**RESTATEMENT OF TORTS THIRD – BASIC PRINCIPLES**
**COMMENTS ON CERTAIN FIRST AMENDMENT ISSUES**

Dear Professors Schwartz, Green and Abraham:

We are submitting these comments in connection with the Reporters' Notes to Comment e of §19, Liability for Physical Harm: (Basic Principles) (Tentative Draft No. 1, March 28, 2001). Our concerns relate to relatively incidental aspects of the work reflected in the current Draft. Nonetheless, we believe it is important to address these items as they do present concerns of constitutional dimension regarding potential liability for speech-related and media publications or broadcasts.

The black letter of §19 as we understand it states the generally unobjectionable principle of tort law that there are occasions when a defendant's conduct may appropriately be deemed actionably negligent, not because it *directly* causes harm, but because of the possibility that the conduct may somehow facilitate or increase the likelihood of improper conduct by a third party, or the plaintiff, that causes harm.

Comment e to §19, we take it, addresses the also generally unexceptionable distinction between "misfeasance" and "nonfeasance," contrasting the affirmative *mis*conduct leading to indirect injury covered under §19 with the separate issues raised by a defendant's failure to take action to protect or rescue others from injury – issues to be separately covered in other Sections of the Restatement.

We have no problem with the three Illustrations to Comment e. Each involves *non-speech* conduct – two with respect to "negligent entrustment" of potentially dangerous physical instrumentalities that later cause injury in the hands of a third party and one with respect to an employer's potential responsibility for the tortious or criminal conduct of a negligently-hired employee. None of these illustrations specifically involves speech-related or media activities.

The Reporters' Notes to Comment e, however, cite without any discussion of their potential First Amendment implications two speech and media-related cases: *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* sustained a newspaper's potential liability for the truthful but allegedly injurious publication of the name and address of the victim of an alleged sexual attack where the attacker, who had not yet been apprehended, acted on the information and allegedly terrorized the witness who he was able to locate. *Weirum* upheld a broadcaster's liability for wrongful auto death caused by a youthful driver responding to a promotional contest sponsored by the defendant's radio station.

At least in the absence of supplemental discussion, we are concerned that the citation of these two cases may suggest, we trust unintentionally, that they and possibly other speech or media-related cases can readily or comfortably be fit within the general rule stated in the black letter of §19 without taking into account the substantial complicating factors that are presented by application of the rule in First Amendment-sensitive contexts.

In both of the cited cases, constitutional defenses were in fact asserted by the media defendants and addressed at some length by the courts. In each a significant First Amendment analysis was required in order to determine whether the rule restated in §19 could be squared with constitutional requirements that at the very least stringently limit proscription or punishment of the publication of truthful, newsworthy information, lawfully obtained, as well as with the cognate rule that only speech that "incites" others to "imminent" lawless or harmful action can constitutionally be proscribed.

We first focus on *Hyde* and *Weirum*, the two media cases cited in the Draft in an arguably inappropriate or to some extent misleading fashion. We then address one further media case that is not cited in the Notes, *Van Horne v. Muller,* 185 Ill.2d 299, 705 N.E.2d 898 (1998). *Muller* recognizes important First Amendment limitations on the doctrine of "negligent hiring" as applied to the media based on reasoning that is closely related to some of our other concerns.

***Hyde v. City of Columbia***

With respect to *Hyde v. City of Columbia*, in very general terms the Note correctly represents this as "a case in which a defendant was sued … for [publishing] information" that could be used by "a third party … in engaging in misconduct."[*] The Note does not reveal, however, that *Hyde* is actually a complex and we submit controversial decision that raises important issues of First Amendment law. Indeed, *Hyde's* authority and precedential value is at the very least undermined by its own internal shortcomings as well as by more recent case law developments, including the subsequent decision of the U.S. Supreme Court in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

In *Hyde,* the victim of an attempted abduction and possible sexual attack reported the alleged crime to the Columbia, Missouri police. The police released that information, including the victim's name and address, to reporters for two city newspapers. The complaint against both the City and the news media alleged that although the newspapers and their reporters were aware that the assailant had not been apprehended, they negligently published the victim's name and address which then came into the possession of the assailant, who allegedly located and terrorized the victim on several occasions.

