Modern Media's Environmental Coverage: What We Don't Know Can Hurt Us

Jane Akre

Steve Wilson
MODERN MEDIA’S ENVIRONMENTAL COVERAGE: WHAT WE DON’T KNOW CAN HURT US

JANE AKRE*
STEVE WILSON**

Abstract: Jane Akre and Steve Wilson had more than fifty years experience as broadcast journalists before becoming Whistleblowers against Rupert Murdoch’s News Corporation, Fox. Steve has worked as an investigative reporter on the network and local level, a program syndicator and currently is at WXYZ in Detroit as Chief Investigative Reporter. Jane has been an anchor at CNN and at various local stations from California to Atlanta as well as consumer, crime, health and investigative reporter. Together they were the first journalists to blow the whistle on the internal workings of a newsroom.

Introduction

On May 20, 2005, Jane Akre went into a FedEx/Kinko’s and filled out an envelope addressed to Fox Television in Los Angeles. Inside the envelope Jane placed a check for a small six-figure number—as if six-figures can ever be small. Jane sealed the envelope, dropped it into the bin, and heard a hollow echo signaling the bin was empty. That sound marked the end of years of litigation over an environmental story we produced, but was never aired on the Fox-owned station in Tampa, Florida. In the end, after winning the battle, we lost the war. We ended up paying them.

I. The Litigation

The litigation began in 1997. We were working as investigative reporters for a station in Tampa that was newly acquired by Fox Televi-

* Freelance Investigative Journalist. The Author has served as news anchor and investigative journalist over twenty-five years. Recently, the Author coauthored Into the Buzzsaw, an anthology by modern day reporters who have watched stories suppressed by powerful interests.

** Chief Investigative Reporter, ABC Affiliate WXYZ, Detroit. The Author previously served as Senior Investigative Correspondent for television newsmagazine Inside Edition. Author has won four Emmy Awards for his investigative reporting.
sion. We have always been interested in environmental issues and environmental health, especially as it affects children. Thus, we chose to report on the bovine growth hormone (rBGH). rBGH is a dairy drug made by a division of the Monsanto Company. The “r” stands for recombinant, which means it is genetically engineered with the help of a culture of bacteria that grows the hormone into one which is nearly identical to a hormone cows produce naturally.

There are important reasons for those working in environmental law to know more about Monsanto. It seems that far too many environmental disasters have Monsanto’s stamp on them. Monsanto is now in the life sciences business, which is a frightening prospect. Monsanto makes rBGH, a genetically engineered drug which was approved by the Food and Drug Administration (FDA) in 1993. This drug, which is injected into the nation’s dairy cows without the public’s knowledge, induces cows to produce more milk. Not that we need more milk—we pay farmers not to make more milk.

Regardless of the need for rBGH, preliminary research indicated that it caused a great deal of harm to cows. rBGH was making the injected cows lame and giving them udder infections called mastitis. Although early studies done by Monsanto showed that the test rats had precancerous cysts and lesions, these harmful effects did not trigger the two-year multigenerational studies that the FDA is supposed to undertake when such adverse results occur. The FDA stated that it had not seen the studies performed by Monsanto. An FDA spokesperson later informed us that the FDA had seen the studies but did not think they were important.

Through our research, we learned that Canadian regulators looked at the Monsanto studies as part of a body of information they were gathering at Health Canada to consider approval of rBGH for use in Canada. Health Canada later voted not to approve the drug in Can-

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3 See DuPuis, supra note 1, at 285.
5 See Dupuis, supra note 1, at 285.
7 Id.
Gaps in the Media’s Environmental Coverage

Dairy cows injected with rBGH produce milk with a greater amount of spin-off hormone called Insulin-like Growth Factor One (IGF-1). IGF-1 is a powerful growth hormone that causes all cells, including cancerous cells, to proliferate. Unlike most hormones, IGF-1 is identical in both humans and bovine. Despite these early warnings, the Center for Veterinary Medicine—which approves and regulates animal drugs under the FDA—approved rBGH. This struck us as a significant story.

