remittitur reducing the compensatory damages to $500,000 and the punitive damages to $2 million. Each party to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

JOHNSON, J.

We concur:

LILLIE, P.J.

WOODS (Fred), J.

APPENDIX

WOLLERSHEIM v. CHURCH OF SCIENTOLOGY

CASE	COMPENSATORY DAMAGES	ORIGINAL PUNITIVE DAMAGES	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	TRIAL COURT RULING ON NEW TRIAL MOTION	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	APPELLATE COURT DECISION (RE DAMAGES)	FINAL RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	FINAL RATIO OF PUNITIVE DAMAGES TO COMPENSATORY DAMAGES
Nelson v. Gaunt (1981) 125 Cal.App.3d 623	$450,000	$1.5 mil	No wealth data		No wealth data	Affirmed	No wealth data	3.3 to 1
Chodos v. Insurance Co. of N. America (1981) 126 Cal.App. 3d 86	$5,146.71	$200,000	.08% net profit .01% net worth	Denie	.08% net profit .01% net worth	Affirmed	.08% net profit .01% net worth	40 to 1
Betts v. Allstate Ins. Co. (1984) 154 Ca..App. 3d 688	$500,000 against D1 $500,000 against D1 and D2	$3 Mil. against D1	Less than one-half week's earnings	Granted (Unless joint and several compensatory remitted to $50,000.)	Less than one-half week's earnings	Affirmed	Less than one half week's earnings	5.5 to 1
Goshgarian v. George (1984) 161 Cal.App. 3d 1214	$714.29	$15,000	10.7% net worth		10.7% net worth	Affirmed Compensatory damages. Punitives reversed. (Unless remitted to $7,500.)	5.4% net worth	10.5 to 1
Hobbs v. Bateman Eichler, Hill, Richards, Inc. (1985) 164 Cal.App. 3d 174	$96,000 against D1 and D2	$220,000 against D1	1% net worth	Denied	1% net worth	Affirmed	1% net worth	2.3 to 1

CASE	COMPENSATORY DAMAGES	ORIGINAL PUNITIVE DAMAGES	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	TRIAL COURT RULING ON NEW TRIAL MOTION	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	APPELLATE COURT DECISION (RE DAMAGES)	FINAL RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	FINAL RATI OF PUNITIV DAMAGES TO COMPENSATO DAMAGES
Sprague v. Equifax, Inc. (1985) 166 Cal.App. 3d 1012	$100,000	$5 Mil.	No wealth data	Denied (Conditional upon reduction in punitives to $1 Mil.)	No wealth data	Affirmed	No wealth data	10 to 1 (If remit accepted.)
Greenfield v. Spectrum Investment Corp. (1985) 174 Cal.App. 3d 111	$350,000 against D1 and D2	$400,000 against D1 $42,500 against D2	D2 earned $2,000/mo. and owned automobile	Granted (Unless compensatory reduced to $150,000; punitives against D1 reduced to $200,000; punitives against D2 reduced to $15,000.)	D2 earned $2,000/mo. and owned automobile	Reinstated original judgments	D2 earned $2,000/mo. and owned automobile	D1: 1.1 to D2: .12 to
West v. Johnson & Johnson Products, Inc. (1985) 174 Cal.App. 3d 831	$500,000	$10 Mil.	.44% net worth	Granted (Unless compensatory damages remitted to $100,000 and punitives to $1 Mil.)	.04% net worth	Affirmed	.04% net worth	10 to 1
Campbell v. McClure (1986) 182 Cal.App.3d 806	$181, 291.13	$99, 393.19 (To be reduced to $1,000 if paid by deadline.)	No wealth data	None	No wealth data	Affirmed	No wealth data	.55 to 1 (If deadlin met, .01 to 1.)

CASE	COMPENSATORY DAMAGES	ORIGINAL PUNITIVE DAMAGES	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	TRIAL COURT RULING ON NEW TRIAL MOTION	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	APPELLATE COURT DECISION (RE DAMAGES)	FINAL RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	FINAL RATIO OF PUNITIVE DAMAGES TO COMPENSATORY DAMAGES
Greenup v. Rodman (1986) 42 Cal.3d 822	$338,000	$338,000	No wealth data	None	No wealth data	Ct. of Appeal affd. Supreme Ct. revd. and reduced compensatory damages to $15,000 and punitives to $100,000. (Unless D files amended complaint.)	No wealth data	6.7 to 1
Barragan v. Banco BCH (1986) 188 Cal.App. 3d 283	$1 Mil.	$2 Mil.	No wealth data	None	No wealth data	Modified compensatory damages to $500,000; reversed punitives and remanded to determine defendant's net worth		
Downey S&L Assn. v. Ohio Casualty Ins. Co. (1987) 189 Cal.App. 3d 1072	$152,983.43	$5 Mil.	1.9% net worth; 1% net worth of parent co. 16.7% net annual income; 3.64% net annual income of parent co.; 7.14% average net annual income	Denied	(Same as column 3)	Affirmed	(Same as column 3)	33 to 1

CASE	COMPENSATORY DAMAGES	ORIGINAL PUNITIVE DAMAGES	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	TRIAL COURT RULING ON NEW TRIAL MOTION	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	APPELLATE COURT DECISION (RE DAMAGES)	FINAL RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	FINAL RATIO OF PUNITIVE DAMAGES TO COMPENSATORY DAMAGES
DeTomaso v. Pan. Am. World Airways, Inc. (1987) 43 Cal.3d 517	$265,000	$300,000	No wealth data	Granted (Unless remittur of $358,393 accepted.)	No wealth data	Ct. of Appeal affd. and reinstated original judgment. Supreme Ct. reversed. (Tort action preempted by Federal Railway Labor Act; breach of warranty; cause of action remanded for new trial.)	No wealth data	———
Seeley v. Seymour (1987) 190 Cal. 3d 844	$200,000 joint and several among 5 defendants	$2.66 Mil. against D1	200% net worth	Denied	200% net worth	Reversed compensatory and and punidamages a: excessive		
Palmer v. Ted Stevens Honda (1987) 193 Cal.App. 3d 530	$29,500	$150,000	No wealth data	Denied	No wealth data	Punitive damages reversed because evidence of actual damages improperly excluded	No wealth data	———
Castaic Clay Manuf. Co. v. Gus Dedes (1987) 195 Cal.App.3d 444	$529,000	$200,000	No wealth data		No wealth data	Affirmed	No wealth data	.38 to 1

