Publication Damages in Newsgathering Cases

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In newsgathering cases, should a litigant who proves that a tort was committed in the process of obtaining information recover damages from the resulting publication? Repeatedly, this question has proved to be critical in newsgathering litigation. However, the answer often appears to be an unsettling "it depends."

For example, three decades ago the Ninth Circuit concluded that damages from an invasion of privacy could be "enhanced" by the subsequent publication.[1] However, other circuits appear to differ.[2] More recently, the Fourth Circuit in the *Food Lion* case held conclusively that a company's lost profits following a critical television broadcast could not be recovered by proving the commission of fraud, trespass, or breach of the duty of loyalty during the newsgathering process.[3] Yet just five months later, the First Circuit read *Food Lion* to support potential lost profits damages to a company that successfully proved a fraudulent misrepresentation used to obtain material for broadcast.[4]

Some of this apparent judicial dissonance results from the absence of any direct guidance from the Supreme Court on the issue. However, some of it also results from failing to recognize that all claims for publication damages are not alike. The issues relevant to publication damages in a particular case may depend upon both the nature of the underlying claim and the nature of the damages alleged.

This article evaluates newsgathering damages claims by analyzing both of these factors. It divides newsgathering claims into three categories: claims involving promises about the content of a future publication, claims alleging physical invasions of privacy, and torts unrelated to privacy. Damages, in turn, are divided into two significant categories: "reputational" and "nonreputational." These distinctions reflect the likely combinations of potential interests implicated by any particular claim for publication damages.

For media attorneys, identifying the particular combination of claims and publication damages present in any particular case is essential to understanding the issues presented by a case seeking publication damages. As a general rule, this article argues that reputational damage claims should be barred in all contexts, except for the unique context of certain economic damages in contract-related cases like *Cohen v. Cowles Media Co., Inc.*[5] Strong arguments exist to bar nonreputational damages as well, but the relevant arguments are somewhat different. To understand why, it is first necessary to review what limited guidance the Supreme Court has provided on the issue.

The Supreme Court and Publication Damages

The Supreme Court has yet to decide a newsgathering case. Newsgathering suits allege that some tort was committed while gathering information but do not claim the resulting publication itself violated any legal duty. Rather, the Court has considered a group of cases in which the publication did allegedly violate some legal obligation, but not defamation. These cases include claims that a publication invaded privacy,[6] violated privacy recording statutes,[7] intentionally inflicted emotional distress,[8] and breached a promise to conceal a source's identity.[9] Much of the confusion in newsgathering cases results from uncertainty about whether or how the principles articulated in these cases should apply. That confusion is heightened because even within this group of nondefamation cases, the Court has decided some cases without reference to the principles articulated in other seemingly related cases.

For example, *Bartnicki v. Vopper*[10] is the latest example of a line of privacy-related cases affirming the principle that if truthful information is lawfully obtained, its publication may rarely, if ever, be sanctioned.[11] In each case, however, the Court has explicitly left open the question more relevant to newsgathering litigation: if material is unlawfully obtained, may the state "punish not only the unlawful acquisition, but the ensuing publication as well"?[12]

Hustler Magazine v. Falwell[13] established the proposition that a public figure may not recover damages for emotional harm caused by a publication that is allegedly offensive, but not actionable in defamation, by positing that the publication constitutes a different tort. *Hustler* reached this conclusion without considering any privacy cases. Nor did *Hustler* directly address whether the same principle applies to cases where the tortious act is something done while gathering the news, rather than by publication.

Finally, *Cohen v. Cowles Media Co.*[14] has created perhaps the most confusion. *Cohen* involved a claim that a newspaper published the identity of a source in breach of a promise to maintain his confidentiality. Though it was not really a newsgathering case, the Court implied the breach of promise might be analogous to unlawful acquisition of the source's identity.[15] In perhaps the most significant portion of the opinion for future newsgathering litigation, the Court distinguished *Hustler* because the source was "not seeking damages for injury to his reputation or his state of mind."[16] Rather, the Court implied the $200,000 in wages that Mr. Cohen lost because he was fired after his employer read the story was something different than the reputational damages at issue in *Hustler*.

Although none of these cases explicitly addressed the issues presented by newsgathering claims, two significant analytic principles emerge from them. First, the nature of the cause of action makes a difference. For example, *Cohen* concluded the privacy-related cases were irrelevant to the quasi-contract context, though both involved the publication of truthful information about a

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matter of public concern. Second, the nature of the damages alleged may make a difference as well. *Cohen* emphasized that damage to "reputation and state of mind" is particularly suspect, though it did not explain why. *Hustler* found that emotional distress damages produced by the plaintiff's reaction to speech were especially constitutionally suspect as well.

Therefore, both the nature of damages alleged and the type of claim at issue should be considered when analyzing a claim for compensatory publication damages. Below, the most significant categories of damage are analyzed, followed by the three primary categories of newsgathering claims.

Reputational versus Nonreputational Damages

Hustler and *Cohen* both suggest that whether a litigant seeks compensation for damage to reputation or state of mind is significant. Neither, however, defines what these terms mean or explains why they are significant. Each of those two questions is addressed below.

What Are Reputational Damages?

It is important to define "reputational damages" because what this concept means in the newsgathering context is often disputed. The definition seems self-evident: any damage resulting from the effect of a publication upon the subject's reputation. There is widespread agreement that reputational damages include what defamation law calls "general damages."[17] General damages are noneconomic damages produced by injurious publications. They include both injury to reputation itself, and, in modern jurisprudence, the emotional distress produced by reputational loss.

What has sometimes been disputed is whether reputational damages include economic losses, traditionally called "special damages" in defamation law. Special damages typically include out-of-pocket losses such as lost wages for individuals or lost profits for businesses.[18] As a factual matter, these economic damages are clearly reputational. They are the direct result of the changed way employers, customers, suppliers, and others view the plaintiff after learning negative information about him.