The Court in *Hyde*, in an elaborately reasoned opinion, but one hardly free from doubt, first held that the information released, although undeniably obtained in a "lawful" fashion by the newspaper, was technically not a matter of "public record" under the state's Sunshine Law. The Court's opinion labors to reach this result in the face of at best ambiguous statutory language and, evidently, a lack of prior precedent on the specific point. The Court nonetheless criticizes

[*] We could quibble with certain minor aspects of the case description. It is suggested, for example, that the suit was "successful," although as far as can be discerned from the published opinion the intermediate appellate tribunal merely overturned the trial court's grant of some of the defendants' motions to dismiss the complaint and remanded the case for further proceedings. No reported opinion reveals whether the action was continued and with what ultimate result or whether it was settled and on what basis. Also, the defendants did not actually "*provide* information … *to*" the party who engaged in misconduct as the Draft states. The media defendants simply published information in newspapers of general circulation and that information allegedly came into the miscreant's possession.

the defendants for arguing an interpretation of the Sunshine statute that it says would lead to the "absurd" result of permitting media interference with active police investigations. The Court does not appear to consider whether, under the circumstances, the newspaper defendants could possibly have known prior to publication that the official information it received was not in fact a matter of public record under the statute. And this labored holding under the state Sunshine Law also seems to accord insufficient significance to the more general constitutional principle, later further elaborated upon in closely analogous circumstances by the Supreme Court in *Florida Star*, of protecting and preserving the media's ability to rely in good faith on disclosures made by government itself.[*]

In addition, although recognizing that such guidelines do not necessarily establish enforceable standards of care, the Court relied heavily on the allegations (also not entirely free from doubt) that both the City and the newspapers had breached their own internal guidelines, creating policies of not releasing the name of the victim of a potential sexual offense or a victim who can identify an at-large assailant in an unsolved case. In this regard, *Hyde's* recognition of a negligence claim against the newspaper defendants has been criticized for "'legaliz[ing]' what heretofore have essentially been questions of journalistic ethics." Dreschel, "Negligent Infliction of Emotional Distress: New Tort Problems for the Mass Media," 12 Pepperdine L. Rev. 889, 890 (1985), cited in McCarthy, *Rights of Publicity & Privacy*, §5:117 at 5-280 (2001).

Although it ultimately ruled against the newspaper defendants on their constitutional defense, the *Hyde* Court did appear to recognize that a different standard must be applied in assessing the potential liability of the government as opposed to that of the news media in light of the First Amendment. In addressing the media defendants' potential liability under the First Amendment the *Hyde* Court reasoned that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and previous Supreme Court cases after *Sullivan*, had flirted with but ultimately rejected considerations of "newsworthiness" as the touchstone for potential media liability *vel non*. Relying on the authority of *Gertz*, the Court thus concluded that the First Amendment did not preclude an action in tort, at least by a "private figure," under a standard of fault that could be defined by mere "negligence."

This basis for the *Hyde* decision is subject to very serious question, in our view, because it failed to take into account that as a libel case – in contrast to a claim involving *truthful* information *lawfully* obtained – *Gertz* presented significant additional elements of fault with respect to alleged falsity and defamation. The *Hyde* Court simply overlooked the fact that the degree of fault applicable to a claim for "negligent" publication might thus have to be defined in a different and substantially more restrictive fashion in order to pass constitutional muster.

The result and reasoning of the *Hyde* case are further called into question by the U.S. Supreme Court's decision seven years later in *Florida Star, supra*. In *Florida Star* the Court held that a rape victim's recovery of a substantial damage award for truthful publication of her name by a newspaper, in violation of a Florida criminal statute prohibiting such publications by the media, was unconstitutional under the First Amendment where the newspaper had lawfully

[*] "Once the government has placed such information in the public domain, 'reliance must rest upon the judgment of those who decide what to publish or broadcast.'" 491 U.S. at 538, quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975); see also *Smith v. Daily Mail Publishing Co*., 443 U.S. 97 (1979).

obtained the plaintiff's name from the government, even if the government had erred in releasing it to the press.

