1987

Colonial Lawyer, Vol. 16, No. 2 (Fall 1987)

Editors of Colonial Lawyer
THE COLONIAL LAWYER:
A Journal of Virginia Law and Public Policy

VOLUME 16 FALL 1987 NUMBER 2

Editor's Brief

Articles

The Court of Appeals of Virginia:
A Quantitative Review. .......................... 81

The Fairness Doctrine:
Friend or Foe of the First Amendment? ............ 93

Recovery for Asbestos Abatement Programs:
A Theory of Recovery for Municipalities. .......... 101
Asbestos Update .................................. 113

Note

Emotional Distress When Libel Has Failed:
The Faulty Logic of Falwell v. Flynt. ............... 115
EDITOR'S BRIEF

This issue of The Colonial Lawyer: A Journal of Virginia Law and Public Policy is less strident than some of our recent issues. Rather than demanding change, this issue presents information which you, the reader, can evaluate to judge if there is need for change in the areas addressed.

Mr. McAuliffe's article presents preliminary information on the effect which the creation of an intermediate appellate court has had on the ability of the Virginia appellate court system to handle its caseload.

The FCC's recent abandonment of the "Fairness Doctrine" is the subject of Ms. Hamner's and Ms. Silber's article. The authors discuss the policy underlying the doctrine, its abandonment, and the likely effect it will have on access to the media of radio and television.

Mr. Vitelli proffers a theory of tort recovery for municipalities facing the enormous expense of asbestos abatement and removal. By allowing recovery for the substances' prophylactic removal courts will decrease the number of future individual sufferers, and thereby reduce the number of future individual recoveries.

Ms. Campbell analyzes the case of Falwell v. Flynn, which presents an interesting first amendment issue and a question of federal supremacy. The Supreme Court recently granted certiorari and may consider these issues this term.

We here at The Colonial Lawyer: A Journal of Virginia Law and Public Policy hope that you find these articles both interesting and useful for your practice and scholarship. If you have any comments, questions, or suggestions for future article topics please feel free to write. It is very easy for those of us who are still in the ivory cocoon of law school to be out of touch with what is truly useful and interesting to a practicing attorney, legislator, or academician.

Bruce William McDougal
ABOUT THE AUTHORS

Michael F. McAuliffe, Court of Appeals of Virginia: A Quantitative Review, is a second-year student at Marshall-Wythe. Mr. McAuliffe received a B.B.A. in the Honors Program from the University of Texas at Austin in 1985. He is a student law clerk for the Court of Appeals of Virginia, and formerly was a Research Associate with the National Center for State Courts.


Felicia Lynn Silber, The Fairness Doctrine: Friend or Foe of the First Amendment?, is a first-year student at Marshall-Wythe. Ms. Silber received an A.B. from Duke University in 1986. She has worked as a Telecommunications intern in a program administered by Henry Geller, former General Counsel to the FCC.

James Thomas Vitelli, Recovery for Asbestos Abatement Programs: A Theory of Recovery for Municipalities, graduated from Marshall-Wythe in May, 1987 and is currently working for the firm of Day, Berry & Howard in Hartford, Connecticut. While a student, Mr. Vitelli was a member of Marshall-Wythe's National Moot Court team. He received a B.A. from Yale University, in 1984. He wishes to thank Terry Richardson, Esq., a partner in Blatt & Fales, in Barnell, South Carolina for his assistance in preparing this article.

Elizabeth Montgomery Campbell, Note, Emotional Distress With a Failed Libel Claim: The Faulty Logic of Falwell v. Flynt, is a third-year student at Marshall-Wythe and is a member of the William and Mary Law Review. Ms. Campbell received a B.A. in Government from the University of Virginia in 1984.
Introduction

While Virginia's appellate court system is one of the oldest in the nation, it has only recently joined the majority of states with a tiered appellate system by adding an intermediate appellate court (IAC). The Court of Appeals of Virginia commenced operation on January 1, 1985, and its operating experiences in the past two and one-half years provide a valuable set of quantitative data from which a preliminary statistical performance evaluation is possible.

At the present time, no caseload/workload analysis exists comparing Virginia's intermediate appellate court experience with other sample states. A statistical profile of the transition from a single court appellate system to a tiered appellate court structure provides information vital in assessing the system's strengths and weaknesses and thus is a useful tool for judicial policymaking.

The present article (1) develops a framework for evaluating the performance of the court by defining the relevant performance variables, (2) compares the experience of adding an intermediate appellate court with other states that added an intermediate appellate court after 1980, and (3) briefly discusses the policy implications of a quantitative snapshot of the court's operations.

Limitations

The present work does not evaluate the Court of Appeals of Virginia or the other sampled courts by the quality of decisionmaking or the degree of "just" results. While inferences may be offered in terms of how the quantitative variables may affect the legal functioning of the court, they are made in a general context and specific applications of such comments are left for the reader.

Also, statistical analysis is dependent on the integrity of the data set and of

---

1 The origins of the court date back to the Quarter Court of 1623. For a brief historical discussion of Virginia's appellate system, see THE STATE OF THE JUDICIARY REPORT 27 (Virginia 1986) [hereinafter JUDICIARY REPORT, 1986].

the ability to control for other variables. Thus, while the methodology employed in this article appears to be sound, the conclusions must nevertheless be tentative.

The Development of the Court of Appeals of Virginia

A brief discussion of the goals and objectives relevant to the creation of the court of appeals is necessary to provide a baseline expectation measure in evaluating the court's performance using statistical criteria. A comprehensive analysis of the circumstances and issues leading to the creation of the court of appeals is covered in several earlier works.

With the passage of the present state constitution in 1970, which explicitly gave the legislature the power to create an intermediate appellate court, the movement for legislative action intensified. Several studies were completed that attempted to provide a suitable justification for adding another appellate court. Concerns about the appellate court system centered on (1) appellate caseload trends, (2) total appellate capacity, (3) the incentive to appeal a case and (4) judicial resources.

Appellate court performance, however, was typically not discussed in terms of workload measures (e.g., disposition rates as a percentage of filings and other processing measures such as time standards). The appellate debate, throughout the 1960's and 70's, primarily focused on the input (filings) of the appellate system only reinforcing the input argument with assertions of delay and other workload factors.

---

3 The table data (filings and dispositions) are taken from the state judicial annual reports of Idaho, South Carolina and Virginia for the years covered in the tables. Minnesota's data are from the state appellate statistical profiles on file with the Court Statistics and Information Management Project (CSIM) of the National Center for State Courts (NCSC). Thus, the origin of the raw numbers are from the administrative office of the state court systems and reflect the most complete data set available for each state. The standard computations are (1) sums of filings and dispositions and (2) dispositions as a percentage of filings for all individual courts and for the state totals. Dispositions as a percentage of filings should adequately approximate the input/output ratio of the court(s). This computation should give a more accurate picture of how a court or court system processes cases than does mere filings or dispositions data alone. Time standard analysis (the time necessary to complete the various parts of an appeal, i.e. docketing to oral argument) would also present useful information concerning consumption of judicial resources. Unfortunately, such information is currently not available for the majority of state appellate courts.

4 One of the earliest and most comprehensive works is Lilly and Scalia, Appellate Justice: A Crisis in Virginia? 57 VA. L. REV. 3 (1971); see also Comment, supra note 2.

5 VA. CONST. art. VI, 2.


7 See Id.

8 See Comment, supra note 2, at 210-12.
measures. Thus, the debate over adding an IAC in Virginia did not provide clear measures for later policymakers to use in evaluating the court's performance.

Additionally, fears of an increased general propensity to litigate and the growth in the Commonwealth's population helped form the backdrop for reform supporters and opponents to struggle with the issue of how to best address the Commonwealth's long-term judicial needs.

By 1982, legislation was introduced into the General Assembly which would create an intermediate court of appeals. The legislation, in large part, was a result of a report by the Judicial Council of Virginia. In 1983, the General Assembly adopted the legislation creating an intermediate court of appeals to be effective January 1, 1985. However, the 1984 General Assembly amended the earlier legislation and instituted several important changes, including making criminal appeals to the IAC discretionary in nature. Thus, when the court commenced operation in 1985, its structure and jurisdiction were the product of intense and prolonged analysis and compromise.

The present statutory scheme for the court of appeals provides that the court has wide-ranging jurisdiction with a specific degree of finality accorded many of its decisions. However, the Supreme Court of Virginia has discretionary jurisdiction to review all cases pursuant to statutorily mandated criteria. In operation, the court of appeals has exercised a significant level of autonomy with only a minimal caseload being processed up to the state supreme court for full review.

Overall, the statutory mandate for the court reveals an overt attempt to "download" specific areas of review and provide a system capable of processing appeals with more flexible management mechanisms. Also, this framework allows the court of appeals to develop a body of case law, providing all participants in the appellate process an increased degree of predictability for potential appeals.

Thus, the proper context for evaluating the court's performance must account for the pre-operation expectations and the perceived needs the court was designed to meet. In the case of Virginia's IAC, the available literature suggests that

9 See, e.g., Note, The Virginia Special Court of Appeals: Constitutional Relief for an Overburdened Court, 8 WM. & MARY L. REV. 244 (1967), Comment, supra note 2, at 211.

10 Comment, supra note 2, at 209.

11 Id.


16 For example, in 1986, of 228 petitions filed for review to the Supreme Court of Virginia from the Court of Appeals, only three were granted. JUDICIARY REPORT, 1986, supra note 1, at 30.
concerns for appellate capacity, filing trends, and appellate access formed the nexus around which the court was developed and initially implemented.

The Court's Performance: A Statistical Analysis

Within the context of high expectations and complex organizational and jurisdictional compromise, the court has completed over two and a half years of operation. A usable set of performance data is now available for examination.

A statistical analysis of the appellate court systems of Virginia, Minnesota, South Carolina and Idaho, all of which added an intermediate appellate court after 1980, can address the following performance areas: (1) the number of appeals/cases the courts disposed of as a percentage of the number of appeals/cases filed with the courts; (2) the trend, if any, of appeal/case filings and dispositions; (3) a comparative view of appellate performance including common transitional experiences; and (4) possible backlog and capacity issues as measures of policy fulfillment.

Tables 1-4 show a year by year breakdown of key variables for the states that added intermediate appellate courts after 1980. Initially, the degree of comparability between the states varies. The footnotes in the tables indicate the relevant differences in counting procedures and other data composition caveats. 17

In evaluating Virginia's experience, a two-fold approach must be taken. A discussion of the Virginia data in isolation provides the initial issue analysis; then a discussion of notable common occurrences is possible from which conclusions can be gleaned.

The Transitional Experience

Notably, the Tables 1-4 reveal several characteristic experiences. First, the initial year of operation for the IAC is marked by complications typical of shifting appellate caseloads and jurisdictions. The most obvious measure of such transition complications is seen in disposition rate fluctuations.

Table 1 shows that, in 1985, the court of appeals disposed of 52% of the cases/appeals filed with the court. Importantly, appeals sought to the Supreme Court of Virginia from cases decided on or after October 1, 1984 for which the court of appeals had jurisdiction, were docketed with the new IAC. 18 Thus, the intermediate appellate court started operation with a pending caseload. In 1986, the disposition rate for the IAC increased to 90% of filings. Interestingly, new filings were fairly constant, indicating the court was, in 1986, processing more cases in relation to its 1985 activity.

Tables 2, 3 and 4 reinforce the observation of transitional disposition fluctuations. In their first year of operation, Minnesota, South Carolina and Idaho all experienced relatively low disposition rates when compared to filings. Also, the

17 For example, instances of possible double counting are noted when cases are refiled with the appellate court and the caseload cannot be broken down to separate them.

18 JUDICIARY REPORT, 1984, supra note 12, at 45.
intermediate appellate courts of all the states increased their disposition rates in later years. For example, Idaho (Table 2), which added an IAC in 1982, shows a steady, significant increase in the disposition rate as a percentage of filings: 1982-(32%); 1983-(67%); 1984-(120%); 1985-(190%); and 1986-(100%).

The initial low disposition rates for all the sampled states indicate that transition for the court is a slow, incremental process. While this conclusion is not surprising, the common experience of all four states points to a longer evaluation period for judging a court's performance record with quantitative measures. With the Virginia IAC in its third year of operation, the court may still be in its operational learning curve. The other states' experiences should reveal that the task of implementing an IAC, even where otherwise clearly needed, is not an immediate panacea for appellate workload issues.