Moreover, defamation law has always recognized that economic losses are just one aspect of injury to reputation.[19] In fact, the common law of slander (and libel in some states) considers special damage to be necessary proof of injury to reputation, for words not self-evidently injurious to reputation.[20] Thus, economic losses should be treated as "reputational damages."

However, a few words in *Cohen* have led some courts to conclude that pecuniary losses are not reputational injury. The plaintiff in *Cohen* recovered economic damages for lost wages following an unflattering publication. Although these damages would appear to result from a diminished reputation, the Court noted that he was not seeking damages for injury to reputation. More recently, the First Circuit followed this logic, permitting recovery of lost profits in a fraud case on the grounds that the damages were "pecuniary, not reputational."[21] On the other hand, the Fourth Circuit in the *Food Lion* case treated the supermarket chain's alleged lost profits as classic reputational damages.[22]

Do these decisions conflict? Does *Cohen* imply that economic publication damages are not "reputational" and thus presumptively less protected by the First Amendment? In fact, these decisions can be sensibly harmonized. The distinction between *Cohen* (and the more recent *Veilleux v. National Broadcasting Co.*) on the one hand, and *Food Lion* on the other, relates to differences in the nature of the claims asserted.

In *Cohen,* it appears that the Court was drawing a distinction between contract and tort damages, rather than purporting to define what "reputational" damage might mean in all contexts. *Cohen* was a quasi-contract case, and *Veilleux* involved a similar claim, though asserted as fraud. Damages in contract cases are typically limited to particular categories of economic damages.[23] Awards of tort-like, personal injury damages, and even consequential economic losses, are usually disfavored.[24]

Moreover, under contract law damages for reputational harm and emotional distress are treated as categories of tort-like damages, different from economic losses caused by the breach of contract. These peculiar aspects of contract law best explain the distinction in *Cohen* between certain economic losses and "injury to reputation or state of mind." But those contract law distinctions should not be imported into tort law, the basis of most newsgathering cases. *Food Lion* was a typical example of a newsgathering tort case. The alleged wrongs by ABC were not breaches of promises about the content of its broadcast, and the economic damages the supermarket chain sought were in no sense contract damages. Rather, they were the identical economic damages the chain would have sought if it had sued for defamation. In these cases, reputational damages should have the same broad meaning as in defamation law.

In short, the definition of reputational damages depends upon the nature of the underlying claim. For newsgathering tort claims, the definition includes all categories of damage traditionally available in defamation suits. For breach of promise claims analogous to *Cohen,* the term refers to noneconomic, reputational damages.

What Is Significant About Reputational Damages?

There are two reasons reputational damages should be of particular concern in claims against the press. First, reputational damages are content- and viewpoint-based sanctions on speech. By their very nature, reputational damages only result from speech understood to say something critical of the plaintiff. Because they impose sanctions on speech traditionally subject to the most exacting First Amendment scrutiny, reputational damages should be inherently constitutionally suspect. Second, permitting recovery of reputational damages in newsgathering cases would tend to reward antisocial conduct. In most cases, the plaintiff has suffered a diminished reputation because some alleged misconduct was exposed in the publication. Awarding reputational damages could paradoxically result in compensation for the lost opportunity to continue to engage in wrongdoing.

For example, if a reporter trespassed upon a public official's property and found a marijuana garden, full compensation for reputational damages would require the reporter to pay the official for the monetary value of his subsequent political demise. Moreover, the more serious the violation uncovered the greater the damage: if the reporter found heroin, the only consequence for the newsgathering tort case would be that the compensatory damage award would be larger. No sensible rule for defining the consequences of a tort should permit this result.

Nonreputational Damages

The definition of nonreputational damages is simple: damage unrelated to any diminished reputation of the plaintiff. Claims for genuinely nonreputational publication damages are much less common in newsgathering cases. However, they do occasionally exist, primarily in certain privacy cases. The most common form of nonreputational damage is alleged emotional distress that results from a publication that is upsetting, but not injurious to reputation. Nonreputational economic losses are rare because publications not injurious to reputation rarely produce lost income.

A good example of nonreputational damage is provided by *Shulman v. Group W Productions, Inc.*[25] *Shulman* concerned hidden-camera and audio recording of paramedics treating the plaintiff at an accident scene. Nothing in the resulting program depicted the plaintiff in a negative light. However, she alleged the mere fact of seeing her trauma played out on television was upsetting.

Nonreputational damages do not have the same potential to reward antisocial conduct that reputational damages do because the plaintiff has not allegedly engaged in misconduct. Furthermore, nonreputational damages discriminate less on the basis of viewpoint because they are not produced by the critical slant of a publication.

However, these claims nevertheless raise serious First Amendment questions as well. They still resemble content-based regulation of speech about matters of public concern. The plaintiff's sensibility towards particular content determines whether, and how much, damages will be sought. They also discriminate on the basis of viewpoint in some sense as well. For example, a publication like the one in *Shulman* that depicts the plaintiff as a sympathetic victim of misfortune may not be injurious to his or her reputation, but may upset someone who does not like to be portrayed as a victim.

If no newsgathering tort were at issue, there would be no question that the publications allegedly causing emotional distress in these cases would be constitutionally protected reports about matters of public concern. If they were not, in most states the publication of private facts tort would provide a means of seeking damages from the publication directly without having to assert a newsgathering claim.[26] Therefore, nonreputational damage claims should be scrutinized as well.

Three Categories of Claims

As the difference between the economic damages permitted in *Cohen* but barred in *Food Lion* illustrates, the nature of the underlying claim is another important factor in analyzing a claim for publication damages. Newsgathering claims fall into two principal categories: tort claims unrelated to invasions of privacy and claims for invasion of privacy. Each of these categories is discussed below. First, however, a third category is considered: claims that something in the publication itself violated a prior promise. The claims at issue in this category do not really challenge newsgathering. However, they are often treated as close cousins of newsgathering and should be considered as well.

