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## Tort Vision for the New Millennium: Strengthening News Industry Standards as a Defense Tool in Law Suits over Newsgathering Techniques Essay

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# TORT VISION FOR THE NEW MILLENNIUM: STRENGTHENING NEWS INDUSTRY STANDARDS AS A DEFENSE TOOL IN LAW SUITS OVER NEWSGATHERING TECHNIQUES

Michael W. Richards\*

## INTRODUCTION

“A Generation of Vipers,” proclaimed the cover story in *The Columbia Journalism Review*, as the nation’s most esteemed voice of media criticism evaluated the journalistic landscape of the mid-1990s.<sup>1</sup> The healthy skepticism that prompts journalism professors to instruct: “if your mother says she loves you, get a second source,” has been replaced by wholesale cynicism, suggests this critique. “It’s worth noting that, in several dozen interviews, no journalist reported becoming less cynical over a lifetime of reporting.”<sup>2</sup>

If cynicism has infected contemporary journalists, then it appears the public has responded with cynicism of its own—apparently viewing the news media, as an institution, with a more jaundiced eye. Survey data from a leading media research think tank, The Pew Center for the People & The Press, in 1997, found the

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1. Paul Starobin, *A Generation of Vipers; Journalists and the New Cynicism*, COLUM. JOURNALISM. REV., Mar.-Apr. 1995, at 25.

2. *Id.*

American public “more critical of press practices, less enthusiastic about the news product and less appreciative of the watchdog role played by the news media than it was a dozen years ago.”<sup>3</sup> Empirically, The Pew Center survey found that in 1985, a solid majority polled believes news organizations were accurate. A dozen years later, a similar majority believed they did not “get the facts straight.”<sup>4</sup> An even more solid majority believed the news media unnecessarily invaded people’s lives – even when it was not in the public interest to do so.<sup>5</sup> The Supreme Court’s majority has paid homage to “the press as a watchdog of government activity,”<sup>6</sup> insofar as “the basic assumption of our political system that the press will often serve as an important restraint on government”<sup>7</sup> and a “check on government abuse.”<sup>8</sup> But three decades since that judicial tribute, these survey data indicate that the public now sees the news media less as watchdog and, perhaps, more as attack dog.<sup>9</sup>

As the news media, institutionally, has no clearly enumerated constitutional role beyond the generally stated principle that “Congress shall make no law . . . abridging the freedom of speech, or of the press,”<sup>10</sup> journalists must depend on a combination of judicial interpretation, statutory immunities, and jury decisions to maintain their ability to gather editorial material as freely as possible. While

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3. Pew Research Center for The People & The Press, 1997 Media Report, *Unfair, Inaccurate and Pushy* (visited Dec. 29, 1998) <<http://www.people-press.org/97/medrpt.htm>>.

4. *Id.* The polls from 1985 and 1997 sought data on this issue through two similar questions: Do news organizations get the facts straight and are stories/reports often inaccurate. The results were consistent, when allowing for the margin of error: “Facts Straight” – 55 percent said yes in 1985, 37 percent said yes in 1997; “Inaccurate” – 34 percent said yes in 1985, 56 percent said yes in 1997. *Id.*

5. Newspapers were viewed as slightly less intrusive, with 54 percent responding that newspapers unnecessarily invade privacy and 64 percent complaining that television programs did so. *See id.*

6. *Leathers, Commissioner of Revenues of Arkansas v. Medlock*, 499 U.S. 439, 447 (1991).

7. *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983).

8. *Leathers*, 499 U.S. at 447.

9. Another 1997 Pew Center poll, The National Social Trust Survey, found that 54 percent of Americans believe the news media get in the way of solving society’s problems, while only 36 percent believe journalists help. Pew Research Center for The People & The Press, *supra* note 3.

10. U.S. CONST. amend. I.

the law of defamation is generally settled by *New York Times v. Sullivan* and its progeny,<sup>11</sup> the United States Supreme Court has never extended First Amendment press freedoms and protection to the gathering of editorial information. In fact, *Cohen v. Cowles Media Co.*,<sup>12</sup> suggests that the First Amendment does not protect the right to gather news. Newsgathering is governed by the same statutory and tort law principles that apply to the public generally – as long as these applications do no more than incidentally interfere with the ability to disseminate editorial material.<sup>13</sup> The Supreme Court has not precisely defined “incidental” – leaving the definition to evolve through the common law.