The most important consideration of what makes a good story is that the topic affects many people. Almost everyone consumes dairy, from children to women fighting osteoporosis. Thus, the rBGH issue had the markings of a good story, and got better and better as it developed. As we prepared the story for air, it was given the green light by the new managers of our Fox station.

The story was supposed to air in February 1997. The radio advertisements were running, promoting The Mystery in Your Milk, with the main weekday anchor dressed in white, resembling a large glass of milk.

On the eve of its airing, Monsanto wrote several strongly-worded letters to Roger Ailes, the head of Fox News in New York. Though he had no connection at all to Tampa, Roger Ailes is probably a pretty good contact if you are trying to kill a news story at a Fox-owned station. The letter read, “[i]ndeed, some of the points clearly contain the elements of defamatory statements which, if repeated in a broadcast, could lead to serious damage to Monsanto and dire consequences for Fox News.” We later asked Walsh, in a deposition, what he meant by “dire consequences”; he responded that it was a threat to sue.

Following the receipt of these letters, the rBGH story—which had been prepared for air and was going into editing—was pulled sud-

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11 See Juskevich & Guyer, supra note 9, at 875.
12 Letter from John J. Walsh, Attorney, Cadwalader, Wickersham & Taft, LLP, to Roger Ailes, Chairman & Chief Executive Officer, Fox News (February 28, 1997) (on file with author).
denly for a “re-review.” We were disappointed, but it was understand-
able. Any station would want to ensure its facts are correct, particu-
larly in light of threatened litigation, though presumably the legal vet-
ting of the script would have adequately addressed this concern. The
re-review process lasted eight months. The story underwent eighty-
three rewrites, which from a news perspective—where a half-dozen
rewrites is commonplace—is far beyond extreme.

During this time, Fox’s lawyers were fully in charge of the editing
process, which should never happen. Journalists work in the public
interest. Lawyers work for their clients. In this case, Fox was not pre-
pared to work without fear or favor as is the professional standard for
journalists. We were mindful that a news organization does have the
right to choose not to air a story. As distasteful as this was, Fox News
chose to exercise that right.

What they do not have a right to do, however, is what the Fox
lawyers were doing with this story. The lawyers did not have a right to
massage the facts by removing a reference to cancer and inserting
statements we had demonstrated to be false. For example, the lawyers
told us to report that Canada had approved the drug, even though it
had not. They also told us to report that there were no health con-
cerns about the drug in Europe. However, we had documentation indi-
cating that European officials were concerned about rBGH, and, in
fact, had banned the use of the drug because of health concerns. The
lawyers also told us to report that the milk was the same wholesome
product it had always been, as that was what Monsanto said. Although
we did report Monsanto’s contention that the milk was as wholesome
as before, we felt it was important to include what our investigation
had revealed—that the milk was not the same product. Fox’s lawyers
did not want us to provide that explanation, explaining it was over our
viewers’ heads. This contentious process continued for eight months.

By standing up for the truthfulness of this story, as journalists are
supposed to do, we were facing dismissal or retaliation. A letter from a
Fox attorney confirmed that we were being dismissed because of our
position. We felt that letter confirmed that Fox was retaliating against
us. In response, we filed the first whistleblower lawsuit ever brought by
journalists against a news organization. 13 Essentially, we argued that Fox
could not lie to the public over the public’s airwaves; 14 it would be a

13 See New World Commc’ns of Tampa, Inc. v. Akre, 866 So. 2d 1231, 1232 (Fla. Dist.
Ct. App. 2003), reh’g granted, modified, id.
14 See id.
violation of the law, and a violation of the Federal Communications Commission’s (FCC) prohibition against news distortion.\textsuperscript{15} Because the airwaves are a public commodity, they cannot be used to intentionally lie to the public.\textsuperscript{16} Whistleblowers have been retaliated against for refusing to participate in something illegal or threatening to report the illegal activity to the authorities, either public or private. We felt our suit met those criteria.