Promissory Content Claims

This first category stems from *Cohen.* Cases in this category all involve situations in which a source alleges the following: a journalist promised that some information (usually the source's identity) or point of view would, or would not, appear in a publication; the source provided information in reliance on that promise; and the content of the publication was not consistent with the promise to the source.[27] For discussion purposes, these cases are called "promissory content" cases.

Virtually all successful promissory content cases to date have been brought by news sources who were promised confidentiality yet were identifiable in a publication. Beyond that fact pattern, it is far from clear that promises *not* involving a breach of confidentiality should be actionable at all. Some sources have tried to assert claims based on promises related to the editorial perspective of a publication, such as alleging they were falsely promised a favorable story. Those claims would seem to more closely resemble the kind of veiled defamation claim proscribed by *Hustler* than the breach of confidence claim permitted by *Cohen.*

The First Circuit in *Veilleux* recently rejected a similar claim.[28] However, *Veilleux* did recognize a cause of action based on a more specific promise, but one still related to editorial perspective rather than confidentiality.[29] Other courts might well conclude that *Veilleux* extended the boundaries of promissory content claims too far.

While courts sometimes treat promissory content cases as newsgathering claims, they are not really primarily about newsgathering. Rather, they challenge publications directly, by challenging a decision to include particular content. Therefore, the principles applicable to publication damages in these cases do not necessarily translate to cases that seek damages indirectly, by challenging the underlying newsgathering.

Within the promissory content category, the nature of the damages alleged may be an important factor in assessing a claim for publication damages. Publication damages in these cases fall into three categories: economic damages, noneconomic reputational damages, and any other noneconomic damages.

Economic Damages: Cohen clearly authorizes recovery of lost wages resulting from a breach of confidentiality. What other economic damages, if any, it authorizes is less clear. Presumably, other economic damages analogous to lost wages would also be permitted.

The nature of the underlying claim is another important factor in analyzing a claim for publication damages.

However, permitting economic damages in these cases should not be a basis for permitting them in newsgathering tort cases. Promissory content cases implicate different interests. First Amendment interests are less offended because the parties themselves define the content restricted from publication.[30] Thus, while publication damages in this context do involve content-based sanctions on speech, the state does not directly define the content proscribed.

This distinction also affects broader social policy interests as well. Promissory content cases are primarily grounded in contract law, which is principally

concerned with neutrally enforcing private promises, even where enforcing a promise might reward less than pristine conduct. Thus, public policy as expressed in contract law is less likely to be offended if economic reputational damages may sometimes reward antisocial conduct. The facts of *Cohen* are a good example, since the plaintiff was compensated for the pecuniary consequence of the public learning that he secretly peddled negative information about a political candidate.

Newsgathering cases, on the other hand, are primarily grounded in tort law or statutes, which are quasi-criminal in nature. Tort and statutory duties are defined by the state, not the parties, so their enforcement inherently requires the exercise of policy judgments about the proper allocation of social responsibility for conduct and injuries.[31]

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However, promissory content claims should still raise First Amendment and other policy concerns, since they sanction truthful speech. The Supreme Court's analysis in *Cohen* appears to reflect an ad hoc compromise between these competing interests, without expressly stating so. The Court found no constitutional bar to a cause of action but implied that damages should be limited to the kind of direct economic losses typically awarded in contract cases. Thus, even within this genre, the First Amendment may bar some categories of damage.

Noneconomic Reputational Damages: *Cohen* implies that if a litigant seeks to use contract-based theories to recover noneconomic reputational damages, those damages would be proscribed. At least two courts have explicitly endorsed that interpretation.[32] Moreover, even if the same litigant also seeks economic damages, the Court's logic suggests the entire claim may be barred if it appears principally directed at injury to reputation or state of mind, rather than economic loss. Although the Court found that the facts of *Cohen* did not present "a case like *Hustler*," it appeared to leave open the possibility that a promissory content claim based on a different set of facts might.[33] Thus, even within this genre, the speech-suppressing impact of reputational damages retains significance.

Noneconomic Nonreputational Damages: Within this genre, all noneconomic damage claims are not necessarily related to reputation. Some cases are essentially contract-based privacy actions. They address breaches of confidentiality that are upsetting but not inherently injurious to reputation. For example, some sources might simply wish to remain anonymous, even though their reputations would not necessarily be harmed if their identities were revealed. Victims of abuse requesting anonymity may be examples of this category.[34] The emotional distress damages they seek may not necessarily be reputational. Within this subcategory, economic damages similar to those in *Cohen* would presumably be permitted. Whether noneconomic, emotional distress damages should be permitted is a closer question that would likely depend on the particular facts of each case.

In any event, the balance of interests struck in promissory content cases should not extend to other newsgathering tort cases, which present a very different set of issues.

Nonprivacy Newsgathering Torts

The first category of genuine newsgathering claims typically challenges the use of misrepresentation to gain physical access to information. Fraud and trespass are the causes of action usually asserted. The plaintiffs are usually commercial or nonprofit entities that have no legal right of privacy to vindicate.[35]

The asserted publication damages in this category are almost always reputational. They usually consist of economic losses caused by the public's negative reaction to information published about the entity. As a result, all of the policy concerns inherent in awards of reputational publication damages are present in these cases.

Almost all courts to address the issue within this genre of cases have denied publication damages.[36] No court has ever finally approved a verdict for publication damages. Only one, in dicta, has ever indicated it would approve such an award.[37] Where fraud is the only claim asserted, the denial of publication damages usually results in outright dismissal because damage is an element of the tort.[38] In a few instances, courts have found small amounts of nonpublication fraud damages.[39] Where trespass is alleged, courts have sometimes recognized a cause of action, but limited recovery to nominal damage.[40] Moreover, courts considering nonprivacy newsgathering torts have consistently proscribed all publication damages, both economic and noneconomic. No reported case has found the distinction between economic and "reputational" damages made in quasi-contract claims like *Cohen* relevant to reputational damage in this context.