Given the difficulties of pursuing defamation cases as a result of *New York Times v. Sullivan* and its progeny, plaintiffs alleging media mistreatment are increasingly bypassing slander and libel causes of action and, instead, entering *Cohen’s* open door to pursue newsgathering claims. The outcomes in these cases demonstrate that “incidental” is in the eye of the beholder: the increasingly jaundiced eye of public opinion. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,<sup>14</sup> a North Carolina jury awarded just \$1,402 dollars in actual damages but \$5.5 million in punitive damages for ABC News’s use of hidden cameras to expose a supermarket chain’s unsanitary practices. Although the damage award was later reduced to just two dollars on appeal,<sup>15</sup> the case remains illustrative: the truth of ABC’s report was not at issue, only the means used to gather information. In *Food Lion*, the entire jury award

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11. *New York Times v. Sullivan*, 376 U.S. 254 (1964). *Sullivan* established the standard that public plaintiffs may only prevail in defamation cases upon proving a journalist or news organization acted with “actual malice” and knowledge of falsity or “reckless disregard” for the truth. For private plaintiffs, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), building on *Sullivan*, excluded liability for presumed or punitive damages to those instances in which a plaintiff demonstrates “knowledge of falsity” or “reckless disregard” for the truth – although liability for actual harm remains. Such damages are often the most painful in defamation cases.

12. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

13. See *id.* at 669. See also *Branzburg v. Hayes*, 408 U.S. 665 (1972), in which the Supreme Court explicitly declined to create a constitutionally-based privilege for reporters to protect confidential sources from exposure during a legal process – in this case, grand jury testimony.

14. 951 F.Supp. 1224 (M.D.N.C. 1996).

15. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

hinged on misrepresentations made by an ABC News journalist when applying for a supermarket job needed for the undercover access necessary to visually document Food Lion's sanitary practices. Similar stealth led a jury in Maine to hold NBC News liable for \$525,000 in damages after it falsely promised a trucker and his employer that, if given access during a transcontinental journey, the network would air a piece with a positive spin. After the trucker violated federal safety regulations, NBC aired the video documentation. Although the information was wholly true, the jury focussed on the initial breach of promise to hold NBC liable.<sup>16</sup> Even when news organizations successfully defeat law suits attacking newsgathering practices as violations of laws of general applicability, judges sometimes chide plaintiffs' attorneys for failing to raise all possible claims such as fraud or trespass<sup>17</sup> or breach of contract,<sup>18</sup> that might have succeeded. With judicial interpretation more likely to assign newsgathering to an analytic box at the edges of First Amendment protection, juries can be expected to continue expressing the general public's well-documented, growing distrust of American journalism. As a post-trial interview with a *Food Lion* juror, 64-year-old Marie Bozeman, illustrates:

She is particularly concerned about the invasiveness of the hidden camera and its potential for exaggerating or misrepresenting events. She painted a scenario in which an employee unburdens himself about his employer to a fellow "employee" who is secretly videotaping. "The next day they may feel different about their company, but it's on TV! Nobody should be made to share their innermost thoughts unless they want to. Because of such tactics, says Bozeman, "I don't trust them to do an honest job – not all the way."<sup>19</sup>

'People don't see journalism as public service anymore,'

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16. See *Veilleux v. National Broadcasting Co.*, 8 F.Supp.2d 23 (D.Me. 1998).

17. See *Sanders v. American Broadcasting Companies, Inc.*, 52 Cal.App. 4th 543 (1997).

18. See *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir. 1994).

19. Russ Baker, *Damning Undercover Tactics as "Fraud": Can Reporters Lie About Who They Are?*, COLUM. JOURNALISM REV., Mar.-Apr. 1997, at 28.

said former Washington Post ombudsman Joann Byrd. 'They believe . . . journalists are engaged in self-service and either getting ratings, selling newspapers or making their own careers. That leads people to believe that our ideas about 'detachment' or 'public service' are so much hogwash.'<sup>20</sup>

The development of large-scale public mistrust toward the institution of journalism, once viewed as a kind of "fourth estate" or proxy for the people, demonstrates that the news media and its attorneys face new challenges. Juries, drawn from a public grown more hostile, threaten enormous awards even when the transgression or tort may be minimal -- in *Food Lion*. The plaintiffs' bar has increasingly taken notice of this trend as "challenges to newsgathering techniques become new arena for attacks on investigative work."<sup>21</sup> Investigative reporting, even by such well-endowed news organization as ABC News, could be chilled by a series of multi-million dollar *Food Lion*-like jury awards. Indeed, in 1995, CBS News refrained from broadcasting an interview with a tobacco industry whistle-blower, fearing that it would run afoul -- and face liability -- for a violation of the whistle blower's employment-related non-disclosure agreement.<sup>22</sup>

The news industry has a business problem in need of attention on several levels. Clearly, American journalism must re-establish institutional credibility. However, changes in attitude often require long time frames -- while ongoing newsgathering efforts can result in lawsuits at any moment. Thus, while the industry grapples with its longer-term public image problems, it should act decisively in developing an immediate legal strategy to defeat the increasingly frequent number of lawsuits arising from newsgathering activities.