Our labor lawyers told us that this case would take about a year and cost about $50,000. That amount was gone after the defendants took our depositions. During the eight weeks of depositions, attorneys for Fox asked us important questions such as where we went to high school and what we studied during our first year of college. We needed our attorney present throughout these depositions; Fox knew these lengthy depositions would cost us large sums of money. However, eight years later, and many hundreds of thousands of dollars later, we did win.\textsuperscript{17} Our trial finally began in July 2000, two years after we filed suit. After a five week trial, a jury of six decided Jane had been retaliated against. The jury verdict states:

\begin{quote}
[T]hat the Plaintiff Jane Akre has proven, by the greater weight of evidence, that the Defendant through its employees or agents, terminated her employment or took other retaliatory personnel action against her, because she threatened to disclose to the Federal Communications Commission under oath, in writing, the broadcast of a false, distorted, or slanted news report which she reasonably believed would violate the prohibition against intentional falsification or distortion of the news on television, if it were aired[.]\textsuperscript{18}
\end{quote}

Jane was awarded $425,000 in damages,\textsuperscript{19} which we both considered a great victory. Steve was a coplaintiff, with the same story and circumstances, but he was not awarded anything. We believe this was because he acted pro se. His attorney backed out six weeks before trial, after requesting $50,000, which he knew we could not afford. We

\textsuperscript{15} See \textit{id.} at 1233 (recognizing that a series of FCC opinions issued between 1969 and 1973 shaped the “FCC’s news distortion policy.”).

\textsuperscript{16} See \textit{id.}

\textsuperscript{17} See \textit{id.}

\textsuperscript{18} See Special Jury Verdict Form, Akre v. New World Commc’ns of Tampa, Inc., No. 98-2439 (on file with author).

\textsuperscript{19} \textit{Akre}, 866 So. 2d at 1233.
think he got cold feet because Fox would be represented by the firm of Williams & Connolly at trial.  

We felt the issues of our complaints were the same, that we had achieved a victory, and that we were prepared to put it behind us and go on with our journalism careers. Fox, however, filed an appeal. They argued that lying to the public over the public’s airwaves was a violation of FCC policy only, and was not prohibited by law, rule, or regulation. Therefore, we were not really entitled to whistleblower protection. Essentially, Fox argued that there is nothing prohibiting a news station from lying to the public, and that the First Amendment is so broad that courts should not look into Fox’s newsrooms and second guess them. Relying on that argument, the appellate court overturned the jury verdict. Furthermore, Florida statute provides that an appellate victory can allow the victorious party to collect costs and fees. Hence after some negotiations, we had to mail Fox a check for their fees and costs in this lawsuit.

II. Implications for Today

What are the implications of this for modern media’s environmental coverage? For Monsanto and Fox, this was a story that would have seen very little airing in the Tampa market, which had about one million viewers. At six o’clock in the evening, maybe one hundred thousand people who were cooking dinner and trying to round up their kids would have seen it. Instead, the story got international coverage, was published on the internet, and has been covered in books, including Robert F. Kennedy, Jr.’s Crimes Against Nature, Jane Akre’s article in Into the Buzz Saw, and in the documentary film The Corporation. Monsanto’s attempt to suppress the story backfired. Frankly, we think this was a good outcome for consumers who have a right to know the contents of the food they serve to their families. For Fox,
the story backfired as well. The “fair and balanced network” was shown to be something quite different.28

The Food Lion, Inc. v. Capital Cities/ABC, Inc. case emboldened industry to challenge the media and win.29 In that case, fifteen producers from the news magazine 20/20 obtained jobs at a Food Lion supermarket and brought hidden cameras into the grocery store, focusing on the meat department.30 The producers caught on camera scenes of unsafe food-handling practices.31 In the meat department, the producers observed employees pouring bleach on meat, repackaging it with a fresher date, and putting it back on the store shelves.32 In addition, employees failed to clean the meat grinders.33 After the story aired, Food Lion sued the news magazine and its owner, ABC.34 Food Lion won on the basis that the news producers had misrepresented who they were, and the employees violated their duty of loyalty to Food Lion.35 Most of the damages awarded to Food Lion were reversed on appeal.36

Around the same time as Food Lion, food disparagement laws—veggie libel laws—became commonplace.37 By 2005, approximately thirteen states had such laws.38 Food disparagement laws allow an industry with a product that has a limited shelf life to sue any media outlet that causes damage to the industry’s reputation as a result of a news report.39 A recent case involving Oprah Winfrey highlighted this

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30 See id. at 510–11.