The case law within this category has relied upon two different grounds for barring publication damages. Not coincidentally, these grounds flow from the two primary policy concerns raised by potential awards of reputational damages: their suppression of core First Amendment rights and potential to reward antisocial conduct.

The First Amendment

A few courts, most notably the Fourth Circuit in *Food Lion*, have relied on the First Amendment to exclude publication damages in this context.[41] Usually, the issue is presented as a straightforward application of *Hustler* and *Cohen.* Their reasoning is as follows: Just as Jerry Falwell could not use an emotional distress tort to avoid proving falsity and fault in *Hustler*, so plaintiffs may not use newsgathering torts like fraud or trespass to do the same. Similarly, just as Dan Cohen could not seek damages to reputation and state of mind, so newsgathering plaintiffs may not either.[42] Although the conclusions these cases draw are sound, their application of *Hustler* and *Cohen* leaves some questions unanswered.

For example, *Hustler* does not directly address whether a publication loses its First Amendment protection when information is tortiously gathered because the parody at issue in *Hustler* was not tortiously obtained. Dan Cohen's identity was not illegally obtained either. Moreover, an overly literal application of *Cohen* might lead a court to

conclude that economic damages may always be recovered in newsgathering cases because they were permitted in *Cohen.* Indeed, the First Circuit appeared to suggest as much in *Veilleux.*[43]

Thus, while *Hustler* and *Cohen* provide important support for the argument against publication damages, the case for or against publication damages need not depend upon literally applying those decisions. Rather, claims for publication damages in this context should not withstand the broader First Amendment scrutiny that must be applied to any attempt to sanction or restrict speech. Because reputational damages are content- and viewpoint-based regulations of speech, they should be subject to strict scrutiny. Under strict scrutiny, they may only be permitted if they satisfy a compelling state interest and are narrowly tailored to meet that interest.[44]

The primary state interest served by compensatory tort damages is to fully restore the plaintiff to the position it would have been in had it not experienced the loss at issue.[45] Where that loss is the result of public reaction to truthful information (or at least information not proven to be false and published with fault) about a matter of public concern, it is difficult to imagine what compelling interest there could be in compensation for that loss. *Food Lion* presents an excellent example. Surely there was no compelling interest in compensating Food Lion for public reaction to information about poor food handling practices, merely because two people entered its stores under false pretenses.

Other state interests frequently cited by advocates of publication damages, such as deterrence and punishment of the underlying tort, are not interests principally served by compensatory tort damages.[46] Rather, they are primarily served by punitive damages.[47] Punitive damages in newsgathering cases implicate a different set of First Amendment interests. For example, punitive damages may chill other, constitutionally protected newsgathering. Moreover, they are not really "laws of general applicability,"[48] because juries ultimately have discretion whether or not to award them in any particular case. Consequently, juries may effectively exercise that discretion based on disapproval of the ultimate publication, rather than the newsgathering conduct at issue.

However, punitive damages in newsgathering cases are a subject for a different article. For purposes of analyzing compensatory publication damages, it is important to recognize that interests related to punitive damages have little relevance.

Proximate Cause

The same disconnect between the interests implicated by the newsgathering torts alleged, and the consequences of permitting damages for the publication, may also be expressed through the common law doctrine of proximate cause, the traditional vehicle in tort law for making policy choices about where the extent of liability for injuries should begin and end.[49] The doctrine of proximate cause is a particularly suitable means for resolving claims for publication damages because they raise policy questions about who should bear the burden of losses flowing from publications.

Proximate cause is in fact the most common reason cited by courts for denying publication damages.[50] Courts have advanced several reasons why publication damages are not the proximate cause of newsgathering torts. Some follow the *Food Lion* district court's conclusion that the acts of the plaintiff depicted in the publication are the real proximate cause of publication damages, rather than newsgathering torts that merely facilitated access to learning about those acts.[51] Others give no reason at all.[52]

Curiously, the simplest explanation is rarely mentioned. One reason the means by which raw information is obtained is not the proximate cause of publication damages is because that raw information harms no one. Rather, damage is caused by the way that information is subsequently presented in the publication, including the meaning that the publication ascribes to it editorially. Thus, the content and viewpoint of the ultimate publication, and the decisions made to express that content, are the proximate causes of publication damages.

In fact, the very arguments made by critics of undercover journalistic investigations prove the point. For example, Food Lion frequently claimed in public relations materials that ABC misrepresented what was on its hidden-camera tapes and claimed the same forty-five hours of hidden-camera tape could yield a positive infomercial about the supermarket chain.[53] On the face of that argument, the publication damages in that case were allegedly caused by editorial decisions about how to interpret and present the tape, rather than the techniques used to gather it.

Thus, the real conduct being challenged in a claim for publication damages is editorial conduct, not newsgathering. In this context, publication damages should only be permitted through the tort that challenges those decisions directly, defamation, rather than through fraud or trespass claims that have nothing to do with editorial content.

This conclusion does not suggest that newsgathering torts have no causal relationship at all to damages from the subsequent publication. Rather, inherent in the concept of proximate cause is that something more than literal causation is required. In addition, policy judgments must be made about the appropriate allocation of responsibility for harms involving a particular course of conduct.

For example, if someone steals a car and damages it in an accident, the owner could presumably sue for conversion and recover damages for the accident damage as well, without independently proving that the thief was a negligent driver. On the other hand, if at the accident scene the thief noticed drugs belonging to the owner and pointed them out to police, the thief would presumably not be liable for the owner's reputational damages resulting from his arrest, unless the owner could prove the thief's accusation was an actionable defamation or false arrest. The actual causal relationship between events in these two examples is not very different, but their legal consequences should be.