The *Florida Star* decision involved civil liability arising from violation of a statute criminalizing release of the victim's name and was thus not on all fours with *Hyde*. The holding in *Florida Star* was also arguably limited to its own facts, at least to the extent that, in a series of cases, the Supreme Court has declined the invitation to hold more broadly that truthful publications may *never* be punished consistent with the First Amendment – an issue that remains open in First Amendment jurisprudence to this day. At a minimum, however, it is subject to the most serious doubt that *Hyde* could have been decided in the fashion it was after *Florida Star.*

Finally, any citation of *Hyde* also suffers from the paucity of subsequent precedent following its approach. Indeed, the only media case of which we are aware that approvingly cited and in its determination relied upon the specific holding in *Hyde* was *Times Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556, 198 Cal. App. 3d 1420 (Ct. App. 4th Dist. 1988), *cert. dismissed*, 489 U.S. 1094 (1989).

Although its facts and result were quite similar to *Hyde*, *Times Mirror* elected to address the publication of allegedly injurious information under an invasion of privacy, rather than a negligence, theory. *Times Mirror*, an intermediate California state appellate decision, found a jury question in whether publishing the name of a witness to a murder while the killer was still at large was an actionable disclosure of private facts. Unlike *Hyde*, the *Times Mirror* Court recognized that newsworthiness *could* be a potential defense. However, it held that the issue in the case at hand was not whether the murder was newsworthy but whether publication of the plaintiff's name was newsworthy. (Having denied the publisher's motion for summary judgment on privacy grounds, the Court did not address whether the same facts stated an actionable claim under the plaintiff's alternative theories of intentional or negligent infliction of emotional distress.)

Both *Times Mirror* and *Hyde* ultimately cleared the way for the potential imposition of liability by rejecting a newsworthiness defense.. However, according to one leading commentator, *Times Mirror's* newsworthiness analysis "does not appear to survive the test [of newsworthiness] established by the [California] Supreme Court in *Shulman [v. Group W Productions, Inc.*, 18 Cal.4th 200, 74 Cal. Rptr.2d 843, 955 P.2d 469 (1998) (holding that a private-facts invasion of privacy claim against the media cannot constitutionally be maintained where *both* newsworthiness and the nexus of otherwise intimate private facts to the newsworthy event are established)]." See *Sack on Defamation*, §12.4.5 at 12-45 n. 212 (3d ed. 2000).

In sum, in light of all of the foregoing factors, we do not believe that *Hyde* can fairly be cited for the proposition it is said to support in the Reporters' Notes to Comment e of §19 without at the very least dealing with the range of complicating facts and constitutional issues that we submit *Hyde* unavoidably presents.

***Weirum v. RKO Gen. Inc.***

The Draft's unadorned citation of *Weirum* presents questions perhaps even more troublesome than its citation of *Hyde*.

In *Weirum*, a local rock radio station announced during a *live* broadcast that a well-known radio personality was contemporaneously driving through Los Angeles. The station's disk jockey periodically identified the car's location, offered prizes to whomever first arrived at the ever-changing location, and even made jokes suggesting that reckless driving was expected in connection with the contest. *Weirum* thus involved the *invitation* and indeed urging of immediate, dangerous action by the defendant who even offered prizes to those successfully taking up the call to dangerous action. In rejecting an asserted First Amendment defense the *Weirum* Court was therefore simply recognizing a legal duty not to directly instruct and reward behavior posing a foreseeably imminent and likely threat to the safety of a limited and identifiable class of motorists in the vicinity of the contest locations.

