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DAMAGE CONSIDERATIONS WHEN THE PRESS IS SUED FOR GATHERING THE NEWS

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This report explores the damages that may properly be claimed when newsgathering techniques are alleged to have been tortious. While there are few reported cases explicitly addressing the scope of damages available for non-publication torts committed by the press -- and the cases are not consistent in their approach -- both the common law and recognized First Amendment principles should serve to limit the availability of reputational and emotional damages flowing from the subsequent publication of information tortiously obtained. This report reviews certain damage-limiting concepts and theories recognized at the common law, and considers the implications when the constitutional protection of both newsgathering and news dissemination is overlaid upon the common law damage limitations. Finally, the report notes some of the unique constitutional issues presented when punitive damages are assessed for conduct undertaken in the pursuit of news.

INTRODUCTION

The recent success of the Food Lion grocery chain in asserting claims of trespass, fraud and breach of duty against ABC -- all allegedly arising during the investigation of a compelling report on Food Lion's unsanitary practices -- typifies an expanding effort by plaintiffs to recover damages for unflattering publications or broadcasts, while avoiding the burden of establishing falsity and the other items of proof required by the First Amendment in a defamation action.[2] "Newsgathering torts" assert liability based solely on steps taken by the press in seeking out the news. Recent cases have included claims against reporters for trespass, intrusion, fraud, tortious interference, intentional infliction of emotional distress, illegal surveillance and constitutional wrongdoing, among other tort theories.[3] Often, claims based on non-publication torts nonetheless seek damages that remain tied

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1 The authors are New York-based litigators with the media practice group of Rogers & Wells. They gratefully acknowledge the assistance of Andrea Del Duca, Joshua Burstein, Sara L. Eisner and E. Scott Morvillo in the preparation of this report.

2 See, Amy Singer, "Food, Lies and Videotape," American Lawyer (April 1997) p. 56 at 63.

3 E.g., Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F.Supp. 811 (D.N.C. 1995) (fraud, trespass, breach of duty); Desnick v. American Broad. Cos., 44 F.3d 1345 (7th Cir. 1995) (trespass, fraud, privacy, illegal wiretapping); (continued...)

to the impact of the publication or broadcast resulting from the challenged newsgathering, including loss of reputation, emotional distress and similar items of non-physical damage.

The claim that such publication damages may be recovered when the press has committed a newsgathering tort is based on two propositions. First, it is urged that crimes and torts committed during newsgathering are not protected by the First Amendment, so "[t]here is no threat to a free press in requiring its agents to act within the law."[4] Second, it is asserted that a subsequent publication is obviously "foreseeable" at the time the newsgathering tort is committed, so that publication damages are properly required to compensate the plaintiff fully for the harm done by the tortious newsgathering of the reporter.[5] As Food Lion's counsel has argued, victims of newsgathering torts "should not be limited to damages for the initial wrongful act -- for example an act of trespass or deception -- but should also be permitted to recover *all* consequential damages resulting from the publication" of information wrongfully obtained.[6]

Each of these propositions, however, is flawed. First Amendment concerns are indeed raised when tort liability is asserted to restrict the ability of the press to gather newsworthy information. And, neither the common law purposes for recognizing tort liability nor the common law bounds on the recovery of consequential damages allow compensation in an action alleging a non-publication tort for reputational injury allegedly caused by the independent act of publication. Moreover, to allow recovery of publication damages through a non-publication tort would permit an improper end-run around the constitutional restrictions that limit punishment for the dissemination of information.

The issues raised when liability is sought to be imposed for newsgathering torts are complex because there will always be circumstances where the only way for a reporter to obtain a story of significant public interest is to trespass, commit a deception, make an implicit misrepresentation or engage in some other arguably tortious act. In such cases, the First Amendment implications of

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[3](...continued)
Sussman v. American Broad. Cos., CV94-8524 (C.D.Ca. filed Feb. 13, 1997) (fraud, conspiracy, illegal eavesdropping); Parker v. Clarke, 905 F.Supp. 638 (E.D.Mo. 1995), order clarified, 910 F.Supp. 460 (E.D.Mo. 1995) aff'd in part, rev'd in part, 93 F.3d 445 (8th Cir. 1996) (deprivation of constitutional rights); Huggins v. Whitney, 24 Media L.Rep. [BNA] 1088 (N.Y. 1995) (tortious interference). See also Ayeni v. CBS, Inc., 848 F.Supp. 362 (S.D.N.Y.), aff'd, 35 F.3d 680 (1994) (trespass and Section 1983 liability alleged for videotaping execution of a search warrant; no broadcast involved); Wolfson v. Lewis, 924 F.Supp. 1413 (E.D.Pa. 1996) (injunction prohibiting newsgathering activities allegedly constituting an intrusion upon seclusion; no broadcast involved).

[4] Galella v. Onassis, 487 F.2d 986, 995-96 (2d Cir. 1973). See, e.g., Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (generally applicable laws do not offend the First Amendment); Branzburg v. Hayes, 408 U.S. 665 (1972) (crimes and torts committed in newsgathering not protected by the First Amendment).

[5] E.g., Miller v. National Broad. Co, 232 Cal.Rptr. 668 (Cal.Ct.App. 1986) (alleging that publication was the motivating force behind the tort of trespass).

[6] John J. Walsh, et al., Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information, 4 Wm. & Mary Bill of Rts. J. 1111, 1112 (1996) (emphasis supplied).

damage awards cannot simply be shrugged off. Several years before Food Lion, some compelling examples of the use of deception by the press were documented in the Texas Law Review:

> In an award winning series of Houston Chronicle articles, reporter Nancy Stancill uncovered shocking conditions in Texas nursing homes. However reforms were not implemented until 20/20, following Stancill's lead, conducted a three month, undercover investigation of the treatment of elderly residents at Texas state and private nursing home facilities. The resulting photos, taken with a hidden camera were horrifying: residents were tied to their beds, starved, abused, and left to lie in filth. Some even died because of the sub-human treatment they received. As a result of the 20/20 investigation and the public outrage it provoked, prompt reform measures ensued. A member of the Texas Board of Health who chaired the sub-committee on nursing home policies resigned, and Governor Ann Richards called for a state investigation of all nursing home facilities. By employing subterfuge to gather news, the 20/20 reporters enhanced the immediacy and credibility of the resulting story. As one journalist argued, "[J]ust describing the conditions would not have cut it. They had to be seen."
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> A recent 60 Minutes expose provides a convincing, if less dramatic, case for the efficacy and importance of subterfuge as a newsgathering method. Posing as a potential investor, reporter Steve Kroft uncovered an illicit odometer rollback scheme at a Houston car dealership. The hidden camera crew captured the perpetrator of the rollback scheme, the singularly unrepentant Bill Whitlow, boasting of his illegal activity. As a result of this 60 Minutes sting, federal investigators prosecuted Whitlow and four other participants for their crimes.

Lyrissa C. Barnett, Intrusion and the Investigative Reporter, 71 Tex.L.Rev. 433 (1992) (citations omitted).

Journalists face such issues all the time. Investigations of the conditions in state mental hospitals and private nursing homes, exposés of the Ku Klux Klan, corruption in labor unions, documentaries on scams by personal injury lawyers, sanitation problems in the commercial fish industry and countless other significant stories have been developed only through undercover investigations involving the use of some deceit as a means of access to truthful information. In ferreting out such news stories, the press performs an extremely valuable -- and constitutionally protected -- function.

Using non-publication torts to compensate for harm caused by truthful reports obtained by

arguably tortious conduct clearly raises significant issues for a vigorous and independent press. To allow publication damages to be recovered when non-publication torts are alleged would raise the very same implications for the chilling of speech as when a defamation claim is alleged directly. The identical constitutional concerns would be presented if the assertion of newsgathering torts becomes a technique to side-step the First Amendment safeguards that limit recoveries where publication torts are involved.

The contours of the First Amendment limitations on the damages available when a tort is committed in the course of newsgathering have yet to be resolved by the Supreme Court, although ABC's pre-trial victory in Food Lion -- excluding reputational and other "publication" damages on constitutional grounds -- stands as a valuable precedent in establishing these limitations. Before turning to the constitutional issue though, this report addresses certain common law principles which should alone restrict the scope of damages that may properly be recovered when a non-publication tort is committed in the course of gathering the news.[7] First, publication-related injuries (e.g., reputational or emotional damage resulting from a broadcast) are not the sort of injuries that the common law traditionally seeks to redress by imposing liability for commission of "non-publication" torts that may be committed during the newsgathering. Second, damages flowing from the separate and independent act of publication cannot be considered, consistent with the common law, as among those "foreseeable," consequential damages proximately caused by the non-publication tort. Moreover, when the well-established First Amendment interests in protecting newsgathering and news dissemination are overlaid upon this common law framework, attempts to expand the traditional scope and analysis of tort damages to encompass publication damages are seen to be all the more improper in non-publication torts.

I. COMMON LAW LIMITS ON TORT DAMAGES

Little case law exists applying common law limits on the scope of damages to newsgathering torts, and the proper approach to damages became confused when two early cases took opposite approaches. In 1970, a New York appellate court ruled that reputational damages could *not* be recovered through a trespass action brought against a reporter. Costlow v. Cusimano, 311 N.Y.S.2d 92 (N.Y.App.Div. 1970). The Costlow court reached this result, in good common law fashion, by focussing on the purpose of the tort of trespass. It dismissed a trespass claim altogether because plaintiff had alleged only reputational damages while the tort of trespass is "designed to protect

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[7] This report focuses principally on the damage aspects of newsgathering torts, although, in many cases involving newsgathering common law and constitutional arguments exist which would preclude the tort liability altogether. See, e.g., Sandra S. Baron, et al., Tortious Interference: The Limits of Common Law Liability for Newsgathering, 4 Wm. & Mary Bill of Rts. J. 1027 (1996); Deckle McLean, Recognizing the Reporter's Right To Trespass, Commun. & The Law at 31, (Oct. 1987). Of course, to the extent that a proper allegation of damage is necessary to establish a prima facie case, the arguments discussed below will often provide a basis for dismissal of the pleadings or for the grant of summary judgment for failure to state a claim. See, e.g., Costlow v. Cusimano, 311 N.Y.S.2d 92, 97 (N.Y.App.Div. 1970) (dismissing trespass claim on grounds that complaint failed to "allege damages proper to a trespass action").

interests in possession of property," not interests in a person's reputation. Id. at 97.

Just a year later, however, a Ninth Circuit panel took a different approach. Addressing a constitutional challenge to the award of publication-related damages in a case involving newsgathering torts, the Ninth Circuit upheld the award on a claim for intrusion upon seclusion. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971). The Dietemann court rejected the argument that the First Amendment prevented intrusion damages from being "enhanced by the fact of later publication," reasoning that a "rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done without any countervailing benefit to the legitimate interest of the public in being informed."[8] The Dietemann court did not consider whether an award of such damages properly redressed plaintiff for the type of harm against which the tort of intrusion is designed to protect, or whether such damages directly flowed from the act of intrusion which was the basis for liability.

Fortunately, there is now a small but growing body of case law that recognizes these shortcomings of the Dietemann analysis. The common law principles not addressed in Dietemann, the nature and purpose of the underlying tort and the boundaries on indirect or consequential damages imposed by the doctrine of proximate cause, appropriately should cut-off expansive claims for publication-related damages in cases alleging only newsgathering torts.

A. PURPOSE OF THE TORT: THE INJURY TO BE COMPENSATED AND THE CONDUCT TO BE DETERRED

Each tort recognized at common law is designed to strike a balance between a plaintiff's claim to protection from damage and a defendant's claim to freedom of action. W. Page Keeton, et al., Prosser and Keeton on Torts § 1 (5th ed. 1984), p. 6 (hereinafter, "Prosser"). By this balance, the law seeks to achieve a societally reasonable allocation of losses arising out of human activities. A guiding principle of tort law, therefore, is that a "liability must be based upon conduct which is socially unreasonable." Id.

In this framework, the measure of damages that may be recovered through a tort claim must focus on the purposes for which tort liability is recognized. While there are various formulations of the purposes of tort law, primary considerations are (1) providing compensation for damage caused by the violation of a recognized legal right, and (2) punishing wrongdoers and deterring wrongful

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[8] Dietemann, 449 F.2d at 250. Note that Dietemann predates the Supreme Court's decision in Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) in which it was held that a plaintiff may not avoid the "actual malice" burden by renaming the damages sought from "reputational" to "emotional distress," because the chilling effect on the "breathing space" to the freedoms protected by the First Amendment are the same.

conduct in the future.[9] See Memphis Community School District v. Stachura, 477 U.S. 299, 306-07 (1986) ("damages in tort cases are designed to provide 'compensation for the injury caused to plaintiff by defendant's breach of duty' . . . Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are compensatory -- damages grounded in determinations of plaintiff's actual losses . . . "); Walje v. City of Winchester, Ky., 773 F.2d 729, 731 (6th Cir. 1985) (the common law is concerned "with the protection of private interests from unconsented intrusions and interference by other private actors . . ."); Hargrave v. OKI Nursery, Inc., 636 F.2d 897, 899 (2d Cir. 1980) ("[t]ort liability is imposed on the basis of some social policy that disapproves the infliction of a specific kind of harm . . ."); Dan B. Dobbs, Law of Remedies, § 3.1 (2d ed. 1993) at p. 282-84 ("an ordinary 'compensatory' damages judgment can provide an appropriate incentive to meet the appropriate standard of behavior"). The common law focus on the purpose of tort liability -- the injury to be compensated and the conduct to be deterred -- provides the first basis for limiting the sort of publication damages permitted by Dietemann.