Predictably, the IAC disposition rate fluctuation is reflected in the overall appellate disposition rate. The addition of the IAC puts a burden on the whole appellate system. The change, in terms of caseload filings and jurisdiction, might significantly reduce the processing ability of both courts in the short term. Again, the conclusion seems reasonable that the evaluation of the new appellate court system cannot be cast in terms of quick relief. The operation of the appellate system must be framed in a long term scheme that specifically accounts for transitional complications.

Appellate Capacity

Appellate capacity represents a second area of analysis appropriately addressed by the tables. The term "capacity" is not used in the context of appellate processing limits. Rather, the capacity of an appellate court, in this article, is deemed a function of the volume inputed into a court and the resulting rate of output. As the absolute caseload limit a court can ultimately process is not easily quantifiable, since a court can theoretically build a limitless pending caseload, the more useful measure is the trend of the rate of disposition in relation to filing patterns. By examining the movement of filing rates over time and the corresponding rates of disposition, the analysis builds on the previous discussion of the transitional data and seeks to identify any total workload/caseload experiences.

An examination of Table 1 shows Virginia experienced a total appellate filing increase of 40% from 1984 to 1985. The large increase in appellate filings could indicate that the previous channels open to litigants after a trial decision were not adequate or that the new channels of appeal are significantly more accessible. The evaluation of whether the rapid increase in appellate filings from 1984-1985 is positive or negative rests with the determination of the merits of the additional appeals.

While the evaluation of the merits of the incremental appeals is a qualitative analysis outside the scope of this work, several points are worth noting. First, the filings increase does not appear to continue from 1985 to 1986. The Virginia appellate court system experienced a modest 3% increase in appellate filings from 1985 to 1986 (see Table 1). The difference in the filing rate increases may be a function of numerous variables, including the perception of a change in the
accessibility of the appellate court system. This explanation suggests the initial large filings increase represents an adjustment process resulting from the appellate channels appearing more accessible to litigants. Thus, a pre-existing demand for the resources of the appellate court system combined with an increased perception of accessibility would be consistent with the significant first year filing increase seen in Table 1.

Also, filing patterns must be put in the context of how the appellate system processes filings. Both the supreme court and the court of appeals have primarily discretionary jurisdiction. Thus, the majority of appellate filings do not necessarily translate into workload measures. This is important as the filing rate for the court may be a deceiving unit of count when focusing on appellate workload.

Similar to Virginia's experience, Table 3 reveals total appellate filings in Minnesota increased dramatically in the years following the implementation of an intermediate appellate court (1983, 1984, and 1985). However, disposition rates were high before the addition of the IAC, indicating that increased capacity, not backlog (pending caseload), was the most visible effect of adding another appellate court.

Conversely, for South Carolina and Idaho (Tables 4 and 2) the total caseload of the appellate court system did not dramatically increase after the IAC was added. Thus, in subsequent years, disposition rates as a percentage of filings usually increased for both courts in the appellate system. The increase in disposition rates, without an increase in filing rates, could indicate the opportunity to reduce any pending caseload present before the IAC started operation.

Tables 1-4 show two distinct appellate patterns at work. Table 1 (Virginia) and Table 3 (Minnesota) appear to have experienced significant filing increases, at least for the year the IAC started operation. Tables 2 (Idaho) and 4 (South Carolina) indicate fairly comparable filing levels, but show high disposition rates. The implication of these differences surfaces as policymakers start to evaluate post-modification appellate court performance. The statistical difference between the two sets of states might be found in the operation of the appellate system prior to the addition of the IAC. However, this pre-implementation experience often rigidly dictates the subsequent evaluation process to the point of precluding any subsequent, but unarticulated, operational benefits.

An Evaluation

Ultimately, in the context of judicial management, how well the justification for adding the IAC matches the post-implementation experience will determine the initial label of "solution" or "symptom" attached to the court. The foregoing analysis reveals that if Virginia and, to a lesser extent, Minnesota were anticipating an opportunity to quickly reduce the pending caseload, the addition of the IAC probably did not meet expectations. Alternatively, if Idaho and South

19 See McAuliffe, Virginia Tort Reform: A Case of Crying Wolf? 16 COL. LAW. 4, 12 (Spring 1987), where the proposition is made that the perception of an increase in trial case filings and recoveries may be a causal factor in the assertion of a litigation "crisis". Appellate filings may be subject to the same process; see also Roper, The Propensity to Litigate in State Trial Courts. 1981-1984, 1984-1985 11 JUST. SYS. J. 262, 267 (1987).
Carolina thought appellate capacity was the pressing need basis for adding another appellate court, their prediction may have been less than accurate.

However, in Virginia's case, a need to open the appellate channels, at least to the degree of not creating potentially unresponsive institutional barriers (e.g., one appellate court with primarily discretionary jurisdiction) seems to have been addressed. If the observation is accurate that the first year increase in filings points to an adjustment process, the tiered appellate court system may be appropriately responding to a demand for some minimal appellate review for more cases.

Also, if the transitional analysis approximates a real world process, low initial disposition rates should not be viewed as a measure of ineffectiveness. The complications of adding an IAC seem to be a part of the appellate modification process and should diminish over time. The Court of Appeals of Virginia and the other sample states' intermediate appellate courts should be evaluated with longer time frames than previously thought appropriate and viewed in terms of addressing changing needs.

Finally, even if the "perceived" need for adding a court does not appear to have been met, the tiered appellate court system may well be the appropriate answer to other important policy concerns not adequately developed in the pre-implementation legislative debate. For example, the need for increased appellate access may have been the accurate justification for adding an IAC in Virginia, but the focus of the initial debate, for some, was the issue of reducing the pending caseload.

A quantitative review of the court of appeals' (indeed the whole appellate court system's) operation enables policymakers to monitor the new mechanism for processing appeals. A two and one-half year snapshot of Virginia's appellate court system leads to the conclusion that the Commonwealth needed additional doors through which appellate review could be sought. The structure of the court of appeals, its primary use of discretionary jurisdiction and the oversight process are all mechanisms designed to enable the court to open and shut the door as the merits of the appeal dictate; nothing, quantitatively, is present to dispute the conclusion that those mechanisms are indeed working properly.
### Table 1

Appellate Filing/Disposition Data for Jurisdictions that Added an Intermediate Appellate Court After 1980
1980-1986

<table>
<thead>
<tr>
<th>Year</th>
<th>Supreme Court</th>
<th>Court of Appeals</th>
<th>State Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Discretionary</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Mandatory</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1980:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td>N/A</td>
<td></td>
<td>2,091</td>
</tr>
<tr>
<td>Disposed</td>
<td>N/A</td>
<td></td>
<td>1,860</td>
</tr>
<tr>
<td>Dispositions as a percentage of filings</td>
<td>N/A</td>
<td></td>
<td>89%</td>
</tr>
<tr>
<td>1981:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td>N/A</td>
<td></td>
<td>2,257</td>
</tr>
<tr>
<td>Disposed</td>
<td>N/A</td>
<td></td>
<td>1,823</td>
</tr>
<tr>
<td>Dispositions as a percentage of filings</td>
<td>N/A</td>
<td></td>
<td>81%</td>
</tr>
<tr>
<td>1982:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td>N/A</td>
<td></td>
<td>2,290</td>
</tr>
<tr>
<td>Disposed</td>
<td>N/A</td>
<td></td>
<td>2,318</td>
</tr>
<tr>
<td>Dispositions as a percentage of filings</td>
<td>N/A</td>
<td></td>
<td>101%</td>
</tr>
<tr>
<td>1983:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td>N/A</td>
<td></td>
<td>2,073</td>
</tr>
<tr>
<td>Disposed</td>
<td>N/A</td>
<td></td>
<td>1,922</td>
</tr>
<tr>
<td>Dispositions as a percentage of filings</td>
<td>N/A</td>
<td></td>
<td>93%</td>
</tr>
<tr>
<td>1984:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td>N/A</td>
<td></td>
<td>1,915</td>
</tr>
<tr>
<td>Disposed</td>
<td>N/A</td>
<td></td>
<td>1,919</td>
</tr>
<tr>
<td>Dispositions as a percentage of filings</td>
<td>N/A</td>
<td></td>
<td>100%</td>
</tr>
<tr>
<td>1985:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td>N/A</td>
<td></td>
<td>1,043</td>
</tr>
<tr>
<td>Disposed</td>
<td>N/A</td>
<td></td>
<td>1,321</td>
</tr>
<tr>
<td>Dispositions as a percentage of filings</td>
<td>N/A</td>
<td></td>
<td>94%</td>
</tr>
<tr>
<td>1986:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td>N/A</td>
<td></td>
<td>1,232</td>
</tr>
<tr>
<td>Disposed</td>
<td>N/A</td>
<td></td>
<td>1,095</td>
</tr>
<tr>
<td>Dispositions as a percentage of filings</td>
<td>N/A</td>
<td></td>
<td>89%</td>
</tr>
</tbody>
</table>

* = year Intermediate Appellate Court started.
-- = not applicable.
N/A = data not available.

Footnotes:
'Totals are incomplete but comparable. Data do not include appeals of right such as appeals from the State Corporation Commission and cases involving the death penalty.

<table>
<thead>
<tr>
<th>Year</th>
<th>Supreme Court</th>
<th>Court of Appeals</th>
<th>State Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Filed</td>
<td>Disposed</td>
<td>Filed</td>
</tr>
<tr>
<td>1980</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>438</td>
<td></td>
<td>438</td>
</tr>
<tr>
<td>1981</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>86%</td>
<td></td>
<td>86%</td>
</tr>
<tr>
<td>1982</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>354%</td>
<td></td>
<td>354%</td>
</tr>
<tr>
<td>1983</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>64%</td>
<td></td>
<td>64%</td>
</tr>
<tr>
<td>1984</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>55%</td>
<td></td>
<td>55%</td>
</tr>
<tr>
<td>1985</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>62%</td>
<td></td>
<td>62%</td>
</tr>
<tr>
<td>1986</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>71%</td>
<td></td>
<td>71%</td>
</tr>
</tbody>
</table>

* = year Intermediate Appellate Court started.
-- = not applicable.
NJ = no jurisdiction.
N/A = data not available.

Footnotes:

1985 figure represents some double counting. Discretionary petitions granted review are counted once as a petition and again when they are refiled as mandatory cases.

In 1984, no data were available on the number of requests to appeal.

1984, 1985 data includes some discretionary cases reviewed on the merits. Also, 1982 data includes all case types, but are comparable.

### Table 3
Appellate Filing/Disposition Data for Jurisdictions that Added an Intermediate Appellate Court After 1980
1980-1986

<table>
<thead>
<tr>
<th>Year</th>
<th>Supreme Court</th>
<th>Court of Appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mandatory</td>
<td>Discretionary</td>
</tr>
<tr>
<td>1980:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Disposed</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Dispositions as a percentage of filings</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>1981:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Disposed</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Dispositions as a percentage of filings</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>1982:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Disposed</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Dispositions as a percentage of filings</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>1983:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td>1,317</td>
<td>6</td>
</tr>
<tr>
<td>Disposed</td>
<td>1,360</td>
<td>3</td>
</tr>
<tr>
<td>Dispositions as a percentage of filings</td>
<td>104%</td>
<td>50%</td>
</tr>
<tr>
<td>1984:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td>216</td>
<td>361</td>
</tr>
<tr>
<td>Disposed</td>
<td>931</td>
<td>151</td>
</tr>
<tr>
<td>Dispositions as a percentage of filings</td>
<td>43%</td>
<td>42%</td>
</tr>
<tr>
<td>1985:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td>211</td>
<td>575</td>
</tr>
<tr>
<td>Disposed</td>
<td>329</td>
<td>626</td>
</tr>
<tr>
<td>Dispositions as a percentage of filings</td>
<td>15%</td>
<td>109%</td>
</tr>
<tr>
<td>1986:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filed</td>
<td>176</td>
<td>595</td>
</tr>
<tr>
<td>Disposed</td>
<td>159</td>
<td>624</td>
</tr>
<tr>
<td>Dispositions as a percentage of filings</td>
<td>90%</td>
<td>105%</td>
</tr>
</tbody>
</table>

*= year Intermediate Appellate Court started.
**= not applicable.
N/A = data not available.