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20. Andrew J. Glass, *Unpopular Press*, GREENSBORO NEWS & RECORD, Oct. 15, 1995, at F1.

21. Scott Andron, *Walking a Tightrope; Freedom of Information 1998 Special Report*, THE QUILL, Sept. 1998, at 4.

22. See James C. Goodale, *'60 Minutes' v. CBS and Vice Versa*, N.Y.L.J., Dec. 1, 1995, at 3; see also Lawrence K. Grossman, *CBS, 60 Minutes, and the Unseen Interview*, COLUM. JOURNALISM REV., Jan. 1996, at 5; see also Richard P. Cunningham, *The Smoking Gun May Belong to CBS, Not Tobacco Firm: Events at 60 Minutes Leave Disillusionment in Their Wake*, THE QUILL, Jan. 11, 1996, at 18.

This essay proposes that the news industry should develop a tort-law strategy centered on establishing measurable industry newsgathering standards. Much as adherence to industry standards can demonstrate reasonable care in more typical personal injury or property damages tort cases, so too can an industry-wide effort at standard-setting serve, in the shadow of *Cohen*, to support the core value of press freedom: that the people shall know.<sup>23</sup> In many instances, the only way the people may know is if the news media has adequate latitude to gather information without the chilling effects of liability hovering like an Alberta Clipper in February.

### I. CASE LAW

The United States Supreme Court has yet to delineate the full scope of protection, if any, the First Amendment provides for newsgathering. However, the majority opinion in *Cohen v. Cowles Media Co.*<sup>24</sup> has opened the door to a growing number of successful lawsuits against news organizations for factually correct reports in which liability arose only from the means used to gather the underlying truthful information. *Cohen* instructs that “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”<sup>25</sup> Justice White’s majority opinion cited a series of cases illustrating how neutral laws of general applicability apply to news organizations:

[T]he truthful information sought to be published must have been lawfully acquired. The press may not with impunity break and enter an office or dwelling to gather news. Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source. The press, like others interested in publishing, may not publish copy-

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23. “That the people shall know” appeared on the former logo of the Columbia University Graduate School of Journalism.

24. 501 U.S. 663, 669 (1991).

25. *Id.* This represented the elevation of dictum in a decision, *Branzburg v. Hayes*, 408 U.S. 665, 691-92 (1972).

righted material without obeying the copyright laws. Similarly, the media must obey the National Labor Relations Act, and the Fair Labor Standards Act, may not restrain trade in violation of the antitrust laws, and must pay non-discriminatory taxes. It is, therefore, beyond dispute that "the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.<sup>26</sup>

As *Cohen* speaks broadly about laws of general applicability, it has opened the door to a wide panoply of suits over newsgathering issues. This tends to underscore lower court decisions that "have generally rejected the idea of extending either First Amendment protection or common law privilege to newsgathering torts."<sup>27</sup> Three cases presented herein illustrate the scope of the issue. The first case describes an instance in which news media defendants prevailed; however, judicial opinions suggest that more careful drafting by plaintiff's lawyers might have led to a different outcome under the *Cohen* rubric.<sup>28</sup> The last two cases discussed illustrate how *Cohen* can lead to liability for truthful significant investigative reporting efforts on issues of clear public importance.<sup>29</sup>

*Desnick v. American Broadcasting Cos.*,<sup>30</sup> upheld a trial court decision holding ABC not liable for use of a hidden camera in an investigative report on a major chain of ophthalmology centers. The report suggested that the eye surgeons were performing needless

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26. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991) (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33) (other citations omitted).

27. Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U.L. REV. 507, 513 (1998).

28. See generally, *Desnick v. American Broadcasting Cos.*, 44 F.3d 1345 (7th Cir. 1994).

29. See generally, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F.Supp. 1224 (M.D.N.C. 1996); see also *Veilleux v. National Broadcasting Co.*, 8 F.Supp.2d 23 (D.Me. 1998).