In the newsgathering context, if publication damages were permitted, media defendants would be forced to pay ruinous damages for producing editorial content that has substantial social value. On the other hand, companies would receive compensation for the public's refusal to tolerate their potentially antisocial conduct. Such an allocation of social responsibility would make little sense. Rather, publication damages are only justified if the editorial content itself is actionable.

Newsgathering Privacy Torts

The final category of newsgathering torts relates to asserted privacy interests of individuals. Common examples include claims for intrusion upon seclu-

sion,[54] challenges to media ride-alongs with law enforcement officers,[55] and trespasses into private homes or other zones of privacy.[56] Unlike the essentially commercial torts at issue in cases like *Food Lion*, privacy claims may or may not assert reputational damages.

Moreover, the case law about publication damages in the privacy context is more divided than it is in the *Food Lion* genre.[57] This suggests some courts may be inclined to treat privacy cases differently, though without explaining why. On the other hand, the majority of privacy cases were decided before *Hustler*, *Cohen*, or recent newsgathering cases like *Desnick* and *Food Lion*. Thus, their authority is more uncertain.

Dieteman v. Time, Inc.

Paradoxically the oldest case in this genre, *Dieteman v. Time*,[58] remains the principal authority used to support claims for substantial publication damages in privacy cases. In *Dieteman*, the Ninth Circuit concluded the First Amendment permits damages in intrusion cases to include "additional emotional distress" caused by the publication of wrongfully acquired data.[59] As a result, both litigants and courts have sometimes interpreted *Dieteman* broadly to authorize awards of publication damages, both reputational and otherwise.[60] Thus, it merits particular attention.

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Dieteman was decided before much of the First Amendment jurisprudence related to publication damages was developed. Moreover, the question of whether publication damages should be rejected on proximate cause grounds was not raised or addressed. Thus, *Dieteman* did not address the principal issues currently relevant to publication damages, and its authority may reasonably be questioned on that ground alone.

However, even putting those issues aside, it is doubtful that *Dieteman* supports the proposition for which it is often cited. *Dieteman*'s language approving publication damages should be read within the context of its facts. Neither the facts of that case nor the damages awarded suggest any broad endorsement of publication damages. In fact, publication damages were effectively denied.

In *Dieteman*, two journalists outfitted with hidden still cameras and audio equipment exposed a quack doctor practicing out of his home. An embarrassing photo of the plaintiff practicing "medicine" was printed in *Life* magazine. As a result, the plaintiff presumably suffered very substantial reputational injury. In fact, the plaintiff sought $100,000 in emotional distress damages at trial.[61]

Yet the trial court awarded a token $1,000 for what it described as "general damages." The trial court never suggested those damages were linked to the publication at all. Rather, it described them simply as "damages for injury to his feelings and peace of mind."[62] The nominal amount of the award suggests the trial court believed compensation for the substantial reputational injuries alleged was inappropriate. The Ninth Circuit affirmed the $1,000 verdict on appeal.

Thus, if the damages at issue in *Dieteman* were publication damages at all, they were probably not reputational, and they did not compensate the plaintiff for the actual harm resulting from the publication. Those damages bear almost no resemblance to the multimillion-dollar claims for reputational injury and emotional distress regularly asserted by litigants in privacy cases today. Had the Ninth Circuit in *Dieteman* confronted one of those verdicts, the result might well have been different.

In fact, the "publication" damages in *Dieteman* more closely resemble the nominal tort damages permitted by cases like *Food Lion*. In short, while the Ninth Circuit's language seems broad, the context in which that language appears provides scant support for the principle of meaningful compensation for publication injuries, particularly reputational damages.

Given the absence of clear judicial guidance within the privacy genre of newsgathering cases, it is even more important to accurately identify the interests implicated by the facts of any particular case. Because privacy cases sometimes seek reputational damages, and sometimes do not, each subcategory is analyzed below.

Privacy Cases with Reputational Damages

A privacy case seeks reputational damages when information allegedly obtained through intrusion or trespass is presented in a context critical of the plaintiff. The damages the plaintiff in *Dieteman* originally sought are a good example.[63] Reputational damages in privacy cases implicate the same interests as in the *Food Lion* genre of newsgathering claims. They sanction speech based on both content and viewpoint: the more critical the publication, the higher the damage. They also have the same potential to reward antisocial conduct like the practice of quack medicine in *Dieteman*. Thus, the same scrutiny should be applied to privacy claims.

Yet courts considering privacy claims are less likely to focus on whether the damages alleged are reputational. Perhaps this difference reflects an assumption that the state interest in protecting personal privacy is more compelling than in protecting companies from trespass or fraud. Two arguments are most frequently advanced in favor of recognizing privacy as a sufficiently compelling state interest to justify full compensation for any publication of material obtained through an invasion of privacy.

First, the argument goes, the protection of privacy is a deeply held social value. Analogy is frequently made to the protections provided by the Fourth Amendment, reflecting the belief that privacy is so important that illegally obtained evidence may not be used, even if potentially criminal conduct goes unpunished as a result.[64] There can be no doubt that protection of privacy is an important state interest.

However, electing not to prosecute a potential wrongdoer to deter future invasions of privacy is quite different from choosing to compensate him for the exposure of his possible crime. Deterrence has little relevance to reputational damages. Compensation implies

the plaintiff has a legally protected right to engage in conduct that the public finds disreputable. For example, if a publication reveals that an individual earned income by cheating the public, compensatory damages would restore all of the lost income the plaintiff would have continued to earn if his cheating had remained private. A social policy that actually rewards private misconduct that hurts the public is not a sensible way to vindicate privacy rights.