CASE	COMPENSATORY DAMAGES	ORIGINAL PUNITIVE DAMAGES	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	TRIAL COURT RULING ON NEW TRIAL MOTION	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	APPELLATE COURT DECISION (RE DAMAGES)	FINAL RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	FINAL RATIO OF PUNITIVE DAMAGES TO COMPENSATORY DAMAGES
Gerard v. Ross (1988) 204 Cal.App. 3d 968	$8,200 against D1 and D2	$50,000 against D1; $100,000 against D2	70% gross income of D1, 11% net worth of D1, 100% net worth of D2 111% to 67% annual net income of D2	Granted unless punitives against D1 remitted to $25,000	5.6% net worth of D1 35% gross income of of D1 100% net worth of D2 111% - .67% annual net income of D2	Reduced punitives against D2 to $1,000	5.6% net worth of D1 35% gross income of D1 1% net worth of D2 1.11%-.67% annual net income of D2	D1: 3.1 to D2: .12 to
Gagnon v. Continental Casualty Co. (1989) 211 Cal.App. 3d 1598	$70,000	$2.5 Mil.	No wealth data		No wealth data	Compensatory and and punidamages reversed (Plaintiff not entitled to compensatory damages and prejudical error made in jury instructions.)	———	Plaintiff n entitled to compensa damages
Wollersheim v. Church of Scientology of California (1989) 212 Cal.App. 3d 872	$5 Mil.	$25 Mil.	156% net worth	Denied	156% net worth	Modified punitives to $2 Mil. and compensatory damages to $500,000	13% net worth	4 to 1

CASE	COMPENSATORY DAMAGES	ORIGINAL PUNITIVE DAMAGES	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	TRIAL COURT RULING ON NEW TRIAL MOTION	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	APPELLATE COURT DECISION (RE DAMAGES)	FINAL RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	FINAL RATIO OF PUNITIVE DAMAGES TO COMPENSATORY DAMAGES
Dumas v. Stocker (1989) 213 Cal.App. 3d 1262	$47,000	$141,000	No wealth data	Denied	No wealth data	Reversed punitives and remanded for re-determination based on defendant's net wealth	No wealth data	———
Storage Services v. Osterhaan (1989) 214 Cal.App. 3d 498	$1 Mil. 044,250 against D1 and D2	$75,000 against D1 $150,000 against D2	50% - 37.5% net worth of D1 144% - 129% gross income of D1 No wealth data on D2		50% - 37.5% net worth of D1 144% - 129% gross income of D1 No wealth data on D2	Reversed punitives against D1 as excessive. (If plaintiff consents to remittur modified to $20,000); reverses punitives against D2 in absence of data on net wealth.	———	———
Fenlon v. Brock (1989) 216 Cal.App. 3d 1174	$95,000	$40,000	No wealth data	Denied	No wealth data	Affirmed	No wealth data	.42 to 1
Armitage v. Decker (1990) 218 Cal.App. 3d 867	$25,000	$1,000	No wealth data	Denied	No wealth data	Affirmed	No wealth data (Court infers from record that $1,000 not excessive)	.04 to 1

CASE	COMPENSATORY DAMAGES	ORIGINAL PUNITIVE DAMAGES	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	TRIAL COURT RULING ON NEW TRIAL MOTION	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	APPELLATE COURT DECISION (RE DAMAGES)	FINAL RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	FINAL RATIO OF PUNITIVE DAMAGES TO COMPENSATORY DAMAGES
Roberts v. Ford Aerospace & Communications Corp. (1990) 224 Cal.App. 3d 793	$292, 224.09	$750,000	No wealth data	Denied	No wealth data	Affirmed	No wealth data	2.6 to 1
Pat Rose Assoc. v. D. Healey Coombe (1990) 225 Cal.App. 3d 9	About $5.2 Mil.	$3 Mil.	No wealth data		No wealth data	Affirmed modified judgment allowing for offset against compensatory damages	No wealth data	.58 to 1
Liberty Transport, Inc. v. Harry W. Gorst Company, Inc. (1991) 229 Cal.App.3d 417	$82,500 against D1 and D2	D1: $40,000 D2: $400,000	No wealth data	Denied	No wealth data	Affirmed	No wealth data	D1: .48 to 1 D2: 4.8 to 1
Adams v. Murakami (1991) 54 Cal.3d 105	$274,266 (after adjustment by trial ct.)	$750,000 (after adjustment by trial ct.)	No wealth data	None	No wealth data	Ct. of Appeal affd. Supreme Ct. reversed punitives because of lack of evidence of defendant's wealth	No wealth data	

CASE	COMPENSATORY DAMAGES	ORIGINAL PUNITIVE DAMAGES	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	TRIAL COURT RULING ON NEW TRIAL MOTION	RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	APPELLATE COURT DECISION (RE DAMAGES)	FINAL RELATIONSHIP OF PUNITIVE DAMAGES TO WEALTH OF DEFENDANT	FINAL RATIO OF PUNITIVE DAMAGES TO COMPENSATORY DAMAGES
Las Palmas Assoc. v. Las Palmas Center Assoc. (1991) 235 Cal.App. 3d 1220	$1 Mil, 502,393	$10 Mil.	2% net value	Denied	2% net value	Reduced punitives to $2 Mil. Reduced compensatory to to $464,786	.4%	4.3 to 1
Douglas v. Ostermeier (1991) 1 Cal.App. 4th 729	$10,624	$187,000	Per defendant, nearly 50% value of his business property. Per plaintiff, "small fraction" of defendant's net worth	Denied	Per defendant, nearly 50% value of his business property. Per plaintiff, "small fraction" of defendant's net worth	Affirmed	Per defendant, nearly 50% value of his business property. Per plaintiff "small fraction" of defendant's net worth	18 to 1
Washington v. Farlice (1991) 1 Cal.App. 4th 766	$10,000	$50,000	More than 30% admitted worth	Denied	More than 30% admitted worth	Affirmed compensatory damages. Reversed punitives. (remanded for re-determination on evidence of defendant's financial condition		

No. 2/7 B023193 - S011790

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED

JUL 23 1992

Robert Wandruff Clerk

DEPUTY

LARRY WOLLERSHEIM, Respondent

v.

CHURCH OF SCEINTOLOGY OF CALIFORNIA, Appellant

Petition for review GRANTED.

Submission of additional briefing, otherwise required by rule 29.3, California Rules of Court, is deferred pending further order of the court.

Arabian
Acting Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

George
Associate Justice

Associate Justice

Associate Justice

Associate Justice

FILED
JUN 22 1984
Clerk
Rosie M. Hart
BY ROSIE M. HART, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CHURCH OF SCIENTOLOGY OF CALIFORNIA, Plaintiff, vs. GERALD ARMSTRONG, Defendant. MARY SUE HUBBARD, Intervenor.	No. C 420153 MEMORANDUM OF INTENDED DECISION

In this matter heretofore taken under submission, the Court announces its intended decision as follows:

As to the tort causes of action, plaintiff, and plaintiff in intervention are to take nothing, and defendant is entitled to Judgment and costs.

As to the equitable actions, the court finds that neither plaintiff has clean hands, and that at least as of this time, are not entitled to the immediate return of any document or objects presently retained by the court clerk. All exhibits

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EXHIBIT H

received in evidence or marked for identification, unless specifically ordered sealed[1], are matters of public record and shall be available for public inspection or use to the same extent that any such exhibit would be available in any other lawsuit. In other words they are to be treated henceforth no differently than similar exhibits in other cases in Superior Court. Furthermore, the "inventory list and description," of materials turned over by Armstrong's attorneys to the court, shall not be considered or deemed to be confidential, private, or under seal.