Under these unique circumstances, *Weirum* is a case of proven, real-time incitement to imminent lawless or harmful action whose result has thus not been viewed as subject to the kind of criticism on First Amendment grounds that can be leveled at *Hyde*. The decision has been recognized as defining a rare if not singular exception to the troublesome constitutional issues that are presented whenever a plaintiff seeks to impose liability for physical injury allegedly based on the mere influence of editorial or artistic content on the actions of a third party or the plaintiff in the absence, as one leading commentator has stated, of an "extremely tight and compelling" causal nexus between the speech and an asserted injury. See Smolla, *Law of Defamation*, §11:50 at 11-56 (2d ed. 2001).

Accordingly, citation of *Weirum* in the Reporters' Notes, while technically supportable, is questionable at least for its failure to advert to or address the issues of constitutional dimension that most cases of this kind present. The danger of unexplicated reliance on *Weirum* in the Notes is highlighted by the fact that the decision has often been cited, albeit almost uniformly rejected, in numerous other less compelling contexts where plaintiffs have sought to dramatically expand *Weirum's* application, but where the nexus between the media publications and the asserted injury – far from being "tight and compelling" – is questionable at best, and the critical "real-time" element is missing.

Application of *Weirum* has been consistently rejected in a laundry list of personal injury actions claiming, as the Reporters' Note describes *Weirum*, that media "defendants were allegedly negligent in inadvertently giving the third party or the plaintiff a motive to act improperly." Examples of claimants who have attempted to rely on *Weirum* in asserting what are clearly more tenuous and constitutionally-suspect claims include: a plaintiff shot by a third party in an urban movie theatre proceeding against a motion picture producer based on its advertisements for the film depicting urban violence being shown at the time of the shooting, *Lewis v. Columbia Pictures Industries, Inc.*, 23 Media L. Rptr. 1052, 1055 (Cal. App. 2d Dis. 1994); a personal injury action brought in connection with injurious third party acts allegedly inspired by a film that "glorified violence," *Bill v. Superior Court*, 187 Cal. Rptr. 625 (Cal. App. 1982); the parents of a teenager who committed suicide while listening to the defendant

performer's and recording company's rock music, *McCollum v. CBS, Inc.*, 202 Cal. App.3d 989, 249 Cal. Rptr. 187 (Cal. App. 2d Dist. 1988); the victim of a "copycat" crime against a television network where the criminal was allegedly inspired by a rape scene in a made-for-TV movie, *Olivia . v. NBC,* 126 Cal. App.3d 888 (Cal. App. 1981); representatives of a teenaged boy against a television network where the boy allegedly emulated a dangerous stunt broadcast on the *Tonight* show, *DeFillipo v. NBC,* 446 A.2d 1036 (R.I. 1982); and parents of a boy who died when he was said to have imitated a dangerous sexual act described in a magazine article, *Herceg v. Hustler Magazine, Inc.,* 814 F.2d 1017 (5h Cir. 1987), *cert. denied,* 108 S. Ct. 1219 (1988). All of these claims were dismissed and *Weirum's* asserted authority in support of the claims was rejected.

**Application of the Concepts of Duty and Burden in First Amendment Cases**

Section 3 of the Basic Principles restates the fundamental principle of negligence law that an assessment of the requisite lack of "reasonable care" must be informed, *inter alia*, by balancing the foreseeability and severity of the harm against the burdens that would be borne, individually and societally, by requiring that sufficient precautions be taken to reduce or eliminate the particular harm. And §7 restates the fundamental rule that a court may as a matter of law relieve even an arguably "negligent" defendant of liability based on a determination that the defendant owes no duty to the plaintiff "based on a judicial recognition of special problems of principle or policy that justify the withholding of liability."

The draft Comments particularize application of these principles to the case of indirect liability under §19 for the subsequent acts of the plaintiff or other third parties. As is recognized in Comment h, "[i]n many situations the conduct by defendants that might lead to dangers if there is third-party misbehavior is conduct that is ordinary and normal." Therefore, such claims "may prompt a public-policy duty review under §7." The Reporters' Notes to Comment g also address the issue of the "burden of precautions."