A second, more subtle argument is that sanctioning publication in the privacy context actually "promotes the freedom of speech"[65] because private speech will be chilled if it is subject to public disclosure.[66] Analogy is frequently made to cases holding that the First Amendment protects the right not to speak publicly, extending protection to private intellectual property such as copyright.[67] The majority in *Bartnicki* recently characterized this argument as "strong," although it did not prevail in that case.[68]

Nevertheless, the private speech argument should be vigorously challenged in future cases. The First Amendment imposes restraints on state action to suppress the speech of private citizens. It does not affirmatively authorize the state to suppress one citizen's speech to facilitate another citizen's speech. Should the state undertake this role, it would inevitably have to choose which citizen's speech the state prefers—precisely what the First Amendment prohibits in the first place.[69]

The rare instances in which the state does intervene in the market for speech, such as to protect copyrights, actually illustrate why the broad sanctions on speech sought by newsgathering litigants should not survive constitutional scrutiny. Copyright law is something of an exception in First Amendment jurisprudence because it results from a separate, affirmative constitutional mandate to Congress to protect a specific category of preferred speech.[70] Nevertheless, copyright law has coexisted with the First Amendment because the category of speech copyright protects is very narrowly defined. It excludes all facts, ideas, or information, is limited only to tangible creative expression, and permits fair use of protected expression.[71] Moreover, the damages copyright law authorizes are narrowly tailored to provide compensation for the value of intellectual property.[72] Copyright law would not likely provide compensation for the kind of reputational damages that newsgathering litigants typically seek. For example, copyright law would not likely provide reputational damages to someone arrested because an infringing use of her unpublished letters revealed her to be a thief.

Newsgathering torts, on the other hand, seek to impose far broader sanctions on speech. Newsgathering torts aim to sanction any and all use of "private" speech, including facts, information, etc. Where reputational damage is sought, the speech is particularly likely to be of significant public concern. Newsgathering torts therefore typically seek damages copyright law would not likely permit. Yet there is no analogous constitutional directive to protect private speech. State intervention in the "speech market" in this context would be inconsistent with core First Amendment principles.

Finally, the particular facts of *Cohen* suggest that privacy interests are not immune from constitutional scrutiny in newsgathering cases. *Cohen* involved publication of information that the parties agreed should remain private and confidential. Yet even within the context of contractual privacy, the Court suggested that reputational damage awards should be limited in some respect.

For all of these reasons, the same First Amendment and proximate cause grounds applicable to the commercial newsgathering torts should bar awards of reputational damages in privacy cases.

Privacy Cases with Nonreputational Damages

However, damages in some privacy cases may also be nonreputational. In this subcategory of newsgathering cases, the publication is not critical of the plaintiff. In fact, often the plaintiffs are portrayed sympathetically, as victims of misfortune.

Rather, damage consists of emotional distress caused entirely by the publication of certain material without consent. Frequently, these cases result from media "ride-alongs" with law enforcement or rescue personnel, though not all "ride-along" cases involve nonreputational damages.[73] The California Supreme Court's decision in *Shulman* may be the most significant case in this genre.[74]

Few of these cases have explicitly addressed the issue of damages. Only one reported opinion in this category, from a California intermediate appellate court in *Miller v. National Broadcasting Co.*,[75] explicitly held that publication damages were permitted in that case. On the other hand, a New York appellate court held that emotional distress damages caused by publishing photographs of the plaintiffs' dead children, obtained by trespass into their home, were not proximately caused by the trespass.[76]

Nonreputational damage awards implicate some, but not all of the policy concerns raised by reputational privacy cases. Compensatory damages would not potentially reward wrongdoers because the publication at issue is not criticizing the plaintiff's conduct. And there is less viewpoint-based discrimination because damage is not as closely related to the publication's editorial perspective.

On the other hand, nonreputational awards do implicate significant First Amendment interests. They are content-based since they are a function of the plaintiff's sensibilities toward particular content. Moreover, the information at issue is almost always newsworthy. The mere fact that the Supreme Court has left open the question of whether publication of truthful, but unlawfully obtained, information about a matter of public concern may be sanctioned at all suggests there may be circumstances where it may not. In fact, in some respects *Hustler* may be more analogous to this subcategory of cases than the commercial tort genre. In *Hustler*, Jerry Falwell also argued that he did not seek reputational damage but rather compensation for his emotional reaction to a publication he found offensive.[77] Given the significant interests on all sides implicated by nonreputational privacy damages, it is more difficult to make categorical judgments about the development of the law, divorced from the facts of any particular case.

However, there is another important question especially relevant to this subcategory of privacy cases that could moot these constitutional questions in many cases. Where the cause of action at issue is the tort of intrusion, it seems doubtful that the common law permits publication damages in any form. The common law tort of intrusion was originally designed solely to address the dis-

ruption of physical solitude, and nothing in the *Restatement* formulation of the tort suggests the possibility of publication damages.[78] Rather, the *Restatement* notes that damages in intrusion cases are ordinarily limited to "damages for the deprivation of seclusion."[79]

As a result, a number of courts have held that claims for intrusion by their very nature must be limited to damages related to the physical intrusion itself, rather than the impact of the subsequent publication.[80] Publication damages must be alleged through the tort of publication of private facts, which excludes liability for newsworthy information.[81] While it is not entirely clear, the *Restatement* seems to lend support to excluding publication damages in intrusion cases.[82] Therefore, in states that follow the *Restatement*, the common law of privacy may provide more fertile ground for seeking exclusion of publication damages on the same policy grounds that would be relevant to a First Amendment analysis.

Conclusion

Unless and until the Supreme Court considers a true newsgathering case, these cases will lack the comparative clarity and predictability of defamation cases. Thus, it is especially important for media attorneys to identify the significant factors relevant to publication damages in any given case. Identifying the nature of the claim, the damages alleged, and the interests implicated by each of those factors will enable practitioners to better evaluate cases in this newly developing area of law.