The Costlow trespass ruling illustrates well the way in which the scope of damages is limited at common law by reference to the purpose of the tort alleged. In Costlow, plaintiffs brought an action against a small town reporter who entered their home, photographed and subsequently published pictures of their small children after they tragically had trapped themselves in the family's refrigerator and died of suffocation. Plaintiffs pursued four causes of action, including trespass, for which they sought both emotional and reputational damages allegedly caused by the subsequent publication of the photographs. The court dismissed the trespass claim, however, specifically because plaintiffs had not pled damages proper to a trespass action. The court reasoned that because "the tort of trespass is designed to protect interests in possession of property, damages for trespass are limited to consequences flowing from the interference with possession" of the property. Costlow, 311 N.Y.S.2d at 97. Thus, the court continued, a trespasser may be liable for "physical harm done while on the land, irrespective of whether his conduct would be subject to liability were he not a trespasser," but damages for injury to reputation and for emotional disturbance are not a "natural consequence of the trespass" and are "more properly allocated under other categories of liability." Id.

The converse situation was presented in Prahl v. Brosamle, 295 N.W.2d 768, 778 (Wis.Ct.App. 1979), but the same common law analysis applied. In Prahl, a defamation claim was dismissed because the damage alleged related solely to the wrongful trespass committed by the reporter in order to obtain the story, *not* from the broadcast of the allegedly defamatory statement. The defendant reporter had accompanied a police SWAT team into plaintiff's home and had filmed

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[9] The Restatement (Second), Torts, § 901 (1976) identifies the purposes as: "(a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help." As a practical matter, the second purpose – that of determining rights – generally is served by an award of nominal damages. Restatement (Second), Torts, § 908; see also Nappe v. Anschelewitz, Barr, Ansell & Bonello, 477 A.2d 1224 (N.J. 1984) (the law vindicates an invasion of a legal right by awarding nominal damages). The fourth purpose -- to vindicate parties and avoid other forms of retaliation -- is generally served by an award of punitive damages. Restatement (Second), Torts, § 908.

the police investigation and interrogation of plaintiff regarding reports that two gun shots aimed at boys bicycling in the area had come from his house. The appellate court found that the broadcast about the incident erroneously stated that plaintiff had been charged with reckless use of a firearm, and that such a statement was defamatory, per se. The court nevertheless dismissed the defamation claim because the plaintiff was not seeking to recover the sort of reputational damages that a defamation action is designed to redress, but rather sought damages flowing directly from the effect of the incident at his residence, including his distress and anguish over the invasion of his house by police and the accompanying trespass by the press.[10]

Thomas v. Pearl, 998 F.2d 447 (7th Cir. 1993), cert. denied, 510 U.S. 1043 (1994), a case involving an alleged intrusion upon seclusion, also illustrates the common law rule requiring the plaintiff to match the damages sought and the conduct challenged to the purpose of the tort under which suit is brought. In Thomas, a high school basketball player brought a claim for intrusion against a University of Iowa basketball coach who had secretly recorded telephone conversations with the high school recruit and had shared the taped conversations with an NCAA enforcement officer and with a University of Illinois attorney. The conversations concerned certain perks that the University of Illinois had been offering to the high school recruit in order to persuade the basketball player to come to Illinois. Disclosure of the tape recordings gave rise to an NCAA investigation of the University of Illinois and, ultimately, disciplinary action for improper recruiting practices. As a result of the investigation, the high school basketball recruit was also forced to sit out the basketball season during his freshman year at the University of Illinois. In his lawsuit the student claimed that the coach's recording of his conversations intruded upon his seclusion and caused the investigation which, in turn, forced him to sit out his freshman year. The Seventh Circuit dismissed the claim because the damages alleged did not flow from the conduct that the intrusion tort was meant to deter. The court reasoned that "a plaintiff fails to state a claim for invaded seclusion if the harm flows from publication rather than the intrusion." Thomas, 998 F.2d at 452.

Many other examples could be cited for the proposition that damages must be limited by reference to the purpose of the tort alleged. For example, in Anderson v. WROC-TV, 441 N.Y.S.2d 220 (N.Y.Sup.Ct. 1981), a trespass action was brought against a TV station that had sent a reporter to accompany the local Humane Society during a "raid" on plaintiff's property to investigate allegations of inhumane treatment of animals. Underscoring the importance of connecting the damages alleged to the tort asserted, the court noted that plaintiff's trespass claim would have been subject to dismissal if it sought simply to recover the value of property missing, presumably because these would be conversion damages. Anderson, 441 N.Y.S.2d at 222, n.*. Only because plaintiff specifically alleged physical harm to his property during the trespass was the claim allowed to stand. Id.

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[10] Prahl, 295 N.W.2d at 778. Note, however, in analyzing trespass damages Prahl followed the lead of Dietemann and held that non-physical damages accruing after the trespass, such as mental distress occasioned by a subsequent broadcast, are available in a trespass claim. (The trial court in Prahl had "concluded that the damages asserted in Dr. Prahl's claim for defamation could not support his claim in trespass." Prahl, 295 N.W.2d at 781.) The error in the Dietemann analysis adopted in Prahl is discussed, infra, pp. 10-14.

Again, the same analysis was applied in Lovgren v. Citizen's First National Bank of Princeton, 534 N.E.2d 987 (Ill. 1989). The defendant bank in Lovgren held the mortgage to plaintiff's farm and plaintiff had failed to meet his obligations under the mortgage. The bank, without plaintiff's knowledge or consent, placed advertisements stating that plaintiff was selling his farm at a public auction. Id. at 988. No such auction had actually been scheduled. Plaintiff sued, claiming that he had suffered mental anguish and reputational damage, and sought to recover these damages against the bank on a theory of unreasonable intrusion upon seclusion. The Illinois Supreme Court held that plaintiff had failed to state a cause of action for intrusion because "the alleged offensive conduct and subsequent harm resulted from the defendants' act of publication, not from any act of prying analogous to the examples set forth by Prosser & Keeton." Id. at 989. See also, Gaycus v. Potts, 808 F.2d 596, 598-99 (7th Cir. 1986) (denying recovery for "impairment of [plaintiff's] sense of security" allegedly caused by defendant's trespass); Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir. 1969) ("in analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate"); Sussman v. ABC, Inc., CV94-8524 (C.D.Ca. filed Feb. 13, 1997) (dismissing fraud and intrusion claims where all alleged damage stems from broadcast); Russell v. American Broad. Co., No. 94 C 5768, 1995 WL 330920 at * 8 (N.D. Ill. May 31, 1995) (no claim for intrusion stated where the harm, if any, was from the publication of a secretly taped conversation and not from the taping itself); Copeland v. Hubbard Broad. Inc., 526 N.W.2d 402, 406 (Minn.App. 1995) (declining to recognize the tort of intrusion upon seclusion especially because plaintiffs had not "alleged any injury not addressed by their trespass claim"); Raskin v. Swann, 454 S.E.2d 809, 810-11 (Ga. Ct. App. 1995) (rejecting claim for fraudulent inducement where damages sought were the sort of reputational damages that should be sought by way of defamation, not fraud).

As the common law analysis makes plain, the damages for which a plaintiff may be compensated are limited to those caused by the type of conduct a tort is meant to prohibit. This limitation is well-established and is not unique to claims against the press. The same approach that limits damages also is applied to determine the adequacy of a pleading in stating a claim, to apply the appropriate statute of limitations, to determine appropriate defenses and to resolve other substantive and procedural issues, all of which are tied to the nature of the cause of action alleged. See, e.g., Desnick v. American Broad. Co., 44 F.3d 1345, 1352 (7th Cir. 1994) (dismissing trespass claim because plaintiff failed to allege the invasion of "any of the specific interests that the tort of trespass seeks to protect"); Sporn v. MCA Records, Inc., 448 N.E.2d 1324 (N.Y. 1983) (evaluating difference between trespass and conversion claims for purposes of statute of limitations); Wild v. Rarig, 234 N.W.2d 775, 793 (Minn. 1975) (applying Minnesota's two-year defamation statute of limitations to claim for tortious interference because "regardless of what the suit is labeled, the thing done to cause any damage to Dr. Wild eventually stems from and grew out of the defamation"); Amigo Foods Corp. v. Marine Midland Bank-New York, 348 N.E.2d 581, 584 (1976) (breach of contract cannot form basis for a tort claim required to exercise long arm jurisdiction).

Thus, where a plaintiff is unable to match the specific harm for which redress is sought and the wrongful conduct allegedly committed by a defendant, to the harm to be redressed and the conduct to be deterred by the tort theory upon which liability is grounded, no recovery will lie. Media defendants that find their newsgathering activities attacked through litigation should thus, in

the first instance, scrutinize the nature of the damages sought in relation to the torts pleaded. Under this analysis, publication-related damages or reputational damages sought in the context of a newsgathering tort will, in many instances, be subject to dismissal.

B. PROXIMATE CAUSATION AND THE INDEPENDENT ACT OF PUBLICATION

The "purpose of the tort" limitation on damages cannot simply be ignored by claiming that a subsequent publication is the foreseeable result of a newsgathering tort. A goal of the common law is to achieve a measure of recovery that fully encompasses the harm naturally flowing from a tortfeasor's wrongful conduct, so recovery of indirect damages caused by defendant's wrongful conduct is indeed permitted in various contexts. However, the effects of an independent act of alleged wrongdoing by the same tortfeasor (such as a subsequent publication), cannot properly be transmogrified into a damage element of an earlier tort through the doctrine of "proximate causation." The doctrine has no proper application in these circumstances.

The concept of proximate cause serves as the measuring stick to define the universe of the items of consequential or indirect damage for which a tortfeasor may be held responsible. McCormick on Damages, § 72 (1935); Dan D. Dobbs, Law of Remedies, § 3.4, p. 321. Although the doctrine of proximate cause varies subtly from state to state, the most generally accepted notion requires that the act or omission of the tortfeasor be a *substantial factor* in producing the indirect damage. McCormick on Damages, § 73. See, e.g., Murphy v. Town of Chatham, 676 N.E.2d 473, 476 (Mass.App.Ct. 1996), reh. denied, 676 N.E.2d 1146 (Mass. 1997) (holding defendant liable for damages in nuisance upon a showing that the nuisance "was more likely than not a substantial factor in bringing about the harm"); Prudential Ins. Co. of Am. v. Jefferson Assoc., Ltd., 896 S.W.2d 156, 160-61 (Tex. 1995) (denying recovery for fraud action because plaintiff was unable to prove that fraudulent statement "was a substantial factor in bringing about an injury which would not otherwise have occurred").

A wrongful act may be considered a "substantial factor" in causing a particular harm when that harm would not have occurred "but for" the wrongful act or omission, or where the further indirect damages were "foreseeable."[11] In cases of intentional wrongdoing, the range of responsibility widens to more remote and less foreseeable consequences. McCormick on Damages, § 74. Interference by a new force or agency, arising after the initial wrongdoing, will limit the original tortfeasor's range of responsibility if the intervening force played a principal part in producing the harmful result. As a general matter, an intervening force "breaks the chain" of causation, unless the wrongdoer could have appreciated that the conduct would create a substantial risk of this new active danger. Id.

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[11] McCormick on Damages, § 73. In the circumstances of certain newsgathering tort actions, "but for" causation, itself, might provide a defense to a claim for publication damages. For example, where it can be shown that the same or substantially the same story would have been published with or without the material that was allegedly obtained tortiously, then it cannot be said that the damages stemming from the publication would not have occurred "but for" the newsgathering tort.

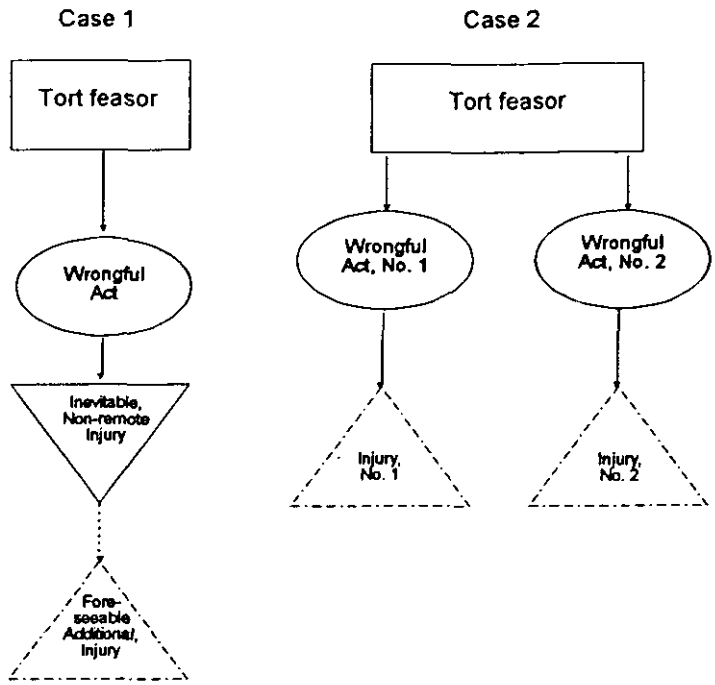
Plaintiffs alleging newsgathering torts have sought to stretch these concepts to urge that damages flowing from publication are a foreseeable consequence of a newsgathering tort and, indeed, the motivating force behind the wrongful conduct. E.g., Miller v. NBC, 232 Cal.Rptr. 668 (Cal.Ct.App. 1986) (specifically alleging in a trespass claim the reporter's intent to broadcast at time of entry). Starting with this premise, plaintiffs contend that publication damages are both proper and necessary in order to fully compensate a plaintiff for the harm caused and to deter future wrongful conduct.

This logic was accepted by the Ninth Circuit in Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), which involved an investigation by the Los Angeles District Attorney's Office of reports that plaintiff Dietemann was offering herbal medicine "cures" out of an office in his home. Defendant Life Magazine arranged with the District Attorney's Office to have two of the magazine's employees visit plaintiff's "office" and seek "treatment." The Life employees took with them a hidden camera and wore radio transmitters which allowed investigators from the D.A.'s office to listen to what transpired during the visit. Plaintiff subsequently was arrested and charged with practicing medicine without a license. When Life Magazine published an article describing the visit and the arrest, plaintiff brought suit and obtained a verdict for invasion of privacy. Allowing recovery of publication damages from the intrusion, the Ninth Circuit held that "[a] rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him . . . [and] would encourage conduct by news media that grossly offends ordinary men." Dietemann, 449 F.2d at 250.