Footnotes:
1981 data do not include administrative agency appeals.

Source: State Appellate Statistical Profiles, National Center for State Courts.
Table 4
Appellate Filing/Disposition
Data for Jurisdictions that Added an Intermediate Appellate Court After 1980
1980-1986

<table>
<thead>
<tr>
<th>State</th>
<th>Supreme Court</th>
<th>Court of Appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td>SOUTH CAROLINA</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>Filed</th>
<th>Disposed</th>
<th>Dispositions as a percentage of filings</th>
<th>Filed</th>
<th>Disposed</th>
<th>Dispositions as a percentage of filings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>921</td>
<td>--</td>
<td>N/A</td>
</tr>
<tr>
<td>1981</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>1,035</td>
<td>--</td>
<td>N/A</td>
</tr>
<tr>
<td>1982</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>971</td>
<td>--</td>
<td>N/A</td>
</tr>
<tr>
<td>1983</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>614</td>
<td>--</td>
<td>N/A</td>
</tr>
<tr>
<td>1984</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>55%</td>
<td>87%</td>
<td>N/A</td>
</tr>
<tr>
<td>1985</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>492</td>
<td>404</td>
<td>N/A</td>
</tr>
<tr>
<td>1986</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>398</td>
<td>398</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Footnotes:
1 = Transfers from the Supreme Court. Transfers not included in state total.
* = year Intermediate Appellate Court started (September 1, 1983).
-- = not applicable.
N/A = data not available.
NJ = no jurisdiction.

THE FAIRNESS DOCTRINE:
FRIEND OR FOE OF THE FIRST AMENDMENT?

by
E. Diana Hamner
Felicia L. Silber

Introduction

On August 4, 1987, the Federal Communications Commission (FCC) abandoned the controversial Fairness Doctrine because the doctrine "violated the First Amendment rights of broadcasters and, therefore, was no longer in the public interest." The Fairness Doctrine imposed on broadcasters two interrelated obligations in return for the privilege, granted by the government, to use a portion of the broadcasting spectrum. The Fairness Doctrine required licensees (1) "to provide coverage of vitally important controversial issues of interest in the community served by the licensees" and (2) "to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues." The decision to eliminate the Fairness Doctrine is not much of a surprise in view of the Reagan era of governmental deregulation. This FCC decision closely followed a June 19, 1987, Presidential veto of the Fairness in Broadcasting Act of 1987, a bill which would have codified the Fairness Doctrine.

The public should note that the disappearance of the Fairness Doctrine does not signal total deregulation of the broadcasting content. In its August 1987 decision, the FCC specifically acknowledged that the ruling against the Fairness Doctrine did not apply to "equal access" and "equal time" requirements imposed

1 For an explanation of the "Fairness Doctrine", see infra notes 3 & 4 and accompanying text.


4 Id.

5 S. 742, 100th Cong., 1st Sess. § 3 (1987).

6 Message to the Senate Returning S. 742 Without Approval, 23 WEEKLY COMP. PRES. DOC. 715 (June 19, 1987).

7 47 U.S.C. § 312(a)(7)(1982) (gives the FCC the authority to revoke a broadcast license for willful or repeated failure to allow "reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcast station by a candidate for federal elective office on behalf of his candidacy").

by the Communications Act. Thus, a broadcaster allowing a qualified candidate for public office to "use" its airwaves must continue to afford equal opportunities to all other opposing candidates.

Remand forced the Decision

The FCC's action to invalidate the Fairness Doctrine came in response to a January 1987, remand order of the U.S. Court of Appeals for the District of Columbia. The FCC found that the Meredith Corporation's (Meredith) television station WTYH of Syracuse, New York, violated the Fairness Doctrine. In review of the FCC's finding of a violation, the court held that although the FCC reasonably interpreted its own Fairness Doctrine precedents, it failed to give adequate consideration to Meredith's constitutional argument. The court evaded constitutional review of whether the application of the Fairness Doctrine to Meredith violated the First Amendment. Instead, the court gave the question back to the FCC because "in a formal adjudication, an administrative agency is obliged to consider and respond to substantial arguments a respondent presents in its defense." In its 1985 Fairness Report, the FCC "deliberately cast grave legal doubt on the Fairness Doctrine", so the time was ripe for the FCC to strike down the Doctrine.

Development of the Fairness Doctrine

The Fairness Doctrine "originated very early in the history of broadcasting..." The origins of the Fairness Doctrine are usually traced to a 1929 decision of the FCC's predecessor, the Federal Radio Commission. In 1949, the FCC issued the Report on Editorializing by Broadcast Licensees, stating the doctrine in its present two-prong form. In 1959, Congress amended Section 315 of the Communications Act so that appearances by political candidates on news broadcasts could be exempted from the

---

9 Syracuse Peace Council v. Television Station WTYH, 52 F. R. 31768. The decision also does nothing to limit the FCC's ability to license stations and regulate them in the public interest. Id.


11 Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987).

12 Id. at 865.

13 Id. at 873 (citing 5 U.S.C. § 557(c)(1982)).

14 Id.


17 13 FCC 1246 (1949) [hereinafter Report on Editorializing].

18 See infra text accompanying notes 3 & 4.

"equal time" rule. The amendment also included this language: "nothing [in this section] shall be construed as relieving broadcasters,..., from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.\textsuperscript{20}

Whether this amendment codified the Fairness Doctrine such that the FCC could not modify or eliminate the doctrine without approval from Congress is a matter of debate.\textsuperscript{21} The Supreme Court stated that the 1959 amendment "ratified" the Fairness Doctrine.\textsuperscript{22} The D.C. Circuit in Meredith also sidestepped the issue. The court pointed out that

the Commission [in its 1985 Fairness Report] refused to decide whether the Fairness Doctrine was self-generated pursuant to its general congressional authorization or specifically mandated by Congress... We think, however, the Commission was obliged to resolve that issue, at least in the context of an enforcement proceeding in which a party raises a constitutional defense.\textsuperscript{23}

The fact that the FCC ruled on August 4, 1987, that the Fairness Doctrine violated the first amendment rights of broadcasters indicates that perhaps the Communications Act does not codify Fairness Doctrine. The answer to the codification issue remains elusive.

The Supreme Court unanimously upheld the Fairness Doctrine in Red Lion Broadcasting v. FCC.\textsuperscript{24} The Court held that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."\textsuperscript{25} The Court justified its conclusion in light of the limited availability of broadcast frequencies, reasoning that the Fairness Doctrine's restrictions on broadcasters' freedom of speech were permissible because the first amendment right to be informed is crucial.\textsuperscript{26} The Court in Red Lion left open the door for future challenges, noting that "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider constitutional implications."\textsuperscript{27}

Although the Supreme Court upheld the Fairness Doctrine in Red Lion on the basis of scarcity of broadcast frequencies, it has declined to apply the Fairness Doctrine to newspaper publishing.\textsuperscript{28} In Miami Herald, the Court struck down Florida's "right of reply" statute granting a political candidate a right to equal

\begin{thebibliography}{9}
\item \textsuperscript{20} Id.
\item \textsuperscript{22} Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 382 (1969).
\item \textsuperscript{23} Meredith Corp. v. FCC, 809 F.2d 863, 873 (D.C.Cir. 1987).
\item \textsuperscript{24} 395 U.S. 367 (1969).
\item \textsuperscript{25} Id. at 389.
\item \textsuperscript{26} Id. at 389-390.
\item \textsuperscript{27} Id. at 393.
\item \textsuperscript{28} Miami Herald v. Tornillo, 418 U.S. 241 (1974).
\end{thebibliography}
space to answer criticism and attacks on his record by a newspaper, free of charge. The Court ignored the argument that "[t]he First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by owners of the market" and concluded that

[t]he choice of materials to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public officials-whether fair or unfair-constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

In *CBS v. Democratic National Committee*, the Supreme Court held that neither the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements. In that opinion, Justice White pointed out that "[u]nlike other media, broadcasting is subject to an inherent physical limitation.... Because the broadcast media utilize a valuable and limited public resource, there is also present an unusual order of First Amendment values." The Supreme Court again affirmed the Fairness Doctrine but noted that "the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded ten years hence." Again the Court left some flexibility in the area of broadcast regulations, tying substance of regulations to technological change.

More recently, in *FCC v. League of Women Voters of California*, the Court declined to reconsider *Red Lion* "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." The FCC's 1985 *Fairness Report* certainly endeavored to send the Supreme Court the signal invited in *League of Women Voters*. Because of the explosive growth of information sources, the 1985 *Fairness Report* found the "scarcity rationale," which has historically justified content regulation of broadcasting, no longer valid. The FCC concluded that "[w]here the balance ours alone to strike, the Fairness Doctrine would...fall short of promoting those interests necessary to uphold its

29 Id. at 251.
30 Id. at 258.
32 Id. at 101.
33 Id. at 102. The Supreme Court also reaffirmed *Red Lion* in *CBS v. FCC*, 453 U.S. 367, 395 (1981) (holding that § 312(a)(7) of the Communications Act creates a *limited* right to "reasonable" access that pertains only to legally qualified federal candidates and may be invoked by them only for the purpose of advancing their candidacies once a campaign has commenced.)
35 Id. at 376-377 n.11.
36 Meredith Corp. v. FCC, 809 F.2d at 867.
37 Id. at 867.
Factors Weighing on the Constitutional Balance

In analyzing the legal and philosophical shift in perception of first amendment rights involved in broadcasting, the climate of deregulation in the Reagan administration, assumptions concerning modern broadcasting technology, and the text of the Doctrine itself must be considered. Often, as with the Fairness Doctrine issue, overruling a legal principle on the grounds that it is contrary to public interest after longstanding, explicit acceptance reflects a pragmatic realization on the part of the Court that a particular policy may be unworkable or undesirable on extra-constitutional grounds.

Regulatory Environment

A trend toward deregulation marks the Reagan era. According to its proponents, deregulation sweeps away anachronistic, harmful restrictions that interfere with the ebb and flow of markets. In the context of businesses providing information to the public, the requirement of fair presentation of important issues was judged, in Syracuse Peace Council, to promote "excessive and unnecessary government intervention into the editorial processes of broadcast journalists."\(^{39}\)

"Excessive intervention" was defined by the standard set in *F.C.C. v. League of Women Voters*;\(^{40}\) the Court ruled that regulation of broadcasters' speech must be "narrowly tailored to achieve a substantial government interest."\(^{41}\) The "substantial government interest" test as applied in *Syracuse Peace Council* suggests that "government interest" will now be closely associated with legitimizing the broadcasters' privileges as rights, rather than defending the public's desire to be heard and to remain informed.

However, regulation of the broadcast industry, despite all its attendant burdens and costs, may be justifiable because of the especially sensitive effect the presentation of news has on the process of democracy, and the important first amendment values embodied in the Doctrine which override pragmatic concerns about "excessive intervention" and economic efficiency.

Modern Broadcast Technology

Opponents of the overturned Doctrine suggest that even if the goal of protecting the public's right to information has merit in the abstract, government involvement has become superfluous in light of current technology, as was argued in the 1985 *Fairness Report*. With the increasing penetration of cable television in its one hundred channel capacity, the possibility for all opinions to be aired is effectively limitless. However, cable serves fewer than 50% of all U.S.

---


41 *Id.* at 380.
households. Furthermore, cable requires additional payment over and above the indirect costs of advertising borne by the consumers of over-the-air stations, which further restricts its potential availability to the general public.

With only one topic featured on many of the cable channels, programming can now be easily directed to a particularly desired audience. This audience fragmentation serves to frustrate the public interest in obtaining a common ground to discuss issues of importance to all kinds of viewers. Devotees of serious news have several channels catering to them, but the limited availability and extra cost arguments minimize these outlets as the solution to the public's need for a balance of biases in the portrayal of issues.