31 Id. at 511.

32 Id. at 510.

33 Id. at 526.

34 Id. at 510.

35 Food Lion, 194 F.3d at 510.

36 See id. at 524.


38 Sheldon Rampton & John Stauber, Oprah’s Free—Are We? FAIRNESS & ACCURACY IN REPORTING, May-June 1998, http://www.fair.org/extra/9805/oprah-beef.html; see, e.g., Tex. CIV. PRAC. & REM. CODE ANN. § 96.002(a) (Vernon 2005) (“A person is liable . . . if . . . the person disseminates . . . information relating to a perishable food product to the public . . . the person knows the information is false; and the information states or implies that the perishable food product is not safe for consumption by the public.”).

issue.\textsuperscript{40} Ms. Winfrey stated on her television program that she would never eat hamburgers again after former rancher and industry whistleblower, Howard Lyman, a guest on her show, discussed Mad Cow Disease.\textsuperscript{41} After the show aired, Ms. Winfrey was sued by cattle processors.\textsuperscript{42} Although she ultimately prevailed, Ms. Winfrey spent a significant amount of time and money defending herself.\textsuperscript{43} Regardless of whether a journalist prevails in these suits, such laws make it difficult for journalists to tell stories for fear of reprisals.

During the last fifteen to twenty years spin and lying by industries has been more widely accepted. It is one thing to spin a story, which public relations practitioners have always done. Monsanto, and many other companies often spin the truth to portray their products more favorably. However, it is very different to say something that is patently false, which, in my opinion, Monsanto has done in the past. It takes reporters to investigate the facts, uncover the truth, and to challenge the companies’ representations. Without the support of a strong news organization that isn’t afraid of challenges, the task is almost impossible.

Sometimes it is difficult to determine where the public stands on an issue. For example, “Astroturf” groups appear to be citizen driven, but are actually staffed and funded by people directly associated with industry. These groups have learned how to use the media to spin a message. Journalists are confused by the appearance of an Astroturf group.\textsuperscript{44} Often an inexperienced editor will require a journalist to include the Astroturf’s point of view in the name of fair and balanced coverage, without revealing the industry forces and funding behind the Astroturf group.

Consolidation of the media is a major factor fueling the independent media movement occurring in this country. When there are basically only four or five owners of major media in this country, journalism becomes more of a bottom-line oriented business than a public service.\textsuperscript{45} Questions of journalistic value and public interest are

\textsuperscript{40} Winfrey, 11 F. Supp. 2d 858.
\textsuperscript{41} The Oprah Winfrey Show (CBS television broadcast Apr. 15, 1996) (“It has just stopped me cold from eating another burger!” (quoting Oprah Winfrey)) (transcript available at http://www.mcspotlight.org/media/television/oprah_transcript.html).
\textsuperscript{42} Winfrey, 11 F. Supp. 2d at 858.
\textsuperscript{44} For information on Astroturf groups, see http://www.sourcewatch.org.
\textsuperscript{45} See Laurence Zuckerman, Questions Abound as Media Influence Grows for a Handful, N.Y. TIMES, Jan. 13, 2000, at C6 (noting that six companies control most of the media consumed by Americans).
replaced with questions of how much can be made, and how quickly. The people with experience, who might question authority, are often the ones with the highest salaries. The experienced journalists can be replaced by younger coworkers, with less experience who are less likely to question authority.

