Expanding Dangers

Sandra Davidson, a noted media lawyer, analyzes the courts' latest decisions on journalistic methods.

In a recent issue of the *Journal*, Sandra Davidson explored the significance today of the case Food Lion v. ABC. In this article, she comments on already decided and pending court cases that may expand the danger zones for investigative journalists. Davidson teaches communications law at the University of Missouri and represents news organizations in court.

Hidden recording devices and invasion of privacy: "Dr. Plumber"

Using hidden microphones or videotape cameras can result in invasion of privacy charges for intrusion into a person's seclusion.[1]

A classic case, *Dietemann v. Time, Inc.*,[2] occurred in 1971 in California, where a plumber was unlawfully practicing medicine. Reporters from *Life* magazine were cooperating with the Los Angeles district attorney and the State Board of Health. A female and a male reporter visited the suspect's home. They told him they were friends of a friend of his, so he let them inside. Her complaint was a lump in her breast. The plumber examined her and told her that her problem was caused by some spoiled butter she had eaten almost 12 years before. She transmitted his "diagnosis" through a device in her purse, while another reporter, a man from the district attorney's office, and an investigator for the state waited outside in a car with a receiver and tape recorder. Her companion also surreptitiously took pictures while inside the plumber's home.

The plumber was convicted of practicing medicine without a license. Nevertheless, he won the invasion of privacy suit he brought. He sued *Life* magazine for its article, which included pictures and carried the headline "Crackdown on Quackery." He only got $1,000. Although that's not much principal with an "al," he won on principle with an "le."

The judge in the case said something every journalist should remember: The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.[3]

Hidden cameras, wiretap law and wrongful death: The not-too-psychic psychics

The federal wiretap law says anyone who "intentionally intercepts ... any wire, oral or electronic communication" has violated the law and can be fined or imprisoned, or both.[4] The wiretap law has been interpreted broadly. Using hidden microphones or hidden videotape cameras could result in charges of violating federal or state wiretap law.[5]

ABC wriggled out of the $1.2 million noose a California jury threw around the necks of reporters trying to catch psychics in the act of—well, not psyching. For a *PrimeTime Live* segment entitled "Hello, Telepsychic," an ABC reporter filmed two psychics at their workplace, answering calls to a 900 number. The two were saying to each other they didn't believe their own hotline advice. (If they were psychic, why didn't they know they were being taped?)

In 1994, a California jury awarded the two psychics, Mark Sanders and Frank Kersis, $1.2 million for invasion of privacy.[6] In 1997, a California appeals court overturned that award.[7] The court said there was no reasonable expectation of privacy in the busy workplace area, and thus no invasion of privacy.

But this situation spawned another suit. The parents of Kersis, who died after the award, sued ABC for wrongful death. Kersis had been a recovering alcoholic. After the airing of the *PrimeTime Live* segment, Kersis fell off the wagon. The Ninth Circuit Court of Appeals said the suit should continue.[8] The court cited California precedent saying that "outrageous conduct that causes a suicide can be the cause of a wrongful death claim."

A kick in the butt and a buck

An Alexandria, Va., jury found *PrimeTime Live* guilty of defamation of a repair shop in another hidden-camera story in 1993. While the jury warned ABC News to "take another look at 'PrimeTime's' goals and objectives," it only awarded the plaintiff $1.[9]

A monolithic defense shows cracks

Besides intrusion into seclusion, another form of invasion of privacy is revelation of private facts.

Are we being force-fed responsibility or are we unfairly accused?

"Newsworthiness" has given journalists a broad defense against this form of invasion. The legal rubric used to be, basically: Journalists can cover it if it's "newsworthy," and it's "newsworthy" if journalists cover it. So journalists were on a roll, with the circular reasoning of the law protecting them.

The Restatement (Second) of Torts, a work produced by scholars belonging to the American Law Institute and highly influential with courts,[10] fueled the petitio principii.[11] But the Restatement also put limits on the "newsworthiness" defense in order to protect personal privacy. The following is the *Restatement's* test:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[12] The "catch," of course, is what is "not of legitimate concern to the public."[13]

This is the second part in a series on recent court decisions affecting journalists. The first part was published in the November - December issue of *The IRE Journal*.