The meaning of an "overall balance" in the presentation of controversial issues has shifted over time from the ideal of balance within each station's programming to a more general notion of balance in all media taken together. In the Miami Herald case, the Court refused to regulate for a balanced approach of all media taken together, citing editorial discretion as the important value to be promulgated, regardless of the impact on the type of information publicly available. Although viewers and listeners may theoretically have the option of pleading their views on a plethora of stations, and in print as well as over the air, the number of stations that will actively seek or welcome material associated with controversial issues will only decline in the aftermath of the elimination of the Fairness Doctrine.

One leading economic rationale justifies government interference on the grounds that competition in the marketplace has failed to provide a necessary or desirable social good. Broadcasters, especially when the issue is the media itself, as a whole have an incentive for preventing the airing of certain viewpoints and issues in their entirety, thus removing a valuable social good. If broadcasters present a monolithic front and universally declare the issue unimportant or not controversial enough to warrant broadcast time, the technologically-increased number of stations theoretically available to the public makes no difference. While technology might have changed since the Red Lion decision, the greater number of media outlets may have merely amplified the strength of the media in resisting its duties rather than providing more of the public an opportunity to gain a hearing.

Efficacy of Enforcement in Light of the Text

The text of the Fairness Doctrine posed a large part of the difficulty in effectively guaranteeing a first amendment atmosphere to the public. Because its provisions were so broad, and thus open to widely differing interpretation, the Doctrine was consistently attacked in its application as an arbitrary vehicle for enforcement, useful only in situations of flagrant and chronic violations on major channels. The Syracuse Peace Council decision illustrates the difficulty the FCC had in enforcing the Doctrine in a fair and predictable manner. The FCC simply does not have the resources available to pursue every possible infraction with the


43 See supra notes 28 & 29 and accompanying text.
same degree of intensity. The vagueness of the first provision of the Doctrine, the "reasonable percentage of time" obligation, could be seen as promoting a general positive value for society, rather than a strict guideline with corresponding penalties for violation.

General industry criticism of the low percentage of Fairness complaints affirmed by the FCC cites inadequacy of resources as the reason behind agency ineffectiveness in carrying out its Fairness goals. Often, the FCC could only truly oversee the major television networks and radio stations in large cities, and broadcasters in smaller communities escaped their obligations since violations were less likely to attract the attention of an national organization like the FCC. This limited enforcement reveals Fairness complaints as vehicles for vocal minorities to pursue their private agendas and impose their views on the public.

The efficacy-of-enforcement question has narrowed the first amendment by limiting affirmative, as well as defensive, actions in support of free speech. If broadcasters fail to present a controversial issue for comment, the supporters of the Doctrine feel that the community as a whole is harmed. But this harm is more difficult to prove than in a case where a group or an individual is prohibited from speaking out. The criteria used to define a controversial issue for Fairness Doctrine purposes are always susceptible to attack as reflecting biases of regulators or broadcasters. Broadcasters know that once a controversial issue is put forward and the "balance" obligation is triggered, the record of the station in presenting both sides is not difficult to check, as in the case of a "defensive" first amendment claim. Although the Doctrine does not require "equal time" be given to both sides, "overall balance" of programming remains a matter of public record in station logs, allowing obviously inequitable presentations to be easily discovered, if indeed the FCC is equipped to monitor them.

By no means has the federal government relinquished control over the content of the airwaves. Because the Syracuse Peace Council did not overturn the "equal time", "equal access" and licensing requirements for political candidates, government retains the ability to prevent media manipulation of vital facts. The FCC's opinion signals in part a concession to the current atmosphere of deregulation, but mainly reflects a concern with breadth of the Doctrine's actual text. Regardless of how worthy its purpose, a regulation cannot function as law without reliable and cost-effective means for enforcement.

Conclusion

If the text of the Doctrine was insufficient to safeguard the public's right to be informed and to inform, a choice must be made between promoting these goals through education and interest group action, or by government regulation. Action in the remainder of the decade will be slow due to the pervasive atmosphere of deregulation, but perhaps a "fairer" doctrine could be developed which would recognize the essential nature of information flowing to the public without entirely defeating the interests of broadcasters in remaining autonomous.

In the absence of new regulations, the standard requiring stations to devote a reasonable amount of time to controversial issues should be promoted by the stations as an industry ethic to accomplish fair representation of opposing views.
Likewise, the now-defunct "controversial" requirement ought to force stations to air timely issues at regular intervals, with formal opportunities for public input.

The philosophy behind the Fairness Doctrine is applauded by all, with the understandable exception of some station owners. Broadcasters clearly owe duties to the public in return for their licenses. However, delineating these duties without hamstringing television and radio stations in the daily conduct of their business requires more definitive statements of policy than those contained in the version of the Fairness Doctrine overturned in August. Finding an appropriate way to articulate our shared concerns for first amendment protections in the broadcasting industry is the task facing the public, the industry, and government alike.
RECOVERY FOR ASBESTOS ABATEMENT PROGRAMS:
A THEORY OF RECOVERY FOR MUNICIPALITIES

by
James T. Vitelli

Knowledge of the severe health risks posed by exposure to asbestos is creating a variety of new legal challenges, some of which have yet to be conclusively litigated. Courts and commentators have given their attention to the liability of asbestos manufacturers for exposing workers to harmful products. This article will focus on a different form of litigation: recovery by a municipality against a manufacturer for expenditures made to abate the health risks generated by asbestos used in the construction of municipal buildings.

Recovery of this sort requires an altogether different theory of liability because no personal injury is alleged. As most of the health concerns with respect to asbestos in municipal buildings stem from exposure to the material by children in public schools, this paper concentrates its analysis on abatement procedures and recovery as they relate to the municipality's school system, although the theory of recovery applies with equal strength to public libraries, city halls, and other public buildings. For the purposes of analysis, we will assume that the municipality referred to in this article is located in a jurisdiction that has adopted the Uniform Commercial Code and section 402A of the Restatement 2d, Torts.

BACKGROUND

From the mid-1940's to the mid-1970's contractors used asbestos-containing materials (ACM) in school buildings for fireproofing and insulation. These qualities include fire resistance, tensile strength, and above average thermal and electrical insulating capabilities. Because of its industrially advantageous qualities, asbestos was widely used in cement products, plaster, fireproof textiles, vinyl floor tiles, thermal and acoustical insulation and sprayed materials. The hard asbestos-containing materials such as vinyl floors are generally safe and produce few, if any exposure problems. However, soft or loosely bound materials, known as friable asbestos, pose serious risks of contamination and exposure-related health problems. Friable materials crumble and fray easily, releasing asbestos dust and fibers into the air from which they can be inhaled and trapped in the respiratory system.

Asbestos Related Health Risks

1 Lang, The Problem of Asbestos in the Public Schools, 16 TRIAL LAW. Q. 13 (No. 2 1984) [hereinafter Asbestos in Public Schools].

2 Id. These qualities include fire resistance, tensile strength, and above average thermal and electrical insulating capabilities.

3 Id.

Among the serious medical disorders associated with exposure to asbestos are: asbestosis, a lung disease; mesothelioma, a rare cancer of the chest and abdominal lining; and cancers of the lung, esophagus, stomach, colon and other organs.\textsuperscript{5} School age children face particularly severe problems because of the diseases' long-term manifestation period.\textsuperscript{6} The Environmental Protection Agency (EPA) estimates that a child exposed to asbestos between the ages of five and ten has at least ten times greater chance of contracting mesothelioma than does an adult between the ages of thirty-five and forty.\textsuperscript{7} In addition to these findings by the EPA, Congress released its own conclusions regarding the health risks presented to school children exposed to asbestos products. Section 4011 of the Asbestos School Hazard Abatement Act of 1984,\textsuperscript{8} now incorporated into Title 20, reads in part:

(a) The Congress finds that --

(1) exposure to asbestos fibers has been identified over long period of time by reputable medical and scientific evidence as significantly increasing the incidence of cancer and other severe fatal diseases, such as asbestosis;

(2) medical evidence has suggested that children may be particularly vulnerable to environmentally induced cancers; ... 

(4) substantial amounts of asbestos, particularly in sprayed form, have been used in school buildings, especially during the period 1946 through 1972;

(5) partial surveys in some States have indicated that (A) in a number of school buildings materials containing asbestos fibers became damaged or friable, causing asbestos fibers to be dislodged into the air, and (B) asbestos concentration far exceeding normal ambient air levels have been found in school buildings containing such damaged materials;

(6) the presence in school buildings of friable or easily damaged asbestos creates an unwarranted hazard to the health of school children and school employees who are exposed to such material...\textsuperscript{9}

In addition to agency and congressional recognition of the health hazards created by exposure to asbestos, courts have also acknowledged the dangers. A federal district court in Minnesota held, when presented with the issue of whether a plaintiff could collaterally estop the defendant from litigating the issue of


\textsuperscript{6} See Lang, Asbestos in Public Schools, at 14, "As contrasted with asbestos workers, school age children have a significantly greater lifetime risk in developing mesothelioma because of the age at which asbestos exposure occurs." Id. at 14 n.13.

\textsuperscript{7} The 1983 EPA Study (Friable Asbestos) at 1-2, as cited in Lang, Asbestos in Public Schools at 14 n.15.


disease causation, that the fact that asbestos causes diseases such as asbestosis
and mesothelioma was so firmly entrenched in medical and legal literature that it
was not subject to serious dispute. 10 This universal recognition of the health
hazards presented by asbestos products to school children and teachers has caused
federal and state agencies to develop mandatory asbestos abatement procedures.

The Process of Asbestos Abatement

In May, 1982, the EPA promulgated a rule requiring "local education agencies
to identify friable asbestos-containing material in public and private schools by
visually inspecting schools buildings for friable materials." 11 This rule also
requires "local education agencies to provide warnings of the health effects of
asbestos and instructions on methods to avoid or reduce exposure to school
employees of any school with friable asbestos-containing material and to notify
parent-teacher associations of the results of inspections." 12 Though the rule
requires detection and warning, the EPA did not require abatement or offer any
guidelines if this course of action was pursued. 13 As a result, school districts
have taken it upon themselves to abate the hazardous materials. In addition to
voluntary abatement, some states have implemented mandatory abatement
procedures upon the discovery of ACM. 14 The procedures often include:
1) total removal, the most costly yet most permanent remedy;
2) enclosure, or the construction of an air tight barrier around the ACM; and
3) encapsulation, or the coating of the ACM to prevent fiber and dust
release. 15

1982). Action brought against manufacturer and seller of asbestos products by
asbestos insulation installer. The issue was whether the plaintiff could collaterally
estoppel the defendants from litigating certain issues. The court held that on the
issue of disease causation estoppel was appropriate as the fact that asbestos dust
causes disease is a fact so firmly established that it is not worthy of relitigation.


12 Id.

13 See Kincade, Issues in School Asbestos Hazard Abatement Litigation, 16

14 See e.g. 1985 Conn. Pub. Acts 541. Section 2 of that act states: "Each
school district shall inspect its school facilities for asbestos and submit a report of
its findings along with an abatement plan..." (emphasis added).

15 Kincade, Issues at 955 n.15. See also CONN. AGENCIES REGS. § 10-__-1:
Definitions.
Abatement procedures are expensive\textsuperscript{16} and many municipalities are unable to bear the entire financial burden absent outside assistance. The Asbestos School Hazard Abatement Act of 1984 provides for financial assistance through an "Assistance Program."\textsuperscript{17} Like many other federally funded assistance programs, the granting of aid is premised on financial need. Subsection (d) of section 4014 states in pertinent part: "In no event shall financial assistance be provided under this chapter to an applicant if the Administrator determines that such applicant has resources adequate to support an appropriate asbestos materials abatement program."\textsuperscript{18} Thus, financially needy school districts are entitled to a 20 year interest free loan of up to one hundred percent of the cost of abatement.\textsuperscript{19} If the Administrator finds that the district will be unable to perform the necessary abatement through a loan, a grant may be given in an amount of up to fifty percent of the cost of abatement.\textsuperscript{20} Districts with "adequate resources" must initiate abatement procedures absent any federal assistance.

Such financial assistance helps to get abatement programs off the ground, but is ineffective as a complete remedy because school districts must, over a twenty year period, find some way to pay the government back. This would necessarily entail drastic long-term budget cuts, resulting in the loss of current school programs, teachers, supplies and extracurricular activities. For districts receiving no financial assistance, this remedy mandates immediate budget cuts. A further pitfall of the federal funding remedy is that the fulfillment of the promise of forthcoming money is tenuous at best.\textsuperscript{21} The most direct and promising alternative to reliance on federal funding is direct tort litigation with the asbestos manufacturers to recover for damage caused by the unreasonably dangerous product.