Endnotes

1. Dieteman v. Time, Inc., 449 F.2d 245 (9th Cir. 1971).
2. Thomas v. Pearl, 998 F.2d 447 (7th Cir. 1993); Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969).
3. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999).
4. Veilleux v. Nat'l Broad. Co., 206 F.3d 92 (1st Cir. 2000).
5. 501 U.S. 663 (1991).
6. *E.g.*, Florida Star v. B.J.F., 491 U.S. 524 (1989).
7. Bartnicki v. Vopper, 121 S. Ct. 1753 (2001).
8. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).
9. *Cohen*, 501 U.S. at 663.
10. *Bartnicki*, 121 S. Ct. at 1753.
11. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979).
12. *Bartnicki*, 121 S. Ct. at 1753.
13. 485 U.S. 46 (1988).
14. 501 U.S. 663 (1991).
15. *Cohen*, 501 U.S. 663 at 671.
16. *Id.*
17. RESTATEMENT (SECOND) OF TORTS §§ 621, 623.
18. *Id.*
19. *Id.* § 622, cmt. b.
20. *Id.* § 575, cmt. b (special damage occurs when "loss of reputation results in material loss capable of being measured in money").
21. Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 128 (1st Cir. 2000).
22. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 522 (4th Cir. 1999).
23. RESTATEMENT (SECOND) OF CONTRACTS § 347.
24. *Id.* § 353.
25. 955 P.2d 469 (Cal. 1998).
26. RESTATEMENT (SECOND) OF TORTS, *supra* note 17, § 652C.
27. *See, e.g.*, Ruzicka v. Conde Nast Publ'n, Inc., 999 F.2d 1319 (8th Cir. 1993); Doe v. Univision Television Group, Inc., 717 So. 2d 63 (Fla. App. 3 Dist. 1998); Doe v. Am. Broad. Cos., Inc., 543 N.Y.S.2d 455 (App. Div. 1 Dep't 1989).
28. Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 119–23 (2000).
29. *Id.* at 123–30.
30. Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991).
31. RESTATEMENT (SECOND) OF TORTS, *supra* note 17, § 901.
32. *Veilleux*, 206 F.3d at 92; Steele v. Isikoff, 130 F. Supp. 2d 23, 29 (D.D.C. 2000).
33. *Cohen*, 501 U.S. at 671.
34. *E.g.*, Doe v. Am. Broad. Cos., 543 N.Y.S.2d 455 (N.Y. App. Div. 1989)
35. *See, e.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999); Desnick v. Am. Broad. Cos., 44 F.3d 1345 (7th Cir. 1995); W.D.I.A. Corp. v. McGraw-Hill, Inc., 34 F. Supp. 2d 612 (S.D. Ohio 1998), *aff'd*, 202 F.3d 271 (6th Cir. 2000); Am. Transmission, Inc. v. Channel 7 of Detroit, Inc., 609 N.W.2d 607 (Mich. Ct. App. 2000); Special Force Ministries v. WCCO Television, 584 N.W.2d 789 (Minn. Ct. App. 1998).
36. *See, e.g.*, *Food Lion*, 194 F.3d at 505; La Luna Enter., Inc. v. CBS Corp., 74 F. Supp. 2d 384 (S.D.N.Y. 1999); *McGraw-Hill*, 34 F. Supp. 2d at 612; Med. Mgmt. Lab. v. Am. Broad. Cos., 30 F. Supp. 2d 1182 (D. Ariz. 1998); Frome v. Renner, 26 Media L. Rep. 1957 (BNA) (C.D. Cal. 1997); Shiffman v. Empire Blue Cross & Blue Shield, 681 N.Y.S.2d 511 (N.Y. App. Div. 1998); Homsy v. King World Entm't. Inc., No. 01–96–00708-CV, 1997 WL 52154 (Tex. App. Feb. 6, 1997).
37. Belluomo v. KAKE TV & Radio, Inc., 596 P.2d 832 (Kan. Ct. App. 1979). In *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789 (Minn. Ct. App. 1998), the court declined to dismiss publication damages at the summary judgment stage.
38. *E.g.*, *Frome*, 26 Media L. Rep. at 1957; *Homsy*, 1997 WL 52154, at *1.
39. *McGraw-Hill*, 34 F. Supp. 2d at 612; *Med. Mgmt. Lab.*, 30 F. Supp. 2d at 1182.
40. *E.g.*, *La Luna Enter.*, 74 F. Supp. 2d at 384; Shiffman v. Empire Blue Cross & Blue Shield, 681 N.Y.S.2d 511 (N.Y. App. Div. 1998).
41. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 522–25 (4th Cir. 1999); *La Luna Enter.*, 74 F. Supp. 2d at 392.
42. *See, e.g.*, *Food Lion*, 194 F.3d at 522–25.
43. Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 127–29 (1st Cir. 2000). In *Veilleux*, the First Circuit erroneously read *Food Lion* to recognize a distinction between pecuniary business losses and other reputational damages. *Id.* at 128. In fact, the Fourth Circuit explicitly held that "items relating to its reputation" included "lost sales." *Food Lion*, 194 F.3d at 522.
44. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
45. RESTATEMENT (SECOND) OF TORTS, *supra* note 17, § 901, cmt. a.
46. *Id.* § 903.
47. *Id.* § 908.
48. Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991).
49. RESTATEMENT (SECOND) OF TORTS, *supra* note 17, § 9.
50. Med. Mgmt. Lab. v. Am. Broad. Cos., 30 F. Supp. 2d 1182 (D. Ariz. 1998); Frome v. Renner, 26 Media L. Rep. 1957 (BNA) (C.D. Cal. 1997); Shiffman v. Empire Blue Cross & Blue Shield, 681 N.Y.S.2d 511 (N.Y. App. Div. 1998); Homsy v. King World Entm't., Inc., No. 01–96–00708-CV, 1997 WL 2154 (Tex. App. Feb. 6, 1997).
51. Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956 (M.D.N.C. 1997), *aff'd on other grounds*, 194 F.3d 505 (4th Cir. 1999).
52. Costlow v. Cusimano, 311 N.Y.S.2d 92 (N.Y. App. Div. 1970).
53. ABC has consistently denied those allegations and stands behind the accuracy of its broadcast.
54. DeTeresa v. Am. Broad. Cos., 121 F.3d 460 (9th Cir.), *cert. denied*, 523 U.S. 1137 (1998); Sanders v. Am. Broad. Cos., 978 P.2d 67 (Cal. 1999); Stessman v. Am. Black Hawk Broad. Co., 416 N.W.2d 685 (Iowa 1987).
55. Berger v. Hanlon, 188 F.3d 1155 (9th Cir. 1999); Parker v. Boyer, 93 F.3d 445 (8th Cir.), *cert. denied*, 519 U.S. 1148