30. 44 F.3d 1345 (7th Cir. 1994)



cataract surgery on Medicare patients. The appeals court victory, however, seemed to also damn the network with faint praise:

Today's "tabloid" style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market, constitutes—although it is often shrill, one-sided, and offensive, and sometimes defamatory—an important part of that market. . . . If the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it (for the media have no general immunity from tort or contract liability) then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly.<sup>31</sup>

In this Seventh Circuit review, Judge Richard Posner, found no violation of laws of general applicability – at least in the causes of action still claimed by the plaintiffs at trial before the case went up on appeal.<sup>32</sup> He did suggest, however, that additional causes of action might have been successful had the plaintiffs raised them – notably breach of contract.<sup>33</sup> Judge Posner noted that ABC had promised Desnick to "present a 'fair and balanced' picture of the Center's operations and would not use 'ambush' interviews or undercover surveillance."<sup>34</sup> In exchange, the network received both a copy of Desnick's promotional video tape and permission to shoot footage of actual cataract surgery in one of Desnick's ophthalmology centers. Judge Posner observed that while investigative journalists often "promise to wear kid gloves, they break their promise(s)," as ABC did, "to expose any bad practices that the investigative team discovered."<sup>35</sup> "Since the promises were given in exchange for Desnick's permission to do things calculated to enhance the value of the broadcast segment, they were, one might have thought, supported by consideration and thus a basis for a

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31. *Id.* at 1355 (citations omitted).

32. These included trespass, invasion of privacy, fraud and illegal electronic surveillance. *Id.* at 1351.

33. *See id.* at 1354 n.15.

34. *Id.* at 1351.

35. *Id.* at 1354.

breach of contract suit. That we need not decide”<sup>36</sup>

Judge Posner described the methods by which ABC obtained elements that make the story more compelling as economically “value-enhancing.”<sup>37</sup> He appears to suggest that economic motives rather than the high-minded ideals of public service guided ABC’s newsgathering decisions. While the news media’s watchdog role has often bolstered its claims for First Amendment protection,<sup>38</sup> these words suggest that when other motives predominate, the level of protection could be limited without violating the First Amendment. Thus, if the story can be told without resort to tort-creating newsgathering stealth, the law will only offer limited constitutional protection. Efforts to make a story more compelling that go beyond gathering the basic facts would not invoke the same level of constitutional protection. This analysis suggests that although the audience may be smaller, the information would be available nonetheless. Enforcement of other laws of general applicability would merely create “incidental effects on. . . [the news media’s] ability to gather and report the news.”<sup>39</sup>

Judge Posner’s opinion did note, however, the traditional protection of First Amendment free press rights under *Sullivan* and its progeny, affirming that journalists are “entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And [are] entitled to them regardless of the name of the tort.”<sup>40</sup> While the analysis went no further, and the decision did not rely on a First Amendment theory, such judicial observation could help frame a future First Amendment approach to suits over newsgathering filed despite the truthfulness of the underlying report. For now, however, *Cohen* is giving plaintiff’s attorneys increasingly wide berth to avoid the difficult path of bringing a defamation suit in the face of strong First Amendment protections. It is simply easier, since *Cohen*, to bring suit over newsgathering techniques than it is to bring suit over the content of a news report.

This ease is evident in the District Court opinion in *Food Lion*,

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36. *Id.* at 1354 n.15.

37. *Id.*

38. *See supra* notes 6-8 and accompanying text.

39. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

40. *Desnick*, 44 F.3d at 1355.

*Inc. v. Capital Cities/ABC, Inc.*<sup>41</sup> The court found no grounds—First Amendment or otherwise—to grant ABC News summary judgment to turn back a lawsuit by the nation’s fastest growing supermarket chain arising from a network undercover report on unsafe food handling practices. Judge N. Carlton Tilley sent the matter to a jury to decide if ABC and its investigative reporting staff were liable in tort. The key charges included misrepresentation, breach of loyalty, and trespass after an ABC News undercover reporter gained employment at a Food Lion Store to gather behind-the-scenes videotape with a hidden camera. “It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”<sup>42</sup> “The facts of this case, taken in the light most favorable to Plaintiff, is that there was fraud involved.”<sup>43</sup>

The jury, including members who seemed to reflect the public’s growing mistrust of journalism,<sup>44</sup> found ABC and several members of its editorial staff liable for just \$1,402 in actual damages, but 5.5 million dollars in punitive damages. Actual damages included \$1,400 for the cost of hiring a worker to replace the undercover ABC News staffer who left the supermarket’s employ after documenting such questionable food handling practices as re-labeling outdated fish and bleaching clean partially spoiled hams. The jury also awarded Food Lion two dollars for trespass. The truth of ABC’s report was not at issue—only the means used to gather information. Although the award was reduced to two dollars on appeal, legal costs in such cases are so great that they can hardly be written off as the cost of doing business.<sup>45</sup>

Similarly, in *Veilleux v. National Broadcasting Co.*,<sup>46</sup> the District Court of Maine refused to grant NBC summary judgment when a driver and his trucking company sued on a claim that the

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41. 951 F.Supp. 1224 (M.D.N.C. 1996).