Following Dietemann's lead, some other courts have accepted, without substantial analysis, the proposition that "a party is entitled to recover compensatory damages for injury resulting from publication of information acquired by tortious conduct." In Belluomo v. KAKE TV & Radio, Inc., 596 P.2d 832, 842 (Kan.Ct.App. 1979), for example, defendant's newsmen accompanied a health inspector during his inspection of plaintiffs' restaurant. The restaurant owners sought damages from the TV station alleging that its reporters had wrongfully obtained injurious audio-visual material through trespass. Defendants argued that they had obtained plaintiffs' consent to enter the restaurant and film the inspectors, but plaintiff countered that the consent had been obtained by fraud. The case was tried to a jury and a verdict for trespass was entered in favor of defendants. An appellate court affirmed the verdict, but nevertheless chose to address the issue of whether damages flowing from publication would have been available if plaintiffs had prevailed on the trespass claim. Citing Dietemann, the appellate court stated that such damages could be recovered in Wisconsin. Belluomo, 596 P.2d at 835. See also, Prahl, 295 N.W.2d at 781 (Wis.Ct.App. 1979) (allowing claim for recovery of nonphysical harm caused by broadcast following a reporter's trespass in order to fully compensate plaintiff); Albertson v. Tak Communications, Inc., 447 N.W.2d 539, 539 (Wis.Ct.App. 1989) (unpublished and "uncitable" decision noting that "a party is entitled to recover compensation for injury resulting from publication acquired through tortious conduct").

What Dietemann and its progeny ignore, however, is the significance of the subsequent independent act by the same alleged wrongdoer. "Proximate cause" is intended to define the range of liability for the damage-causing actions of others, not for independent acts by the same party. The

difference is illustrated by the following two paradigms:



Case 1 depicts an initial act of misconduct which sets off a chain of events, involving additional misconduct by others; Case 2 depicts a number of separate actions of misconduct by a single wrongdoer.[12]

Publication does not fit the Case 1 paradigm, but entails an intentional, independent act as illustrated by Case 2 -- an act involving liability separately addressed through defamation and public disclosure torts. Such independent actions by the same wrongdoer must be analyzed against the purpose of the tort alleged in order to define the scope of damages available, not against a standard of foreseeability. Ignoring this distinction would raise a number of conceptual difficulties. For example, if publication damages could be alleged as just an additional element of recovery in a claim

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[12] Renaire v. Vaughn, 142 A.2d 148 (D.C. 1958) demonstrates a typical Case 1 embedded in the context of a potential Case 2. Renaire involved a conditional sales contract for a refrigerator pursuant to which Vaughn authorized Renaire to enter his property to retake the refrigerator upon the event of a default. Vaughn defaulted. Renaire then sent an aggressive agent to repossess the refrigerator. Not finding Vaughn at home, the agent broke a window in order to enter and retake the refrigerator. One issue before the court was whether the entry was reasonable and, therefore, privileged as part of the retaking of the chattel. The court found that the entry was unreasonable, and therefore constituted a trespass. The seller thus was held liable for the consequential damages of the trespass, including property subsequently stolen by a third party who apparently entered the home through the window broken by the Renaire agent. Notably, however, the defendant could not be held liable in trespass for the refrigerator it had retaken. *This taking was not a "foreseeable" consequence of the trespass, but an independent* action as to which the potential tortfeasor had a meritorious defense.

for trespass, a verdict denying trespass liability or setting nominal trespass damages should necessarily preclude a subsequent defamation action under principles of res judicata. The confusion that would be engendered by such an approach underscores the basic error in the attempt to lump into one tort theory a recovery of damages representing multiple, independent claims.

This significance of the distinction between Case 1 and Case 2 is illustrated by Jorgensen v. Massachusetts Port Authority, 905 F.2d 515 (1st Cir. 1990). In Jorgensen, two pilots obtained a jury verdict against the Massachusetts Port Authority for harm to their professional reputation resulting from an aircraft accident that was found to have been caused, in part, by the negligence of the Port Authority in maintaining its runways. The alleged harm to reputation grew out of the fact of the pilots' involvement with the accident, not out of any publication by the defendant about the accident. (The pilots alleged that they had trouble getting new jobs when they had to tell prospective employers about the crash.) In these circumstances, the First Circuit held that damages for reputation could be recovered as consequential damages, so long as the Port Authority's conduct complained of did not include "the communication of an idea."[13] If the conduct by defendant did include communication of an idea, plaintiffs could recover reputational damages only through a separate defamation claim. Jorgensen, 905 F.2d at 520. In short, if the Port Authority had subsequently published information about the plaintiffs involvement in the accident which caused the alleged reputational damage, the act of publication would break the causal chain between the negligent maintenance of the runways and the reputational damage at issue.[14]

As Jorgenson recognized, when separate actions by the same wrongdoer are involved, the analysis must return to the nature of the wrongful acts and the purpose of the different causes of action that provide remedy to the harm caused. The distinction among specific causes of action against a single wrongdoer, and the scope of damages available, were of particular concern at the common law. The common law developed under a system of writs, and invoking the proper writ for the specific type of relief requested was crucial.[15] This was especially so because multiple writs

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[13] The First Circuit nevertheless ultimately denied the claim for reputational damages on the ground that the plaintiffs had not sufficiently proved the amount of damages they allegedly suffered. Jorgensen, 905 F.2d at 527.

[14] This distinction illustrated by Jorgenson is particularly important in addressing those non-publication tort claims where reputational damages are, in some circumstances, available at common law. E.g., Oksenholt v. Lederle Labs., a Div. of Am. Cynamid Corp., 656 P.2d 293 (Or. 1981) (physician alleging fraudulent misrepresentation on part of drug manufacturer entitled to recover damages to his professional reputation stemming from his reliance on the misrepresentation). See generally infra, pp. 26-34.

[15] Consider, for example, the historical distinction between the writs of trespass and a trespass on the case. At common law, both writs were available to redress a tortious harm. Nappe v. Anschelewitz, Barr, Ansell & Bonello, 477 A.2d 1224, 1228-29 (N.J. 1984). However, trespass was considered quasi-criminal in nature and was the remedy for forcible, direct and immediate injuries to person or property, while trespass on the case developed as a derivative claim and for the express purpose of allowing an injured party a remedy for indirect harm resulting from a trespass. Id.; see also Day v. Avery, 548 F.2d 1018, 1028-29, n. 52 (D.C.Cir. 1976), cert. denied, 431 U.S. 908 (1977); Jones v. Preuit & Mauldin, 763 F.2d 1250, 1254, n.4 (11th Cir. 1985) ("trespass involves an intentional act done with force and immediately injurious to the person of another or to property in his or her

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generally could not be joined in one proceeding and courts of law could not grant equitable remedies. See, e.g., Oliver L. McCaskill, The Elusive Cause of Action, 4 U.Chi.L.Rev. 281 (1937); Silas Harris, What is a Cause of Action?, 16 Cal.L.Rev. 459 (1928). Thus, great pressures developed for courts to consider various elements of damage to be within one "cause of action." As Professor McCaskill wrote more than fifty years ago:

> With a division of jurisdiction established between courts of law and equity, and with rigid boundaries maintained between the common law remedies, preventing unions between them, inevitably situations arose in which it was impossible for a claimant to obtain the full relief desired without resorting to two or more suits, unless he could avail himself of some principle of merger by which courts see as a single unit things which are commonly regarded as separate and distinct.

4 U.Chi.L.Rev. at 291-92. As the doctrine of merger evolved, some types of damage thus came to be allowed as "aggravating" the original wrong and recovered in one lawsuit if they took place as part of a single course of conduct by a defendant. For example, conversion of chattel during a trespass in some instances could be recovered as an "aggravation" of the trespass damages. Id. at 294-95.

Under this analysis, however, not all "aggravations" were allowed at common law. Defamation damages, in particular, could not be merged with damages awarded for a trespass claim because defamation presents a distinct type of damage and substantive ground of liability. A defamation allegation in a trespass case "was strictly an aliter enormia, pertinent only to show malice as a basis for punitive damage." Id. at 295. As Professor McCaskill makes clear, the common law rule, as applied to defamation, remained that different theories of liability must be treated as different transactions, leading to distinct liabilities.

In separating distinct causes of action at common law (as in Case 2), the standard articulated by Professor Pomeroy in 1904 was widely accepted and applied by the Courts:

> Of these elements, the primary right and duty and the debit or wrong combined constitute the cause of action in the legal sense of the term, and as is used in the codes of the several states.

Pomeroy, Code Remedies, § 347 (4th ed. 1904). In other words, distinct causes of action can be determined by breaking the wrong complained of into its "component factors, that is, the primary right asserted and the conduct of defendant complained of as a violation thereof." Harris, supra, 16

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[15](...continued)
possession. Trespass on the case would lie when the wrongful act causes harm only indirectly and without an intentional act of force.") The classic illustration of the difference between the two writs was that of a log thrown onto a highway: If a person were struck by the log, a cause of action for trespass would lie; if, instead, someone came along later and fell over the log as it lay on the road, the action would be for trespass on the case. Nappe, 477 A.2d at 1229.

Cal.L.Rev. at 463.

Even in an age of unified courts and notice pleading, where the distinction between writs no longer carries the same jurisdictional significance, the proper separation and identification of causes of action remains important in several respects, such as the articulation of defenses, application of statutes of limitations, determination of claim preclusion and other issues. Notions of proximate cause and foreseeability do not relieve a plaintiff of the burden of establishing that the nature of the right asserted and the type of conduct alleged to be wrongful fit within a recognized theory of recovery. See, e.g., Nader v. General Motors Corp., 255 N.E.2d 765, 770 (N.Y. 1970) (plaintiff not permitted to rely on invasion of privacy as means of avoiding the more stringent pleading and proof requirements for an action for intentional infliction of emotional distress); AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180, 181 (Fla. 1987) (Florida law does not permit a party to recover economic damages in tort without alleging tortious conduct separate and independent from a breach of contract); Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 273-74 (7th Cir. 1983) (refusing to allow plaintiff to avoid specific limitations of the law of defamation by labeling an action which sounds in defamation as an action for wrongful interference); Hargrave v. Oki Nursery, Inc., 636 F.2d 897, 898-99 (2d Cir. 1980) (where the interest at stake is that of holding the defendant to a promise, plaintiff may not recover in tort whether or not he has a valid claim for breach of contract).

C. COMMON LAW LIMITATIONS IN THREE POTENTIAL NEWSGATHERING TORTS: TRESPASS, INTRUSION AND FRAUD

The common law concepts of the purpose of the tort and the limits of proximate causation thus provide a powerful basis for excluding publication damages from newsgathering torts. These common law arguments against permitting the recovery of publication damages are explored with reference to three potential "newsgathering" tort claims: trespass, intrusion and fraud.

1. Trespass

The interest to be protected by the tort of trespass is an owner's interest in the possession of property. E.g., Robert's River Rides, Inc. v. Steamboat Development Corp., 520 N.W.2d 294, 301 (Iowa 1994) ("gist of claim for trespass on land is the wrongful interference with one's possessory rights in property"); Kay Homes, Inc. v. South, No. 93-L-182, 1994 WL 660600, at *2 (Ohio Ct.App., Nov. 18, 1994) ("trespass action is designed to protect the interest in exclusive possession of real estate"); Borland v. Sanders Lead Co., Inc., 369 So.2d 523, 527 (Ala. 1979) ("trespass protect[s] the possessor's exclusive possession of property"). The conduct to be deterred by imposing trespass liability is the interference with a possessory interest. E.g., Jones v. Preuit & Mauldin, 763 F.2d 1250, 1254 (11th Cir. 1985) ("trespass involves an intentional act done with force and immediately injurious to the person of another or to property in his or her possession"); Desnick v. American Broad. Co., Inc., 44 F.3d 1345, 1351-52 (7th Cir. 1995) (to enter upon another's land without consent is a trespass); Sporn, 448 N.E.2d at 1326; see also Prosser § 13.

Accordingly, a newsperson who enters another's land without authorization to cover a story faces potential liability for trespass as a result of the interference with the possession of property.[16] See Rafferty v. Hartford Courant Co., 416 A.2d 1215, 1217 (Conn.Super.Ct. 1980) (reporters liable for trespass for crashing mock "unwedding" ceremony); Le Mistral, Inc. v. Columbia Broad. Sys., 402 N.Y.S.2d 815, 817-18 (N.Y. App. Div. 1978), appeal dismissed, 46 N.Y.2d 940 (1979) (filming in restaurant after request to leave subject to trespass liability); Anderson v. WROC-TV, supra, 441 N.Y.S.2d at 226-27 (plaintiff stated claim against television crew for trespass for accompanying Humane Society inspector into house over owner's objection). Such an invasion is characterized as an intentional tort, the remedy for which is always at least nominal damages, regardless of the actor's motivation. Hajec v. Novitzke, 175 N.W.2d 193, 201 (Wis. 1970) (affirming an award of one dollar); Diana Shooting Club v. Kohl, 145 N.W. 815 (Wis. 1914) (affirming award of six cents); Vecchiotti v. Tegethoff, 745 S.W.2d 741 (Mo.App. 1987) (nominal damages available for trespass to land that causes no harm).

Consistent with the concept of proximate cause and to discourage behavior which interferes with an owner's interest in land, a trespasser in many jurisdictions may be held liable for all consequential harm, including non-physical harm, flowing from all acts committed *during* the trespass, regardless of whether the act occasioning the injury is independently wrongful or negligent. See, e.g., Preiser v. Wielandt, 62 N.Y.S. 890 (N.Y. App. Div. 1900) (liability on trespasser whose mere presence frightens pregnant woman to point of heart attack); Southern Counties Ice Co. v. RKO Radio Pictures, 39 F.Supp. 157, 159 (S.D.Cal. 1941) (trespasser liable for any loss that occurs during trespasser's use of land even if loss was caused by an "irresistible or extraordinary force, and even though the event was entirely unexpected"); Kornoff v. Kingsburg Cotton Oil Co., 288 P.2d 507, 511 (Ca. 1955) (once cause of action for trespass is established, owner of land may recover damages for annoyance suffered during the trespass even if he or she has suffered no physical injury); Thompson v. Simonds, 155 P.2d 870, 875 (Ca. 1945) (plaintiff can recover damages for pain, anxiety, inconvenience, and annoyance resulting from the interference that defendant's trespass caused to plaintiff's free use of his land); Prosser § 13 (trespasser "liable for all direct consequences of any conduct engaged in while trespassing . . . [and sometimes] for indirect consequences").