All other documents or objects presently in the possession of the clerk (not marked herein as court exhibits) shall be retained by the clerk, subject to the same orders as are presently in effect as to sealing and inspection, until such time as trial court proceedings are concluded as to the severed cross complaint. For the purposes of this Judgment, conclusion will occur when any motion for a new trial has been denied, or the time within such a motion must be brought has expired without such a motion being made. At that time, all documents neither received in evidence, nor marked for identification only, shall be released by the clerk to plaintiff's representatives. Notwithstanding this order, the parties may

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1. Exhibits in evidence No. 500-40; JJJ; KKK; LLL: MMM; NNN; OOO; PPP; QQQ; RRR; and 500-QQQQ.

Exhibits for identification only No. JJJJ; Series 500-DDDD, EEEE, FFFF, GGGG, HHHH, IIII, NNNN-1, OOOO, ZZZZ, CCCCC, GGGGG, IIIII, KKKKK, LLLLL, OOOOO, PPPPP, QQQQQ, BBBBBB, OOOOOO, BBBBBBB.

at any time by written stipulation filed with the clerk obtain release of any or all such unused materials.

Defendant and his counsel are free to speak or communicate upon any of Defendant Armstrong's recollections of his life as a Scientologist or the contents of any exhibit received in evidence or marked for identification and not specifically ordered sealed. As to all documents, and other materials held under seal by the clerk, counsel and the defendant shall remain subject to the same injunctions as presently exist, at least until the conclusion of the proceedings on the cross complaint. However, in any other legal proceedings in which defense counsel, or any of them, is of record, such counsel shall have the right to discuss exhibits under seal, or their contents, if such is reasonably necessary and incidental to the proper representation of his or her client.

Further, if any court of competent jurisdiction orders defendant or his attorney to testify concerning the fact of any such exhibit, document, object, or its contents, such testimony shall be given, and no violation of this order will occur. Likewise, defendant and his counsel may discuss the contents of any documents under seal or of any matters as to which this court has found to be privileged as between the parties hereto, with any duly constituted Governmental Law Enforcement Agency or submit any exhibits or declarations thereto concerning such document or materials, without violating any order of this court.

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This court will retain jurisdiction to enforce, modify, alter, or terminate any injunction included within the Judgment.

Counsel for defendant is ordered to prepare, serve, and file a Judgment on the Complaint and Complaint in Intervention, and Statement of Decision if timely and properly requested, consistent with the court's intended decision.

Discussion

The court has found the facts essentially as set forth in defendant's trial brief, which as modified, is attached as an appendix to this memorandum. In addition the court finds that while working for L.R. Hubbard (hereinafter referred to as LRH), the defendant also had an informal employer-employee relationship with plaintiff Church, but had permission and authority from plaintiffs and LRH to provide Omar Garrison with every document or object that was made available to Mr. Garrison, and further, had permission from Omar Garrison to take and deliver to his attorneys the documents and materials which were subsequently delivered to them and thenceforth into the custody of the County Clerk.

Plaintiff Church has made out a prima facie case of conversion (as bailee of the materials), breach of fiduciary duty, and breach of confidence (as the former employer who provided confidential materials to its then employee for certain specific purposes, which the employee later used for other purposes to plaintiff's detriment). Plaintiff Mary Jane Hubbard has likewise made out a prima facie case of conversion

and invasion privacy (misuse by a pe n of private matters entrusted to him for certain specific purposes only).

While defendant has asserted various theories of defense, the basic thrust of his testimony is that he did what he did, because he believed that his life, physical and mental well being, as well as that of his wife were threatened because the organization was aware of what he knew about the life of LRH, the secret machinations and financial activities of the Church, and his dedication to the truth. He believed that the only way he could defend himself, physically as well as from harassing lawsuits, was to take from Omar Garrison those materials which would support and corroborate everything that he had been saying within the Church about LRH and the Church, or refute the allegations made against him in the April 22 Suppressive Person Declare. He believed that the only way he could be sure that the documents would remain secure for his future use was to send them to his attorneys, and that to protect himself, he had to go public so as to minimize the risk that LRH, the Church, or any of their agents would do him physical harm.

This conduct if reasonably believed in by defendant and engaged in by him in good faith, finds support as a defense to the plaintiff's charges in the Restatements of Agency, Torts, and case law.

Restatement of Agency, Second, provides:

"Section 395f: An agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest of himself or a third person.

"Section 418: An agent is privileged to protect interests of his own which are superior to those of the principal, even though he does so at the expense of the principal's interest or in disobedience to his orders."

Restatement of torts, Second, section 271:

"One is privileged to commit an act which would otherwise be a trespass to or a conversion of a chattel in the possession of another, for the purpose of defending himself or a third person against the other, under the same conditions which would afford a privilege to inflict harmful or offensive contact upon the other for the same purpose."

The Restatement of Torts, Second, section 652a, as well as case law, make it clear that not all invasions of privacy are unlawful or tortious. It is only when the invasion is unreasonable that it becomes actionable. Hence, the trier of fact must engage in a balancing test, weighing the nature and extent of the invasion, as against the purported justification therefore to determine whether in a given case, the particular invasion or intrusion was unreasonable.

In addition the defendant has asserted as a defense the principal involved in the case of Willig v. Gold, 75 Cal.App.2d, 809, 814, which holds that an agent has a right or privilege to disclose his principal's dishonest acts to the party prejudicially affected by them.

Plaintiff Church has asserted and obviously has certain rights arising out of the First Amendment. Thus, the court cannot, and has not, inquired into or attempted to evaluate the

merits, accuracy, or truthfulness of Scientology or any of its precepts as a religion. First Amendment rights, however, cannot be utilized by the Church or its members, as a sword to preclude the defendant, whom the Church is suing, from defending himself. Therefore, the actual practices of the Church or its members, as it relates to the reasonableness of the defendant's conduct and his state of mind are relevant, admissible, and have been considered by the court.

As indicated by its factual findings, the court finds the testimony of Gerald and Jocelyn Armstrong, Laurel Sullivan, Nancy Dincalcis, Edward Walters, Omar Garrison, Kima Douglas, and Howard Schomer to be credible, extremely persuasive, and the defense of privilege or justification established and corroborated by this evidence. Obviously, there are some discrepancies or variations in recollections, but these are the normal problems which arise from lapse of time, or from different people viewing matters or events from different perspectives. In all critical and important matters, their testimony was precise, accurate, and rang true. The picture painted by these former dedicated Scientologists, all of whom were intimately involved with LRH, or Mary Jane Hubbard, or of the Scientology Organization, is on the one hand pathetic, and on the other, outrageous. Each of these persons literally gave years of his or her respective life in support of a man, LRH, and his ideas. Each has manifested a waste and loss or frustration which is incapable of description. Each has broken with the movement for a variety of reasons, but at the same time, each is, still bound by the knowledge that the Church has

in its posse. on his or her most inner oughts and confessions, all recorded in "pre-clear (P.C.) folders" or other security files of the organization, and that the Church or its minions is fully capable of intimidation or other physical or psychological abuse if it suits their ends. The record is replete with evidence of such abuse.

