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VIA EMAIL – ali@ali.org

Joseph A. Mendecino, Jr.
Director of Administrative Services
The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104

Dear Mr. Mendecino:

Attached for consideration at the 79th Annual Meeting of the American Law Institute is a motion to amend Tentative Draft No. 2 of the Restatement of the Law of Torts: Liability for Physical Harm (Basic Principles) (March 25, 2002).

Our motion is addressed to the revised version of §7 ("Duty") in Chapter 3. The motion takes no exception to the black-letter of the pending draft or to the Comments as far as they go. However, the undersigned believe it is important for the Restatement to expressly recognize, consistent with the current draft, that claims seeking to impose negligence liability for physical harm in media or speech-related cases raise serious constitutional concerns under the first amendment that should be addressed under the "duty" principle.

We are authorized to represent that the Reporters have reviewed the attached and that they support this motion.

Sincerely,

Henry R. Kaufman, New York, NY
Jack M. Weiss, New York, NY
Sanford L. Bohrer, Miami, FL
Carl A. Solano, Philadelphia, PA
Luther T. Munford, Jackson, MS

Motion to Amend Section 7 (Chapter 3), Restatement of the Law of Torts: Liability for Physical Harm (Basic Principles), Tentative Draft No. 2 (March 25, 2002)

I. Introduction to Proposed Amendment Regarding "Duty" in Media and Speech-Related Cases

Section 7, as it has been revised since last year's annual meeting, addresses exceptions to the ordinary duty of reasonable care in negligence cases and identifies some of the considerations that have influenced courts to make exceptions to that general rule. Comment a notes that in some categories of cases reasons of principle or policy dictate that negligence liability should not be imposed. Comment d further recognizes that in some classes of cases negligence-based liability may conflict with another domain of law such as contract, property or the law of particular categories of torts such as misrepresentation.

The current draft of §7 does not advert to conflicts with the domain of constitutional law that are presented in media or speech related cases. Yet these are another significant group of claims where the no-duty principle is appropriately applied as a matter of policy and in order to avoid conflicts with another body of law. Consistent with the foregoing we believe it is important for the Restatement to expressly recognize, as have the cases, that imposing negligence liability for physical harm in media or speech-related cases would raise serious constitutional concerns under the first amendment. Addressing these issues under the duty principle in the first instance is appropriate in order to minimize the damage to first amendment interests threatened by such claims.

The issues addressed in this motion were informally raised with the Reporters last year in connection with certain cases cited in the Reporters' Notes to §19 regarding liability for physical injury caused by the actions of third parties said to arise, in one fashion or another, out of media publications. In the context of those discussions it was the Reporters who suggested that, for purposes of the tort analysis, the more general first amendment concerns would best be addressed under the rubric of "duty."

It is our understanding that the Reporters support the following motion.

II. Motion to Amend Comment d to §7 to Expressly Address Application of the "Duty" Principle in Media and Speech-Related Cases

Comment d ("Conflicts with another domain of law") recognizes that in certain classes of cases negligence-based liability may conflict with another domain of law and that a "no-duty" finding by the court "helps police the boundaries between these various areas of law."

Comment d as currently drafted does not address the important category of potential conflicts with the domain of constitutional law under the first amendment that have been recognized in a long line of media and speech-related cases.

To remedy this oversight the motion simply proposes that Comment d be amended to add language reflecting that the serious first amendment concerns presented by claims alleging negligent physical injury in media or speech-related cases are appropriately addressed under the duty principle in the first instance.

At the request of the Reporters the motion does not propose specific comment language to this effect, but leaves the initial drafting of that language to the Reporters.

III. *Basis for Proposed Amendment*

Beginning with the landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), tort plaintiffs have been constrained by application of constitutional principles mandating stringent limits on liability in connection with traditional media or speech-related claims such as libel and invasion of privacy that focus on reputational or dignitary harms. In recent years plaintiffs have increasingly attempted to craft new theories of recovery in order to get around these well-established first amendment limitations. This has at times included efforts to impose tort liability for alleged physical harms in media or speech-related cases under a negligence standard. Such claims have generally been rejected by the courts on a variety of grounds, most prominently the absence of a "duty."