That this broad view of liability for consequential harm is limited to acts committed during the trespass was illustrated in the context of an alleged newsgathering tort in Baugh v. CBS, 828 F.Supp. 745 (N.D. Cal. 1993). In Baugh, a news crew from the CBS program "Street Stories" entered plaintiff's home after an incident of domestic violence, along with a "Mobile Crisis Intervention Team" (a social work unit of the Alameda District Attorney's Office). After a story based on this visit was broadcast, plaintiff brought, among other causes of action, a trespass claim. Plaintiff alleged that she had consented to the camera crew's presence on her property only because she had been told that the film was for the use of the D.A.'s office. Under a common law analysis,

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[16] Of course, a newsgatherer is not liable for trespass if the property owner permits the newsgatherer to enter, Restatement (Second) of Torts § 167 at 309, and this consent may either be express or implied by custom. Florida Publ'g Co. v. Fletcher, 340 So. 2d 914 (Fla. 1976), cert. denied, 431 U.S. 930 (1977); Baumgart v. Spierings, 86 N.W.2d 413, 415 (Wis. 1957).

the court rejected plaintiff's trespass claim because, "if [defendants] exceeded the scope of Baugh's consent, they did so by broadcasting the videotape, an act which occurred after they left Baugh's property," and this act taken off of the property could not "support a trespass claim." Baugh, 828 F.Supp. at 756-57.

In some circumstances, a trespasser can be held liable for *physical* damages to person or land directly resulting from, although occurring after, the trespass. E.g., Wardrop v. City of Manhattan Beach, 326 P.2d 15 (Cal. Ct. App. 1958) (holding trespasser liable to minor plaintiff and her parents for causing her to contract polio by pumping contaminated *water into her backyard*); Rogers v. Board of Rd. Comm'rs for Kent County, 30 N.W.2d 358 (Mich. 1948) (trespassers liable for death of land owner when his mower got caught in post left *on plaintiff's property* by trespassers); Kopka v. Bell Tel. Co. of Pa., 91 A.2d 232, 235 (Pa. 1952) (allowing damages for personal injuries caused by hole trespasser dug *on plaintiff's property*); Van Alystyne v. Rochester Tel. Corp., 296 N.Y.S. 726 (N.Y. City Ct. 1937) (trespasser liable for death of landowner's dogs who ate lead dropped *on property* by trespasser); Hammond v. County of Madera, 859 F.2d 797, 802-3 (9th Cir. 1988) (permitting plaintiff to seek damages for "increased noise, and other pollution and destruction of plants" *on property* as consequential damages of trespass); Wyant v. Crouse, 86 N.W. 527 (Mich. 1901) (trespasser liable for destruction by fire of *building he unlawfully entered*, without regard to the care used by trespasser in lighting stove).

However, in most jurisdictions, *non-physical* damages that occur after the trespass are not recoverable as damages in a trespass action. E.g., Miller, 232 Cal. Rptr. 668, 677 (Cal.Ct.App. 1987); Gaycus v. Potts, 808 F.2d at 599 (declining to allow recovery for non-physical damages arising after the trespass); Harris v. Birmingham Hide & Tallow Co., Inc., 589 So.2d 150, 151 (Ala. 1991) (asserting that damages for mental distress in trespass actions must involve circumstances of insult or contumely); Broadfoot v. Aaron Rents, Inc., 409 S.E.2d 870, 873 (Ga.Ct.App. 1991) (denying damages for emotional distress resulting from trespass where trespass did not cause plaintiffs to suffer from any physical injury); Stoll v. Curl, 551 P.2d 1058, 1059 (Or. 1976) (stating that "[m]ental anguish is not compensable in the ordinary trespass action" where there are no special circumstances). But see, Belluomo v. WAKE TV & Radio, Inc., supra, 596 P.2d at 842; Prahl v. Brosamle, supra, 295 N.W.2d at 781.

Accordingly, under the common law rules applicable to the law of trespass, reputational and other non-physical damages flowing from a broadcast subsequent to the trespass are not recoverable as trespass damages. Such damages do not address the type of harm that the tort of trespass is meant to address, nor do they serve to deter the type of conduct the tort of trespass is meant to deter.

2. Intrusion

The interest to be protected by the tort of intrusion upon seclusion is the plaintiff's interest in solitude, either as to his person or to his private affairs or concerns. E.g., Sanders v. American Broad. Co., Inc., 60 Cal.Rptr.2d 595, 598 (Cal. Ct.App. 1997); Magenis v. Fisher Broad., Inc., 798 P.2d 1106 (Or. 1990); Miller v. NBC, 232 Cal.Rptr. 668 (Cal. Ct.App. 1986); Prosser § 117. The

tort of intrusion upon seclusion is aimed at redressing discomfort caused by the intrusion, itself -- for example, someone enters your bedroom . . . opens your mail. . . or makes repeated and unwanted telephone calls to you. Lovgren v. Citizens First National Bank of Princeton, supra, 534 N.E.2d at 988 ("the core of this tort is the offensive prying into the private domain of another."); Ali v. Douglas Cable Communications, 929 F.Supp. 1362, 1381 (D.Kan. 1996) (prying is essential element of the tort); People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1279 (Nev. 1995); Thomas, 998 F.2d at 452; Glasgow v. Sherwin-Williams Co., 901 F.Supp. 1185, 1192 (N.D.Miss. 1995); Hogin v. Cottingham, 533 So.2d 525 (Ala. 1988); Yarbay v. Southern Bell Tel. & Tel. Co., 409 S.E.2d 835, 837 (Ga. 1991); Wolfson v. Lewis, 924 F.Supp. 1413, 1420 (E.D. Pa. 1996) (hounding, harassing and unreasonable surveillance).

The conduct to be deterred by the intrusion tort is an unreasonable interference with solitude, something in the nature of prying or harassment. People for the Ethical Treatment of Animals, 895 P.2d at 1279 ("the intrusion tort gives redress for interference with one's right to be left alone"); Prosser § 117. The conduct prohibited is not limited to physical intrusion.[17] Prosser § 117; Amati v. City of Woodstock, Ill., 829 F. Supp. 998 (N.D. Ill. 1993) (secret phone-tap of employees phones is actionable as an intrusion upon seclusion); Phillips v. Smally Maintenance Servs., 435 So.2d 705, 711 (Ala. 1983) (employer's improper inquiries into employee's "sexual proclivities and personality" support a claim for intrusion even in the absence of any physical invasion); Berthiaume's Estate v. Pratt, 365 A.2d 792, 795 (Me. 1976) (allegations that doctor took picture of dying patient against desire of patient stated cause of action for intrusion); Nader v. General Motors Corp., 255 N.E.2d 765, 770-71 (N.Y. 1970) (unauthorized wiretapping and eavesdropping by mechanical means support an action for intrusion); Fowler v. Southern Bell Tel. & Tel. Co., 343 F.2d 150, 156 (5th Cir. 1965) (tapping of phone wires amounts to an intrusion upon solitude).

Commentators and courts alike have recognized that the conduct sought to be deterred by the tort of intrusion does not involve speech or other expression.[18] "The general rule is that no

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[17] Intrusion thus differs from trespass in several ways. First, there can be an intrusion without any trespass because no actual physical entry on land is required for an intrusion claim to stand. Highly offensive eavesdropping or observance from afar can alone constitute an intrusion. Prosser § 117. Likewise, "[c]onduct that amounts to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi-public place, may nevertheless rise to the level of invasion of privacy based on intrusion upon seclusion." Wolfson v. Lewis, supra, 924 F. Supp. at 1420, citing Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973). Conversely, not every trespass gives rise to intrusion claim; "[t]respass alone cannot automatically change an otherwise reasonable surveillance into an unreasonable one." McLain v. Boise Cascade Corp., 533 P.2d 343, 347 (Or. 1975). The intrusion tort does not prevent mere entry onto land, rather "the extent of the intrusion, the context, conduct and circumstances surrounding the intrusion, the defendant's motives, the setting into which defendant intruded and the plaintiff's expectation of privacy" are all relevant considerations in determining whether an actionable intrusion upon seclusion has occurred. Magenis, 798 P.2d at 1110.

[18] Intrusion is thus distinguished from the tort of public disclosure of private facts -- a tort which does seek to deter publication. See Green v. Chicago Tribune, 675 N.E.2d 249, 259 (Ill. App. Ct. 1996) (Cahill, dissenting) ("The tort of intrusion upon the plaintiff's seclusion and the tort of publication of private facts . . . are separate torts . . . When the elements of the torts are mingled . . . we are led down an analytical path that ignores the distinction (continued...)

publication is required in right to privacy cases where the invasion consists of an intrusion upon the plaintiff's physical solitude or seclusion, whereas in those based on disclosure, false light or appropriation, publication will be a distinct element of the tort." Fowler v. Southern Bell Tel. & Tel. Co., 343 F.2d 150, 156 (5th Cir. 1965) (rejecting defendant's argument that "no cause of action for the invasion of privacy by wiretapping arises in the absence of publication or disclosure of the information overheard"). See also, Dietemann, supra, 449 F.2d at 247 ("there is agreement that publication is not a necessary element of the tort"); Phillips v. Smally Maintenance Servs., 435 So. 2d 705, 709 (Ala. 1983) (publication not necessary element for intrusion); see also Restatement (Second), Torts § 652B cmt. a ("invasion of privacy governed by this Section does not depend on any publicity given to the person whose interest is invaded or to his affairs"); Nimmer, The Right to Speak From Time to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Cal.L.Rev. 935, 957 (1968) (intrusion "occurs by virtue of the physical or mechanical observation of the private affairs of another, and not by the publication of such observations"). Thus, as with trespass, publication is not the sort of conduct sought to be deterred by the tort of intrusion. See Pearson v. Dodd, 410 F.2d 701, 705 (D.C.Cir. 1969) ("in analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate."); see also, Thomas v. Pearl, 998 F.2d 447 (7th Cir. 1993); Russell v. American Broad. Co., No. 94C 5768, 1995 WL 330920 at * 8 (N.D. Ill. 1995); Lovgren v. Citizen's First National Bank of Princeton, 534 N.E.2d 987 (S.Ct.Ill. 1989).[19]

There are instances where a publication has been allowed to provide the basis for a claim of intrusion upon seclusion, but these involve instances where the publication incites the intrusion, that is the publication causes the type of injury the intrusion tort is intended to prevent. See, e.g., Vescovo v. New Way Enters., Ltd., 130 Cal.Rptr. 86 (Ca. Ct. App. 1976) (publication of sexual solicitation advertisement disclosing plaintiff's name and address which resulted in hundreds of harassing encounters with uninvited visitors could be the basis of a cause of action for intrusion upon seclusion); Harms v. Miami Daily News, Inc., 127 So.2d 715 (Fla.Dist.Ct. App. 1961) (publication to the effect that plaintiff had a "sexy telephone voice" which resulted in hundreds of unwanted calls

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[18](...continued)
between the way information is gathered and its subsequent publication."); see also Pearson v. Dodd, 410 F.2d 701, 705 (D.C.Cir. 1969) ("[i]n analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate. Where there is intrusion, the intruder should generally be liable whatever the content of what he learns. An eavesdropper to the marital bedroom may hear marital intimacies, or may hear statements of fact or opinion of legitimate interest to the public; for purposes of liability, that should make no difference. On the other hand, where the claim is that private information concerning plaintiff has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained.")

[19] The recent holding in Sanders v. American Broad. Co., Inc., 60 Cal.Rptr.2d 595 (Cal.Ct.App. 2d Dist. 1997), also suggests this limitation on the intrusion tort. Sanders involved a claim based upon the broadcast of videotape taken while plaintiff was working at a "psychic hotline." A California Court of Appeals rejected the position, advocated by one dissenting judge, that the broadcasting of a videotape is a form of public observation which should be actionable as a wrongful intrusion. Sanders, 60 Cal.Rptr.2d at 600. The majority held that the tort of intrusion prohibits only an unwarranted invasion where an objectively reasonable privacy expectation exists, notwithstanding the impact of the broadcast which so motivated the dissenter.

supported a cause of action for intrusion). Additionally, there are reported cases where reputational damages were considered available for an intrusion, but in these cases, as in Jorgenson, the act itself caused the reputational harm and no allegation was made of an independent act of publication. See, e.g., Love v. Southern Bell Tel. & Tel., 263 So.2d 460, 466 (La.Ct. App.), writ denied, 266 So.2d 429 (1972) (permitting reputational damages arising from the public speculation following plaintiff's discharge resulting from employer's intrusion at his home); Pinkerton Nat. Detective Agency v. Stevens, 132 S.E.2d 119, 123, 108 Ga.App. held 159 (Ga.Ct.App. 1963) (ostracism by neighbors resulting from a detective's espionage of plaintiff held a valid element of damages); Pack v. Wise, 155 So.2d 909, 915-16 (La.Ct.App. 1963) (coerced firing caused compensable temporary loss of reputation among co-workers). Again, the liability imposed in these instances fits squarely within the Case 1 pattern -- the defendant committed one wrongful act which resulted in foreseeable damages. As with trespass, reputational and related damages flowing from a publication are not the type of injury to be compensated and do not involve the type of conduct to be deterred by the tort of intrusion.

3. Fraud

The tort of fraud is intended to protect an innocent party from suffering an undue disadvantage gained by "some act or omission that is unconscientious or a violation of good faith." Jewish Center of Sussex County v. Whale, 432 A.2d 521, 524 (N.J. 1981). The tort of fraud thus seeks to protect a plaintiff who relies upon materially incorrect information, and to deter a defendant from inducing such a reliance on knowingly incorrect information.[20] Hargrave v. Oki Nursery, Inc., 636 F.2d 897, 899 (2d Cir. 1980) ("the law of fraud seeks to protect against injury those who rely to their detriment on the deliberately dishonest statements of another"); Lengyel v. Lint, 280 S.E.2d 66, 69-70 (W.Va. 1981) ("'a vendor guilty of a representation made with intent to deceive should not be heard to say that the purchaser ought not to have believed him'").