Establishing Manufacturer Liability

The most promising and complete theory upon which manufacturer liability can be established is a strict products liability theory under section 402A of the Restatement 2d, Torts. That section reads:


\textsuperscript{17} 20 U.S.C.A. § 4041 (West Supp. 1987).

\textsuperscript{18} Id. at § 4014 (d).

\textsuperscript{19} Id. at § 4014 (e)(1), (f)(2).

\textsuperscript{20} Id. at § 4014 (e)(1).

\textsuperscript{21} Kincade, Issues at 956 n.18. In addition to being speculative, federal funds cause other problems as well. "In hearings before the House Energy and Commerce Subcommittee on Transportation and Commerce, John A. Moore, EPA assistant administrator for Pesticides and Toxic Substances, testified that the Act is 'likely to be counter-productive because school districts would begin competing for the federal funds instead of moving quickly on their own.'" Id.
Special Liability of Seller of Product For Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his products, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

For a municipality to recover under this section, it must establish a defect in the product, a causal link between this defect and the injury to the user or his product, and the manufacturer's knowledge that the product would reach the user without substantial change in condition.22 We may assume that the last element, change in condition, is unchallenged where there is no claim of product tampering or alteration. The first two elements however, defect and causal link, are fiercely contested issues in asbestos litigation.

Manufacturer's Duty to Warn

Comment (j) of the Restatement requires the seller to warn of a danger of which it has knowledge, or "by the application of reasonable, developed human skill and foresight should have knowledge...."23 This requirement that the manufacturers warn if it had or should have had knowledge of the dangerous conditions presents many problems for municipal plaintiffs. Defendants offer their lack of knowledge at the time of sale as the "state of the art" defense. If there was no way for manufacturers to know of the product hazard at the time of sale, then section 402A cannot apply and the manufacturers are absolved.24

The applicability of comment j to asbestos cases is subject to dispute.25 Recent court decisions addressing the issue have rejected the state of the art defense,26 opining that its knowledge and foreseeability analysis "equates the

---


23 RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

24 Note, Issues in Asbestos Litigation, at 886.

25 Id.

failure to warn standard applied under strict liability with that applied under a negligence theory, thus removing the distinctions between the two causes of action.\textsuperscript{27}

In \textit{Beshada v. Johns-Manville Products Corp.}, a suit brought by individuals who contracted asbestos-related diseases from their exposure to friable asbestos, the New Jersey Supreme Court refused to permit the defendant to assert the state of the art defense, holding that if the product is in fact dangerous, the knowledge of such danger is implied to the defendants.\textsuperscript{28} In so holding, the Court stressed that any further application of a duty to warn based on then-existing knowledge would remove the distinction between strict liability and negligence.\textsuperscript{29} The Court stated "that if a product was in fact defective, the distribution of the product should compensate its victims for the misfortune that is inflicted on them."\textsuperscript{30}

In \textit{Flatt v. Johns-Manville Sales Corp.}, an action involving the same issue as \textit{Beshada}, the district court held that the defendants could not avail themselves of the state the art defense:\textsuperscript{31}

Evidence relating to the state of the art at the time of manufacture is relevant only to the issue of due care in the manufacturing process, a negligence concept not at issue in this strict liability action.... Regardless of what was reasonably foreseeable to the defendants at the time of manufacture, asbestos products should have been accompanied by adequate warnings; the nature of this strict liability action makes the defendants' state of knowledge at the time of manufacture irrelevant. The product and warnings attached thereto are in issue, not the defendants' conduct.\textsuperscript{32}

However, two years later, the 5th Circuit, in \textit{Hardy v. Johns-Manville Sales Corp.}, though not explicitly overruling \textit{Flatt}, held that "strict liability because of failure to warn is based on a determination of the manufacturer's reasonable knowledge."\textsuperscript{33} This statement would appear to reinstate the state of the art defense, because reasonable knowledge at the time of sale is relevant to establish

\textsuperscript{27} Note, \textit{Issues in Asbestos Litigation} at 886.

\textsuperscript{28} 90 N.J. 191, 447 A.2d 539, 543 (1982).

\textsuperscript{29} 447 A.2d at 546.

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} 488 F. Supp. 836, 841 (E.D. Tex. 1980).

\textsuperscript{32} \textit{Id.} at 841-42.

\textsuperscript{33} 681 F.2d 334, 344 (5th Cir. 1982).
whether the defendant breached a duty by failing to warn.

The approach taken by the courts which eliminate the state of the art defense is the wiser analysis. Comment (a) of section 402A purports to "make the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product." The care required in the sale of the product should include marketing and warnings. The knowledge and foreseeability element of comment (j) should be removed from all products liability action, not just asbestos cases.

If neither party is aware of the risks, the party best able to bear them should be forced to do so, because consumers are incapable of paying the high costs which the risks impose, especially when the consumer is a municipality with a tight fixed budget. Manufacturers on the other hand need only increase the price of their products a small percentage to meet the increase in insurance premiums which are inevitable if strict liability is applied in the strictest sense, without regard to knowledge and foreseeability.

Placement of liability on manufacturers, regardless of what they knew at the time of sale would encourage more testing and research of new products prior to marketing if the new product will expose the consumers to unwarranted danger. More expansive safety research will advance the policy of accident avoidance while not stifling technological advancements.

Actual Notice

If the state of the art defense is not abolished, plaintiffs must be prepared to prove that manufacturers in fact had knowledge sufficient to require warnings regarding asbestos related hazards. In Borel v. Fibreboard Paper Products Corp., the Court held that "a seller is under a duty to warn of only those dangers that are reasonably foreseeable. The requirement of foreseeability coincides with the standard of due care in negligence cases in that a seller must exercise reasonable care and foresight to discover a danger in his product and to warn users and consumers of that danger." Despite this rule which favors the defendants much more than the Beshada approach, the court still found the defendants liable for failure to warn.

In Borel, the defendants argued that the danger from inhaling asbestos was not foreseeable until "about 1968." The Court held that the jury, relying on

34 Restatement (Second) of Torts §402A comment (a) (1965) (emphasis added).

35 "By imposing on manufacturerurs the cost of failure to discover hazards, we create an incentive for them to invest more actively in safety research." Beshada, 447 A.2d at 548.


37 Id. at 1093.

38 Id. at 1092.
expert witness testimony, could find that the danger of inhaling asbestos was recognized as early as the 1930's. One witness, Dr. Hans Weill, testified that "prior to 1935 there were literally dozens and dozens of articles on asbestos and its effects on man." A plaintiff's expert witness, Dr. Clark Cooper, stated that "it was known in the 1930's that inhaling asbestos dust caused asbestosis and that the danger could be controlled by maintaining a modest level of exposure." The Court cited findings by the American Conference of Governmental Industrial Hygienists which in 1947 issued guidelines suggesting threshold limit values for exposure to asbestos dust. A 1947 report relied on by the plaintiffs warned of respiratory diseases resulting from exposure to asbestos dust.

After considering all of this evidence, the Court held that "once the danger became foreseeable, the duty to warn attached." Even the lenient application of the strict liability analysis resulted in a finding of manufacturer liability. If municipal plaintiffs can effectively utilize this and similar testimony, the state of the art defense will fail, to the extent that plaintiffs can establish that the state of the art throughout the period of installation included the knowledge of serious health risks.

Knowledge of the Dangers of Low Level Radiation

The next obstacle which municipal plaintiffs face is the fact that all prior litigation concerning the knowledge of health risks focused on high levels of exposure. The issue which is "firmly entrenched in the medical and legal literature" such that it is "not subject to serious dispute" is that high levels of occupational asbestos exposure causes severe health risks. If lower levels associated with exposure to school children do not pose similar risks, the fact that the state of the art defense is abolished or strictly applied will be of no consequence. If school children and municipal workers face no health risks, then the asbestos is not unreasonably dangerous with respect to municipal plaintiffs. Despite the congressional findings that asbestos in schools presents a risk of harm to children, the defendants are free to litigate the risk of this harm as such findings do not affect the legal

39 Id.
40 Id.
41 Id.
42 Id. at 1092-93.
43 Id. at 1093.
44 Id.
45 Id. at 1089.
47 See supra note 11 and accompanying text.
rights of any party.48

In jurisdictions abolishing the state of the art defense, defendants will argue that knowledge of the danger is imputed to them if and only if there is actual danger. If low levels of exposure are in fact harmless, there can be no liability. In jurisdictions employing the state of the art defense, defendants can argue that the knowledge in the 1930's and 1940's of risks posed by high level exposure did not constitute knowledge of risks present in low level exposure situations.

To overcome this problem, plaintiffs must propose jury instructions which allow juries to impute the knowledge of asbestos hazards in high level situations to those involving lower level. In Karjala v. Johns-Manville Products Corp., the court upheld such an instruction.49 The Eighth Circuit approved an instruction which informed the jury that factory workers risked disease due to asbestos exposure, and that knowledge of this risk was known to the manufacturer at least as early as 1942.50 Though the plaintiff was an installation worker and not a factory worker, thus subject to lower levels of exposure, it was for the jury to decide whether the knowledge with respect to factory workers put the defendant on notice of the danger to the plaintiff in his capacity as an installation worker.51 Similarly, municipal plaintiffs may argue that the known hazards associated with occupational exposure created a duty to warn due to the foreseeability of health risks in non-occupational settings.52

Given the knowledge of the risks available in the 1930's and 40's, the reinforcement of that knowledge in the 1950's and 60's,53 and the knowledge of the manufacturers that millions of people would come in contact with their products, it is not unreasonable to find, as a matter of law, that a risk exists, that it was realized at the time of sale, and that warnings were required. The only alternative - waiting twenty or so years to determine if, in fact, low level exposure is harmful - is unreasonable as this would create a disincentive for municipalities to take corrective action, thereby exposing many more children to the potentially harmful product while the manifestation period runs.

Suppression of Information

Another argument which plaintiffs may advance to establish that manufacturers should have known about risks posed by low level exposure is that the suppression of medical findings severely limited the public's knowledge of the

49 523 F.2d 155, 159 (8th Cir. 1975).
50 Id. at 158.
51 Id.
52 See Kincade, Issues at 960.
hazards, and consequently stifled further testing which may have revealed the extent of the risks involved.

According to one commentator, the president of Raybestos-Manhattan in 1935 denied permission to the editor of Asbestos, a trade journal, to print the results of a British study documenting the occupational hazard of asbestos dust inhalation.\footnote{Id.} President Simpson later thanked the editor for following the directive, stating: "the less said about asbestos, the better off we are..."\footnote{Id. at 22.} Johns-Manville maintained a policy of withholding the confirmed diagnosis of asbestosis from its workers while they were still able to work lest they "become mentally and physically ill, simply through the knowledge that [they have] asbestosis."\footnote{Id. at 24.} Workers with the disease were denied treatment and were forced to suffer continued exposure to the very mineral causing their disease, as knowledge of such disease might result in depression at home and on the job.

Had the extensive nature of asbestos-related diseases been publicized during the 1930's and 40's, further studies could have and probably would have been performed. These studies could have resulted in findings that low level exposure situations pose a substantial risk of health problems. Because of the industrial cover-up, the risk of low level exposure remains speculative. The manufacturers should not be permitted to use this speculation as a defense in light of the fact that the lack of conclusive evidence pertaining to low level situations was a direct result of their misconduct.