42. *Id.* at 1232 n.8.

43. *Id.* at 1232.

44. *See supra* Introduction.

45. *See* James C. Goodale, *Shooting the Messenger Isn’t So Easy*, N.Y.L.J., Dec. 3, 1999, at 3.

46. 8 F.Supp.2d 23 (D.Me. 1998), *rev’d in part and remanded*, 206 F.3d 92 (1st Cir. 2000).

network lied about the nature of a story to induce them to allow the network on board for a cross-country run. In a segment broadcast on the magazine program, *Dateline*, the trucker was depicted as falsifying safety records and admitting that his recent mandatory drug test showed amphetamine and marijuana use. The plaintiffs claimed they were misled because NBC promised to do a positive story about truckers. NBC claimed it only agreed to do a fair story in a segment on dangerous practices affecting the nation's highways. The plaintiffs pursued their claim, in part, under Maine's fraudulent misrepresentation law. "It simply subjects media representatives to liability for pecuniary harm where they fail to use reasonable care in conveying information for the guidance of others in their business transactions and where one justifiably relies on the negligently conveyed information."<sup>47</sup>

In allowing *Veilleux* to proceed for jury trial, Judge Morton Brody ruled:

Defendants' negligent use of hollow promises to induce their cooperation and Defendants' failure to apprise them of the true nature of the *Dateline* report after it became clear that it would not be positive. The Court is persuaded that a duty of reasonable care could arise from Defendants' alleged assurances designed to coerce Plaintiffs' participation in their project.<sup>48</sup>

In so ruling, Judge Brody clearly relied on *Cohen* as his source of authority for setting aside any First Amendment claims raised in NBC's summary judgment motion:

If imposing a duty of care on media representatives inhibits truthful reporting, as Defendants claim, "it is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law" that requires those who make certain kinds of representations to use reasonable care in doing so.<sup>49</sup>

A jury imposed liability of \$525,000 on NBC for misrepre-

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47. *Id.* at 31.

48. *Id.* at 41.

49. *Id.* at 42 n.9 (citation omitted).

senting the goal of the story to both the trucker and his employer, as well as for the emotional distress and invasion of privacy that the jury found resulted from the initial misrepresentation.<sup>50</sup>

*Veilleux* is “a dangerous decision,” opined George Freeman, the assistant general counsel at The New York Times. “It ultimately appears to be based on what sources thought they heard when they agreed to talk.”<sup>51</sup> “[W]hen does getting someone to open up become manipulative and misleading? When does a reporter expose herself, and her employer, to a claim of misrepresentation?” wondered the First Amendment columnist for the *Columbia Journalism Review*.<sup>52</sup>

The hypothetical question appears to have no easy or clear answer. *Cohen* has given judges the analytic leeway, as in *Food Lion* and *Veilleux*, to place a broad array of investigative reporting outside the First Amendment’s protective shield because they only have “incidental effects on [the news media’s] ability to gather and report the news.”<sup>53</sup> When motions for summary judgment fail, *Cohen* has left the answer in the hands of jurors drawn from a public increasingly skeptical, if not outright hostile, toward news industry practices, motives and intent. The danger to journalistic enterprise appears clear: back off from investigative work or risk losing lawsuits that can impose chilling economic pain—even on the most well-endowed news organizations.

While lawsuit outcomes are always somewhat affected by public perceptions and sympathies, effective use of legal tools can help mitigate jurors’ visceral reactions. These cases demonstrate the time may be right for the institution of American journalism to establish industry standards for newsgathering. Such standards would serve as evidence of “reasonableness” that can pose a

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50. The plaintiff trucker claimed, for instance, that he was so vigorous an individual that he could drive perfectly well even if he violated federal rules requiring a set rest break between driving stints. While it was absolutely true that he violated the federal safety regulations, the jury was apparently persuaded by plaintiff’s complaint that NBC did not equally stress the trucker’s belief in his personal vigor.