According to Prosser, it is "only where the fact misstated was of a nature calculated to bring about [the harm suffered by the plaintiff] that damages for it can be recovered." Prosser § 110 at 767. In other words, where the allegedly fraudulent misstatement in no way relates to the factors that caused loss to plaintiff, or was "immaterial" to plaintiff's loss, there is no basis for plaintiff to recover in fraud. Id., citing, Waddell v. White, 108 P.2d 565 (1940), rehearing denied, 109 P.2d 843 (Ariz. 1941) (false statement made in connection with sale of corporate stock, but losses caused by a subsequent decline in market); Morrell v. Wiley, 178 A. 121 (Conn. 1935); Boatmen's Nat'l Co. v. M.W. Elkins & Co., 63 F.2d 214 (8th Cir. 1933).

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[20] Claims for fraud arising in the context of alleged promises not to publish, or not to reveal identity, are promises of future intent and not actionable, at least in a minority of jurisdictions. Morgan By & Through Chambon v. Celender, 780 F.Supp. 307, 311 (W.D.Pa. 1992) ("[a] promise to do something in the future (such as keeping information confidential), which promise is not kept, is not fraud"); Desnick, 44 F.3d at 1354 ("Illinois does not provide a remedy for fraudulent promises ('promissory fraud') unless they are part of a 'scheme' to defraud"); Ruzicka v. Conde Nast Publications, Inc., 939 F.2d 578, 583, n.8 (8th Cir. 1991) (in Minnesota, "a representation about future acts is not fraudulent merely because the represented act does not happen, unless the promisor never intended to perform").

Unlike actions for trespass, for which nominal damages are almost always available, the majority of jurisdictions hold that an action for fraud must fail if it is not accompanied by a showing of actual damages. Stiefel v. Schick, 398 S.E.2d 194, 195 (Ga. 1990) ("an award of nominal damages for fraud is improper, as '[t]o establish a cause of action for fraud, a [party] must show that actual damages, not simply nominal damages, flowed from the fraud alleged'"); Day v. Avery, 548 F.2d 1018, 1028 (D.C.Cir. 1976), cert. denied, 431 U.S. 908 (1977) ("necessary ingredient of the tort of misrepresentation as, in olden times, of any action on the case, is that the claimant suffer harm by reason of the tortious conduct"); Nappe v. Anschelewitz, Barr, Ansell & Bonello, 477 A.2d 1224, 1232 (N.J. 1984) (majority rule in fraud cases is that "in the absence of an award of compensatory damages, a cause of action has not been made out and nominal and punitive damages may not lie"), citing, Monteleone v. Trail Pontiac, Inc., 395 So.2d 1003, 1004 (Ala.Civ.App. 1980), cert. denied, 395 So.2d 1005 (Ala. 1981); Beik v. Thorsen, 363 A.2d 1030, 1031 (Conn. 1975); Mumphord v. First Victoria Nat'l Bank, 605 S.W.2d 701, 704-15 (Tex.Civ.App. 1980).

A minority of jurisdictions, however, do hold that so long as the plaintiff can show some harm as a result of the fraud, the action will not fail merely because an exact amount of damages cannot be proved, and the plaintiff will be entitled to at least nominal damages.[21] Nappe, 477 A.2d at 1232-33 (adopting this minority rule), citing, Pihakis v. Cottrell, 243 So.2d 685 (Ala. 1971); Obrien v. Small, 122 N.E.2d 701 (1954); Sands v. Forrest, 434 A.2d 122 (Pa.Super. 1981); Collier v. Bankston-Hall Motors, 267 S.W.2d 898 (Tex.Civ.App. 1954); see also, Beavers v. Lamplighters Realty, Inc., 556 P.2d 1328, 1333 (Ct.App.Ok 1976), citing, Oklahoma City v. Eylar, 61 P.2d 649 (1936), Franklin v. Shure, 237 P. 461 (1925) and Woods v. Ft. Smith & W.Ry., 219 P. 650 (1923).[22]

Additionally, "the interest ordinarily protected [by a fraud action] . . . is purely an economic interest . . . the damages are limited to such pecuniary loss, with no recovery for emotional distress." Dan B. Dobbs, Law of Remedies, § 9.2(4) at pp. 55-60, citing, Sierra National Bank v. Brown, 95 Cal.Rptr. 742 (Cal. 1971); Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987) (deceit is an economic not a dignitary tort); Jourdain v. Dineen, 527 A.2d 1304 (Me. 1987).[23]

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[21] Additionally, when plaintiff seeks only equitable remedies, "[a]ctual loss in the financial sense is not required . . . . Equity looks not to the loss suffered by the victim but rather to the unfairness of allowing the perpetrator to retain a benefit unjustly conferred." Jewish Center of Sussex County, supra, 432 A.2d at 525.

[22] In some of the minority jurisdictions, such an award of nominal damages will, in turn, support an award of punitive damages, if the facts of the case otherwise warrant. Nappe, 477 A.2d at 1232-33, citing, Pihakis v. Cottrell, 243 So.2d at 691-92; Harris v. Wagshal, 343 A.2d 283, 288 n. 13 (D.C. 1975); United Sec. Corp. v. Franklin 180 A.2d 505, 511 (D.C. 1962); Beavers, 556 P.2d at 1333.

[23] Historically, the cause of action for fraud developed to protect the economic interests of one who is induced by mistake to enter into a bargaining transaction. Prosser § 105. "Consequently the action has been colored to a considerable extent by the ethics of bargaining between distrustful adversaries. Its separate recognition has been confined in practice very largely to the invasion of interests of a financial or commercial character, in the course of business dealings." Prosser § 105 at 726. While "there is no essential reason to prevent a deceit action from (continued...)

As with intrusion, reputational damage has been recognized in some instances as a kind of harm properly compensated through a claim for fraud. If a plaintiff can prove that justified and material reliance on defendant's knowing misrepresentation caused reputational damages, those damages will be recoverable upon proof of liability. In Lowrey v. Dingman, 86 N.W.2d 499 (Minn. 1957), for example, plaintiff pony breeder purchased two ponies from defendant who fraudulently represented them to be thoroughbred Shetland ponies. Id. at 501. Relying on defendant's false representation as to the parentage of the ponies, plaintiff raised the ponies and then sold them to third parties. The third parties later discovered that the ponies were not thoroughbreds and demanded that plaintiff take them back. Plaintiff did, and then sued the defendant for fraud. Addressing the appropriate measure of damages available, the court held that under Minnesota's "out-of-pocket-loss" rule, plaintiff could recover damages to his "reputation for honesty and care as a pony breeder" which were "a direct and proximate result of defendant's fraud." Id. at 502.

In this scenario, reputational damages are within the traditional umbrella of damages "proximately" caused, because the defendant's wrongful conduct set in motion a clearly foreseeable chain of events which, ultimately, gave rise to the harm to plaintiff's reputation. See also Oksenholt v. Lederle Labs, 656 P.2d 293, 656 P.2d 293 (Or. 1982) (doctor permitted to recover reputational damages from drug manufacturer due to misrepresentations about its drug); Duval County Ranch Co. v. Woolridge, 674 S.W.2d 332 (Tex.Ct.App. 1984) (plaintiff awarded damages for harm to his credit standing caused by defendant's fraudulent misrepresentation that he would repay loans before plaintiff's obligations become overdue); First Nat'l Bank of New Castle v. Acra, 462 N.E.2d 1345, 1351 (Ind.Ct.App. 1984) (damages to reputation awarded upon a showing that defendant bank made fraudulent representations that plaintiff relied on in issuing several checks which bank subsequently dishonored). Again, the award of reputational damages in such (Case 1) fraud actions does not justify an award of reputational damages flowing from a separate (Case 2) publication following the receipt of information allegedly obtained through fraud.

As the case law illustrates, a focus upon the nature of the injury to be compensated and the conduct to be deterred should, in most cases, preclude claims for publication damages in actions alleging newsgathering torts. Arguing "but for" liability or foreseeability does not provide a proper basis for ignoring the separation of distinct claims long required at the common law.

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[23](...continued)

being maintained, for intentional misstatements at least, where other [i.e., non-commercial] types of interests are invaded," other theories of recovery are usually thought to be both sufficient and more appropriate to address legal wrongs committed outside of the commercial setting. Id. For example, inducing someone to eat chocolates that are poisoned is a battery, or restraining a person by falsely claiming legal authority to do so is false imprisonment. Jimenez-Nieves v. United States, 682 F.2d 1, 4 (1st Cir. 1982).

II. IMPLICATIONS OF THE FIRST AMENDMENT PROTECTION OF NEWSGATHERING AND NEWS PUBLICATION

The protection extended to the press by the First Amendment must be considered as an overlay to the common law arguments about the scope of damages available in newsgathering torts. The First Amendment protects the press in its collection and its dissemination of the news. Both of these protected activities would improperly be threatened if publication damages can simply be added-on to claims for non-publication torts.

Not surprisingly, those pursuing non-publication tort claims against the media dismiss the notion that any constitutional analysis is required, arguing simply that the First Amendment does not "immunize the media from sanctions for the commission of unlawful acts" or shield the media against claims for "intentional illegal news-gathering."[24] The proponents of this position invoke the Supreme Court's reference, in Cohen v. Cowles Media Co., 501 U.S. 663 (1991), to the "well established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[25]

The First Amendment considerations of tort liability arising out of the pursuit of news cannot, however, so easily be dismissed. In New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court found that the First Amendment indeed restricts a law of general applicability, state common law of defamation. Again, in Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), the Supreme Court found a First Amendment limitation on the pursuit of a claim for the generally applicable tort of emotional distress.[26] While these cases involved claims based upon a publication, the critical constitutional consideration -- evident in the Cohen decision itself -- extends to newsgathering as well as news dissemination.

Cohen makes plain that generally applicable laws may be enforced against the press consistent with limitations of the First Amendment only when their enforcement "has *incidental* effects on its ability *to gather and report* the news." 501 U.S. at 669 (emphasis supplied). The Cohen holding thus embraces the principle that the First Amendment indeed limits the application of general tort theories

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[24] John J. Walsh, et al., Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information, 4 Wm. & Mary Bill of Rts. J. 1111 (1996).

[25] Cohen, 501 U.S. at 669. In Cohen, the Supreme Court held that the First Amendment does not bar a common law claim for promissory estoppel against a newspaper that breached a pledge of confidentiality. Long before Cohen, some cases had accepted that news organizations could be held liable for torts and crimes committed in the process of gathering news. See, e.g., Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) (intrusion); Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (intrusion and emotional distress); Le Mistral, Inc. v. Columbia Broad. Sys., 402 N.Y.S.2d 815 (N.Y. App. Div. 1978) appeal dismissed, 46 N.Y.2d 940 (1979) (trespass); Stahl v. State, 665 P.2d 839 (Okla. Crim. App. 1983), cert. denied, 464 U.S. 1069 (1984) (trespass).

[26] Laws of general applicability asserted against the press were also scrutinized under First Amendment mandates in Florida Star v. B.J.F., 491 U.S. 516 (1989) and Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

of liability which have more than an "incidental" effect on the "ability to gather" the news. As Justice White explained in Cohen, the absence of such a direct impact on newsgathering was critical to the holding in that case. In Cohen, the Supreme Court found that enforcing a promise of confidentiality would result in only an "incidental, and constitutionally insignificant" impact on newsgathering and reporting. 501 U.S. at 672. The same cannot be said when trespass, fraud, intentional interference with contract and other tort theories are applied specifically to prevent the press from obtaining newsworthy information. E.g., Sandra S. Baron, et al., Tortious Interference: The Limits of Common Law Liability for Newsgathering, 4 Wm. & Mary Bill of Rts. J. 1027, 1063 (1996).

The existence of a qualified protection for newsgathering activity is, at this point, undeniable. Only the full scope and application of the protection remains to be resolved. The rationale behind the constitutional protection was explained twenty-five years ago in Branzburg v. Hayes, 408 U.S. 665, 681 (1972), where the Supreme Court noted that "without some protection for seeking out the news, freedom of the press could be eviscerated." Indeed, the complete body of case law affirming the existence of an affirmative First Amendment right of access to judicial proceedings is premised on the existence of a constitutionally protected right to gather news. In first articulating the constitutional right of access, the Supreme Court observed:

> It is not crucial whether we describe this right to attend criminal trials to hear, see and communicate observations concerning them as a "right of access" or a "right to gather information," for we have recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated."

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (citations omitted).

Several policy considerations underlie this First Amendment protection for newsgathering activity. As one commentator concluded, "the two structural theories for our distinct constitutional role for the press, under which the press serves to check governmental abuses of power and provide the public with the information it needs to preserve a system of self government, thus provide further support for an independent content to the press clause." Note, Press Passes and Trespasses: Newsgathering on Private Property, 84 Colum. L. Rev. 1298, 1321 (1984). The first of these critical press roles (the "checking function") is to serve as a direct check on governmental abuse. In his influential analysis of the unique status of the press under our constitutional structure, Justice Stewart articulated this function:

> In setting up the three branches of the Federal Government, the Founders deliberately created an internally competitive system. . . . The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside of the Government as an additional check on the three official branches.

Potter Stewart, Or of the press, 26 Hastings L.J. 631, 634 (1975).

A further policy consideration lies in the special constitutional role of the press as the messenger of information to the public. Justice Powell articulated this role in his dissent from a ruling denying interviews with federal prisoners:

> An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news, the press therefore acts as the agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.[27]

Like the checking function on government abuses, the press' role as public informer requires the recognition of constitutional protection for the gathering of news. To protect the right of the public to receive information, the press "is not only shielded when its speaks out, but when it performs all of the myriad tasks necessary for it to gather and disseminate the news." William J. Brennan, Jr., Address, 32 Rutgers L. Rev. 173, 177 (1979).