In 1970 a police agency of the French Government conducted an investigation into Scientology and concluded, "this sect, under the pretext of 'freeing humans' is nothing in reality but a vast enterprise to extract the maximum amount of money from its adepts by (use of) pseudo-scientific theories, by (use of) 'auditions' and 'stage settings' (lit. to create a theatrical scene') pushed to extremes (a machine to detect lies, its own particular phraseology . .), to estrange adepts from their families and to exercise a kind of blackmail against persons who do not wish to continue with this sect."[2] From the evidence presented to this court in 1984, at the very least, similar conclusions can be drawn. In addition to violating and abusing its own members civil rights, the organization over the years with its "Fair Game" doctrine has harassed and abused those persons not in the Church whom it perceives as enemies. The organization clearly is schizophrenic and paranoid, and this bizarre combination seems to be a reflection of its founder LRH. The evidence portrays a man who has been virtually a pathological liar when it comes to his history,

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2. Exhibit 500-[redacted].

background, - achievements. The writ. ,s and documents in evidence additionally reflect his egoism, greed, avarice, lust for power, and vindictiveness and aggressiveness against persons perceived by him to be disloyal or hostile. At the same time it appears that he is charismatic and highly capable of motivating, organizing, controlling, manipulating, and inspiring his adherents. He has been referred to during the trial as a "genius," a "revered person," a man who was "viewed by his followers in awe." Obviously, he is and has been a very complex person, and that complexity is further reflected in his alter ego, the Church of Scientology. Notwithstanding protestations to the contrary, this court is satisfied that LRH runs the Church in all ways through the Sea Organization, his role of Commodore, and the Commodore's Messengers.[3] He has, of course, chosen to go into "seclusion," but he maintains contact and control through the top messengers. Seclusion has its light and dark side too. It adds to his mystique, and yet shields him from accountability and subpoena or service of summons.

LRH's wife, Mary Sue Hubbard is also a plaintiff herein. On the one hand she certainly appeared to be a pathetic individual. She was forced from her post as Controller, convicted and imprisoned as a felon, and deserted by her husband. On the other hand her credibility leaves much to be desired. She struck the familiar pose of not seeing, hearing,

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3. See Exhibit K: Flag Order 3729 - 15 September 1978 "Commodore's Messengers."

or knowing a evil. Yet she was the h . of the Guardian Office for years and among other things, authored the infamous order "GO 121669"[4] which directed culling of supposedly confidential P.C. files/folders for purposes of internal security. In her testimony she expressed the feeling that defendant by delivering the documents, writings, letters to his attorneys, subjected her to mental rape. The evidence is clear and the court finds that defendant and Omar Garrison had permission to utilize these documents for the purpose of Garrison's proposed biography. The only other persons who were shown any of the documents were defendant's attorneys, the Douglasses, the Dincalcis, and apparently some documents specifically affecting LRH's son "Nibs," were shown to "Nibs." The Douglasses and Dincalcises were disaffected Scientologists who had a concern for their own safety and mental security, and were much in the same situation as defendant. They had not been declared as suppressive, but Scientology had their P.C. folders, as well as other confessions, and they were extremely apprehensive. They did not see very many of the documents, and it is not entirely clear which they saw. At any rate Mary Sue Hubbard did not appear to be so much distressed by this fact, as by the fact that Armstrong had given the documents to Michael Flynn, whom the Church considered its foremost

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4. Exhibit AAA.

lawyer-enemy." However, just as the plaintiffs have First Amendment rights, the defendant has a Constitutional right to an attorney of his own choosing. In legal contemplation the fact that defendant selected Mr. Flynn rather than some other lawyer cannot by itself be tortious. In determining whether the defendant unreasonably invaded Mrs. Hubbard's privacy, the court is satisfied the invasion was slight, and the reasons and justification for defendant's conduct manifest. Defendant was told by Scientology to get an attorney. He was declared an enemy by the Church. He believed, reasonably, that he was subject to "fair game." The only way he could defend himself, his integrity, and his wife was to take that which was available to him and place it in a safe harbor, to wit, his lawyer's custody. He may have engaged in overkill, in the sense that he took voluminous materials, some of which appear only marginally relevant to his defense. But he was not a lawyer and cannot be held to that precise standard of judgment. Further, at the time that he was accumulating the material, he was terrified and undergoing severe emotional turmoil. The court is satisfied that he did not unreasonably intrude upon Mrs. Hubbard's privacy under the circumstances by in effect simply making his knowledge that of his attorneys. It is, of course, rather ironic that the person who authorized G.O. order 121569 should complain about an invasion of privacy. The

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Insofar as the return of documents is concerned, matters which are still under seal may have evidentiary value in the trial of the cross complaint or in other third party litigation. By the time that proceedings on the cross complaint are concluded, the court's present feeling is that those documents or objects not used by that time should be returned to plaintiff. However, the court will reserve jurisdiction to reconsider that should circumstances warrant.

Dated: June 20, 1984

PAUL G. BRECKENRIDGE, JR.
Judge of the Superior Court

THE DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE.
SEP 11 1984
ATTEST _____, 19__
JOHN A. CORDRAY, County Clerk and Clerk of the Superior Court of California, County of Los Angeles
BY _____ DEPUTY
S. HURST

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ATTEST- FS 7-83

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As indicated by its factual findings, the court finds the testimony of Gerald and Jocelyn Armstrong, Laurel Sullivan, Nancy Dincalcis, Edward Walters, Omar Garrison, Kima Douglas, and Howard Schomer to be credible, extremely persuasive, and the defense of privilege or justification established and corroborated by this evidence. Obviously, there are some discrepancies or variations in recollections, but these are the normal problems which arise from lapse of time, or from different people viewing matters or events from different perspectives. In all critical and important matters, their testimony was precise, accurate, and rang true. The picture painted by these former dedicated Scientologists, all of whom were intimately involved with LRH, or Mary Jane Hubbard, or of the Scientology Organization, is on the one hand pathetic, and on the other, outrageous. Each of these persons literally gave years of his or her respective life in support of a man, LRH, and his ideas. Each has manifested a waste and loss or frustration which is incapable of description. Each has broken with the movement for a variety of reasons, but at the same time, each is, still bound by the knowledge that the Church has

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Insofar as the return of documents is concerned, matters which are still under seal may have evidentiary value in the trial of the cross complaint or in other third party litigation. By the time that proceedings on the cross complaint are concluded, the court's present feeling is that those documents or objects not used by that time should be returned to plaintiff. However, the court will reserve jurisdiction to reconsider that should circumstances warrant.

Dated: June 12, 1984

PAUL G. BRECKENRIDGE, JR.
Judge of the Superior Court

THE DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE.

ATTEST SEP 1 1984 19

JOHN A. CLARKE, Executive Officer and Clerk of the Superior Court of California, County of Los Angeles

BY S. HURST DEPUTY

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232 Cal.App.3d 1060

CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al., Plaintiffs and Appellants,

v.

Gerald ARMSTRONG, Defendant and Respondent.

Nos. B025920, B038975.

Court of Appeal, Second District, Division 3.

July 29, 1991.

Review Denied Oct. 17, 1991.