Proving the Injury

Having established that the defendants knew or should have known about a hazardous condition that causes injury, the plaintiff's final element of proof is that the product in fact caused such injury. As stated above, the 'municipality as plaintiff' case is unique in that there is admittedly no personal injury. In order to recover, the plaintiff must establish physical injury to the consumer's property. If no physical injury is established, section 402A will not apply and the plaintiff will be limited to contract recovery for damages contemplated by the parties at the time of forming the contract.\footnote{See Hadley v. Baxendale, 9 Ex. Ch. 341, 355, 156 Eng. Rep. 145, (1854). "Where two parties have made a contract which one of them has broken, the damages ... ought [to be]...such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."}

Physical Injury or Economic Loss

What the plaintiff actually seeks is the cost to remove and replace the defective product. Such causes of action are usually defined as actions for
economic loss, and are usually decided under the Uniform Commercial Code (UCC). "The [UCC] is generally regarded as the exclusive source for ascertaining when a seller is subject to liability for damages if the claim is based on intangible economic loss not attributable to physical injury to person or harm to a tangible thing other than the defective product itself."59

The defendant will assert that the UCC precludes a strict liability recovery, as the dangerous condition of asbestos results only in deterioration of the product itself and causes no personal or physical injury. "When the defect causes an accident 'involving some violence or collision with external objects' the resulting loss is treated as property damage. On the other hand, when the damage to the product results from deterioration, internal breakage or other non-accidental causes, it is treated as economic loss."60 To counter these assertions, the plaintiff must establish that the dangerous condition caused by the presence of asbestos does produce a collision, thereby satisfying the physical injury requirement of section 402A.

Although no reported decision has couched the asbestos cause of action in such terms, the physical injury necessary for tort recovery can be cast as having arisen from "some violence or collision with an external object."61 This collision can result in one of two ways. First, the presence of the ACM creates an inevitable collision between the building itself and the municipality's effort to remove it. In other words, "the physical act of ripping out and tearing away the asbestos material from other parts of the school building reflects damage to property other than the product itself."62 The second form of collision is that which occurs when the friable asbestos fibers and dust break away from the product and land on other parts of the building and its occupants. Though these particles may be invisible and float through the air like feathers, their impact is significant.

A recent decision by the Alaska Supreme Court provides insightful, though not binding, support to the first theory of collision.63 In Shooshanian v. Wagner, the Court held that where plaintiff sought costs for tearing out inner walls of its building in order to reach and remove noxious insulation, a cause of action in


61 The collision test is discussed in Fentress v. Van Etta Motors, supra note 60.

62 Kincade, Issues at 970.

63 672 P.2d 455 (Alaska 1983).
strict products liability could be maintained. The plaintiffs had no choice but to pursue procedures which would alter their living and working environment. Though the Court did not use 'collision' language, it can be applied without great strain. Alteration of the environment was necessary to abate the hazard. It created an inevitable collision in the form of tearing up the walls and ceilings, and no one would deny that this constitutes physical damage. As long as the defendant's conduct made this damage necessary, an action should lie.

In an analogous situation, a defendant is liable for trespass if, without entering the land of another, he forces a third person onto the plaintiff's land, or coerces him to enter through fear or false representations. The defendant's act caused the harm, and liability is established. In the asbestos case, the defendant's manufacture of a hazardous product and his failure to warn caused the plaintiff to harm his own building. This resulting harm should be charged to the defendant.

The second collision theory does not appear to have much (if any) reported precedent, although a recent unpublished opinion from the District Court of South Carolina indicates that such a theory is viable. In City of Greenville v. W.R. Grace & Co., the district court, though not using the term 'collision,' held that where asbestos fibers broke away and landed on other parts of the building, the building had suffered physical damage. In an action to recover asbestos abatement costs incurred in cleansing Greenville's City Hall, the jury found that asbestos materials were falling off the infrastructure beams and landing on ceiling tiles. City experts tested for the presence of fibers and found "invisible asbestos fibers on every building surface tested in amounts of up to millions of fibers per square foot of surface area." Asbestos contaminated both carpets and ceiling tiles as well. The Court's consistent use of the terms 'contamination,' and 'landed' reconcile the asbestos deterioration with the need to find an accident or collision. Each fiber-causing contamination is the result of a collision between the fiber and the building, this collision producing a danger of harm to the building's occupants. Such contamination caused by the landing fibers is sufficient to create a physical injury aside from mere deterioration or other economic loss.

Summary of Cause of Action

To establish manufacturer liability, the municipal plaintiff should move to

64 Id. at 464.

65 See PROSSER & KEETON at 72-3.


67 Id. at 7.

68 Id. at 3.

69 Id.
strike the state of the art defense as it does not comply with a strict liability theory. If this effort is unsuccessful, the plaintiff must establish actual knowledge on the part of the manufacturer at the time of sale sufficient to require a warning. This may be done either by imputing the existing knowledge concerning high level risk situations to low level exposure situations or by establishing that the lack of risk awareness at the time of sale was due to the defendant's own misconduct in suppressing information.

Finally, the plaintiff must establish a physical injury in order to avoid UCC limitations. This can be accomplished by demonstrating the physical injury to the building through a collision theory. One form of collision occurs when the plaintiff tears apart the building to gain access to the ACM. The second form of collision occurs when the asbestos fibers break away and contaminate the building.

Conclusion

The flexibility of progressive courts in dealing with the issue of foreseeability and physical harm should enable municipal plaintiffs to establish valid causes of action under section 402A of the Restatement. This will enable these plaintiffs to recover the expenses of abatement procedures from manufacturers instead of bearing the burden themselves. Establishing manufacturer liability will enable municipalities to continue operation without cutting valuable services such as education, police protection, fire prevention, and road/sewer maintenance. This liability also comports with the policy of making society pay the expenses of technology a little at a time, instead of forcing individual victims to pay in large lump sums.

ASBESTOS UPDATE


However, the Supreme Court of Virginia, in School Board v. Gypsum Co., No. 870265 (1987), denied recovery by the Norfolk School Board for the cost of removing products containing asbestos from school buildings. Importantly, the decision was based on the relevant statute of limitations rather than a theory of recovery.
Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press.

It has accordingly been decided . . . that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits.¹

James Madison’s remark during the Constitutional debates remains the underlying principle governing the disposition of cases involving first amendment freedom of speech issues. In order to protect and encourage robust public debate— to preserve the "marketplace of ideas"—the United States Supreme Court has interpreted the language of the first amendment liberally, placing only certain limited categories of speech outside its purview and protection. Obscenity², child pornography³, and words that incite people to riot⁴ are examples of speech the Court deems unprotected.

The Court also excludes libelous speech from first amendment protection. Generally, the legal system embodied in the Constitution and the Bill of Rights does not favor publication of falsities that defame or harm the reputation of others. Defamation, libel or slander is a communication that tends to harm the reputation of someone. The harm occurs when the community lowers its estimation of the defamed and the communication deters third persons from dealing or associating with him.⁵

Although a court finds a communication non-defamatory the plaintiff may still suffer emotional distress from the publication. The libel plaintiff may therefore opt to bring a claim for intentional infliction of emotional or mental distress.

The mental distress action protects a plaintiff’s interest in his peace of mind.⁶ The courts have been slow to redress emotional injury for a number of


⁶ Id. § 12, at 49.
reasons. In recent years, however, judges have become more willing to allow recovery under this tort. Furthermore, plaintiffs are now pleading emotional distress as well as libel in suits against the media.

An example of a recent suit involving both libel and infliction of emotional distress claims is Falwell v. Flynt. In Falwell, the Reverend Jerry Falwell sued Larry Flynt, publisher of Hustler Magazine. Hustler had run an advertisement that portrayed Falwell as engaging in a drunken incestuous relationship with his mother in an outhouse in Lynchburg, Virginia. Falwell sued Flynt under three theories: defamation, invasion of privacy, and intentional infliction of emotional distress.

At trial in the United States District Court for the Western District of Virginia, the jury returned a mixed verdict. While Falwell lost his libel and invasion of privacy claims, the jury found Flynt guilty of intentional infliction of emotional distress. It awarded Falwell $200,000 in damages for his mental pain and suffering. The United States Court of Appeals for the Fourth Circuit affirmed this decision. The Supreme Court has granted certiorari.

Falwell raises serious questions about freedom of speech under the first amendment. Only a few decisions have granted emotional distress claims when a libel claim failed. Before Falwell, no court had allowed a public figure plaintiff to receive damages for intentional infliction of emotional distress for a publication which a jury found could not reasonably be interpreted as making any statements of fact.

A court can use one of three approaches when faced with an intentional infliction of emotional distress claim accompanying a failed libel claim. First, the court may do as the Fourth Circuit did in Falwell and treat the two causes of action as entirely separate and independent (the separateness approach). In these cases a distress claim may survive the demise of plaintiff's libel claim and the court will treat an individual's interest in injury to peace of mind independently of first amendment interests.

7 Id. at 50-51. Prosser cites reasons such as difficulty of proof, difficulty in measuring damages and judicial fear of sham claims for mental injury.

8 See generally Prosser, Insult and Outrage, 44 CALIF. L. REV. 40 (1956).


12 Falwell, 797 F.2d 1270 (4th Cir. 1986).

13 See Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979). See also Time, Inc. v. Firestone, 424 U.S. 448 (1974). In the Firestone case it is less clear that the plaintiff's recovery was indeed for emotional distress.
claim rise and fall with a libel claim (the contingency approach), as long as there is a public figure or matter of public interest involved and the communication is not conveying false statements of fact. In these cases, first amendment concerns will override an individual’s interest in recovering for personal distress.

Third, the court, after determining that a plaintiff indeed satisfies the statutory or common law standard for intentional infliction of severe mental distress, may weigh that plaintiff’s interest in peace of mind against the value of the speech at issue. The court will examine the purpose and content of the speech: whether the speech is informative or educational, or, whether it is merely exploitive or entertaining. A judge determines if the first amendment interest in not suppressing the speech is enough to overcome the public figure’s interest in recovering for mental harm. If the speech contributes to the marketplace of ideas, then first amendment concerns will prevail and the distress claim will die. But, if the court finds that the speech does not contribute to robust public debate, then the distress claim may survive in spite of first amendment objections.

This note will examine these three approaches in light of *Falwell v. Flynt*[^14] and related cases while considering the distress and libel causes of action and the interests each protect. It will suggest that the “contingency” approach holds the most merit and suggest that first amendment protection should apply to any claim which may damage freedom of the press or freedom of speech. Allowing a plaintiff to recover for hurt feelings as a result of an unpleasant or insulting publication circumvents the stringent defamation requirements set forth in *New York Times Co. v. Sullivan*.[^15] Permitting someone to bypass the requirement of proving "actual or constitutional malice" by merely showing common law malice[^16] required by the tort of intentional infliction of emotional distress poses a danger to freedom of speech and will likely chill the exercise of this constitutional right. The central issue addressed in this article is whether a public figure plaintiff should recover damages under the tort of intentional infliction of emotional distress based on facts insufficient to support a cause of action for defamation when the publication in question contains no assertions of fact.

The Facts of *Falwell v. Flynt*

*Falwell*[^17] arose from Hustler Magazine’s publication of one of a series of advertisements for Campari liqueur that featured certain celebrities talking about

[^14]: 797 F.2d 1270 (4th Cir. 1986).


[^16]: Common law malice is ill will or spite, thus meaning that motive is all important. Constitutional or actual malice instead focuses on whether a defendant knew her publication was false or published it with reckless disregard of whether it was false or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

[^17]: 797 F.2d 1270 (4th Cir. 1986). All of the facts in the next several pages of text are taken from the published opinion and the two opening briefs of counsel for Falwell and Flynt. Opening Brief for Appellant at 2-5, Flynt v. Falwell, 797 F.2d 1270 (4th Cir. 1986) (No. 85-1417 (L) consolidated with No. 85-1480).
their "First time." These celebrities related their first time drinking Campari, but
the ads carried sexual connotations as well. The ad featuring Jerry Falwell
portrayed him as intoxicated from the liqueur when his "First time" was with his
mother behind an outhouse in Lynchburg, Virginia. It ad portrayed Falwell as a
drunkenard and as having engaged in an incestuous relationship with his deceased
mother.

The parody appeared in the section of Hustler entitled "FICTION; Ad and
Personality Parody." Furthermore, the ad contained a disclaimer which read "AD
PARODY--NOT TO BE TAKEN SERIOUSLY." In response, Falwell brought suit
against Hustler Magazine, Inc., publisher Larry Flynt, and Flynt Distributing
Company, Inc. Five months later Hustler re-published the ad in its March 1985
issue.