Does an accident victim have a "good side" for TV cameras? Anderson finds no judicial relief

In 1985, the Supreme Court of Oregon, in *Anderson v. Fisher Broadcasting Company*,[14] virtually rejected the view that a plaintiff could overcome a "newsworthiness" defense. A television station used footage of Richard Anderson, an automobile accident victim bleeding on the pavement as he received emergency medical treatment. The footage was not used in a newscast, but did air in an advertisement for an upcoming special report on dispatching emergency help. Anderson sued for invasion of privacy, arguing the pictures were not newsworthy and that their use was "offensive to a reasonable person." The Oregon court said views of "offensiveness" differ too much for a community standard to exist. The court then used a variety of arguments to reject the claim of invasion of privacy, including a non-inclusiveness argument: "If the tort [of invasion of privacy] is designed to protect a plaintiff's interest in nondisclosure only against widespread publicity , . . it singles out the print, film, and broadcast media for legal restraints that will not be applied to gossipmongers in neighborhood taverns or card parties, to letter writers or telephone tattlers."[15] In ruling against Anderson, the court also cited a survey of the law written in 1979 which said that since 1967, no plaintiff in any reported case had won a suit for a "truthful disclosure" by the press, and thus the "very existence" of invasion of privacy as a cause of action "is in doubt."[16]

Beware of shots inside helicopters

The Supreme Court of California in June 1998 left no doubt that it believed in invasion of privacy as a cause of action. In *Shulman v. Group W Productions*,[17] the court whittled away at reporters' freedom to videotape the aftermath of an automobile accident. While reporters can claim protection when photographing or videotaping accident victims on the road, the shield evaporates inside the helicopter transporting the victim.

California's high court opened its decision in a manner designed to cause defendant journalists discomfort: "More than 100 years ago, Louis Brandeis and Samuel Warren complained that the press, armed with the then-recent invention of 'instantaneous photographs' and under the influence of new 'business methods,' was 'overstepping in every direction the obvious bounds of propriety and of decency.'" In this case, the overstepping occurred when a journalist with a video camera took footage of car-accident victim Ruth Shulman inside a rescue helicopter. Shulman, left a quadrapalegic, learned about the video while in the hospital—when her son called her to tell her, "Channel 4 is showing our accident now." She had not consented to this broadcast of "On Scene: Emergency Response."

The Supreme Court of California considered the accident, the emergency response to it and the dangers to which it exposed emergency medical personnel to be highly newsworthy. Further, the accident occurred on Interstate 10, not private property. But the court concluded, "Although the attendance of reporters and photographers at the scene of an accident is to be expected, we are aware of no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient's consent." The court drew a line—and said the reporter had crossed it.

An old hospital case told of danger

The Shulman case is in ways an extension of the privacy doctrine contained in an old Missouri case. In 1942 in *Barber v. Time*,[18] the court found an invasion of privacy. While she was protesting to a reporter that she wanted no publicity, a photographer took a picture of Dorothy Barber at the time she was in a Kansas City hospital. She suffered from a disease that made her body inefficient in processing food. The story, published in *Time* magazine under the title "Starving Glutton," said her doctor "found that although she had eaten enough in the past year to feed a family of ten, she had lost 25 pounds." The caption under her picture said, "Insatiable-Eater Barber; She Eats for Ten." This appeared on *Time's* "Medicine" page, which gave medical news in lay terminology. But, the Court pointed out, publishing her name and address was unnecessary.

The court's comment draws a distinction between the newsworthiness of the issue and the lack of newsworthiness of the individual.

In Vitro fertilization: The practice is newsworthy, not the patient

In 1991 a Missouri court of appeals in *Y.G. v. Jewish Hospital* relied heavily on the reasoning of the *Restatement (Second) of Torts* when it ruled a married couple had the right to sue for invasion of privacy. A St. Louis television station broadcast footage of the wife, who was pregnant with triplets as a result of in vitro fertilization.[19] The parents attended a party thrown by a hospital for successful couples. The mother refused interviews while there and claimed she received assurances that she would receive no publicity. The court found that although the subject was newsworthy, the fact that this particular couple had conceived through in vitro fertilization was "a private matter which was not newsworthy." The couple belonged to a church that did not endorse in vitro fertilization, so were "chastised" by the church.