Analogous constitutionally-based constraints on tort liability for media publications were recognized in the Restatement Third of Products Liability. That Restatement excluded from the definition of a "product" the category of "intangible personal property," defined to include information in media such as "books, maps and navigational charts." Comment d to §19 of the Products Liability Restatement concluded that "[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."

For the same reasons, the position of the Products Liability Restatement has also been applied to claims involving physical harm alleged to have been *negligently* caused by media publications or speech. In fact, the very same cases cited in the Reporters' Notes to the Products Liability Restatement in support of the general exclusion of media publications from products liability also support the preclusion of media or speech-related claims under a negligence standard.

For example, *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991), cited in the Products Liability Restatement as a "leading case" rejecting application of products liability to "information in a published book," also rejected the plaintiff's alternative claim of "negligence." As the court in *Winter* observed: "[i]n order for negligence to be actionable, there must be a legal duty to exercise due care." The Ninth Circuit concluded that "the defendants have no duty to investigate the accuracy of the contents of the books it publishes," noting that "there is nothing inherent in the role of publisher or surrounding legal doctrines to suggest that such a duty should be imposed on publishers. Indeed the cases uniformly refuse to impose such a duty."[*] The *Winter* Court also bolstered its duty analysis with a recognition of the constitutional sensitivities: "Were we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs."

The Reporters' Notes to the Product Liability Restatement cited six other media cases in which a negligence claim was asserted but also rejected. In at least five of the cited cases negligence liability was excluded based on a finding of no duty and in all of the cited cases liability was also rejected, in whole or in part, on the basis of first amendment concerns.

See *Way v. Boy Scouts of Am.*, 856 S.W.2d 230 (Tex. Ct. App. 1993) (rejecting negligence claim against publishers of an advertising "shooting-sports" supplement distributed to boy scouts, concluding that "the firearms supplement did not create a duty on the part of [the publisher] to either refrain from publishing the supplement or add warnings about the danger of firearms and ammunition"); *Birmingham v. Fodor's Travel Pubs., Inc.*, 833 P.2d 70 (Haw. 1992) (upholding summary judgment on the ground that publisher "has no duty to investigate and warn its readers of the accuracy of the contents of its publications," noting concern over the "scope of liability" and "burden" that such a

[*] The court in *Winter* cited, *id.* at n.8, the following media or speech-related cases to support its finding of a uniform refusal to impose a duty: *First Equity Corp. v. Standard & Poor's Corp.,* 869 F.2d 175, 179-80 (2d Cir. 1989) (financial publications); *Jones v. J.B. Lippincott Co., infra* (nursing textbook)*; Lewin v. McCreight,* 655 F. Supp. 282, 283-84 (E.D. Mich. 1987) (book on metalsmithing); *Alm v. Van Nostrand Reinhold Co.,* 134 Ill. App.3d 716, 721, 480 N.E.2d 1263, 1267 (1985) (book on tool making); *Roman v. City of New York,* 110 Misc.2d 799, 802, 442 N.Y.S.2d 945, 948 (Sup. Ct. 1981) (pamphlet on contraception); *Gutter v. Dow Jones, Inc.*, 22 Ohio St.3d 286, 291, 490 N.E.2d 898, 902 (1986) (description in *Wall Street Journal* of certain corporate bonds); *Smith v. Linn, infra* (diet book)*; Herceg v. Hustler Magazine, Inc., infra* (magazine)*; Libertelli v. Hoffman-LaRoche,* 7 Media Law Rptr. 1734, 1736 (S.D.N.Y. 1981) (*Physician's Desk Reference*); *Yuhas v. Mudge,* 129 N.J. Super 207, 209-10, 322 A.2d 824, 825 (1974) (magazine advertisement); *Beasock v. Dioguardi Enters., Inc.*, 130 Misc.2d 25, 30-31, 494 N.Y.S.2d 974, 979 (Sup. Ct. 1985) (industry standards published by a trade association). In that same note the court in *Winter* distinguished *Weirum v. RKO General, Inc., infra,* observing that "[a] publisher's role in bringing ideas and information to the public bears no resemblance to the *Weirum* scenario."