Falwell filed suit in the United States District Court for the Western District
of Virginia. He sued the three defendants alleging three causes of action: libel,
invasion of privacy, and intentional infliction of emotional distress. The district
court dismissed the privacy claim under Virginia state law which permits recovery
for invasion of privacy only if a plaintiff's name and likeness is used "for purposes
of trade."\(^\text{18}\) The court barred the invasion of privacy recovery because the name
or likeness must be infected with substantial falsification and a reader must
reasonably believe the falsification. Because the jury found the parody was not
believable, Falwell had no cognizable claim for invasion of privacy.

The jury found no reasonable person could believe that the ad parody
conveyed statements of fact about Jerry Falwell. In order to prevail on a libel
cause of action, a public figure plaintiff must prove constitutional actual malice--
that the defendant knowingly or with reckless disregard published falsities about
the plaintiff. Because the ad was not false it could not libel the well-known
Reverend Falwell. The jury thus found for defendant Flynt on the libel claim.

The claim for emotional distress

The court then addressed the most interesting part of the case: Falwell's
intentional infliction of emotional distress claim. The jury viewed several pieces
of evidence over defendant's objections. The jury saw a video tape of Flynt's
deposition in which he testified that he wanted to upset Falwell and to assassinate
his integrity.\(^\text{19}\) The District Judge also admitted into evidence prior issues of


\(^{19}\) The following is an excerpt from the deposition of Larry Flynt taken by
Falwell's counsel:

Q. Did you want to upset Reverend Falwell?
A. Yes.

Q. Do you recognize that in having published what you did in this ad, you
were attempting to convey to the people who read it that Reverend Falwell
was just as you characterized him, a liar?
A. He's a glutton.
Q. How about a liar?
A. Yeah. He's a liar, too.
Q. How about a hypocrite?
A. Yeah.
Q. That's what you wanted to convey?
A. Yeah.
Hustler that had ridiculed Falwell. The jury concluded that Flynt had intended to cause Falwell emotional distress and awarded him $100,000 actual damages. The jury also assessed $50,000 punitive damages against Flynt and $50,000 punitive damages against Hustler. On appeal the United States Court of Appeals for the Fourth Circuit upheld the district court's ruling. On defendant's petition for rehearing with suggestion for rehearing en banc the Fourth Circuit denied rehearing five to four. The Supreme Court granted certiorari in 1987.

The Evolution of the Law of Defamation

The first amendment provides "Congress shall make no law . . . abridging the freedom of speech, or of the press." Some legal scholars and judges construe this language to mean that absolutely no speech should be punishable. Although this sounds extreme, Justice Black conceded that when speech is accompanied by disorderly conduct it may not be protected.

For those on the opposite end of the spectrum, government censorship and content-based restrictions are a matter of course. Consider people who espouse the views of the far right. They favor censoring rock music containing lyrics they find offensive and banning school books that embody philosophies with which they do not agree. The history of defamation law in the United States displays a series of movements along the spectrum between these two extremes.

The Sedition Act of 1798 made criticism of members of Congress and the

Q. And didn't it occur to you that if it wasn't true, you were attacking a man in his profession?
A. Yes.
Q. Did you appreciate, at the time that you wrote "okay" or approved this publication, that for Reverend Falwell to function in his livelihood, and in his commitment and career, he has to have an integrity that people believe in? Did you not appreciate that?
A. Yeah.
Q. And wasn't one of your objectives to destroy that integrity, or harm it, if you could?
A. To assassinate it.

Falwell, 797 F.2d 1270, 1273 (4th Cir. 1986). Flynt's counsel tried desperately to exclude the video tape from evidence on the grounds that Flynt was incompetent because the deposition was taken while Flynt was in prison right after his leg had been broken. When asked, he identified himself as Christopher Columbus Cornwallis I.P.Q. Harvey H. Apache Pugh and claimed that the ad parody had been written by rock stars Yoko Ono and Billy Idol. Counsel said he was at the peak of a manic phase of a manic-depressive psychological disorder at the time. Opening Brief for Appellant at 5.


21 U.S. Const. amend I.

President a crime. In addition, States once imposed strict liability defamation statutes. The State and private plaintiffs thus had a relatively easy time in succeeding with defamation suits. The guarantees of the first amendment did not become firmly embedded in our constitutional scheme until 1964 when the Supreme Court handed down *New York Times Co. v. Sullivan*. In *New York Times*, the Court said that a public official plaintiff, in order to win a defamation claim, must prove that the allegedly defamatory communication "was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The "actual malice" standard the Court defined was a marked departure from the common law malice standard which turned on the defendant's intent: whether ill will or spite motivated the publication. The actual malice/reckless disregard standard presents a high threshold for plaintiffs in defamation cases. A mere failure to investigate is not reckless disregard; rather, a defendant must have entertained serious doubts as to the truth of his publication in order to fall under the actual malice heading.

In *Gertz v. Robert Welch, Inc.* the Supreme Court distinguished between the burden of proof on public and private figures. *Dun and Bradstreet v. Greenmoss Builders* may have complicated the picture further by subjecting matters of private concern and public concern to different standards of proof by plaintiffs. Depending therefore upon who the communication was about and its subject matter, different proof requirements may apply. The end result is that plaintiffs have more difficulty than ever winning libel claims. Two decisions handed down in 1986 reaffirm the Supreme Court's commitment to first amendment

---


25 *Id.* at 279-80.


27 418 U.S. 323 (1974). *Gertz* established that suits brought by public officials and public figures, at least against media defendants, must always meet the actual-malice test. Second, all defamation suits, even those by private plaintiffs based on communications about nonpublic issues, must not provide for liability unless there is a showing of fault. Third, damages may no longer be awarded without proof of injury, although a broad range of injury is still compensable and the proof requirements are not stringent. Finally, there must be proof of actual malice before punitive damages may be awarded." (citations omitted). Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 10 (1983).

28 472 U.S. 749 (1985). In a suit by a private plaintiff over a matter of private concern the Court held that the plaintiff does not have to prove reckless disregard for the truth by defendant.
freedoms. In *Anderson v. Liberty Lobby, Inc.*\(^{29}\) the Court held that a plaintiff must provide "clear and convincing" preliminary evidence that the defendant acted with actual malice even on a motion for summary judgement. The Court ruled in *Philadelphia Newspapers Inc. v. Hepps*\(^{30}\) that in order to receive damages for libel a private-figure plaintiff must show that the allegedly defamatory communication was false.

**Evolution of the Tort of Intentional Infliction of Emotional Distress**

The emotional or mental distress tort is a relative newcomer to the redressable injury group. Early on, courts refused to allow any sort of recovery for mental injury unless the plaintiff had suffered some physical injury or other objective manifestation of serious emotional distress in order to deny spurious claims.\(^{31}\) Courts came to recognize recovery for emotional distress by piggybacking the claim on some other tort. For instance, in *State Rubbish Collectors Association v. Siliznoff*\(^{32}\) the defendant threatened bodily harm to a garbage man who refused to make extortion payments; plaintiff sued for assault and mental distress and won on both counts.\(^{33}\) Prosser describes these "parasitic" damages as a wedge in the door toward the eventual wide open independence of the distress tort.\(^{33}\) A psychologist's testimony as to a victim's mental state without proof of adverse physical symptoms proximately caused by stress prevented recovery. Judges understandably are wary of sham claims of emotional injury. Objective manifestations of emotional distress or physical injury legitimize plaintiffs' claims.

Some courts, however, have allowed recovery for extreme and outrageous

\(^{29}\) 106 S. Ct. 2505 (1986). A citizen's lobbying organization sued a media defendant for three articles about the group that it claimed were defamatory. The Supreme Court reversed the United States Court of Appeals for the District of Columbia Circuit with Justice White mandating that the plaintiffs must show clear and convincing evidence of actual malice by defendants in order to be granted summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

\(^{30}\) 106 S. Ct. 1558 (1986). In *Hepps* a private figure plaintiff sued a newspaper for allegedly defamatory statements linking the plaintiff to organized crime. The Supreme Court held that the communication was a matter of public concern and that the plaintiff must bear the burden of proving the speech was false.

\(^{31}\) W. Prosser, *supra* note 5, § 12 at 51.


\(^{33}\) W. Prosser, *supra* note 5, § 12, at 52. Prosser recognizes that elements that start out as dependent or parasitic usually evolve into independent legal creatures.
conduct where plaintiffs do not show bodily harm. These courts require that defendant's conduct meet a four-part test: (1) the conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) a causal connection must link the wrongful conduct to the plaintiff's emotional distress; and (4) the emotional distress must be severe. Prosser postulates that the emotional distress claim has developed to accommodate circumstances where conduct exceed[s] all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind. The requirements of the rule are rigorous and difficult to satisfy. The examples Prosser gives of conduct that falls within this category include spreading false rumors about plaintiff's son's suicide, a practical joker telling a woman her husband had just been in an accident and broken both his legs, and mishandling of dead bodies.

Subjection to insults, indignity, profanity, obscenity or abuse should not be sufficient to constitute a cause of action under the tort of infliction of mental distress. A tough mental hide is still expected of people living in the everyday world.

There is still in this country at least, such a thing as liberty to express an unflattering opinion of another however wounding it may to the other's feelings; and in the interest not only of freedom of speech but also avoidance of other more dangerous conduct, it is still very desirable that some safety valve be left through which rascible tempers may blow off relatively harmless steam.

A tension exists between compensating plaintiffs who have genuinely suffered injury from a defendant's speech or conduct, and preserving a defendant's first amendment right to voice his opinions about the plaintiff. On the one hand, undermining a plaintiff's right to be compensated for severe emotional injury is not


36 Restatement (Second) of Torts § 46 (1965).


38 Wilkinson v. Downton, 2 Q.B.D. 57 [1897].


41 W. Prosser, supra note 5, § 12, at 54.
desirable. On the other hand, the first amendment considerations of promoting open, robust debate should not be ignored either. The following analyses discuss these competing interests with three methods of resolving their conflicts and the advantages and disadvantages of each approach.

The Separateness Approach

Treating the torts of emotional distress and libel as mutually independent holds much logical appeal. Until recently, the torts have evolved separately and distinctly with no apparent overlap or intertwining. Theoretically the two causes of action protect different interests. Emotional distress recovery protects a plaintiff's interest in his peace of mind; a libel recovery protects against injury to a plaintiff's reputation. In most courts, the emotional distress tort now has a viability of its own. No longer must a plaintiff bring some other cause of action to serve as a vehicle for emotional distress recovery.

The United States court of Appeals for the Fourth Circuit in *Falwell*, applying Virginia law, has recognized independent recovery for intentional infliction of emotional distress. The failure of an accompanying libel claim did not deter the court from upholding Falwell's $200,000 award for emotional distress. The court in *Falwell* found authority for its position in *Womack v. Eldridge*, a 1974 Virginia case setting out a four-part test for recovery for emotional distress absent physical injury. The Fourth Circuit upheld the district court jury's finding that Flynt's conduct was intentional and outrageous. They found his conduct proximately caused Falwell's distress and that his distress was severe. Falwell thus met Virginia's standard of recovery for intentional infliction of emotional distress.

For the proposition that an emotional distress claim may survive despite the failure of other tortious claims, the Fourth Circuit need only have looked to its own decision in *Rafferty v. Scott*. Rafferty involved a husband suing his former wife for attempting to destroy his relationship with his son. He sought recovery under two theories: alienation of affection and intentional infliction of emotional distress. The Fourth Circuit found the husband could not successfully sue for

---


43 See LDRC Survey, supra note 42.


45 See supra notes 34-35 and accompanying text.

46 Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986).

47 756 F.2d 335 (1985).