"Outrage" and a little girl's skull

In 1991, plaintiffs in Florida lost their invasion of privacy claim, but won the right to sue for the tort of "outrage." The parents of a six-year-old murder victim, Regina Mae, sued when an Orlando television station ran footage of their daughter's skull.[20] In 1985, Regina was abducted in Orlando. Two years later, a construction worker found her skull and sun dress. On the day of Regina's memorial service, an enterprising reporter for Orlando's Channel 2 went to a police station and videotaped the police chief removing the skull from a box. The news producer and anchor did not want to run the videotape, but the news director said, "F— it! We are going to run it." No one at the station had yet seen the videotape.

That evening, the Armstrong family, who had not been warned about the videotape of the skull, gathered around their TV. The emotional impact was devastating. Regina Mae's 12-year-old sister, Christina, fled from the room screaming "that cannot be my sister."

The court called the close-up "gruesome and macabre." Ruling the family could sue for outrage, the court explained: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

Instead of appealing, Channel 2 settled out of court, paying the Armstrongs somewhere between $175,000 and $250,000.[21]

Negligence and the Hyde case: Enabling a stalker

The key to liability in negligence cases is "foreseeability." If an individual engages in conduct that could foreseeably create harm, and if that harm occurs, the individual may be liable for negligence. Foreseeability refers to what a "reasonably prudent person" would "reasonably" foresee under similar circumstances.[22] "Ordinary care" is the standard one must meet to avoid liability.[23]

In 1983, the United States Supreme Court let stand a Missouri case, *Hyde v. City of Columbia*,[24] which allowed a negligence suit brought by Sandra Hyde against a newspaper, *The Columbia Daily Tribune*.

As Hyde walked down the main street of Columbia after midnight in August 1980, a man pulled alongside her. He opened his car door, leveled a sawed-off shotgun at her and ordered her to get in. She did. He then demanded, "You will do what I want you to do or I will blow your brains out." As he drove around a corner, Hyde jumped out of the car and ran to safety in a nearby disco.

Hyde reported the incident to the police. Of course, she gave her name and address—a couple of facts her assailant didn't have until a *Tribune* reporter got a copy of the report from the police and the newspaper published her name and address the next day. Then, according to Hyde, the man started terrorizing her.

Hyde brought suit, alleging negligence by the city in disclosing her name and address and negligence by the newspaper in printing them. The defendants countered that the information disclosed was a public record under Missouri's Sunshine Law. The trial court ruled in favor of the defendants, accepting the public-record defense. However, the Court of Appeals for the Western District of Missouri ruled that Hyde did indeed have valid grounds to sue for negligence.

The court of appeals concluded, "[I]t was reasonably foreseeable that the publication of the name and address of the victim, while the assailant was still at large, was a temptation to [the assailant] to inflict an intentional harm upon the victim — a foreseeable risk the . . . defendants had a duty to prevent." To avoid what the court called an "absurd" conclusion, it held that "the name and address of a victim of crime who can identify an assailant not yet in custody is not a public record under the Sunshine Law."[25]

The court draws a distinction between the newsworthiness of an issue and the lack of newsworthiness of an individual.

Confronting an assailant — and the L.A. Times

A California appeals court cited Hyde when it let a woman sue the *Los Angeles Times* after the paper reported her name in connection with her discov-

ery of the body of her roommate who had been beaten, raped and strangled. The reporter, a summer intern, had gotten the name through the coroner's office. Again, the court did not accept the public-record defense.[26]

Pushing the scope of negligence

In May 1993, a Rhode Island woman came home to find her mentally ill husband, Bruce Clift, threatening suicide. He had turned on a gas jet and then started firing guns. Police surrounded the home, and the wife left. While an experienced police officer attempted to dissuade Clift from killing himself, reporters gathered outside the home. Then Clift received a phone call from a broadcast reporter who had not asked police if she could call. She taped an interview with Clift and told him she would broadcast it. At 6:04, the reporter appeared on a newscast live from the scene. She told viewers, "It's obvious we're dealing with a very troubled man. What you're about to hear is a man who is angry at the world and could be on the verge of suicide. It's an interview you'll see only on Channel 12."[27] At 6:07, Clift killed himself. Police rushed in and found his body. His television sets were playing Channel 12.[28]

Clift's wife sued the television station, claiming her husband's death was the result of the reporter's negligence. The trial judge granted the station's motion to dismiss, but the Supreme Court of Rhode Island reinstated the suit. Relying on a medical doctor's affidavit, the court decided, "There were facts ...that suggest the decedent's suicide resulted from an uncontrollable impulse that was brought about by a delirium or insanity caused by (the reporter's) negligence."