duty would entail, and citing first amendment problems and the "chilling effect" that negligence liability would impose on the "public's free access to ideas," thus counseling against "imposing a *new duty*" on publishers in such circumstances); *Jones v. J.B. Lippincott Co*., 694 F. Supp. 1216 (D. Md. 1988) (holding, on the negligence counts, that publisher of a textbook "has no duty of care with respect to the content of the book" and noting concern that imposition of [product] liability "could chill expression and publication which is inconsistent with fundamental free speech principles"); *Herceg v. Hustler Magazine Inc*., 565 F. Supp. 802 (S.D. Tex 1983), *aff'd,* 814 F.2d 1017 (5h Cir. 1987), *cert. denied,* 108 S. Ct. 1219 (1988) (in copycat self-injury case, rejecting plaintiff's causes of action for negligence, noting that "there is no legal basis for defendant [private publisher]'s duty with respect to the content of its publications," adverting in its duty analysis to "policy considerations such as 'the practical need to draw the line somewhere so that liability will not crush those on whom it is put" and noting that "First Amendment considerations … argue against the liability of a publisher for a reader's reactions to a publication, absent incitement"); *Walter v. Bauer*, 439 N.Y.S.2d 821 (N.Y. Sup. Ct. 1981) (refusing to find a "duty to warn" on the part of a science textbook publisher and warning of "chilling effect … on the First Amendment"); *Smith v. Linn*, 563 A.2d 123 (Pa. Super. Ct. 1989), *aff'd*, 526 Pa. 447, 587 A.2d 309 (1991) (affirming grant of summary judgment in a wrongful death case allegedly caused by following a negligently published diet regime, accepting publisher's first amendment defense in relation to plaintiff's theory of "incitement," and noting that the "appellant does not point us to any established exception to first amendment protection").

In another group of media and speech-related cases, not presenting any products liability component, claims for allegedly negligent media publications said to have caused the plaintiff or third parties to take actions resulting in physical harm to themselves or others, were also rejected on similar grounds. In these cases as well, with few and narrowly limited exceptions, courts have generally rejected negligence claims based on a finding of no duty owing to the plaintiff, with such holdings often substantially influenced by recognition of the first amendment sensitivities of a contrary ruling.

A detailed articulation of the concept of duty as applied to such negligence claims appears in *McCollum v. CBS, Inc.,* 202 Cal. App.3d 989, 249 Cal. Rptr. 187 (Cal. App. 2d Dist. 1988). In *McCollum* a teen suicide was said to have been negligently "caused" by pre-recorded rock musical compositions. The court in *McCollum* identified as a threshold question "whether any duty was owed to the plaintiffs" and identified among the factors to be examined in its 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 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.'

* * * *

"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, admittedly an 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.