Church sued former church worker alleging he converted confidential archive materials and disseminated materials to unauthorized persons, in breach of his fiduciary duty. Former church worker cross-complained seeking damages for fraud, intentional infliction of emotional distress, libel, breach of contract and tortious interference with contract. The Superior Court, Los Angeles County, Paul G. Breckenridge, Jr., and Bruce R. Geernaert, JJ., dismissed complaint, later settled and dismissed cross action, and ordered documents returned to the church and the records sealed. Church appealed. The Court of Appeal, Danielson, J., held that: (1) successor judge's order unsealing record more than five years after order was sealed by his predecessor exceeded judge's authority, and (2) under application of conditional privilege doctrine, sufficient evidence supported finding that church worker's conversion of church documents was justified by his reasonable belief that church intended to cause him harm and that he could prevent the harm only by taking the documents.

Affirmed.

1. Appeal and Error ⇐106

An order dismissing conversion action with prejudice, rather than an interlocutory order captioned "judgment" which ordered that conversion plaintiffs take nothing by their complaint but did not resolve cross complaint, was the appealable judgment in the action.

2. Appeal and Error ⇐837(9)

Claim that opponent's testimony was impeached by testimony given in other proceeding subsequent to judgment appealed from was not cognizable on appeal.

3. Judges ⇐32

Successor judge's order on his own motion vacating predecessor judge's order sealing court records in document conversion dispute between church and former church member exceeded successor judge's authority where vacating order was entered long after time for reconsideration of sealing order had expired, and no showing was made other than that supporting motion for access to record by nonparty who was also involved with litigation with church. West's Ann.Cal.C.C.P. §§ 473, 1008.

4. Records ⇐32

Persons seeking sealing of record on appeal had to make more particularized showing of need than a mere request that their pursuit of an action for conversion of confidential church documents, brought primarily to protect privacy interests in the documents converted, should not cause disclosure of the information they sought to protect, without any limitation to any particular portions of voluminous record of trial court proceedings.

5. Torts ⇐27

Trover and Conversion ⇐40(1)

Sufficient evidence supported finding that church worker's alleged conversion of confidential church archive materials when worker delivered documents to his attorney was motivated by worker's reasonable belief that he and his wife were in danger because the church was aware of what he knew about the life of its founder, the secret machinations and financial activities of the church, and worker's dedication to the truth, and thus did not subject worker to liability for conversion and invasion of privacy under the conditional privilege doctrine.

6. Religious Societies ⇐31(5)

Trial ⇐64(1)

Trial court did not abuse its discretion in admitting documentary and testimonial

evidence concerning history of church worker's relationship with church and church practices in relation to its members, former members or critics, where record indicated court recognized that the statements were admitted for the limited purpose of proving reasonableness of worker's belief that church intended to harm him when he converted church's documents.

7. Trial ⇐387(1)

Trial court's statement of decision in church document conversion case merely reflected court's findings on elements of justification defense asserted by church worker and did not result in miscarriage of justice.

Rabinowitz, Boudin, Standard, Krinsky & Lieberman, Bowles & Moxon, Eric M. Lieberman, Timothy Bowles, Kendrick L. Moxon and Michael Lee Hertzberg, for plaintiffs and appellants.

Gerald Armstrong, In Pro. Per.

Toby L. Plevin, Paul Morantz and Michael L. Walton, for defendant and respondent.

Lawrence Wollersheim, amicus curiae, on behalf of respondent.

DANIELSON, Associate Justice.

In consolidated appeals, the Church of Scientology (the Church) and Mary Sue Hubbard (hereafter collectively "plaintiffs") appeal from an order after appealable judgment unsealing the file in Church of Scientology of California v. Gerald Armstrong (B028975), and from the judgment entered in the case (B025920). We vacate the order and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

In the underlying action, the Church sued Armstrong, a former Church worker, alleging he converted to his own use confidential archive materials and disseminated the same to unauthorized persons, thereby breaching his fiduciary duty to the Church, which sought return of the documents, injunctive relief against further dissemination of the information contained therein, imposition of a constructive trust over the property and any profits Armstrong might realize from his use of the materials, as well as damages. Mary Sue Hubbard (Hubbard), wife of Church founder L. Ron Hubbard, intervened in the action, alleging causes of action for conversion, invasion of privacy, possession of personal property [*sic*], and declaratory and injunctive relief. Armstrong cross-complained, seeking damages for fraud, intentional infliction of emotional distress, libel, breach of contract, and tortious interference with contract.

With respect to the complaint and complaint-in-intervention, the trial court found the Church had made out a prima facie case of conversion, breach of fiduciary duty, and breach of confidence, and that Mary Sue Hubbard had made out a prima facie case of conversion and invasion of privacy. However, the court also determined that Armstrong's conduct was justified, in that he believed the Church threatened harm to himself and his wife, and that he could prevent such harm by taking and keeping the documents.

Following those determinations the court made and entered an order, entitled "Judgment," on August 10, 1984,[1] ordering and adjudging that plaintiffs take nothing by their complaint and complaint-in-intervention, and that defendant Armstrong have and recover his costs and disbursements. Plaintiffs filed notice of appeal from that order.

[1] We dismissed the appeal (B005912) because that "judgment" was not a final judgment and was not appealable; Armstrong's cross-complaint had not yet been resolved and further judicial action was essential to the final determination of the rights of the parties. (*Lyon v. Goss* (1942) 19 Cal.2d 659, 670, 123 P.2d 11.)

Armstrong's cross-action was then settled and dismissed, the subject documents

1. The "judgment" of August 10, 1984, is not included in the present record on appeal. However, it is included in the petition of plaintiffs and appellants for review by our Supreme Court of our decision (B005912) in this case, filed December 18, 1986.

were ordered returned to the Church, and the record was sealed by Judge Breckenridge pursuant to stipulation of the parties. The dismissal of Armstrong's cross-action was a final determination of the rights of the parties, and constituted a final judgment, permitting appellate review of the court's interlocutory order captioned "judgment" filed August 10, 1984.

Plaintiffs then timely filed a new notice of appeal (B025920), from the orders entitled "Order for Return of Exhibits and Sealed Documents" and "Order Dismissing Action With Prejudice," both filed December 11, 1986, and from the "Judgment" filed August 10, 1984, stating that the appeal was "only from so much of those orders and judgment which denied damages to plaintiff and plaintiff-intervenor" on their complaints. We rule that the Order Dismissing Action With Prejudice is the appealable judgment in B025920.[2]

The Unsealing Order After Judgment (B033975)

On October 11, 1988, Bent Corydon, who is a party to other litigation against the Church, moved to unseal the record in this case for the purpose of preparing for trial of his cases. He sought only private disclosure. Judge Breckenridge having retired, Corydon's motion was heard by Judge Geernaert, who made an order dated November 9, 1988, which he clarified by another order dated November 30, 1988, which opened the record not only to Corydon but also to the general public, thus vacating the earlier order made by Judge Breckenridge.

On December 19, 1988, plaintiffs Church and Hubbard filed a timely notice of appeal from those orders made after appealable judgment. That appeal, B033975, is the other of the current consolidated appeals.