The Supreme Court has heard a couple of cases that let journalists know not only that it expects ethical behavior from them but also that it is willing to impose ethical standards on them as a matter of law.

The Supreme Court's view: Tough love?

The Supreme Court merely let stand the *Hyde* case on negligence for printing the name and address of a victim while her assailant was still at large. However, the Court has heard a couple of cases that let journalists know not only that it expects ethical behavior from them but also that it is willing to impose ethical standards on them as a matter of law.

Keeping promises: Even journalists have to do It

In *Cohen v. Cowles Media Co.*[29], the Supreme Court says to journalists that promise keeping is important. This case started during a gubernatorial race in Minnesota when Dan Cohen, working with the Republican candidate, offered to give the *St. Paul Pioneer Press* and the *Minneapolis Star and Tribune* information on the Democratic candidate for lieutenant governor in exchange for a promise of confidentiality. Reporters made the promise, and Cohen turned over the information—public court records showing that Marlene Johnson had been convicted of theft because she left a store without paying for sewing materials worth $6 at a time when she was "emotionally distraught" over her father's death. Later, the conviction was vacated.

Editors at the papers apparently thought the real story was that someone connected with the Republican campaign would release such information. The papers published Cohen's name. The Republican gubernatorial candidate then disavowed any involvement with the incident and fired Cohen. Cohen sued, and the Supreme Court upheld his right under the theory of "promissory estoppel" for breach of the promise made to him.

The Court said, "[G]enerally 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."

He said, she said: Protecting the sanctity of quotation marks

The Court has also fought to protect the sanctity of quotation marks, as *Masson v. New Yorker*[30] demonstrates.

Jeffrey Masson, a psychoanalyst, became disillusioned with Freudian psychology when serving as projects director of the Sigmund Freud Archives in London. Janet Malcolm wanted to write about the situation.[31] Malcolm taped more than 40 hours of interviews with Masson. But she said she did not record all of their conversations, especially conversations that occurred when they were walking together or traveling in her car. She said she had taken notes that were lost.

Malcolm wrote about Masson for *The New Yorker* in 1983. Malcolm claimed that Masson said, among other things, that his superiors at the Sigmund Freud Archives considered him "an intellectual gigolo—you get your pleasure from him, but you don't take him out in public." Masson maintained he never said that. A tape recording shows that he said, "I was, in a sense, much too junior within the hierarchy of analysis for these important training analysts to be caught dead with me." Masson claimed the "intellectual gigolo" quotations and others were fabricated. He sued for libel. Masson conceded that he was a public figure. (Regardless of his Id, he had a big Ego.)

In 1989, the Ninth Circuit Court of Appeals ruled in favor of a summary judgment for the defendants.[32] The court said an author may, "under certain circumstances, fictionalize quotations to some extent." Masson, as a public figure, had to prove "actual malice"—knowledge of falsity or reckless disregard.

But in 1991, the Supreme Court overturned the

Notes

To save space in the *IRE Journal* all footnotes (1 through 35) are available on the IRE web site at http://www.ire.org.

decision. While the Court was trying to protect the sanctity of quotation marks, the Court also made clear that not every deliberate change in a quotation should lead to a lawsuit. A material change in meaning is the issue. A material change, of course, could come about in many ways—such as editing videotape to leave the wrong impression.

The Supreme Court remanded the case, and eventually Malcolm won.[33]

Conclusion: Avoiding a rush to judgment is good

When the court system is slapping down journalists for bad behavior, how should other journalists respond? The default mode seems to be a knee-jerk reaction to rush to the defense of the journalists. But the urge needs to be tempered—by facts, by reason, by ethics. Maybe the journalist deserves our support, maybe not.

