1983

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TORT!

There is Tort Liability for Negligent Programming

BY HARVEY L. ZUCKMAN

Being the case for the proposition that the California and Rhode Island courts erred in extending first amendment protection to media whose negligent programming causes personal injury to those in the audience.

Maybe it's the torts professor in me overwhelming the communications law pedagogue, Floyd, but I am convinced that the decisions in Olivia N. v. NBC, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981), and DeFilippo v. NBC, —R.I. ___, 446 A.2d 1036 (1982), are just plain wrong.

In those cases your client, the National Broadcasting Company, was held to be protected against personal injury liability in tort for allegedly negligent programming by the first amendment.

In the Olivia N. case, a minor female was "bottle raped" by other minors at a San Francisco beach following the presentation on the NBC television network of a film entitled Born Innocent in which an adolescent female inmate of a state-run home for wayward girls is sexually attacked in a shower room by other inmates wielding a "plumber's helper." In the DeFilippo case, a thirteen-year-old boy accidentally hanged himself while apparently emulating a trick hanging demonstrated by Johnny Carson and a Hollywood stunt man on NBC's "Tonight Show."

While I believe, Floyd, that in neither case should your client have been held liable for damages in tort, I also believe that it received unwarranted protection of the first amendment.

Regarding tort liability for negligent programming, it is a basic proposition of tort law that a defendant can only be negligent if it creates

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RETORT!

Negligent Programming? Some First Amendment Ramifications

BY FLOYD ABRAMS

Being the case against the proposition that the California and Rhode Island courts erred in extending first amendment protection to the media in this situation.

The questions forcefully put, if wrongly answered, by Harvey Zuckman are best considered in a hypothetical framework. Consider the following wholly fictional creation:

1. In the weeks following the reporting of the Tylenol deaths, similar acts of poison being inserted in publicly sold drug products occur around the nation.
2. Two people in Cleveland die as a result of such actions.
3. A Cleveland resident is apprehended who claims that he "got the idea" to poison the drugs from reports he had seen and read.
4. Some social scientists believe that the reporting of the Tylenol deaths foreseeably led to imitative acts by members of the public.
5. An action is commenced by the widow of one of the two deceased Cleveland victims against a local newspaper and television station.

What result?

I take it, Harvey, that you and I agree on the answer. There can be no liability imposed upon the newspaper and television station. But why? What analysis leads to that conclusion?

Here we disagree. Your analysis is rooted in— I would say mired in—negligence law. Mine is premised upon the first amendment. What difference does it all make? Let's see.

Under principles of negligence law, you rightly say, the test is one of reasonableness. We should weigh, you say, the prob-
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unreasonable risks to others by its conduct. The mere airing of a motion picture containing a sexual assault should not qualify as unreasonable, utilizing Judge Learned Hand’s famous test balancing the probability of the risk and the gravity of the risk against the burden of alternative conduct.

In Olivia N., the risk that someone might emulate the film’s sexual assault scene has to be considered small from the perspective of foresight. Concededly, the gravity of the risk, i.e., rape or simulated rape, is substantial, but the burden here on NBC would be to avoid ever broadcasting any program involving a sexual assault scene. Thus, an entire genre of dramas and docudramas would be ruled off the air. Such a burden would have to outweigh the risks involved, and hence the airing of individual programs with such scenes ought not to be considered negligent.

Likewise, with the DeFilippo case, a whole area of broadcasting would be wiped out if the programming of daredevil stunts was held to be unreasonable and the burden of refraining from such programming would be too great to impose tort liability. Moreover, in DeFilippo the stuntman conducting the trick hanging cautioned the audience against trying the trick themselves. “Believe me, it’s not something that you want to go and try. This is a stunt . . . .” He then added, “I’ve seen people try things like this. I really have. I happen to know somebody who did something similar to it, just fooling around, and almost broke his neck . . . .” Simply stated, there was no negligence in either DeFilippo or Olivia N.

But, Floyd, I can understand NBC counsel’s reluctance to try the case on tort grounds. First, disposing of a negligent case on summary judgment is rare since the issue of negligence is normally for the jury, and second, we all know the bias against the media that jurors very often harbor.

I believe the proper approach to this problem is the one taken by the California Supreme Court in Weirum v. RKO General, Inc., 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975). There, a radio station with a rock music format aimed primarily at a teenage audience conducted a contest which rewarded the first audience member to locate “the real Don Steele,” one of its disc jockeys assigned to move around the Los Angeles metropolitan area. Once Steele was found, with the aid of broadcast information, the first contestant on the scene could win a modest cash prize by answering some question about the station and its programming.

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In an attempt to be first on the scene at one of the disc jockey’s stops, two teenagers began following Steele’s vehicle from the point of his previous stop, weaving in and out of freeway traffic and reaching speeds of up to 80 miles an hour. In the course of this pursuit, one of the teenagers forced Mr. Weirum’s car on to the center divider where it overturned, killing him.