Because gathering the news is a necessary prerequisite to publishing it, lower courts have repeatedly recognized that a constitutional protection of newsgathering is necessary to avoid media self-censorship and to preserve an unimpeded flow of information to the public.[28] In Nicholson v. McClatchy Newspapers, 223 Cal.Rptr. 58 (Cal. Ct.App. 1986), a California appellate court recognized that "the news gathering component of the freedom of the press--the right to seek out information--is privileged at least to the extent it involves 'routine . . . reporting techniques'. . . ." Id. at 64. This constitutional protection of newsgathering compels the conclusion that the common law concerns with the purpose of the tort and the independent actions of the tortfeasor need to be strictly enforced to avoid an impermissible chilling effect on the important actions of the press in

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[27] Saxbe v. Washington Post Co., 417 U.S.843, 863 (1974) (Powell, J. dissenting). See also Note, Press Passes and Trespasses: Newsgathering on Private Property, 84 Colum.L.Rev. 1298 (1984).

[28] See, e.g., FMC Corp. v. Capital Cities/ABC, Inc., 915 F.2d 300 (7th Cir. 1990) (recognizing First Amendment protection for newsgathering) ;Boddie v. American Broad. Cos., Inc., 881 F.2d 267, 271 (6th Cir. 1989), cert. denied, 493 U.S. 1028 (1990) (same); von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 142 (2d Cir.), cert. denied, 481 U.S. 1015 (1987) (same); In re Express-News Corp., 695 F.2d 807, 808-809 (5th Cir. 1982) (same); Sanders v. American Broad. Cos., Inc., 60 Cal.Rptr.2d 595, 597 (Cal.Ct.App. 1997) (claims challenging newsgathering activity implicate First Amendment issues); Allen v. Combined Communications Corp., 7 Media L.Rep. (BNA) 2417, 2419 (Colo.Dist.Ct. 1981) (First Amendment should protect all "activities which are necessary to the publication of [a news story]"). Cf. Zerilli v. Evening News Ass'n., 628 F.2d 217, 224 (D.C. Cir. 1980) (rejecting a §1983 claim against the press due to the special factors presented in "uncovering and publishing information" the press deems newsworthy).

gathering the news.

Efforts to recover reputational injury and other publication damages through newsgathering torts also raise constitutional issues apart from the First Amendment protection of newsgathering itself. Allowing publication damages to be awarded as a result of a newsgathering tort would raise precisely the same speech-chilling concerns that led to the recognition of constitutional limits to liability for defamation. As the Supreme Court stated in New York Times v. Sullivan, the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open. . . ." 376 U.S. at 270. Recognizing this constitutional commitment, the Court held in Sullivan that even the common law defense of truth was inadequate to allow defamation liability to be imposed by a public official because of the substantial chilling effect created through the mere threat of litigation. Id. The very same chilling concerns are presented if a plaintiff could recover publication damages from the press by asserting only a newsgathering tort without being required to meet the constitutional liability standards that apply to a defamation claim.

Indeed, courts repeatedly have refused to allow plaintiffs to do an end-run around the First Amendment by asserting that other tort liability has arisen out of a publication. The same analysis should apply when a publication is asserted to have arisen out of another tort. See e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. at 56 (rejecting emotional distress cause of action arising out of a publication); Moldea v. New York Times Co., 22 F.3d 310, 319 (D.C. Cir.), cert. denied, 513 U.S. 875 (1994) (rejecting false light cause of action arising out of a publication); Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 273 (7th Cir. 1983) (rejecting tortious interference cause of action); Beverly Hills Foodland, Inc. v. United Food Comm'l Workers Union, 39 F. 3d 191, 196 (8th Cir. 1994) ("plaintiff may not avoid the protection afforded by the Constitution and federal labor law merely by the use of creative pleading."); Aequitron Medical, Inc. v. CBS, Inc., 1997 WL 139528 (S.D.N.Y. 1997) (tortious interference claim based on defamatory conduct must be "governed by the special rules applicable to defamation cases").

The constitutional interests that compel this conclusion were forcefully stated by Judge Posner in Desnick v. American Broadcasting Cos., 44 F.3d 1345 (7th Cir. 1995). In rejecting claims for trespass, fraud, invasion of privacy and violation of statutes regulating electronic surveillance asserted against ABC for its undercover investigation of the practices at an ophthalmic clinic disclosed on "PrimeTime Live," Judge Posner found significant constitutional difficulties posed by the assertion of liability for investigative newsgathering techniques:

> Today's "tabloid" style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market constitutes--although it is often shrill, one-sided, and offensive, and sometimes defamatory--an important part of that market. *It is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And, it is entitled to them regardless of the name of the tort, and, we add, regardless of whether the tort suit is aimed at the content of the broadcast or the*

production of the broadcast.

Desnick, 44 F.3d at 1355 (emphasis added) (citations omitted).

An important contribution of the Food Lion litigation is the express recognition of a constitutional limitation on the ability of plaintiffs to recover publication damages for non-publication torts. As the trial court held in barring Food Lion from recovering compensatory damages resulting from the ABC broadcast:

> To the extent Food Lion's damages are reputational in nature, the Supreme Court's decision in Hustler prevents recovery . . . Food Lion may recover only those damages resulting from ABC's alleged trespass, fraud, unfair and deceptive trade practices, as well as those from the other remaining claims. However, Food Lion may not recover any publication damages for injury to its reputation as a result of the Prime Time Live broadcast.

887 F.Supp at 823. Cf. Allen v. Combined Communications 7 Media L. Rep. (BNA) 2417, 2420 (Colo. Dist. Ct. 1981) (finding First Amendment requires additional burdens to state a trespass claim against a reporter).

III. PUNITIVE DAMAGE CONSIDERATIONS

While Food Lion makes a significant contribution to limiting the compensatory damages in newsgathering torts, the jury verdict provides a cautionary tale on the dangers of permitting the award of punitive damages to single out the press for punishment. The same First Amendment concerns that compel the conclusion that publication damages may not properly be recovered through the pursuit of non-publication tort claims also support the argument that punitive damages should be prohibited in the context of newsgathering torts.

In New York Times v. Sullivan, the Supreme Court recognized that the availability of huge punitive sanctions in libel cases poses a severe constitutional problem as "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." 376 U.S. at 278 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)). These same concerns exist when punitive damages are focused on the press for its newsgathering activities. The availability of punitive damages necessarily invites a jury to pass judgement on the value of the story being reported and to impose penalties in ways that may well chill the pursuit of certain types of stories challenging the activities of powerful or popular figures. Cf., Punitive Damages in Libel Actions, 42 Record of Ass'n of Bar of City of N.Y. 20 (1987). As Justice O'Connor noted in her dissent from the punitive damages decision in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 43 (1991), in assessing punitive damages,

> [j]uries are permitted to target unpopular defendants, penalize unorthodox or controversial views and redistribute wealth. Multi-million dollar losses are inflicted on a whim.

Food Lion fully establishes the validity of Justice O'Connor's concerns. In asking for punitive damages, plaintiff's counsel repeatedly stressed the status of the defendant as a powerful media organization: "This is not a case of media wrongdoing. This is a case of the media doing wrong."[29] The jurors were importuned to fulfill their duty as "the policemen on the media highway" id., and they responded to the challenge. A punitive damage award of $5.5 million was entered in a case of trespass, fraud and breach of duty where, according to the same jury, the plaintiff suffered just $1,402 in compensatory damages.

Nor do any state interests justify such punitive awards targeted against newsgathering. The purposes served by punitive damages are punishing unlawful conduct (retribution) and deterring its repetition. See BMW of N. Am. Inc. v. Gore, 116 S.Ct. 1589, 1595 (1996); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991). However, these interests in permitting "gratuitous awards and money damages far in excess of any actual injury" do not rise to the same level as the "strong and legitimate state interest in compensating in private individuals" for actual injuries they suffered. Gertz v. Robert Welch, Inc., 418 U.S. 323 348-49 (1974). It thus would be entirely appropriate to argue that punitive damages should not be available for newsgathering torts, because of the risks that they will substantially deter socially valuable activity.

As ABC argues in its pending post-verdict motions in Food Lion, there is clear Supreme Court precedent to restrict punitive damages on the basis of such policy calculations. For example, the Court previously has prohibited recoveries of punitive damages in litigation brought against unions for breaching the duty of fair representation, International Brothers of Electric Workers v. Foust, 442 U.S. 42, 49-52 (1979), on the grounds that the potential for massive punitive awards would undermine the willingness of unions to pursue certain complaints by their members. The Court also has prohibited the availability of punitive damages in actions against municipalities under 42 U.S.C. § 1983 (1997) because "such awards would burden the very tax payers and citizens for whose benefits the wrong doing was being chastised." City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 263 (1981). The same weighing of the competing policy concerns warrants a rule prohibiting the recovery of punitive damages when tort claims are brought for newsgathering activities, and limiting a recovery to the actual damage caused to the plaintiff from the improper activity itself.

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[29] Amy Singer, "Food, Lies and Videotape," American Lawyer (April 1997) at 63.

THE MODEL PUNITIVE DAMAGES ACT AND ITS IMPLICATIONS FOR PUNITIVE DAMAGES IN DEFAMATION CASES

By P. Cameron DeVore and Michele Earl-Hubbard[1]

INTRODUCTION

Punitive damage awards against media defamation defendants rose dramatically in 1996, reaching the second highest point in sixteen years, according to the 1997 survey conducted by the Libel Defense Resource Center.[2] The average punitive damage award was more than $3.4 million, up from $369,388 in 1994 and 1995,[3] with punitive awards accounting for more than 60 percent of total awards in media cases.[4]

In addition, the current LDRC data suggest that defendants in media defamation and related suits both lose more often at trial and are subject to punitive damages far more frequently than defendants in product liability and medical malpractice suits.[5] In 1996, fifty percent of defamation

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1 Mr. DeVore is a partner and Ms. Earl-Hubbard an associate at Davis Wright Tremaine in Seattle. DeVore filed media amicus briefs in most of the punitive damages cases reaching the U.S. Supreme Court in recent years, including Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); and BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996). He also served as an ABA advisor to the Drafting Committee for the Uniform Law Commissioners' Model Punitive Damages Act (1996).

2 LDRC BULLETIN 1997 (1) at 6, 25.

3 Id. at 2, 25. The median award in 1996 was $4.5 million, the highest recorded in the 16 years LDRC has been gathering such data. Id. at 2.

4 Id. at 6. Indeed, in the highly publicized case of Food Lion v. Capital Cities\ABC, Inc., No. 6:92CV00592 (M.D.N.C Jan. 22, 1997), involving allegations of trespass, breach of loyalty and fraud stemming from investigative newsgathering activities, without any allegation of defamation, a jury returned an award of $5.5 million in punitive damages, but only $1,402 in compensatory damages. "Jury: ABC, Pay $5.5M," National L.J., Feb. 8, 1997, at A8. For a further discussion of the Food Lion decision and its implications for media defendants, see Marcia Coyle, "'BMW' Punies Ruling May Upend Food Lion Verdict," National L. J., Feb. 3, 1997, at A9, and Floyd Abrams, "'Food Lion' Endangers Muckrackers," National L. J., Feb. 17, 1997, at A15.

5 LDRC BULLETIN 1997 (1) at 15. Whereas punitive damages were assessed against defamation and related claim defendants between 16.7% and 75% of the time in media cases between 1990-1995, jury verdict reports show that the highest incidence of punitive damages during these years was 13% in product liability suits and only 4% in medical malpractice suits. Id.

and related cases resulting in an award included an award of punitive damages.[6]

In the midst of these rising awards and their increased application to media defamation defendants, the U.S. Supreme Court has not dealt directly with the issue of defamation punitive damages in more than a decade since Dun & Bradstreet v. Greenmoss Builders, Inc.[7] However, in a series of non-defamation cases between 1985 and 1994, the Court has considered punitive damage challenges under both the Due Process Clause and the Excessive Fines Clause of the Eighth Amendment.[8]

Since 1994, the Court has dealt with the punitive damage issue only once, in BMW v. Gore.[9] In Gore, the Court for the first time constitutionalized state punitive damage law, but provided little guidance to either legislatures or courts regarding the parameters of such constitutional limitations.

To address some of the ambiguities present in the current case law on the subject, the National Conference of Commissioners on Uniform State Laws promulgated a model act in 1996 to guide states in developing punitive damages legislation. This article describes the Model Act and its implications for defamation defendants and discusses recent state and federal defamation cases in the area which set the stage for the Act's implementation.

I. BACKGROUND

A. BMW v. Gore: The Supreme Court's 1994 Ruling on Punitive Damage Awards in Civil Lawsuits[10]

As stated above, one rationale for the Model Act stems from the lack of clear instruction provided by the Supreme Court regarding constitutional limitations on punitive damages. In BMW

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6 Id. at 2, 25.

7 472 U.S. 749 (1985). For a review of Dun & Bradstreet and prior Supreme Court rulings on defamation punitive damages, arguing that the constitutionality of such damages remains unresolved, see LDRC Bulletin 1994 (3) at 24.

8 For a discussion of these earlier decisions, see P. Cameron DeVore & Marshall J. Nelson, "Punitive Damages in Libel Cases," LDRC Bulletin No. 24, December 15, 1988 at 26-43; P. Cameron DeVore & Marshall J. Nelson, "Punitive Damages in Libel Cases after Browning-Ferris," 12 Hastings Comm. & Ent. L.J. 153 (1989); P. Cameron DeVore, Marshall J. Nelson & Christopher Pesce, "An Update on Punitive Damages in Defamation Cases," LDRC Bulletin, 1994 (3) at 73-85.

9 116 S. Ct. 1589 (1996).