On December 22, 1988, Division Four of this court issued an order staying Judge Geernaert's orders (1) unsealing the record and (2) denying a motion for reconsideration of the unsealing order, to the extent those orders unsealed the record as to the general public and permitted review by any person other than Corydon and his counsel of record. On December 29, 1988, Division Four modified this stay order by adding to it a protective order prohibiting Corydon and his counsel from disseminating copies of or disclosing the content of any documents found in the file to the public or any third party, except to the extent necessary to litigate the actions to which Corydon and the Church were parties. Corydon and his counsel were also required to make good faith efforts in Corydon's litigation to submit under seal any documents they found in the file of this case.

On this appeal, Corydon argues in favor of the trial court's order unsealing the record, as he wishes to be free of the protective orders contained in the modified stay order issued by Division Four.

The "Judgment" of August 10, 1984 (B025920)

[2] Armstrong's taking of the documents is undisputed. The evidence relating to his claim of justification, which was found credible by the trial court,[3] established that Armstrong was a dedicated member of the Church for a period of twelve years. For ten of those years, he was a member of the Sea Organization, an elite group of Scientologists working directly under Church founder L. Ron Hubbard. In 1979, Armstrong became a part of L. Ron Hubbard's "Household Unit" at Gilman Hot Springs, California.

In January 1980, fearing a raid by law enforcement agencies, Hubbard's representatives ordered the shredding of all doc-

2. We later granted the motion of appellant Church to deem the record on appeal in B005912 to be the record on appeal in B025920, which is one of the current consolidated appeals; we also take judicial notice of the entire record in B005912. Consequently the reporters' transcript, the appendices of the parties on appeal, and the parties' briefs in case No. B005912 are part of the record on appeal in B025920. The parties have also filed briefs in B025920.

3. Plaintiffs' contention that certain testimony was impeached by testimony given in other proceedings subsequent to the judgment herein is, of course, not cognizable on this appeal.

uments showing that Hubbard controlled Scientology organizations, finances, personnel, or the property at Gilman Hot Springs. In a two-week period, approximately one million pages were shredded pursuant to this order.

In the course of the inspection of documents for potential shredding, Armstrong reviewed a box containing Hubbard's early personal letters, diaries, and other writings, which Armstrong preserved.

Thereafter, Armstrong petitioned for permission to conduct research for a planned biography of Hubbard, using his discovery of the boxed materials. Hubbard approved the petition, and Armstrong, who had discovered and preserved approximately 16 more boxes of similar materials, became the Senior Personal Relations Officer Researcher. He subsequently moved the materials to the Church of Scientology Cedars Complex in Los Angeles.

Hubbard selected one Omar Garrison to write his biography. Armstrong became Garrison's research assistant, copying documents and delivering the copies to him, traveling with him, arranging interviews for him, and generally consulting with him about the project. Armstrong also conducted a genealogical study of Hubbard's family, and organized the materials he had gathered into bound volumes for Garrison's use, retaining a copy for the Church archives. The number of documents obtained by Armstrong ultimately reached 500,000 to 600,000. Within a week after commencing the biography project, Armstrong and Garrison began to note discrepancies between the information set forth in the documents and representations previously made concerning Hubbard. Then Armstrong was summoned to Gilman Hot Springs, where he was ordered to undergo a "security check" consisting of interrogation while connected to a crude lie-detector called an E-meter, to determine what materials he had delivered to Garrison and to meet charges that he was speaking out against Hubbard.

In November 1981, Armstrong wrote a report urging the importance of ensuring the accuracy of all materials published concerning L. Ron Hubbard, and relating examples of factual inaccuracies in previous publications. In December 1981, Armstrong and his wife left the Church, surreptitiously moving their possessions from the Church premises because they knew that persons attempting to leave were locked up, subjected to security checks, and forced to sign promissory notes to the Church, confessions of "blackmailable" material obtained from their personal files, and incriminating documents, and they were afraid that they would be forced to do the same. Before leaving, Armstrong and his wife copied a number of documents which he delivered to Garrison for his work on the Hubbard biography. After leaving, Armstrong cooperated with his successor, assisting him in locating documents and other items.

Commencing in February 1982, the international Church of Scientology issued a series of "suppressive person declares" in effect labelling Armstrong an enemy of the Church and charging that he had taken an unauthorized leave, was spreading destructive rumors about senior Church officials, and secretly planned to leave the Church. These "declares" subjected Armstrong to the "Fair Game Doctrine" of the Church, which permits a suppressive person to be "tricked, sued or lied to or destroyed . . . [or] deprived of property or injured by any means by any Scientologist. . . ."

At around the same time, the Church confiscated photographs of Hubbard and others that Armstrong had arranged to sell to one Virgil Wilhite. When Armstrong met with Church members and demanded the return of the photographs, he was ordered from the Church property and told to get an attorney. Thereafter, he received a letter from Church counsel threatening him with a lawsuit. In early May 1982, he became aware of private investigators watching his house and following him.

These events caused Armstrong to fear that his life and that of his wife were in danger, and that he would be made the target of costly and harassing lawsuits. The author, Garrison, feared that his home would be burglarized by Church personnel

seeking to retrieve the documents in his possession.

For these reasons, Armstrong took a number of documents from Garrison and sent them to his attorney.

Following commencement of the instant action, Armstrong was pushed or shoved by one of the Church's investigators. In a later incident his elbow was struck by an investigator's vehicle; still later, the same investigator pulled in front of Armstrong on a freeway and slammed on his brakes. This investigator's vehicle also crossed a lane line as if to push Armstrong off of the road. Plaintiffs' position is that the investigators were hired solely for the purpose of regaining the documents taken by Armstrong.

Trial of the complaint and the complaint-in-intervention was by the court sitting without a jury. On August 10, 1984, the court made its order, captioned "Judgment," ordering that plaintiff Church and plaintiff in intervention Hubbard, take nothing by their complaint and complaint-in-intervention and that defendant Armstrong have and recover from each of them his costs and disbursements.

DISCUSSION

The Order Unsealing The Record Must Be Reversed

[3] "Although the California Public Records Act (Gov.Code, §§ 6250 [et seq.]) does not apply to court records (see § 6252, subd. (a)), there can be no doubt that court records are public records, available to the public in general ... unless a specific exception makes specific records nonpublic. (See *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 220–222 [71 Cal.Rptr. 193]....) To prevent secrecy in public affairs public policy makes public records and documents available for public inspection by ... members of the general public.... [Citations.] Statutory exceptions exist [citations], as do judicially created exceptions, generally temporary in nature, exemplified by such cases as *Craemer*, *supra*, and *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190 [124 Cal.Rptr. 427] ..., which involved temporary sealing of grand jury transcripts during criminal trials to protect defendant's right to a fair trial free from adverse advance publicity. Clearly, a court has inherent power to control its own records to protect rights of litigants before it, but 'where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed.' (*Craemer*, *supra*, 265 Cal.App.2d at p. 222 [71 Cal.Rptr. 193]) The court in *Craemer* suggested that countervailing public policy might come into play as a result of events that tend to undermine individual security, personal liberty, or private property, or that injure the public or the public good." (*Estate of Hearst*, (1977), 67 Cal.App.3d 777, 782–783, 136 Cal. Rptr. 821.)