51. Seth Schiesel, *NBC is Guilty of Negligence, A Jury Finds*, N.Y. TIMES, July 9, 1998, at A18.

52. Ellen Alderman, *Revenge of the ‘Misled’ Source*, COLUM. JOURNALISM REV., Sept.-Oct. 1998, at 71.

53. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

counterweight to increasingly distrustful attitudes toward the news media. Establishing industry standards could help investigative journalists who follow industry norms demonstrate that their actions were reasonable and, therefore, not tortious. Such standards can also play a role in news industry efforts to rebuild public confidence and trust. Once re-established, this confidence and trust is likely to make juries more hospitable to media defendants sued over truthful reports gathered with the assistance of contemporary investigative journalism techniques.

## II. TORT LAW STRATEGY: INDUSTRY STANDARDS CAN HELP

The reasonableness standard is the hallmark of tort law for all but those ultra-hazardous activities for which strict liability is usually imposed.<sup>54</sup> As journalistic missteps are not likely to cause widespread death or dismemberment, ordinary or reasonable care standards would apply to newsgathering tort suits. Industry standards have traditionally helped guide courts in assessing whether a defendant acted reasonably; reasonable action diminishes liability. "If the actor does what others do under like circumstances, there is at least a possible inference that he is conforming to the community standard of reasonable conduct."<sup>55</sup>

In product liability cases, for instance, industry standards from such respected organizations as the American National Standards Institute (ANSI) are "generally considered relevant . . . on issues of design defects and to impeach expert testimony that is contrary to standards."<sup>56</sup> Although, evidence of industry standard or custom is "not necessarily conclusive as to whether the actor, by conforming to it, has exercised the care of a reasonable man under the circumstances, or by departing from it has failed to exercise such care,"<sup>57</sup> it could serve as weighty evidence demonstrating that journalists acted responsibly. Such evidence can also help rebut hostile plaintiff-side experts as industry standards usually "trump testimony from a qualified expert witness, particularly when that expert

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54. See RESTATEMENT (SECOND) OF TORTS, § 519 (1977).

55. RESTATEMENT (SECOND) OF TORTS, § 295a cmt. b (1965).

56. 47 A.L.R. 4th 621.

57. RESTATEMENT (SECOND) OF TORTS § 295a cmt. c (1965).

offers no 'special circumstances' requiring a heightened standard of care."<sup>58</sup> Moreover, if jurors once again see journalists as reasonable, their outrage may be refocused on the bad acts exposed by an investigative report. Evidence of conformity with industry standards could also help tilt the balance in close decisions at the summary motion stage. A media defendant's plea to dismiss may be strengthened by a combined showing that the report is true and the reporter was acting reasonably when gathering the information.

For instance, an objective industry standard might have helped ABC better explain to the *Food Lion* jurors that the small stealthful incursion onto the supermarket chain's employer rights was reasonable based on news industry practice – especially when its public interest goal was to expose questionable sanitary practices in a major supermarket. Carefully elaborated standards would help describe reasons for the slight incursions into defendant's rights and how these practices build protections of fairness into the system. As case law developed, the standards themselves would help shape common law involving newsgathering torts. News organizations, as defendants, could point to cases in which other news organizations crossed over the lines set up by the industry code of conduct, and in so doing distinguish how the newsgathering techniques at issue in a current case are reasonable by comparison.

Creating industry standards could also provide the collateral benefit of helping the news industry re-establish public trust. It is simply hard to proclaim credibly that one is working in the public interest when the public appears increasingly skeptical or even hostile toward what is done in its name. Defining standards could help the news industry show that it is responding to public concerns about its own ways of doing business and help restore the more widespread public confidence that the industry enjoyed in years past. As the news media responds more pro-actively to public concerns over perceived journalistic excesses, members of the public called as jurors in a newsgathering tort case may be more inclined to give journalists the benefit of the doubt. An industry that polices itself effectively is likely better positioned to avoid the

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58. Cale H. Conley, Note, *A State Law Theory for Products Liability Claims: A Journey Best Not Taken*, 30 GA. L. REV. 267, 289 (1995).

kind of ugly public backlash evidenced by the enormous punitive damage awards in *Food Lion*<sup>59</sup> and *Veilleux*.<sup>60</sup>