The final issue regarding the state of the media today is self-censorship by people working in newsrooms. The journalists perceive the lack of support from the top, and consequently, they shut up and do what is in their best interest. This behavior is understandable even for the most altruistic of journalists. We understand that better than anyone else. But these forces present an ethical dilemma to newsroom journalists. Do they take the ethical high road? Quit? Speak out? These are questions many professionals will face in their fields, hopefully without consequences as severe as we faced.

Since this happened to us, we have had the privilege of talking to some of the best and the brightest students at some of the nation’s top schools. After a combined fifty years as investigative reporters fighting with lawyers over freedom of information issues, we often ask ourselves if we really need more lawyers.

However, we believe at this time society needs more lawyers doing public interest and government work. We applaud lawyers who take that path because there are easier ways to make a living than standing up for what is right. When Steve took his first television job thirty years ago, television news was something broadcasters did for free. They did not expect to make much money. They did it because it was a repayment for the right to be able to use the public airwaves to make fortunes on the Johnny Carson Show, What’s My Line, Ed Sullivan, and other entertainment shows. They did a respectable job providing the news, discussed important issues, and did not expect to make a profit.

Television changed for the worse when executives discovered that news programs could turn a profit. A similar realization, to a lesser extent, was made in the print media.

Important stories, such as the piece on the adverse health effects of bus emissions—a legitimate investigative piece—were sensationalized in television promotions. Every time viewers turned on their televisions, they were greeted with advertisements such as “Killer Buses—Film at Eleven.” Indeed, nobody wants to miss killer buses. The television business has outsmarted itself by promoting issues that people do not care about. By producing stories that mean very little to viewers, the industry has caused smart, intelligent people to turn off their television sets.
The number of homes using televisions is decreasing rapidly. In any other business in America, if you make a product that people stop buying, you might stop to think about what is wrong. Apparently this is not the case in television. What is left is what we refer to as the “Jerry Springer audience.” These are viewers who like to watch Geraldo, and similar talk shows, which discuss trivial issues.

Recently the entertainer Lindsay Lohan was on the front page of a newspaper. She had crashed her Mercedes into a man while attempting to evade the paparazzi. This story was on the front page of the Star Tribune, a reputable newspaper. Meanwhile, global warming was on page nineteen, if it appeared at all.

Consultants now advise the television industry about what viewers want to see. Consultants believe that viewers have short attention spans, so even the Lindsey Lohan story should get only twenty seconds. For a story on global warming, consultants would allot a minute and a half.

After what happened to us, we came to the conclusion that respectable television news is gone. For example, Dateline used to investigate corporate misdeeds, such as the Food Lion story, in primetime. They have succumbed to marketing pressures, and now advertise stories with such statements as “They went on a vacation, he ended up missing. Did she throw him overboard on the cruise ship? Tonight on Dateline.” This type of story embarrasses my former colleagues who now work at Dateline. The editors do it though because consultants tell them that viewers want to see these stories.

After we had given up, Steve got a call from a news director in Detroit, inviting Steve to head their investigative unit. He promised Steve that he could take the time and the resources to do environmental stories, consumer issues, corruption, and the other important issues.

Steve was skeptical when the news director informed him that he could take twelve minutes on the six o’clock evening news for investigative reporting while the entire newscast is only fifteen minutes long. As it turned out, this television station is unlike many others these days, permitting this kind of reporting.

Conclusion

We still believe in television and its potential. We still believe that the kinds of environmental stories that need to be told can be told—and often are best suited—for television. Television can do things that

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print cannot, and a picture truly is worth a thousand words. We encourage people not to give up on reporters in general, and television reporters in particular. Some reporters can still occasionally get a decent story on the air.

Great work is being done even though the corporate media is owned by several large corporations that do not know the light bulb division from the television news division. To them, it is all money. Their questions are how much is it going to cost us to tell this story? If we are going to get sued and have to defend the truth, how much will it cost? If we are going to lose an advertiser, how much will it cost? Add all of that up and the corporate media might well decide that a story is not worth doing. These are the fights that we have on a regular basis in the television business, but rest assured there are people working in mainstream newsrooms who, like those in independent media, still want to make a difference.