"If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism. For this reason traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals. Thus in *Sheppard v. Maxwell* (1966) 384 U.S. 333, 350 [86 S.Ct. 1507, 1515, 16 L.Ed.2d 600, 613], the court said it is a vital function of the press to subject the judicial process to 'extensive public scrutiny and criticism.' And the California Supreme Court has said, 'it is a first principle that the people have the right to know what is done in their courts.' (*In re Shortridge* (1893) 99 Cal. 526, 530 [34 P. 227]....) Absent strong countervailing reasons, the public has a legitimate interest and right of general access to court records...." (*Estate of Hearst*, *supra*, 67 Cal.App.3d at p. 784, 136 Cal.Rptr. 821.)

We are unaware of any showing made before Judge Breckenridge, other than the parties' stipulation, justifying sealing by the trial court of the record in this case. However, inasmuch as the parties agreed to the sealing in December of 1986, and no third party intervened at that time to seek reconsideration or review of the court's order, the order became final long before Corydon intervened in the action almost two years later.

In *Greene v. State Farm Fire & Casualty Co.* (1980) 224 Cal.App.3d 1583, 274 Cal.Rptr. 736, the court stated at page 1588, 274 Cal.Rptr. 736: "The power of one judge to vacate an order duly made by another judge is limited. In *Fallon v. Superior Court* (1939) 33 Cal.App.2d 48, 52 [90 P.2d 858] ... we issued a writ of prohibition restraining a successor law and motion judge from vacating an order of his predecessor, stating, 'Except in the manner prescribed by statute a superior court may not set aside an order regularly made.' In *Sheldon v. Superior Court* (1941) 42 Cal.App.2d 406, 408 [108 P.2d 945] ... the Court of Appeal, Second Appellate District annulled the order of one probate judge which vacated the previously made order of another probate judge appointing an administrator, stating 'that a valid order made *ex parte* may be vacated only after a showing of cause for the making of the latter order, that is, that in the making of the original order there was (1) inadvertence, (2) mistake, or (3) fraud.' Even more on point, in *Wyoming Pacific Oil Co. v. Preston* (1958) 50 Cal.2d 736, 739 [329 P.2d 489] ... the California Supreme Court reversed the order of a second judge dismissing an action under former [Code of Civil Procedure] section 581a for failure to make service of process within three years, after a first judge had found as a fact that the affected defendant was concealing himself to avoid service of process, quoting *Sheldon*. [Citation.]" (Fn. omitted.)

In *Greene*, *supra*, Alameda County Superior Court Judge Donald McCullum issued general order 3.30, in which he found it impracticable, futile, or impossible to bring certain cases, including *Greene*, to trial within the applicable five-year limitation period (Code Civ.Proc., § 583, subd. (b)), and extended the deadline for bringing those cases to trial. Thereafter, Judge Richard Bartalini, to whom the case was assigned for trial, dismissed the action, on motion of the defendants, for failure to bring it to trial within five years. The court stated, "[D]efendants were, in effect, asking Judge Bartalini to focus on the particular facts of the case and, in light of those facts, to rethink Judge McCullum's order and to see whether he agreed with it. No statutory authority exists for such a request, and Judge Bartalini erred in granting it. [Citations.] General order 3.30 could 'not be set aside simply because "the court concludes differently than it has upon its first decision."' [Citations.]" (*Greene v. State Farm Fire & Casualty Co.*, *supra*, 224 Cal.App.3d at p. 1589, 274 Cal.Rptr. 736.)

In our case, Corydon intervened in the action between plaintiffs and Armstrong, seeking access to the sealed record for the limited purpose of preparing his own cases involving the Church. Judge Geernaert, on his own motion, vacated Judge Breckenridge's order sealing the record. The time had long since expired for reconsideration of Judge Breckenridge's order (Code Civ.Proc., § 1008), or relief therefrom pursuant to Code of Civil Procedure section 473, and the parties had the right to rely on the sealing order. No showing was made other than that supporting Corydon's motion for access to the record.[4] We hold Judge Geernaert exceeded his authority in vacating Judge Breckenridge's order sealing the record.[5]

4. Plaintiffs do not challenge Corydon's access to the record, stating in their brief: "Corydon's access must continue to be limited by the conditions imposed thus far by this court's Modified Temporary Stay Order.... He sought access only for use in private litigation against the Church; this court's order, which permits him to use the information he obtains only in said litigations and only after making a good faith effort to have it introduced under seal, is appropriately tailored to meet his asserted need without unnecessarily invading appellants' privacy." Pursuant to the stay order issued by Division Four, Corydon has had the desired access since December 22, 1988, and the issue is moot as to him. He now seeks in this court more than he sought by his motion in the trial court.

5. Armstrong, who did not participate in the hearing on the motion below, has filed a brief claiming the record should be unsealed because the Church has failed to comply with the terms of its settlement agreement with him. His declarations to the latter effect are not properly before us on this appeal, as they were not considered by the trial court. We therefore consider neither the meaning of the portions of the settlement agreement to which he refers nor the question whether the Church has complied therewith.

The Record On Appeal Is Not Sealed

There remains a question as to the effect of this appeal upon the sealing order. The brief filed by the plaintiffs apparently assumes continued effectiveness of the order on appeal.

In *Champion v. Superior Court* (1988) 201 Cal.App.3d 777, 247 Cal.Rptr. 624, the court referred to "an increasing trend by litigants to assume that when the parties stipulate below or convince the trial court of the need for confidentiality, no showing of need must be made in this court." (*Id.* at p. 785, 247 Cal.Rptr. 624.) The *Champion* court determined to the contrary, stating "that a party seeking to lodge or file a document under seal bears a heavy burden of showing the appellate court that the interest of the party in confidentiality outweighs the public policy in favor of open court records. The law favors maximum public access to judicial proceedings and court records. [Citations.] Judicial records are historically, and presumptively open to the public and there is an important right of access which should not be closed except for compelling countervailing reasons.' [Citation.]" (*Id.* at p. 788, 247 Cal. Rptr. 624.)

Plaintiffs cite *Champion*, claiming, inter alia, that the appellate court, in granting the motion to seal in that case, stated it was "influenced by the [underlying] parties' agreement to the procedure and by the lower court's sealing of its records." The quoted language appears at page 786, 247 Cal. Rptr. 624 of the decision, and refers to the court's initial response to requests to seal received in connection with the petition, opposition, and amici curiae requests. Later, after receiving "rebuttal briefs, rebuttal declarations, reply to amici, declarations in reply to amici, and supplemental declarations," (*Champion v. Superior Court*, *supra*, 201 Cal.App.3d at p. 786, 247 Cal.Rptr. 624) resulting in a file containing "some sealed documents, some public documents, and many documents not yet designated as sealed or public," (*ibid.*) most of which blended together discussions of confidential and public materials, as well as requests to seal all of the documents without any explanation of why any of the documents deserved such treatment (*ibid.*), the court stated, at page 787, 247 Cal.Rptr. 624, "it is apparent that we acted precipitously in granting the earliest, unsupported, requests to seal documents lodged or filed in this matter." While the court did ultimately grant the application to seal the entire file, it did so because of the confusion and undue complication and delay that would be caused by return of the documents for segregation into public and confidential portions. (*Id.* at pp. 789–790, 247 Cal.Rptr. 624.)