### III. NEWS COUNCILS: AN IDEA WHOSE TIME MAY HAVE COME

Industry standards require creation of a central organization encompassing most, if not all, segments of the industry. However, rugged independence is a hallmark of the journalistic ethic. Particularly among investigative journalists, an institutional ideal exists casting as true heroes “wily, Odyssean reporter[s], employing clever techniques and staunchly maintaining his or her independence.”<sup>61</sup> “Yielding a sliver of that autonomy. . . has all the appeal to a journalist that the Brady Bill has to the National Rifle Association.”<sup>62</sup> Most previous attempts to establish clearly enumerated and widely accepted industry standards through voluntary association have generally failed. The now defunct National News Council limped along from its founding in 1973 until its demise in 1984.<sup>63</sup> In announcing its own dissolution, a National News Council statement noted “a general lack of news media acceptance of the concept of a news council.”<sup>64</sup>

The American Society of Newspaper Editors (ASNE) and The Radio and Television News Directors Association (RTNDA) both promote model rules of ethics but “the record here is not universally positive. The rules found in the codes . . . contain no sanctions—creating little accountability. More critically, codes for many individual news organizations fall into disuse . . . as [m]any journalists working for media organizations with codes do not even know the codes exist.”<sup>65</sup>

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59. 951 F.Supp. 1224 (M.D.N.C. 1996).

60. 8 F.Supp.2d 23 (D.Me. 1998).

61. Lee C. Bollinger, *The Press and the Public Interest: An Essay on the Relationship Between Social Behavior and the Language of First Amendment Theory*, 82 MICH. L. REV. 1447, 1457 (1984).

62. David Boeyink, *Public Understanding, Professional Ethics, and the News: A Response to Jane Rhodes*, 47 FED. COMM. L.J. 41, 42 (1994).

63. Everette E. Dennis, *Internal Examination: Self-Regulation and the American Media*, 13 CARDOZO ARTS & ENT. L.J. 697, 700-01 (1995).

64. Jonathan Friendly, *National News Council Will Dissolve*, N.Y. TIMES, Mar. 23, 1984, at B18.

65. Boeyink, *supra* note 62, at 43 (citing JOHN L. HULTENG, PLAYING IT STRAIGHT:



But given the clear message from the public, whose interest the news industry often aims to serve, this public interest may best be served by journalistic institutions ceding some of their much vaunted independence by creating a method to better demonstrate standards and accountability. The time may now be right to create a new National News Council.<sup>66</sup> The new council should develop codes of practice and ethics – in cooperation with such professional groups as ASNE, RTNDA, and the Society of Professional Journalists – and, as its predecessor did, serve as an out-of-court quasi-adjudicative body to resolve complaints against news organizations.<sup>67</sup>

Accomplishing this task, however, will require overcoming many of the objections that scuttled the previous council – and a number of efforts to create state or local councils in various media markets around the country.<sup>68</sup> In 1973, The New York Times publisher, Arthur Ochs Sulzburger, said news councils would divert attention from the actions of government officials, which should be the focus of public scrutiny, to the newsgathering and dissemination activities of the messengers who reveal information.<sup>69</sup> Expanding on the newspaper's traditional skepticism, the newspaper's current executive editor, Joseph Lelyveld, worried that

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A PRACTICAL DISCUSSION OF THE ETHICAL PRINCIPLES OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS (1981)).

66. Richard Salant, the former president of CBS News, who headed the previous National News Council at its demise in 1984, said: "We believe that a national news council is a valuable and valid idea whose time has not yet come, but will come in the near future – in the best interests of this nation, its press and its people." See Friendly, *supra* note 64.

67. The previous National News Council's power was mainly moral – in that it could only render judgments but had no ability to sanction beyond the embarrassment and poor public relations created for news organizations cited for improper or unethical practices. The adjudicative workings are illustrated by the longevity and credibility garnered by the Minnesota News Council, which still functions as an alternative dispute resolution forum, 18 years since its founding. Chaired by a state supreme court justice, its staff screens complaints against news organizations before selecting cases to be heard by a panel of 12 journalists and 12 members from outside the profession. Those bringing cases agree not to bring suit in court. See Alicia C. Shepard, *Going Public*, AM. JOURNALISM REV., Apr. 1997, at 24.

68. Similar attempts took place to create state and local news councils with news industry support. Only two remain: in Minnesota and in Honolulu.