By citing *Hyde* and *Weirum,* we believe that the Draft presents for consideration questions of burden and duty in cases of asserted of media liability, with their unavoidable First Amendment policy overtones. Yet the Draft does not address the concepts of duty and burden as they must be specially applied in order to protect individual and societal interests under the First Amendment. In fact, it is well recognized that a carefully-calibrated application of the limiting concepts of duty and burden is required in this constitutionally-sensitive context.

A thoughtful articulation of the concepts of duty and burden as applied to negligence claims involving media expression appears in *McCollum, supra,* one of the line of cases that has rejected broadened application of *Weirum.* In *McCollum* a teen suicide was said to have been negligently caused by pre-recorded rock musical compositions. Consistent with the Basic Principles, *McCollum* identified as a threshold question in any negligence claim "whether any duty was owed to the plaintiffs" and identified among the factors to be examined in any duty analysis "the foreseeability of harm to the plaintiff … the closeness of the connection between the defendant's conduct and the injury suffered … the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care …"

The *McCollum* Court observed with regard to media liability for allegedly negligent speech that,

> "a very high degree of foreseeability would be required because of the great burden on society of preventing the kind of 'harm' of which plaintiffs complain by restraining or punishing artistic expression. The 'countervailing policies' which arise out of the First Amendment 'have substantial bearing upon the issue whether there should be imposed upon [defendants] the exposure to liability of the kind for which plaintiffs contend.'
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> "Plaintiff's case is not aided by an examination of the other factors which are part of the duty analysis. It cannot be said there was a close connection between [plaintiff's] death and defendants' composition, performance, production and distribution years earlier of recorded artistic musical expressions. Likewise, no moral blame for that tragedy may be laid at defendants' door. [Plaintiff's] suicide, an admittedly irrational response to [defendants'] music, was not something which any of the defendants intended, planned or had any reason to anticipate. Finally, and perhaps most significantly, it is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy. No case has ever gone so far. We have no basis in law or public policy for doing so here." 202 Cal. App.3d at 1004, 1005-06.

In sum, we believe it is imperative that the Draft address the vitally-important First Amendment considerations unavoidably raised by the citation of the two media cases in the Reporters' Notes to §19.

**Negligent Hiring - *Van Horne v. Muller***

Shortly after the Draft cites *Hyde* and *Weirum* it discusses the tort of "negligent hiring" but does not cite a recent case that considers the tort in a media context. *Van Horne, supra,* addresses the First Amendment implications of applying the "negligent hiring" doctrine to a media defendant in a fashion that could circumvent otherwise applicable constitutional limitations on media liability for defamation of a public-figure plaintiff.

In *Van Horne,* the Court was called upon to determine whether the corporate owner of a radio station could constitutionally be held liable for the negligent hiring (and also supervision and retention) of on-air employees, separate and apart from the owner's potential vicarious or

*respondeat superior* responsibility for allegedly defamatory remarks broadcast by the employees with alleged constitutional malice.

In rejecting the negligent hiring theory, the Illinois Supreme Court reasoned that the type of conduct that would put the employer on notice of an employee's unfitness, and thus of the foreseeability of harm that the employer should be deemed to have a duty to prevent,

"will differ in every case. In this case we employ a narrow interpretation of this requirement because of the first amendment concerns which arise when liability is predicated on speech. Although we do not decide in this case whether first amendment concerns would preclude all attempts to state a cause of action for negligent hiring or retention premised on an employee's defamatory statements, we do find that recognition of this cause of action where the employee had previously engaged only in 'outrageous,' but nondefamatory, conduct or speech would run afoul of first amendment principles. The most obvious impact of this rule would be on media employers. Plaintiff's theory would thus hold a media employer liable for its decision to hire or retain a broadcaster simply because that broadcaster was a controversial figure, the reasoning being that such controversial figures are 'likely' to engage in defamatory speech. Such a holding would have an inevitable chilling effect on free speech, as media employers would be reluctant to hire controversial broadcasters or reporters. The law of defamation must not only protect the individual's interest in vindicating his good name and reputation, but also allow the first amendment guarantees sufficient 'breathing space' essential to their fruitful exercise. [citing, *inter alia, New York Times v. Sullivan*] Imposing liability for negligent hiring or retention under these circumstances would not grant the first amendment guarantees sufficient 'breathing space.'"