[4] In our case, plaintiffs have not formally requested sealing of the record on appeal. They argue, in seeking reversal of Judge Geernaert's order vacating the sealing order made in the trial court, that their pursuit of an action brought primarily for the purpose of protecting their respective privacy interests in the documents converted by Armstrong should not cause disclosure of the very information they sought to protect, through references in the record to such information. The argument is not limited to any particular portion or portions of the voluminous record of the trial court proceedings. Should plaintiffs move to seal the record on appeal, we would require a much more particularized showing.

The Defense of Justification Applies To The Causes Of Action Alleged Against Armstrong; The Judgment Is Affirmed

"One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other." (Rest.2d Torts, § 652A(1).) "The right of privacy is invaded by [¶] (a) unreasonable intrusion upon the seclusion of another, . . . or . . . (c) unreasonable publicity given to the other's private life. . . ." (Rest.2d Torts, § 652A(2).) "The rules on conditional privileges to publish defamatory matter

We are also in receipt of an amicus curiae brief of Lawrence Wollersheim, who urges unsealing of the record based on reasons of public policy. Wollersheim's argument is directed primarily to the documentary exhibits lodged in the underlying case. Those documents have been returned to the Church in accordance with the terms of the settlement agreement.

stated in §§ 594 to 598A, and on the special privileges stated in §§ 611 and 612, apply to the publication of any matter that is an invasion of privacy." (Rest.2d Torts, § 652G.) Under section 594 of the Restatement "[a]n occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest."

"Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge." (Res.2d Agency, § 396.) However, "[a]n agent is privileged to protect interests of his own which are superior to those of the principal, even though he does so at the expense of the principal's interests or in disobedience to his orders." (Res.2d Agency, § 418.)

With respect to plaintiffs' causes of action for conversion, "[o]ne is privileged to commit an act which would otherwise be a trespass to or a conversion of a chattel in the possession of another, for the purpose of defending himself or a third person against the other, under the same conditions which would afford a privilege to inflict a harmful or offensive contact upon the other for the same purpose." (Res.2d Torts, § 261.) "For the purpose of defending his own person, an actor is privileged to make intentional invasions of another's interests or personality when the actor reasonably believes that such other person intends to cause a confinement or a harmful or offensive contact to the actor, or that such invasion of his interests is reasonably probable, and the actor reasonably believes that the apprehended harm can be safely prevented only by the infliction of such harm upon the other. (See § 68.) A similar privilege is afforded an actor for the protection of certain third persons. (See § 76.)" (Res.2d Torts, § 261, com.)

We find no California case, and the parties cite none, holding that the above described privileges apply in this state.[6] We

6. No purpose would be served by our engaging in an exhaustive discussion of each of the points asserted by plaintiffs.

For example, plaintiffs misconstrue the decision in *Dietemann v. Time, Inc.* (9th Cir.1971) 449 F.2d 245. The *Dietemann* court stated: "Privilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication." (*Id.* at pp. 249–250.) The question in that case was whether the defendant, whose employees gained entrance to plaintiff's home by subterfuge and there photographed him and recorded his conversation without his consent, was insulated from liability by the First Amendment because its employees did these acts for the purpose of gathering material for a magazine story which was thereafter published. The case has nothing to do with the justification asserted herein. *Pearson v. Dodd* (D.C.Cir.1969) 410 F.2d 701, is similarly inapposite.

Discussing the privilege of an agent set forth in section 418 of the Restatement, plaintiffs point to the last sentence of comment b, which reads: "So, too, if the agent acquires things in violation of his duty of loyalty, he is subject to liability for a failure to use them for the benefit of the principal." This language has reference to the initial sentence of the comment: "If the conflict of interests is created through a breach of duty by the agent, the agent is subject to liability if he does not prefer his principal's interests." In the present case, the conflict was created by the plaintiffs, who threatened Armstrong with harm.

Referring to comment b to section 396 of the Restatement Second of Agency, which has to do with the use of customer lists in unfair competition, plaintiffs urge that even if Armstrong was privileged to verbally report to others information he gained in his capacity as an agent of the Church, he would not be privileged under any circumstances to retain or disseminate Church documents. They also urge, based on cases which are inapposite to that at bench, that the justification defense applies only in emergency situations requiring immediate action to avert danger, or where the agent believes that the principal's documents are the fruits or instrumentalities of crime or fraud. The court found, on substantial evidence, that Armstrong was under a reasonable apprehension of danger when

believe the trial court appropriately adopted the Restatement approach respecting conditional privilege. (See 5 Witkin, Summary of Cal.Law (9th ed. 1988) Torts, § 278, p. 360; *Gilmore v. Superior Court* (1991) 230 Cal.App.3d 416, 421, 281 Cal. Rptr. 343.)

[5] In its statement of decision the court found Armstrong delivered the documents in question to his attorney "... because he believed that his life, physical and mental well-being, as well as that of his wife, were threatened because the organization was aware of what he knew about the life of L. Ron Hubbard, the secret machinations and financial activities of the Church, and his dedication to the truth. He believed that the only way he could defend himself, physically as well as from harassing lawsuits, was to take from Omar Garrison those materials which would support and corroborate everything that he had been saying within the Church about L. Ron Hubbard and the Church, or refute the allegations made against him in the April 22 Suppressive Person Declare. He believed that the only way he could be sure that the documents would remain secure for his future use was to send them to his attorneys, and that to protect himself, he had to go public so as to minimize the risk that L. Ron Hubbard, the Church, or any of their agents would do him physical harm." The court's findings were substantially supported by the evidence adduced at trial.

Admission of Documentary and Testimonial Evidence Over Appellants' Objections Did Not Result In A Miscarriage of Justice

Armstrong's defense was predicated on his claim that he reasonably believed the Church intended to cause him harm, and that he could prevent the apprehended harm only by taking the documents, even though the taking resulted in harm to the Church.

[6] Plaintiffs complain of the trial court's admission of documentary and testimonial evidence concerning the history of Armstrong's relationship with the Church, and certain practices of the Church in relation to its members, as well as its former members and/or critics. The record is replete with statements of the court's recognition of the limited purpose for which the complained of statements were properly admitted, i.e., to prove Armstrong's state of mind when he converted the Church's documents. These statements are referenced in Armstrong's briefs, and acknowledged by plaintiffs.

Plaintiffs complain that certain testimony of defense witnesses was irrelevant, as there was no showing that Armstrong was aware of the facts to which the witnesses testified. The testimony in question was largely corroborative of Armstrong's testimony with respect to Church practices affecting his state of mind, and was relevant to the issue of the reasonableness of his belief that the Church intended to cause him harm.

[7] Plaintiffs complain, finally, that the trial court's statement of decision shows the court improperly considered the evidence admitted for the limited purpose of establishing Armstrong's state of mind. We are satisfied the complained of comments reflect the court's findings on the elements of the justification defense asserted by Armstrong, and that neither the admission of the evidence nor the court's comments resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.)

DECISION

The judgment is affirmed. The order vacating the order sealing the record in the trial court is reversed. Each party to bear its own costs on this appeal.

KLEIN, P.J., and HINZ, J., concur.

he delivered the documents to his attorney.

More was not required.