In upholding a verdict and judgment against the radio station owner for wrongful death, the California Supreme Court used a traditional negligence analysis. It found that the station owed a duty of due care to Weirum because he was within a foreseeable class of persons i.e., motorists and pedestrians along Steele’s route, put at risk by the station’s encouragement of its teenage listeners, who were out of school for the summer, to be the first to reach “the real Don Steele” over the roadways of Los Angeles.

The breach of that duty was clear to the court when it compared the grave risk of death or serious injury raised by the defendant’s contest with the burden of running this particular contest.

Regarding the issue of the teenagers as intervening cause cutting off the station owner’s liability (the proximate cause issue), the court restated the modern view that third-party wrong-doing upon a stage set by the defendant’s negligent conduct will not cut off the defendant’s liability when such third-party intervention could reasonably be anticipated. And here it was the creation of the risk of third-party negligent driving that made defendant negligent in the first place.

Having determined that the verdict and judgment were correct insofar as traditional negligence law is concerned, the court then rejected the station owner's contention that its programming was protected by the first amendment. "The issue here," the court said, "is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to defendant. The First Amendment does not sanction the infliction of physical injury merely because it was achieved by work, rather than act." (15 Cal. 3d at 48, 123 Cal. Rptr. at 472.)

The California court was obviously concerned that physical injuries to innocent persons caused by careless use of the media not go uncompensated and refused to believe that a broadcaster

Ku Klux Klansmen saluting the flag and the fiery cross in a photo taken during the Klansmen's resurgence in the 1920s. In 1969, the Supreme Court held in Brandenburg that a Klansman could not be convicted unless his speech produced "imminent lawless action." The case sets the first amendment standard applicable to speech that may threaten third parties.
could hide behind the first amendment after causing such injuries.

At least so long as the U.S. Supreme Court continues to permit liability of the media for negligent defamation of private persons under its decision in Gertz v. Welch, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), I will support the California Supreme Court's decision in Weirum. In departing from the broad principles of New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), encouraging robust expression by the media, the Court in Gertz recognized that some persons unfairly hurt by such expression, i.e., the private person caught up in newsworthy matters, had no way of defending himself against the injury and little chance to obtain recompense under the actual malice standard of New York Times v. Sullivan. In permitting the states to adopt a negligence standard for determining media culpability in defamation cases involving private persons, the Court was clearly saying that tort liability of the media was alive and well in the face of first amendment claims. I fail to see what is so different about the torts of defamation that allow one to recover from the media for injury to reputation occasioned by negligence but not for physical injury or death occasioned by similar negligence.

Frankly, Floyd, if I had my druthers, I'd prefer to have my reputation dened rather than my body. If I can collect for denied reputation à la Gertz, a fortiori I ought to be able to collect for physical injury to my person caused by negligent media programming. It was unfair and unprincipled for the courts in Olivia N. and DeFilippo to turn the plaintiffs away on first amendment grounds.

Those courts ignored the constitutional standard for tort liability of the media established in Gertz and relied on the inapposite "incitement" test of Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). Weirum was disposed of in Olivia N. with the oblique suggestion that it was an "incitement" case like that of Brandenburg and was largely ignored in DeFilippo.

To indicate the shakiness of the decisions favoring NBC, I would first point out that in DeFilippo, the Rhode Island Supreme Court states as dogma that there are "four classes of speech which may legitimately be proscribed . . . ," including incitement to imminent lawless action. While I would agree with you, Floyd, that the less proscription of free speech the better, where is it written that there are four proscriptions, and only four? And do these proscriptions, alluded to by the Rhode Island court on June 15, 1982, include, for instance, the sexual, though not necessarily obscene, exploitation of children by movie makers condemned by New York statute and the U.S. Supreme Court on July 2, 1982? See New York v. Ferber, 458 U.S. 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). Not likely!

Moving from questionable dogma to erroneous case analysis, the courts' acceptance of the "incitement" test ignores the possibility that in radically different contexts different standards may be applied. The criminal syndicalism statute in Brandenburg was directed toward forbidding or proscribing speech that advocated the use of force or violations of law to overthrow the existing social order.

Working on the principle that the constitutional guarantees of free speech and free press do not permit a state to forbid or prescribe such advocacy except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action, the Court struck down the statute and reversed the conviction of a Klansman orator obtained under it.

But what has this to do with a state permitting a private common-law tort action to provide recompense for personal injuries caused by someone negligently communicating with others? I submit, nothing at all. The state's action in permitting such suits neither forbids nor proscribes negligent communications. All that is involved is imposition of liability if and only if such communications result in harm to others. Since negligent expression is not proscribed nor forbidden by penalty of law, the "incitement" test, which is designed to limit proscription of free speech, is totally inappropriate here.

What we have in these cases, Floyd, is the classic example of someone, here NBC, exercising its right of free speech and allegedly doing so negligently. Traditionally, when one's exercise of a right is done in a wrongful way and injury is caused to another, the injury must still be recompensed.