10 For a discussion of cases prior to 1994, see DeVore et al., "An Update on Punitive Damages in Defamation Cases," supra note 8; DeVore & Nelson, "Punitive Damages in Libel Cases after Browning-Ferris," supra n.8; DeVore & Nelson, "Punitive Damages in Libel Cases," supra n.8.

of North America, Inc. v. Gore,[11] the Court for the first time held that the Due Process Clause of the Fourteenth Amendment prohibits a state from imposing "grossly excessive" punishment on a tortfeasor. The Court found this prohibition violated by a state court decision granting $2 million in punitive damages to a doctor who purchased a new BMW with an undisclosed touched-up paint job following damage from acid rain during shipping.[12]

In a 5-4 decision, the Supreme Court reversed and remanded. Justice Stevens writing for the majority and joined by Justices O'Connor, Kennedy, Souter and Breyer, held that federal review of state punitive damage awards was required under the Due Process Clause, and concluded that the "grossly excessive award [of $2 million] imposed in this case transcends the constitutional limit."[13] Although the Court acknowledged the appropriateness of a sanction based on the state's interest in protecting its citizens from deceptive trade practices, the Court held that a defendant must have adequate notice of the conduct that will subject him to punishment and of the severity of the penalty that a state may impose.[14]

The Gore Court set forth three "guideposts" to assess whether a party has received adequate notice: (1) the degree of reprehensibility of the defendant's conduct -- "perhaps" the most important indication of the reasonableness of an award (noting that here, BMW's conduct, based on an analysis of various state statutes imposing a vendor's duty to notify product purchasers of defects, "evinced no indifference or reckless disregard" for the health or safety of others); (2) the disparity between the harm or potential harm suffered and the punitive damages award (although here despite a 500 to 1 ratio, the Court expressly disavowed the use of a "mathematical bright line"); and (3) the difference between the punitive award and the civil or criminal penalties authorized or imposed in the state for comparable misconduct, whether statutorily or judicially determined (noting that here, the maximum fine for BMW's conduct under Alabama law was $2,000).[15]

Applying the three-factor test, the Court found the $2 million award to be grossly excessive and a violation of the Fourteenth Amendment's Due Process Clause.[16] The Court held that the disparity between the punitive and compensatory award and the lack of statutory penalties or other

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11 116 S. Ct. 1589.

12 Gore's suit was filed in Alabama state court alleging fraud and seeking compensatory and punitive damages of $500,000. Id. at 1593. The jury found BMW guilty of fraud and awarded Gore $4000 in compensatory damages and $4 million in punitive damages. BMW of North America, Inc. v. Gore, 646 So.2d 619 (Ala. 1994). The punitive damages were reduced to $2 million on remittitur by the state supreme court prior to the appeal to the U.S. Supreme Court. Id. at 629.

13 116 S. Ct. at 1604.

14 Id. at 1598.

15 Id. at 1598-99, 1602-03.

16 Id. at 1604.

judicial decisions of such an amount denied BMW notice that it could be subjected to a $2 million penalty for its conduct.[17]

Dissents by Justice Scalia joined by Justice Thomas, and by Justice Ginsberg joined by Chief Justice Rehnquist, sharply criticized the majority result as (in Justice Scalia's words), an "unjustified incursion into the province of state governments."[18] Justice Scalia also argued that the majority's "'guideposts' mark a road to nowhere; they provide no real guidance at all," and are merely "criss-crossing platitudes."[19] Justice Ginsberg expressed concern that the Court "unwisely ventures" into the state's domain, particularly in light of the plethora of reform measures "reasonably adopted or currently under consideration in legislative arenas."[20]

B. STATE AND FEDERAL CHALLENGES TO PUNITIVE DAMAGE AWARDS IN DEFAMATION SUITS, FROM 1994 TO THE PRESENT,[21] HAVE FAILED TO SET MEANINGFUL LIMITS UNDER GORE

1. Federal

Since 1994, six of the twelve federal circuits have considered the issue of punitive damages in a defamation context, although all but one of those cases pre-date Gore and only one involved media defendants. These decisions have either provided little or no guidance as to when such awards are constitutionally appropriate[22] or have set forth rules and reasoning that conflict with the pronouncements of other courts.

For example, recent decisions of both the Second and Seventh Circuits suggest that a finding of constitutional actual malice alone justifies an award of punitive damages, without a showing of ill

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17 Id. at 1598, 1602-03.

18 Id. at 1610 (Scalia, J., dissenting).

19 Id. at 1613.

20 Id. at 1614 (Ginsberg, J., dissenting).

21 For a discussion of cases prior to 1994, see DeVore & Nelson, "Punitive Damages in Libel Cases," supra n.8; DeVore, et al., "An Update on Punitive Damages in Defamation Cases," supra n.8.

22 In the First Circuit's only decision on the topic, Simon v. Navon, 71 F.3d 9 (1st Cir. 1995), the court reversed a $1 million plus award for defamation and related torts because it found the evidence did not support a verdict for the plaintiff rather than because the amounts awarded were improper. The plaintiff alleged that his business partners had defamed him by telling creditors and a bank that he was responsible for the company's lingering debts, and the account he opened was unauthorized and was being used to divert company funds. Id. at 17-18. The court vacated the damage award and remanded for a new trial because it found Simon had failed to prove these statements to be false. Id. at 18. On remand, summary judgment was granted for the defense. No. 92-0209-B, 1997 U.S. Dist. LEXIS 443 (D. Me. Jan. 15, 1997).

will or common-law malice or of the necessity for the award in order to punish or deter conduct.

In Purgess v. Sharrock,[23] a nonmedia defamation case with a private figure plaintiff decided two years before Gore, the Second Circuit stated explicitly that knowing or reckless publication of a false statement is sufficient to establish common law malice justifying punitive damages.[24] The court purported to apply New York law and cited the 1993 decision of the New York Court of Appeals, Prozeralik v. Capital Cities Communications, Inc., 626 N.E. 2d 34 (NY Ct. App. 1993), which held that both actual malice and common law malice were required for an award of punitive damages. The second circuit did not explain how its acceptance of "actual malice" as proof of common law malice complied with Prozeralik's reasoning. The court also did not discuss the purposes of punitive damages or explain why defamation defendants face a lower threshold than other tortfeasors.

A similarly confused statement was made by the Seventh Circuit in Rice v. Nova Biomedical Corp.[25] where the court criticized a defendant for objecting to a punitive award due to a lack of evidence of "malice" by the defendant. The court stated that "actual malice" was required for an award of punitive damages in a defamation action and that express or common law malice was only relevant to arguments regarding the loss of a privilege.[26]

The Ninth Circuit, in an unpublished opinion in Lancer Insurance Co. v. D.W. Ferguson & Associates,[27] upheld a $175,000 punitive award stating that state law required a finding of common law malice and a showing that the award did not exceed that necessary to punish and deter.[28] The court assessed the amount based on the nature of the conduct, the amount of the compensatory award, and the wealth of the defendant.[29]

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23 33 F.3d 134 (2d Cir. 1994).

24 Id. at 143. In Purgess, anesthesiologist sued for defamation stemming from false statements made by his former employer to state agencies and prospective employers after his termination. The court upheld an award of $500,000 in punitive damages and $4.6 million in compensatory damages for the defamation and contract claims asserted by Purgess. The jury initially returned a punitive award of $4.6 million to accompany the equally large compensatory award. The punitive award was reduced to $500,000 per an agreed remittitur. Id. at 136.

25 38 F.3d 909 (7th Cir. 1994), cert. denied, 115 S. Ct. 1964 (1995).

26 Id. at 916-17.

27 Nos. 93-55789 & 93-55790, 1995 U.S. App. LEXIS 1092 (9th Cir. Jan. 19, 1995) (unpublished), cert. denied, 116 S. Ct. 86 (1995).

28 Id. at *11-12, 16-18. The defamation claim stemmed from statements made by a competitor about an insurance broker to the broker's customer. The competitor stated that the broker was homosexual, unethical and did not adequately care for his customers. Id. at *14.

29 Id. at *16-17.

The Sixth Circuit, in Glennon v. Dean Witter Reynolds, Inc.,[30] upheld a $750,000 punitive damage award issued by an arbitrator stating that a court will review such an award only if the record shows "no evidence" justifying the award.[31] The propriety of the amount awarded was not reviewed. This is disturbing in light of the nature of the claim. The defamatory statement consisted solely of the checking of a box on a form following the plaintiff's termination as a stockbroker for defendant. The box checked indicated that plaintiff was under investigation for the wrongful taking of property. Plaintiff was fired after he refused to return stipends incorrectly paid to him because he claimed the company owned him a recruitment bonus and finder's fee.[32]

In Israel Travel Advisory Serv. v. Israel Identity Tours,[33] the Seventh Circuit upheld a punitive award of $102,945 stating only that the evidence "did enough to demonstrate malice that punitive damages were available," that the ratio of punitive to actual damages (based on a $75,000 compensatory award) was not excessive, and that the defendant's low net worth did not preclude the award.[34] The court did not discuss the purposes of punitive damages nor explain why the amount awarded was justified, particularly given the defendant's net worth.

At the lower federal court level, the District Court for the Eastern District of Kentucky overturned summary judgment in a media case denying the right to a punitive award based on Kentucky's retraction statute in White v. Manchester Enterprise Inc.[35] Without discussing whether the plaintiff had a right to such an award from the newspaper which wrote about her, the court declared the retraction statute violative of the state constitution because it protected only newspapers and not broadcasters or other media.

In the only federal circuit media case addressing punitive damages since Gore, the Fourth Circuit, in an unpublished opinion in Rassam v. Fawzi Yousef,[36] upheld a $50,000 punitive and $3,000 compensatory award requiring only a finding of actual malice, proportionality to the compensatory award, and some consideration of the effect of the award on the defendant. The plaintiff, an Iraqi radio and television personality, recovered punitive damages from an Arab paper which printed a letter accusing the plaintiff of embezzlement. Other than finding that the paper had behaved with actual malice in publishing the letter, the court did not require that common law malice

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30 83 F.3d 132 (6th Cir. 1996).

31 Id. at 138-39.

32 Id. at 134-35.

33 61 F.3d 1250 (7th Cir. 1995), cert. denied, 116 S. Ct. 1847 (1996).

34 Id. at 1254, 1256. The plaintiff alleged that defendant, a competitor of the plaintiff in the travel business, told prospective customers that plaintiff was on the point of bankruptcy. Id. at 1253.

35 24 Media L. Rep. 1627 (E.D. Ky. Jan. 11, 1996).

36 25 Media L. Rep. 1012 (4th Cir. 1996) (unpublished).

or ill will be shown. Other than discussing the relative profits obtained by the paper for each issue, the court did not discuss the purpose of the punitive award or confirm whether the award was designed to punish or deter the paper. Although decided three months after Gore, the court did not refer to its "guideposts" nor even cite the opinion.

2. State

Appellate courts in several of the states and U.S. territories decided at least one case challenging punitive awards in a defamation action between 1994 and the present. The state cases exhibit the same conflicts and ambiguities presented by their federal counterparts. Several of these decisions pre-date Gore, but even those entered after the opinion have failed to articulate meaningful constitutional limits on punitive damages in defamation cases.

Several of the state cases disposed of punitive award challenges by means not requiring consideration of the awards. For example, the West Virginia Supreme Court overturned a $160,000 punitive award and $1 compensatory award stemming from an editorial criticizing a local college administrator because it found the editorial to be non-actionable opinion. Maynard v. Daily Gazette Co., 447 S.E.2d 293 (W. Va. 1994).

The Colorado Supreme Court took the same course in Keohane v. Stewart,[37] where it dismissed a punitive award against a writer and editor stemming from letters to the editor criticizing a local judge. Though the letters set forth factual claims that the judge had taken a bribe to let a murderer free, the court found the letters as a whole to be non-actionable opinion.

The Arkansas Supreme Court in Thomson Newspaper Publishing, Inc.v. Coody,[38] though not directly addressing the issue of punitive damages, stated that evidence of ill will or common law malice may serve as circumstantial evidence of actual constitutional malice required for a public official to obtain any damage award. Evidence of ill will between a newspaper editor and mayoral candidate alone was not sufficient to prove actual malice for a story published by the editor prior to the election. Because the candidate failed to prove by clear and convincing evidence that the editor entertained serious doubts about the truth of the article, the $275,000 award of compensatory and punitive damages awarded by the jury was reversed. The Arkansas court clarified that it recognized common law malice and actual malice as two distinct doctrines, both of which are required for an award of punitive damages.

The California Court of Appeal upheld a $1.3 million punitive award against Zsa Zsa Gabor and her husband Frederic Von Anhalt in Sommer v. Gabor[39] stemming from statements Gabor and Von Anhalt made about actress Elke Sommer to a German reporter. The jury found by clear and

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[37] 882 P.2d 1293, 22 Media L. Rep. 2545 (Colo. 1994), cert. denied, 115 S. Ct. 936 (1995).

[38] 896 S.W.2d 897 (Ark.), cert. denied, 116 S. Ct. 563 (1995).

[39] 24 Media L. Rep. 1225 (Cal. Ct. App. Dec. 8, 1995).

convincing evidence that the defendants acted with malice. The court reviewed the jury's award, giving great weight to the jury's determination that the award was justified and not excessive, and reviewed the record and underlying factual disputes in the light most favorable to the judgment.

In one of the few post-Gore decisions, the South Carolina Supreme Court reversed a $625,000 punitive and $50,000 compensatory damage award to a politician because it found actual malice had not been shown to justify liability in this public official context. Peeler v. Spartan Radiocasting, Inc., 478 S.E.2d 282 (S.C. 1996). The defamation action arose from a television broadcast regarding forgeries on petitions to place candidates on the ballot, and the broadcast reported an allegation that the politician was involved. Because the court disposed of plaintiff's damage award in its entirety, no discussion of the Gore guideposts or the distinct constitutional parameters for punitive awards was provided.

In Richette v. Philadelphia Magazine,[40] a decision entered a week after Gore, the Pennsylvania Court of Common Pleas dismissed via a demurrer proceeding a plaintiff's claim for punitive damages stemming from a magazine article publishing a court room observer's criticism of a judge because it found the plaintiff did not show outrageous conduct, ill will and actual malice. Though the court recognized a requirement of both "ill will" or common law malice and actual malice, no other discussion of the requirements for a punitive damage award were provided. Gore was not cited or discussed. The statements reported were found to be non-actionable opinion.