See also *Lewis v. Columbia Pictures Industries, Inc.*, 23 Media L. Rptr. 1052, 1055 (Cal. App. 2d Dist. 1994) (rejecting claim against a motion picture producer by a plaintiff wounded in an urban movie theatre based on advertisements for the film depicting urban violence, the court found no duty in light of first amendment sensitivities); *Bill v. Superior Court*, 187 Cal. Rptr. 625 (Cal. App. 1982) (rejecting personal injury action brought in connection with injurious third party acts allegedly inspired by film on the ground that, as a matter of law, producer of motion pictures has no general duty to its audience, even if the film arguably "glorified" violence); *Olivia N. v. NBC*, 126 Cal. App.3d 488 (Cal. App. 1981) (rejecting claim against television network by victim of "copycat" rape where criminal was allegedly inspired by scene in made-for-TV movie on ground that imposing "civil liability premised on traditional negligence concepts" would have "chilling effect" on First Amendment freedoms, thus necessitating proof of "incitement"); *DeFillipo v. NBC*, 446 A.2d 1036 (R.I. 1982) (rejecting claim by representatives of teenage boy killed emulating dangerous stunt shown on network's television program, holding that in media case the first amendment generally precludes recovery for physical injury under a negligence theory in the absence of proof of incitement); *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199 (S.D. Fla. 1979) (no duty to protect member of broadcast audience from mental or emotional injuries related to alleged long-term effects of exposure to violence on television).

The handful of cases that have upheld a negligence claim in a media or speech-related context tend to prove the general rule of no duty on the part of a publisher or broadcaster to its general audience in the absence of proof of fault greater than mere negligence or some relationship creating a special duty of care.

Probably the media physical injury case most widely cited by plaintiffs is *Weirum v. RKO Gen. Inc.*, 539 P.2d 36 (Cal. 1975). *Weirum* upheld a broadcaster's liability for wrongful auto death caused by a youthful driver responding to a promotional contest. In *Weirum*, the defendant's local rock station announced – during a *live* broadcast – that a well-known radio personality was currently driving around Los Angeles. The station's disk jockey periodically identified the car's location, offered prizes to whomever arrived first at the ever-changing location, and even made jokes suggesting that reckless driving was expected in connection with the contest. *Weirum* thus involved an *invitation* and indeed the urging in *real time*, to a *live* radio audience, of *immediate* dangerous action where the station even offered prizes to those successfully taking up its call to action. In rejecting an asserted First Amendment defense the court in *Weirum* was thus simply recognizing a legal responsibility not to directly instruct a live audience and reward that audience for 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.

Although cited as a case imposing a duty of reasonable care in a negligence context, from the point of view of the first amendment analysis *Weirum* is best understood as one premised on *incitement* of a live audience to imminent lawless and harmful action. The decision has thus been recognized as defining a rare exception in the realm of the troublesome constitutional issues that are presented whenever a plaintiff seeks to impose liability for physical injury based on the mere cognitive 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 any asserted injury. See Smolla, *Law of Defamation*, §11:50 at 11-56 (2d ed. 2001).

It is for this reason that *Weirum* has been rejected as precedent for negligence liability in numerous other contexts involving traditional publications, artistic works, movies, musical recordings or performances and the like, where the nexus between the media publications and the asserted injury – far from being "tight and compelling" – was questionable at best, and where the critical element of incitement of a live audience was entirely absent. It is thus not surprising that W*eirum* has not been followed in a laundry list of personal injury actions claiming that media "defendants were allegedly negligent in inadvertently giving the third party or the plaintiff a motive to act improperly," including in various of the plaintiff and third party imitation cases cited above.

In addition to *Weirum,* only a handful of other reported cases involving claims for physical harm arising out of media publications have imposed a duty, or otherwise recognized the possibility of negligence-based liability for the publication of truthful information consistent with the first amendment. These few and limited exceptions to the general rule of no duty have arisen in two unique contexts, both crime related: first, in two of the notorious trilogy of "gun-for-hire" cases and in a "hit man" case; and second, in a case involving a newspaper's publication of the name and address of a rape victim while the perpetrator was still at large (*Hyde v. City of Columbia*).

In two of the "Soldier of Fortune Magazine" ("SOF") trilogy of "gun-for-hire" cases the publisher was held liable for gun shot injury or wrongful death arising out of commercial advertisements when men hired in response to the ads thereafter caused physical harm to the plaintiffs or the decedents. Each of these cases presented unique circumstances in the nature of criminal solicitation that cannot be said to meaningfully undermine the general rule of no-duty in media or speech-related cases, at least with respect to *editorial* matter circulated to general audiences.