(1997); Ayeni v. CBS, Inc., 848 F. Supp. 362 (E.D.N.Y. 1994), *aff'd*, 35 F.3d 680 (2d Cir. 1994).

56. Copeland v. Hubbard Broad., Inc., 526 N.W.2d 402 (Minn. Ct. App. 1995); Costlow v. Cusimano, 311 N.Y.S.2d 92 (N.Y. App. Div. 1970).

57. *See* Dieteman v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); *Sanders*, 978 P.2d at 67; Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668 (Cal. Ct. App. 1986); Prahl v. Brosalme, 295 N.W.2d 768 (Wis. Ct. App. 1980) (all permitting publication damages). *See also* Thomas v. Pearl, 998 F.2d 447, 452 (7th Cir. 1993); Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir. 1969); *Costlow*, 311 N.Y.S.2d at 92 (all disapproving publication damage). The California Supreme Court acknowledged, but declined to resolve the issue in *Shulman v. Group W Prod., Inc.*, 955 P.2d 469 (Cal. 1998).

58. *Dieteman*, 449 F.2d at 245.

59. *Id.* at 250.

60. *E.g.*, *Shulman*, 955 P.2d at 496 n.18.

61. Dieteman v. Time, Inc., 284 F. Supp. 925, 926 (C.D. Cal. 1968).

62. *Id.* at 932.

63. More recent examples include *People for the Ethical Treatment of Animals v. Bobby Berosini Ltd.*, 895 P.2d 1269 (Nev. 1995) and *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078 (9th Cir. 1999), *opinion withdrawn*, 237 F.3d 1007 (9th Cir. 2001).

64. Peavy v. WFAA-TV, Inc., 221 F.3d 158, 192 (5th Cir.), *cert. denied*, 121 S. Ct. 2191 (2001).

65. Boehner v. McDermott, 191 F.3d 463, 468 (D.C. Cir. 1999), *vacated and remanded*, 121 S. Ct. 2190 (2001).

66. Bartnicki v. Vopper, 121 S. Ct. 1753, 1764–65 (2001).

67. *Id.* at 1764; *Peavy*, 221 F.3d at 192; *Boehner*, 191 F.3d at 469.

68. *Bartnicki*, 121 S. Ct. at 1764. The dissent thought the argument was dispositive. *Id.* at 1775–76 (Rehnquist, C.J., dissenting).

69. The compelled speech cases upon which this argument partially relies have little to do with the issue posed by newsgathering damages. In compelled speech cases, the government tried to affirmatively force citizens to say or express something, such as salute the flag, *Bd. of Educ. of West Virginia v. Barnette*, 319 U.S. 624 (1943), put a message on a license plate, *Wooley v. Maynard*, 430 U.S. 705 (1977), or include a group advocating point of view in a private parade, *Hurley v. Irish-American Gay, Lesbian, and Bi-Sexual Group of Boston*, 515 U.S. 557 (1995). In newsgathering cases, no state-compelled speech is at issue.

70. U.S. CONST., art. I, § 8.

71. 17 U.S.C. §§ 102, 107

72. 17 U.S.C. § 504.

73. *E.g.*, Robinson v. City of Philadephia, No. 99-CV-1158 (E.D. Pa. 2001).

74. Other examples include Barrett v. Outlet Broad., Inc., 22 F. Supp. 2d 726 (S.D. Ohio 1997); Marich v. QRZ Media, 86 Cal. Rptr. 2d 406 (Cal. Ct. App. 1999); Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668 (Cal. Ct. App. 1986); Costlow v. Cusimano, 311 N.Y.S.2d 92 (N.Y. App. Div. 1970)

75. 232 Cal. Rptr. 668 (Cal. Ct. App.).

76. *Costlow*, 311 N.Y.S.2d at 92.

77. Hustler Magazine v. Falwell, 485 U.S. 46, 52–53 (1988).

78. RESTATEMENT (SECOND) OF TORTS, *supra* note 17, § 652B.

79. *Id.* § 652H, cmt. a.

80. *E.g.*, Thomas v. Pearl, 998 F.2d 447, 452 (7th Cir. 1993); Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir. 1969). New York courts apply the same principal to trespass. Costlow v. Cusimano, 311 N.Y.S.2d 92 (N.Y. App. Div. 1970).

81. In *Shulman*, the California Supreme Court acknowledged, but declined to resolve this question under California law. The court held that the plaintiff did not state a claim for the publication of private facts, but elected not to address the question of whether she could recover the same damages through her intrusion claim. Shulman v. Group W Prod., Inc., 955 P.2d 469, 496 n.18 (Cal. 1998).

82. *Id.* RESTATEMENT (SECOND) OF TORTS, *supra* note 17, § 652A, cmt. d.