It would be refreshing if, instead of rushing to the defense of anyone they sense to be a part of the journalistic pack, more journalists would welcome attempts at accountability and even file a few amici briefs on the side of plaintiffs. This would require journalists who are unafraid of the much-hyped "chilling effect" of anything that smacks of restraints of journalistic excess.[34]

Granted, the *Food Lion* case is scary; for one thing, the "breach of the duty of loyalty" expands media liability in a creative manner. But also scary is the way so many journalists rushed to ABC's defense. How many did so without seeing ABC's outtakes?[35]

The message of *Food Lion* is not particularly palatable for some journalists concerned that courts are eroding First Amendment freedoms. But freedom entails responsibility. A heavy helping of responsibility is something conscientious journalists have always had on their plates. Courts have started to force-feed responsibility to journalists who are less conscientious. If the less responsible journalists are caught by judicial demands for more media accountability, then the field of journalism may well improve.

Books: Continued from page 10

The book's endnotes make discovery of fraud seem simple. A typical endnote reads "Military record of Brian Manion Dennehy, National Personnel Records Center, FOIA request by B.G. Burkett, May 17, 1991." But the ferreting out of such fraud is not simple, making the professional offenses of other journalists slightly more understandable. A request to the records center often is met with resistance or delays by information bureaucrats. Burkett filed a lawsuit against the U.S. Navy over records of an officer who not only inserted phony documents into his file, but also obtained a fraudulent commission. That lawsuit is pending.

Sometimes the problems derive from the original information. More than once, Burkett has checked military records for one name only to discover the journalist who originally brought the name to public attention had misspelled it. In other instances, Burkett discovered the subject had changed his name.

Even when the release of records is thorough and swift, the detective work has often just begun. The records might explain the who, what, where and when. They rarely explain the why or how.

Burkett and Whitley have a more cosmic reason for exposing the huge numbers of phony heroes than the thrill of outing individuals. The authors explain convincingly that the phony heroism claims cause societal harm.

First, the claims create a culture of mistrust. Second, the phony heroes sometimes trade on their alleged exploits to collect taxpayer dollars for military-related disabilities supposedly linked to their combat experiences. Determinations of physical or mental disability from exposure to the chemical Agent Orange or from residual effects of battle called Post-Traumatic Stress Disorder have meant millions of unwarranted dollars in the pockets of thousands of veterans.

Frequently the taxpayer-supported treatment occurs at Veterans Administration hospitals. Burkett and Whitley explain how phonies enter the VA system without arousing suspicion.

The first type of phony receiving treatment did enter the military, but lied about his record. As Burkett and Whitley say, "Once inside the hospital, the veteran can inform the clerks and doctors that he was a POW. That goes in the record. He can tell them he was a Green Beret. That goes in the record. He can tell them he committed atrocities in Vietnam and is haunted by the memories of killing children. That goes in the record. But the clerks usually do not request the patient's military record from the NPRC...to allow physicians to verify those claims."

The second type of phony receiving VA hospital treatment never entered the military. They begin their quest for unwarranted free medical care by going to a local Veterans Center with the military discharge form DD-214. Although such forms are easily forged, many Veterans Center employees accept them without question. At that juncture, the imposters receive a C-Card that designates them as members of the VA family. Usually, no further checking is done at the Veterans Center or the VA Hospital.

Burkett began examining the rhetoric surrounding Vietnam veterans. It did not fit the reality of the military folks he knew from the war. Burkett realized that the phony veterans had captured the mass media, so he mounted his campaign one case at a time to demonstrate to journalists that they had been fooled.

Burkett's investigations even took him into the realm of computer-assisted reporting as he tried to figure out which Texas names should be engraved on a Vietnam Killed-in-Action memorial.

Nobody at the Pentagon seemed to have the list of Texans killed in action during Vietnam. Burkett's inquiries finally led him to the electronics branch of the National Archives, which had a list of every known Vietnam casualty on a mainframe computer tape. A clerk told Burkett that nobody had ever asked for the tape. She told him to file an FOIA request, something Burkett had never done.

Unlike many journalists, Burkett managed to receive a positive response within weeks. Soon after, a "round tape the size of a dinner plate" arrived by mail. Burkett took it to a fellow Vietnam veteran working in the computer mainframe room of a local corporation. The employee got permission to run the tape during unused mainframe time.

After the computer run, Burkett was amazed at the "astonishing amount of information. The archives had deleted a few items, such as next-of-kin, but many other facts—date of birth, date of death, age, marital status, race, service, hometown—were listed for every one of those killed or missing in action in Vietnam, a sample of over 58,000." It was a revelation any journalist could appreciate.