II. THE MODEL PUNITIVE DAMAGES ACT

As shown above, the reasoning and rules articulated in federal and state case law vary greatly by jurisdiction. No court interpreting Gore or earlier U.S. Supreme Court punitive damage decisions has articulated coherent constitutional limits on defamation punitive damages. The remaining ambiguities inherent in the Gore decision, its Supreme Court predecessors, and other caselaw throughout the nation thus argue for a cohesive model of standards and procedures under which punitive awards may be assessed and reviewed. Though some states have enacted legislation to either prohibit or limit the situations in which punitive damages may be awarded, other states are still debating the issues. Few states have defined limits addressed to the particular concerns of defamation law.[41]

To assist the states in developing their own statutory guidelines, the National Conference of Commissioners on Uniform State Laws established a drafting committee on the subject of punitive damages in 1994. After more than two years of deliberation, the Committee recommended its final version of the Act, entitled the Model Punitive Damages Act, and it was debated, amended, and

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[40] 24 Media L. Rep. 2425 (Pa. Ct. Common Pleas, May 28, 1996).

[41] For a discussion of state reforms and their implications for defamation defendants, see LDRC 50-State Survey 1996-97, Media Libel Law, Sections I.G.2 in individual state reports, at 171-902; LDRC BULLETIN 1996 (4) at 55.

finally adopted by the Commission in July 1996.

The Punitive Damages Act is presented as a Model Act, as opposed to a Uniform Act. Unlike the latter format, whose principal objective is to attain uniformity among the states on a particular subject, a Model Act is a tool to assist states in developing an effective approach to a particular problem area of the law. A Model Act can be tailored by an enacting state to complement and comply with the state's current statutory scheme. Its proposals can be more experimental and the approaches suggested novel. Finally, a Model Act's provisions may require testing by trial and error by enacting states to determine whether such approaches are effective.

A. OVERVIEW

The Model Punitive Damages Act incorporates and integrates several provisions from reform legislation underway in the various states and offers new statutory techniques to ensure that the system under which punitive damages are awarded is balanced and fair.[42] The Act does not authorize punitive damages or specify the categories of cases for which such an award may be made; those determinations are left to the states. Nor does the Act place limits or caps on punitive damages unless they already exist in or are implemented by an enacting state.

However, the Act defines more precisely the standard of culpability which must be found to enter a punitive award and the manner in which the amount of such an award is to be determined. The Act employs measures to facilitate judicial review of punitive damages awarded by juries and to help ensure that these measures satisfy due process under the Fourteenth Amendment. The Act also clarifies the role of respondeat superior in punitive damage awards, generally accepting the majority position of the states, that an employer may be liable for punitive damages based on the conduct of an employee only if the employer is also proven to be at fault. In one of its more novel proposals, the Act seeks to deal with situations where defendants may be exposed to multiple punitive awards. Finally, the Model Act specially addresses the problem of punitive damages in constitutionally sensitive defamation actions.

B. PROVISIONS OF THE MODEL ACT

Section 1 of the Act defines punitive damages as "an award of damages made to a claimant solely to punish or deter." Section 1 thus clarifies that punitive damages are not designed to compensate a victim for an injury.

Section 2 clarifies that the Act applies to all civil actions in which state law allows the award of punitive damages.

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[42] Model Punitive Damages Act, Prefatory Note, at 5.

Section 3 provides that a pleading may not state the amount of punitive damages sought unless allowed by a particular statute. A pleading may state only that the amount in controversy exceeds any jurisdictional limits for the court where the action is filed.

Section 4 provides that discovery of information relevant only to the punitive award, such as the defendant's wealth or financial condition, may not be ordered unless the plaintiff first makes a prima facie showing that the defendant is liable for a legally recognized injury that allows punitive damages under state law and that the defendant "maliciously intended to cause the injury or consciously and flagrantly disregarded the rights or interests of others in causing the injury." This section attempts to balance the rights of plaintiffs and defendants, preventing the plaintiff from compelling the disclosure of such information by the defendant until the plaintiff demonstrates a colorable claim that could support an award of punitive damages.

Section 5 sets forth the standard of culpability required for an award of punitive damages. It provides that punitive damages may be awarded only if (1) the defendant has been found liable for a legally recognized injury which supports an award of punitive damages under the state's law; (2) the plaintiff has established by clear and convincing evidence that the defendant "maliciously intended to cause the injury or consciously and flagrantly disregarded the rights or interests of others in causing the injury;" and (3) an award is "necessary to punish the defendant for the conduct or to deter the defendant from similar conduct in like circumstances." In part, Section 5 essentially paraphrases language from the Restatement of Torts with one important exception: the Act does not allow awards, as the Restatement does, where a defendant "should realize" that there is a strong probability harm may result. The Restatement language employs an objective test: a reasonable person would understand that the conduct creates a high risk of harm. The Drafting Committee in its accompanying comment to section 5 clarifies that the Model Act uses a subjective test: the defendant in question must actually know of the high risk of harm and yet intentionally act to cause the harm or act with conscious indifference to the risk.

The Drafting Committee believed that the Restatement test could be interpreted as a mere negligence standard because its language could permit cases to go to the jury without proof of the intentional and conscious state of mind that the Committee believed should be required to support punitive damages. The requisite state of mind is described in the accompanying comment as knowledge that harm will result or knowledge that there is a very high risk that harm will result. The state of mind can also include wanting to harm another person, or trying to cause the harm, albeit realizing that the chances of success are slim. If the defendant surprisingly succeeds, a punitive award would be allowed.

Section 5 emphasizes that a trier of fact must find that the goals of punishment and deterrence are served by imposing a punitive award on the defendant. The plaintiff bears the burden of proof on these requirements.

Most importantly from the perspective of media defamation defendants, the Drafting Committee included the following statement in the Comment to Section 5:

> In an action for defamation or other related torts where speech is directly related to matters of public concern, the imposition of punitive damages may raise questions under the First Amendment or applicable state constitutional guarantees of free expression. At a minimum, in those cases where "actual malice" is required as a prerequisite to an award of compensatory damages, that finding is not the equivalent of the malice or the other terms required by Section 5 as a basis for awarding punitive damages. To award punitive damages in such cases, the trier of fact must additionally find that the defendant had the intention and acted in a manner described in Section 5.[43]

This comment clarifies that a plaintiff in a defamation action who must show actual malice to receive compensatory damages, must still and "additionally" show common law malice and the other requisites of Section 5 to obtain a punitive award. As shown by several of the recent court cases discussed above, courts and juries frequently have glossed over this fundamental distinction and have assumed that constitutional actual malice, without more, supports entitlement to punitive damages.

Section 6 addresses the propriety of imposing punitive damages against an employer for the acts of his or her employee, an issue of particular concern to media defendants where the punitive damages dollar risk increases if the news entity's assets can be evaluated in formulating the award. The Act clarifies that an employer may not be assessed punitive damages unless he or she is also at fault, though the standard is a less stringent requirement than that provided in Section 5 above.

To assess damages against the employer, the employee must first be found liable for punitive damages under Section 5 for an act occurring within the course and scope of his or her employment. This requires that the employee be found to have acted with common law malice as described in Section 5 and actual malice where required. The trier of fact must also determine that a punitive award is necessary to punish and deter the employee from future conduct. Even if these tests are met, the employer may not be assessed punitive damages unless the employer was involved in the wrongful conduct, specifically that the employer "with knowledge of its wrongful nature, directed, authorized, participated in, consented to, acquiesced in, or ratified the conduct." The trier of fact must then find that the award is necessary to punish or deter the employer in the future.[44] Section 6 makes clear that state law will determine the types of entities which can be liable for punitive damages. Though the commentary to Section 6 contemplates that a corporation can be found liable for punitive damages as an "employer" of the wrong-doer, whether in fact a corporation can face such liability is left to the

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[43] Comment to Section 5, at 14-15.

[44] Section 6 also clarifies the application of this rule to directors, officers or agents with policymaking authority, allowing vicarious liability to the principal or entity for the acts of those representatives if the representatives first meet the requirements of Section 5. If the principal or entity did not act "with knowledge" of the wrongful conduct as discussed above, the principal's or entity's liability is limited to the profit or gain obtained from the wrongful conduct of the representative, allowing a deduction of any portion consumed by a compensatory award.

individual states.[45]

Section 6 will provide employers and media entities another layer of protection from punitive damages. They should be insulated from such awards if they acted without knowledge of the "wrongful nature" of their employee's conduct. They may also avoid an award if a trier of fact determines that an award is not necessary to punish or deter them from such conduct in the future.

Section 7 concerns the amount of a punitive award. It provides that a "fair and reasonable" amount may be awarded to the extent necessary to punish and deter the defendant. The trier of fact is to consider 9 factors to decide the amount, the first three of which paraphrase the three guideposts set forth in Gore.[46] The factors include the nature of the wrong and effect on the plaintiff and others, the amount of compensatory damages, other amounts paid by defendant for the same conduct, his past and present financial condition and the effect of the award on same, the profit or gain by defendant from the conduct, adverse effect of award on innocent persons, remedial measures taken by defendant, and other aggravating or mitigating factors.[47] If a court decides the amount of the award, a party can request that the court make findings showing the basis for such award to allow for appellate review. This section can be tailored for enacting states with current limits or caps on punitive awards.

Section 8 allows for immediate trial court review of a jury award of punitive damages, and provides the standard of review to be used for particular situations. If a court determines that there is "no legally sufficient basis" to find liability under Section 5, the court must enter judgment for the defendant on the punitive issue. If the decision to award punitive damages is found to be "against the great weight of the evidence," a new trial must be ordered on the issue of punitive damage liability. If the court determines that the amount is against the great weight of the evidence pursuant to the factors listed in Section 7, a new trial will be ordered unless the defendant agrees to a remittitur. In making these determinations, the court must make findings and indicate the basis for its decision on the record, including its the method for determining the reduced award in the case of a remittitur.

Section 9 provides that a party cannot seek appellate review of a jury determination of liability for, or the amount of, a punitive award unless he or she first seeks review by the trial court under Section 8. If the punitive damage issue reaches the appellate court, the appellate court may review both the liability for and the amount of the award, and make whatever orders are fair and just under

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[45] Comment to Section 7, at 16, 18.

[46] Id. at 20.

[47] The accompanying commentary to Section 7 states that this list is not exclusive and that any other evidence relevant to the amount of the award may be considered. Comment to Section 7, at 20. Though the commentary does not describe examples for the criteria, the "adverse effects" on innocent persons and "aggravating or mitigating factors" criteria could be used by defamation defendants to their advantage. A media defendant could argue that a large punitive award will deter vigorous news reporting, thus harming the public. Further, a trier of fact could consider the First Amendment rights of the defendant and the public's interest in access to information in determining the amount of the award.

the circumstances. If the appellate court determines that the award is excessive, the court may order a new trial or reduce the award if the defendant agrees to a remittitur.

The Act does not specify a standard for appellate review, but the commentary explains that a state should employ its current standard for reviewing damage awards unless the state adopts a specific standard for the review of punitive awards. The commentary reaffirms that the Gore guideposts, which are incorporated in the determination of the amount of the award in Sections 7 and 8, will be relevant "guideposts" for appellate review regardless of the standard of review employed.[48]

Section 10, one of the more novel proposals in the Act, gives defendants the right to a hearing to show that a punitive award is unfairly duplicative of other awards for the same conduct. A reviewing court may either reduce a current punitive award or stay collection of existing awards or the entry of judgment or execution to the extent that these awards unfairly punish the defendant for the same conduct punished by another punitive award.

Section 11 allows for the bifurcation of the punitive damage phase of a trial. The Act provides that upon the motion of a party, a court "shall" order a separate trial of the punitive damage phase if it is necessary to avoid undue prejudice in the liability phase. The court "may" order a separate trial of any claim or issue if it is in furtherance of the convenience of the parties or for any other good cause.

Section 12 allows for the consolidation of trials or joint hearings for cases within the state that concern the same act or course of conduct by the defendant. The Act also allows a court to issue orders concerning any proceedings for such multiple claims "to avoid manifest injustice or unnecessary expense or delay."[49]

Section 13 provides that a judgment creditor may not collect a punitive damage award pending a timely appeal, unless the court orders otherwise for good cause shown.

C. Implications for Media Defendants

As indicated, punitive damage awards represent the largest dollar risk to the media defamation defendant.[50] Currently, media defendants with national reach must analyze all applicable state standards regarding punitive damages, and the difference between no award and million dollar awards may depend entirely on the jurisdiction where the claim is brought. If adopted in a given state, the Model Act would be at least a step toward some clarification of state standards for the imposition of punitive damages.

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[48] Comment to Section 9, at 24.

[49] Section 12(b).

[50] Page 1, above.

More than two decades ago in Cantrell v. Forest City Publishing Co.,[51] in the context of a false light privacy claim, the Supreme Court recognized a clear distinction between the common law malice required to uphold an award of punitive damages and the concept of constitutional malice relevant to liability under New York Times v. Sullivan.[52] The Drafting Committee's pivotal comment to Section 5 should serve to remind state legislatures (as well as courts) of this difference and to emphasize that a finding of malice for purposes of punitive damages is not the same as a finding of constitutional actual malice under Sullivan. To recover punitive or compensatory damages a plaintiff must first comply with stringent First Amendment standards. Beyond this, a separate and distinct finding of common law malice and compliance with the substantive and procedural requisites of the Model Act should be required to justify an award of punitive damages in defamation cases. With this in mind, the media should support the enactment of the new Model Punitive Damages Act in all jurisdictions where they broadcast or publish.

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[51] 419 U.S. 245, 251-52 (1974).

[52] In Cantrell, the Court upheld an award of compensatory damages for false light invasion of privacy against a paper for a feature story about the family of a victim killed in a bridge collapse. The story made many misrepresentations about the family, describing the widow's facial expressions during the interview though she was not present during the interview. Before the trial, the district judge dismissed the plaintiff's claim for punitive damages finding no evidence of "malice." The appellate court reversed the compensatory award interpreting the judge's finding as that of no "actual malice", thus invalidating any award. In its opinion, the U.S. Supreme Court clarified that a finding of "actual malice" was "quite different from the common-law standard of 'malice' generally required under state tort law to support an award of punitive damages." 419 U.S. at 252. Finding the trial judge's decision to refer to "common law malice" and not actual malice, the Court upheld the compensatory award.