**Proposed Revisions to the Draft**

1. *Hyde v. City of Columbia*: Under the circumstances identified, we question whether citation of *Hyde* is appropriate at all. If the citation is retained, we would urge that its complicating First Amendment aspects be noted in some appropriate fashion, either parenthetically where *Hyde* is cited, or in a special section in the Reporters' Notes addressing the applicable First Amendment concerns.

2. *Weirum v. RKO Gen. Inc.*: If you choose to retain the *Weirum* citation we would urge that it limits be acknowledged in the Reporters' Notes in relation to the range of other claims against media or artistic expression that have been pursued under the *Weirum* theory but rejected as violative of fundamental principles of First Amendment jurisprudence.

3. Burden and Duty: Especially if any of the subject citations are retained or added, and/or if you chose to include a separate discussion of the special First Amendment issues presented by application of §19 in speech-related or media cases, we believe it would also be appropriate to address in the Reporters' Notes, but possibly also to recognize in the Comments, the importance of considering First Amendment policy issues with respect to the assessment of *duty* and *burden* when such claims are asserted under §19 and earlier Sections of the Basic Principles. For example, it would seem logical and simple enough to add the following at the

end of the discussion of "public policy duty review under §7" in Comment h (at pp. 280-81): "In assessing duty in speech-related or media cases courts have, appropriately, given especially sensitive consideration to applicable First Amendment limitations and concerns."

4. Negligent hiring: As the Draft already cites (at p. 286) a string of other cases that "consider the negligent-hiring concept in a variety of contexts," it would seem quite appropriate to also cite *Van Horne* noting that case's recognition of the potential First Amendment limitations on the negligent hiring doctrine**.**

**Conclusion**

Largely since the Second Restatement of Torts was completed, and as the full limiting implications of *New York Times v. Sullivan* and its progeny have played out over the years in the specialized field of alleged media torts, plaintiffs have come more and more to rely on new and creative theories of asserted media liability in tort separate and apart from more traditional claims of defamation and invasion of privacy. Although on rare occasion such theories have been found to have some basis, in most cases these claims have been recognized for what they typically are: attempted "end-runs" around the established and appropriately stringent constitutional limitations on speech-related actions. *See, e.g*., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 86 (1988) (rejecting theory of "intentional infliction of emotional distress," in the absence of proof of "actual malice" under the *Sullivan* defamation law standard).

As drafting of the Restatement Third of Torts continues, and as it undertakes to articulate theories of potential liability in the black letter rules, as illustrated and explicated in the Comments and Reporters' Notes, we believe the Institute should remain vigilant to assure that First Amendment issues and sensitivities not be overlooked. This commitment to constitutional sensitivity applies, in our view, to at least the foregoing aspects of the pending Draft regarding the "Basic Principles" of negligence liability, as applied in speech-related and media contexts, as well as to all further sections of the Torts Restatement to be subsequently addressed.

**A final note**. We do not represent any one client or interest group, and have not sought the approval of or consulted with any clients, for purposes of this submission. However, we do wish to acknowledge, in deference to Institute policy, that each of our practices focuses on First Amendment and media matters to one extent or another and that we have each represented publishers, broadcasters, motion picture and record producers and/or other media entities and organizations having an interest in these issues.

May 12, 2001

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[*] Until recently, Mr. Weiss represented Warner Brothers and director Oliver Stone in the "Natural Born Killers" litigation. See Byers v. Edmondson, 712 So.2d 681 (La. App. 1st Cir.), writ denied, 726 So.2d 29 (La. 1998), cert. denied, 119 S. Ct. 1143 (1999).