69. See Friendly, *supra* note 64.

“voluntary regulation can lead, bit by bit, to more serious kinds of regulation.” This would come about as “courts, legislatures, and regulatory commissions like the FCC might utilize the codes of conduct and conclusions produced by these non-governmental groups to craft legally enforceable obligations for news organizations, particularly those that took no part in the creation of these codes.”<sup>70</sup> “They have no damn business meddling in our business,” opined The Boston Globe’s editor, Tom Winship, when the last National News Council was operating almost two decades ago.<sup>71</sup>

The problem with this line of thought is that courts—through increasingly common and large jury awards – are already delineating guidelines that help shape internal legal review of sensitive investigative pieces. Creating journalist-driven, rather than jury-driven, guidelines will better preserve the editorial integrity and independence of news organizations, in general – even if certain news organizations might, on a case-by-case basis, be ensnared in code not of their own making. As juries are already meddling with potentially disastrous result, any news organization would be better served through regulations promulgated by the devils they know in the news business who share both a professional orientation and an understanding of journalism’s core values.

Any reconstituted National News Council will likely face a special set of problems as a result of technological developments in the decade-and-a-half since the demise of the old council. While journalistic diversity once meant accounting for the differing production and newsgathering needs of print, television and radio, today’s standards must take into account the growing importance of new electronic media – especially the Internet. While today’s Internet-based news media more resemble a hybrid convergence of print and broadcast media, a distinct freestanding journalistic idiom can be expected to develop in cyberspace. Any news industry attempts to establish standards must be broad enough to avoid institutionalizing current idioms, but still be clear enough to provide adequate guidance both for today’s journalists and for courts adju-

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70. Jane E. Kirtley, Essay, *Freedom of the Press: An Inalienable Right or a Privilege to Be Earned?*, 9 U. FLA. J.L. & PUB. POL’Y 209, 218 (1998).

71. Shepard, *supra* note 67.

dicating law suits against them. This is no easy drafting task.

However, these considerations are not terribly different from the considerations required to bridge the gap between better-established print and broadcast media. While print can more readily rely on the written word to tell a story, and can often use lower impact newsgathering techniques, television, requires pictures—and more intrusive cameras, whether visible or hidden—to tell a story most effectively. Yet, today's news media has found common ground in the defense of First Amendment values; print organizations regularly file *amicus* briefs when television practices are challenged in court. This indicates a core set of values within journalism – no matter what form the reporting takes. Common virtues shared by reputable news organizations, such as commitments to truthfulness, the public interest, and respect for privacy when the public interest does not outweigh it, must be stated as the core to any guidelines emanating from a news council. Thus, much as common law identifies underlying principles applicable in future cases, news council standards must point to underlying values, clearly elaborating them at each step in the process. In this way, novel means of journalistic expression will not be stifled, but will instead be informed by the underlying virtues and values that have long guided what is best in American journalism.

#### CONCLUSION

The line of cases from *Cohen*<sup>72</sup> to *Food Lion*<sup>73</sup> and *Veilleux*<sup>74</sup> make clear that plaintiffs will have an easier time attacking the methods by which a story is reported than the veracity of the story itself. Given growing public distrust – and even hostility – to the news media as an institution, plaintiff successes are becoming more costly. As costs grow, so grow the potentially chilling effects from the liability threat posed when newsgathering techniques possibly violate laws of general applicability that have merely “incidental effects” on First Amendment rights.

As it works to rejuvenate its image in the public mind, so jurors

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72. 501 U.S. 663 (1991).

73. 951 F.Supp. 1224 (M.D.N.C. 1996).

74. 8 F.Supp.2d 23 (D.Me. 1998).

become less hostile to journalistic enterprises, the news industry needs also to use any techniques at its disposal to better cast its legal position. Industry standards, when followed, can serve as powerful evidence that practices under legal attack are reasonable. Absent strict liability, establishing reasonableness can turn a potential tort disaster into a defendant's victory. But to adequately tap into this tool, industry standards must provide a kind of irrefutable quality that only widespread acceptance can provide. Thus, in confronting the growing number of painful judgments arising from lawsuits over newsgathering, the news industry must shed its traditional reluctance to yield any editorial discretion to those outside of a particular news organization. In an era of judge and juror meddling into editorial product, such independence is illusory at best. True autonomy to act in the public interest can better be achieved by yielding some superficial trapping of independence by establishing a project of joint action in the interest of keeping at bay the ultimately more chilling threat of burdensome court judgments. The news council model can serve that purpose – with the corollary public relations benefits that industry self-criticism and accountability can help foster the ultimate goal of reversing journalism's diminished public standing.

While courts may increasingly find that causes of action involving newsgathering only incidentally effect First Amendment values, journalists know better. If they can't get what is needed to demonstrate a problem in a compelling way, even the most significant issues risk being ignored. By taking the tort law offensive now, even if it means yielding some trappings of independence to a news council that has journalistic values at its heart, the news industry will better be able to perform its mission—so that the people shall know.

*Notes & Observations*