

**LDRC Libelletter - News & Update Item**  
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**American Law Institute Debates Third Restatement of Torts**  
**Redrafting of “Basic Principles” May Impact Speech and Media-Related Cases**

**By Henry R. Kaufman \***

At its 2001 annual meeting the American Law Institute debated a draft Restatement of the Law of “Liability for Physical Harm (Basic Principles).” This is one part of a multi-phase undertaking by the ALI, with potentially significant implications for future development of media law, to write a Third Restatement of Torts.

On May 15 the ALI tentatively approved several sections of the Basic Principles. Two sections, however, including one treating the pivotal concept of “duty” in negligence cases, were sent back for further revision. As part of that rewrite the Torts Third Reporters have agreed, at the request of a group of ALI members who practice media law, to consider incorporating language that addresses First Amendment considerations applicable to the duty principle in speech and media-related cases.

ALI’s Restatements of Torts

Historically, the ALI has had great influence over development of tort law, dating back to the first Restatement of Torts, begun in 1923 and completed in 1939. That was decades before Supreme Court recognition of First Amendment limitations on speech and media-related torts.

The Second Restatement of Torts, drafted by ALI Reporters Prosser and later Wade, was begun in 1955 and completed in 1979. The Second Restatement did not take a final position on all post-*Sullivan* issues, reasoning that the constitutional rules were still developing.

The period since the Second Restatement has, of course, seen dramatic activity in media law, including many novel theories of liability crafted by tort claimants in an effort to circumvent *Sullivan* and its progeny. Any undertaking to comprehensively “restate” this body of developing precedent will inevitably have far-reaching ramifications.

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\* Henry R. Kaufman was General Counsel of LDRC from 1980 to 1996 and is now in private practice. He is a member of the American Law Institute and of the LDRC Defense Counsel Section. Kaufman and other ALI members seek to assure that appropriate First Amendment principles are incorporated in the Third Restatement of Torts. DCS members supporting that effort include Jack Weiss, Sandy Bohrer, Carl Solano, Luther Munford, Jim George and David Klaber. A full copy of the media comments discussed in this article can be obtained by contacting hrkaufman@aol.com.

### The Third Restatement

In 1991, the ALI began to draft a Third Restatement of Torts. Tort law is now vast in scope, Balkanized into many subtopics and specialties. The ALI has therefore elected to pursue a series of projects, two of which have been completed. In 1998 a Restatement of “Products Liability” was approved. And last year “Apportionment of Liability” was completed, covering developments in contributory negligence and comparative responsibility.

These first two volumes do not have wide-ranging implications for media law. Products Liability, however, does address media claims involving allegedly injurious experiments, recipes, regimens, instructions and like editorial matter in textbooks, cookbooks, health and diet books, how to books, travel guides and other factual publications.

The ALI has rejected products liability in such cases. Excluded from the definition of a “product” is the category of “intangible personal property,” including information in media such as “books, maps and navigational charts.” According to the new Restatement, “[m]ost courts, expressing concern that imposing strict liability for the dissemination of false and defective information would significantly impinge on free speech have, appropriately, refused to impose strict products liability in these cases.”

### The Pending Draft on “Basic Principles”

The purpose of the Basic Principles is to restate standards applicable to torts causing “*physical*,” as opposed to “emotional” or “dignitary,” injury. The Principles thus have only limited application to media law and the current draft does not address First Amendment limitations on negligence liability in speech or media-related cases. But the Reporters’ Notes do approvingly cite two media cases involving allegedly “negligent” publications with no discussion in the current draft of their potential constitutional implications. See *Hyde v. City of Columbia*, 637 S.W. 2d 251 (Mo. Ct. App. 1982) and *Weirum v. RKO Gen. Inc.*, 539 P.2d 36 (Cal. 1975).

*Hyde*, decided seven years before *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), questionably sustained on a negligence theory a newspaper’s potential civil liability for the truthful but allegedly injurious publication of the name and address of the victim of a sexual assault, lawfully obtained from a police official, when the perpetrator was still at large.

*Weirum* upheld a radio broadcaster’s liability for wrongful death caused by a youthful driver responding to a live, on-air promotional contest urging listeners to speed to distant locations. *Weirum*, far from establishing media liability of broad application, may define only a rare if not singular exception to the profound constitutional issues presented by claims for physical injury alleged to arise out of the influence of editorial or artistic content on the actions of a third party. *Weirum* has been consistently distinguished or rejected in a range of other media cases.

### Media Comments on the Basic Principles Draft

Because approval of *Hyde* and *Weirum* might suggest the ALI generally endorses media liability for physical injury caused by third parties under a mere negligence standard, without consideration of First Amendment constraints, a group of ALI members active in media law submitted written comments critiquing citation of the two cases and proposing certain other revisions to accommodate constitutional doctrine.

The media comments noted that in both *Hyde* and *Weirum* constitutional defenses were asserted by the media defendants and addressed by the courts. In each case a significant First Amendment analysis was required in order to determine whether the negligence claim could be squared with constitutional limitations on imposition of liability for the publication of truthful, newsworthy information lawfully obtained, as well as with the cognate rule that only speech inciting others to imminent lawless action can constitutionally be proscribed.

The media comments also suggested the need to address the concepts of duty and burden of compliance as they must be specially applied in order to protect individual and societal interests under the First Amendment.

Finally, the comments recommended supplementing a discussion of the doctrine of negligent hiring with citation of *Van Horne v. Muller*, 185 Ill.2d 299, 705 N.E.2d 898 (1998). In that case the Illinois Supreme Court held that a radio station owner cannot, consistent with the First Amendment, be held liable for defamatory statements by an on-air employee about a public figure based on an allegation of mere negligence in hiring an “outrageous” and “controversial” disk jockey.

### Future of the Third Restatement of Torts

Once revised, the Basic Principles will be further considered, first by advisory and consultative committees and then at a future ALI annual meeting, perhaps in May 2002. Beyond resolution of immediate concerns presented in the Basic Principles, the task of drafting the balance of the Torts Restatement will doubtless remain a monumental undertaking, requiring perhaps an additional generation if not more to complete.

No work has yet been scheduled on additional segments of the Torts Third project. Nonetheless, the ultimate goal is no less than to rewrite the entire Second Restatement, including its many other substantive topics of potential application to speech or media-related activities such as infliction of emotional distress, fraud and misrepresentation, defamation, privacy, trespass, interference with contract, etc., etc. A separate Restatement on “Employment Law” is also planned for the near future.

This author and other interested ALI members will continue to express their views as the drafting process progresses, believing it is essential that First Amendment precedents and values to be adequately reflected, not only in the pending Basic Principles draft but also in all future aspects of the Restatement.