In the first of the SOF cases, *Norwood v. Soldier of Fortune*, 651 F. Supp. 1397 (W.D. Ark. 1987), an advertisement boldly labeled "GUN FOR HIRE" was held to have put SOF on notice, and therefore to have made it reasonably foreseeable, that a gun would be used and result in the gunshot injuries suffered by the plaintiff. And in *Braun v. Soldier of Fortune*, 968 F.2d 1110 (11th Cir. 1993), the court upheld a wrongful death action based on a duty under Georgia law arising out of SOF's publication of an ad, also clearly labeled "GUN FOR HIRE." The Eleventh Circuit held that the published advertisement created an unreasonable and foreseeable risk of harm from violent criminal activity, including murder. However, the court made clear, under the "modified" negligence standard it approved, that "SOF had no legal duty to *investigate* the ads it printed" and that a jury could properly find negligence "only if [the] advertisement '*on its face*' would have alerted a reasonably prudent publisher that the 'ad in question contained a clearly identifiable unreasonable risk, that the offer in the ad is one to commit a serious violent crime'." *Id.* at 1118 (emphasis added).

In contrast, in *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989), the Fifth Circuit rejected a wrongful death claim where SOF's ad referred only to "high risk assignments," a phrase the court held was facially innocuous and ambiguous and thus did not render the risk of harm sufficiently foreseeable so that, when weighed against the heavy burden of requiring the publisher to reject *all* such advertisements, a duty of care would be breached.

In *Rice v. Paladin*, 128 F.3d 233 (4th Cir. 1997), *cert. denied,* 118 S. Ct. 1515 (1998), the Fourth Circuit held that the publisher of a book titled "Hit Man: A Technical Manual for Independent Contractors," was not entitled to summary judgment in its defense of a wrongful death claim where the murderer had concededly used the book in planning and executing the decedent's murder and where it was stipulated by the defendant publisher that it knew and intended that the book would be used to *immediately* assist in the crime of murder-for-hire. The court in *Rice* observed that on these facts the case was "unique

in the law" and held that the book's "palpable exhortation to murder" was in actuality a "speech-act" that amounted to "aiding and abetting" murder, thus going beyond even the restrictive test of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), with respect to constitutionally-actionable "incitement." The court was therefore able to conclude that "the indisputably important First Amendment values" otherwise at stake in connection with tort claims for personal injury in media or speech-related cases, would *not* be "imperiled … [or] even arguably be adversely affected … under the peculiar facts of this case." *Id*. at 265.

Finally, *Hyde v. City of Columbia*, 637 S.W. 2d 251 (Mo. Ct. App. 1982), sustained a newspaper's potential liability for the truthful but allegedly negligent and 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 victim who he was able to locate. The rule of *Hyde* has not been squarely followed in any subsequent case[*] and its vitality is subject to some question under a series of U.S. Supreme Court cases addressing the constitutional viability of claims attacking the publication of *truthful* information *lawfully* obtained – *see, e.g*., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975); *Smith v. Daily Mail Publishing Co*., 443 U.S. 97 (1979); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Bartnicki v. Vopper*, *121 S. Ct. 1753* (2001). In any event, *Hyde* is unique and its implications are narrowly limited in that it imposed a duty of reasonable care *not* applicable to the *general* public in effect recognizing no more than a *special* duty applicable solely to the identified rape victim not to publish that victim's name and location while the perpetrator was still at large.

[*] The only other media case known to have approvingly cited *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). However, *Times Mirror* ultimately upheld liability for the publication of similar rape victim information under an invasion of privacy, rather than a negligence, theory. Moreover, the authority of *Times Mirror* under California law is uncertain – see *Sack on Defamation*, §12.4.5 at 12-45 n. 212 (3d ed. 2000), observing that *Times Mirror's* newsworthiness analysis "does not appear to survive the test [of newsworthiness later] 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)]."