123
alienation of affection under a Virginia statute\textsuperscript{48}, but nevertheless held the facts were sufficient to support a finding of intentional infliction of emotional distress.\textsuperscript{49} "The fact that a tort may have overtones of affection alienation does not bar recovery on the separate and distinct accompanying wrongdoing."\textsuperscript{50} 

Recognizing the high threshold of proof a plaintiff must overcome for recovery for distress the court declared "[i]ntentional infliction of emotional distress and alienation of affection are two distinct causes of action . . . not only are the elements of the two causes of action different, but intentional infliction of emotional distress implies a higher burden of proof than alienation of affection."\textsuperscript{51} The four-part test required to be met for severe distress recovery is a difficult standard for plaintiffs to achieve. Not just one or some of the elements must be met; they all must be proven by the plaintiff. That the court recognized the distress tort's rigorous proof requirements in Rafferty gives credence to their similar declaration in Falwell that meeting the intent test for distress satisfies the stringent intent requirement of the \textit{New York Times} actual malice standard.\textsuperscript{52} 

\textit{Time, Inc. v. Firestone} is a Supreme Court case that commentators often cite as evidence that even though a libel claim fails, a plaintiff can recover for her mental suffering.\textsuperscript{53} Mary Alice Firestone, wife of the head of the Firestone corporation, sued \textit{Time} Magazine for erroneously printing that her divorce had been granted in part on grounds that she was an adulteress. She withdrew her libel claim on the eve of trial, but still the jury awarded her $100,000 in damages. It is logical to assume that the jury saw fit to compensate her for mental anguish and the effect Ms. Firestone claimed the article would have on her young son.\textsuperscript{54} The Supreme Court thus upheld an apparent recovery for emotional anguish even where the plaintiff did not succeed with a libel claim.

The only case to date in which a court clearly rejected a cause of action for libel but nevertheless awarded plaintiff damages for intentional infliction of emotional distress is \textit{Chuy v. Philadelphia Eagles Football Club}.\textsuperscript{55} The suit arose out of an article by a sports columnist reporting that Chuy, a retired Philadelphia Eagles football player, was stricken with polycythemia vera, a terminal disease. Chuy read the report in the paper and believed he must have the fatal disease,


\textsuperscript{49} Rafferty, 756 F.2d at 339.

\textsuperscript{50} Id.

\textsuperscript{51} Id. at 339 n.4.

\textsuperscript{52} Falwell, 797 F.2d 1270, 1275 (4th Cir. 1986).

\textsuperscript{53} 424 U.S. 448 (1976).

\textsuperscript{54} Mead, \textit{Suing Media}, supra note 9, at 46.

\textsuperscript{55} 595 F.2d 1265 (3d Cir. 1979).
although his own doctor had never informed him he had it. The doctor who told
the sportswriter of Chuy's condition was mistaken; thus the writer printed a
falsity. Chuy was so upset by the report that he refused to be tested to confirm
the inaccuracy and spent several months anguishing over the possibility of his
imminent death. Chuy sued the doctor and the writer for libel and intentional
infliction of mental distress.

Because the United States Court of Appeals for the Third Circuit found Chuy
to be a public figure, he had to establish actual malice on the sportswriter's part
for libel recovery. The jury found that the sportswriter did not act with reckless
disregard or entertain serious doubts of the truth of his story. Regarding the
doctor, the court found no libel because the medical declaration did nothing to
lower Chuy's reputation in the eyes of the community; rather the court found the
publication would evoke sympathy from the public, not scorn or rejection.

Regarding Chuy's emotional distress claim, the Court of Appeals noted that
Pennsylvania had accepted the independent legal vitality of the distress tort.
Defendant's conduct satisfied the tort requirements because the doctor knew or
could have known that when he told the press that Chuy had a fatal disease,
knowing he did not, a finding of extreme and outrageous conduct was possible.
The jury found that the doctor's conduct went beyond all bounds of decency.
Chuy recovered nothing for libel because his reputation was not damaged, but he
collected $15,000 for intentional infliction of emotional distress. On its face then,
Chuy seems to lend direct support to the Fourth Circuit decision in Falwell
allowing distress recovery in the face of a failed libel cause of action.

The Fourth circuit has hinted in at least one case prior to Falwell that intent
may be an important element in adjudging a libel claim. Their words in the past
arguably show their similar treatment of intent under libel and intent under
emotional distress, explaining the outcome of Falwell. In Time, Inc. v. Johnston
Sports Illustrated published an article about "Sportsman of the Year" Bill Russell.
One section of the piece recited how Russell had "destroyed" another player,
Johnston, on the basketball court by outplaying him and psychologically
intimidating him. Johnston sued the author for libel claiming that the article had
damaged him in his chosen profession which was coaching basketball. Although
Johnston lost his libel suit, the Fourth Circuit may have given a hint as to what
direction it was moving in its discussion of intent of the publisher of the article.
The court noted that the author writing about Russell did not intend to convey
that Russell literally destroyed Johnston, but merely used hyperbole as an
interesting way to present his story. Within the Johnston opinion the court cited
Greenbelt Co-op Pub. Ass'n v. Bresler in which use of the word blackmail was
not intended to charge the plaintiff with the commission of a crime, and Curtis

56 Id.

57 See Restatement (Second) of Torts § 46, comment d (1965).

58 448 F.2d 378 (4th Cir. 1971).

Pub. Co. v. Birdsong\textsuperscript{60} in which use of the term "bastard" was not actually meant to say that the subject was actually born out of wedlock. The Fourth Circuit thus favors an examination of intent in determining possible defamation liability.

Finally, a 1984 California case cited in plaintiff's opening brief in \textit{Falwell} may further support a court's examination of intent or motive under both emotional distress and libel claims. In \textit{Koch v. Goldway}\textsuperscript{61} plaintiff sued defendant, his political opponent, for libeling him and severely distressing him by making a vague suggestion that plaintiff might be a Nazi war criminal. The District Court for the Central District of California dismissed the libel claim because the statement was nonactionable opinion, but went on to inquire into the intent of the speaker in regards to the emotional distress claim. Finding that the facts did not reveal an "intent to cause, or a reckless disregard of the probability of causing emotional distress,"\textsuperscript{62} the distress claim failed too. The fact that the court continued to search the facts for a basis for distress recovery notwithstanding a failed libel claim arguably supports the separateness approach which was used by the Fourth Circuit in \textit{Falwell}.

Treating the torts of emotional distress and defamation as independent may not necessarily forfeit first amendment interests. The instances in which a jury will find speech or conduct outrageous and distress severe will be few. In those few cases, however, a plaintiff still must prove intent to cause distress. Confessions by defendants of intent to distress a plaintiff will be rare. Larry Flynt's emphatic deposition is almost certainly a once in a lifetime gift to the plaintiff's attorney in an emotional distress suit.\textsuperscript{63} The court in \textit{Falwell} points out that emotional distress tort requires intentional or reckless misconduct by the defendant. The court declared that

\begin{quote}
[t]his is precisely the level of fault that \textit{New York Times} requires in an action for defamation. The first amendment will not shield such misconduct resulting in damage to reputation, and neither will it shield such misconduct which results in severe emotional distress. We, therefore, hold that when the first amendment requires application of the actual malice standard, the standard is met when the jury finds that the defendant's intentional or reckless misconduct has proximately caused the injury complained of. The jury made such a finding here, and thus the constitutional standard is satisfied.\textsuperscript{64}
\end{quote}

Treating libel and emotional distress independently therefore does not sacrifice first amendment concerns. This approach does not place a blanket prohibition on recovery for emotional distress in spite of a failed libel claim. Legitimate injuries

\begin{itemize}
\item \textsuperscript{60} 360 F.2d 344, 348 (5th Cir. 1966).
\item \textsuperscript{61} 607 F.Supp. 223 (C.D. Cal. 1984).
\item \textsuperscript{62} \textit{Id.} at 226.
\item \textsuperscript{63} Smith, Note, \textit{(concerning Falwell and the believability of fact requirement)} (available from \textit{WAKE FOREST LAW REVIEW}) (unpublished manuscript) (1987-88)
\item \textsuperscript{64} \textit{Falwell}, 797 F.2d at 1275.
\end{itemize}
consequently do not go unredressed.

The Contingency Approach

Language in the Koch case can support an approach different from the separateness approach taken in Falwell. In Koch, the court said that "[i]t is incongruous to classify a statement, for purposes of defamation, as a constitutionally protected statement of opinion, but then determine that the same statement is so outrageous that it justifies recovery for intentional infliction of emotional distress." Koch suggests that when a libel claim is coupled with a claim for intentional infliction of emotional distress the latter claim's fate is contingent on the success of the former. If a plaintiff proves libel then he may collect for distress as well. If a court rejects a libel claim a plaintiff cannot use emotional distress as a basis for recovery. The contingency approach is conditioned on the existence of either a public figure plaintiff or subject matter of public interest and that the communication in question not be false statements of fact. Suits involving private figure plaintiffs or private matters have a lower threshold of proof than constitutional actual malice. In the same way, publications that convey false statements of fact do not leave the defense of truth to defendants, and plaintiffs will be one step closer to recovery.

The first amendment protects speech from prosecution or repression with few limited exceptions. Speech that libels someone by damaging his reputation is not protected. When speech is not defamatory, however, and does not fall under one of the other categories of unprotected speech, courts should leave the communication undisturbed. To punish defendants for speech that emotionally distresses someone opens up a whole new category of speech left unprotected by the first amendment. The courts and constitutional scholars may not be ready for such a departure from the New York Times rule.

Under the Court's reasoning in Gertz "[h]owever pernicious an opinion may seem, we depend on its correction not on the conscience of judges and juries but on the competition of other ideas." One of the policies underlying first amendment freedom of speech is to encourage "uninhibited, robust, and wide-open" debate, a principal to be kept in mind when considering punishment for speech some may find distressing and outrageous. The Supreme Court has said even "vulgar" communications receive first amendment protection. As with the separateness approach the contingency method on what interests a court deems to have priority: an individual's interest in personal peace of mind,


66 See supra notes 2-4 and accompanying text.


or a constitutional interest in protecting freedom of speech. The appeal of the contingency approach is that constitutional rights will assume top priority while individual interests in peace of mind are sacrificed in only a few limited situations: when a public figure or private figure with a matter of public interest sues on a communication not asserting false statements of fact the plaintiff will not recover for distress because he has not been libeled. Private figures are thus still protected (unless the communication is a matter of general public interest). Public figures will still recover if a defendant knowingly published lies about them.

The contingency approach is consistent with the Supreme Court's standard of lesser protection for public figures. The political arena is a particularly "public" place. Hurt feelings are part and parcel of political debate. Public officials and figures who purposely take part in the discourse voluntarily subject themselves to "the vehement, caustic, and sometimes unpleasantly sharp attacks" that may distress some individuals. Moreover, public officials and figures have ready access to the media to respond to and rebut criticism against them.

The Fourth Circuit in *Falwell* satisfied itself that constitutional issues were not a problem in awarding recovery for emotional distress absent a successful defamation claim. Focusing on the test of *New York Times*, the court said that the heart of the actual malice standard is culpability—whether a defendant's misconduct was knowing or reckless. The Fourth Circuit equates constitutional actual malice with the first prong of the test for common law severe emotional distress.

The test of *New York Times* and its progeny is whether a defendant published a statement knowing it was false or with reckless disregard of the truth or falsity of the statement. The Court has said a defendant must have entertained serious doubts as to the truth of his publication to be guilty of libel. The Fourth Circuit chose to focus on the intent and reckless disregard portion of the actual malice test, ignoring the requirement of falsity of the publication. Therein lies the flaw in the court's reasoning under the second approach. The most meaningful support for the theory of the contingency approach is found in a case that facially supported the separateness approach, *Chuy v. Philadelphia Eagles Football Club*. Chuy did not prove he was libeled, yet still recovered $15,000 for emotional distress. Chuy was not libeled because his reputation was not lowered in the eyes of others.

---


71 *Id.* at 1561.

72 *Falwell v. Flynt*, 805 F.2d 484, 485 (4th Cir. 1985).

73 *Falwell*, 797 F.2d at 1275.

74 *See, e.g., supra* notes 27-30 and accompanying text.


76 595 F.2d 1265 (3d Cir. 1979).
of third parties. He suffered severe distress, however, because he believed the
publication that asserted he had a fatal disease. The crucial point is that the
article asserted false statements of fact. The article was believable, unlike *Falwell*
in which the jury found no one would reasonably believe the ad parody to be
asserting statements of fact.\(^{77}\) Because Chuy was only allowed to recover on a
distress claim in which he was a public figure and the publication was a believable
lie, all first amendment concerns of not punishing protected speech were satisfied.
Knowingly published lies are never protected. Conversely, the *Falwell*
communication was not a lie, but a joke.

*Pring v. Penthouse International, Ltd.*\(^{78}\) a case from the Tenth Circuit
supports the notion that a communication must be believable; in other words, false
statements of fact must be asserted for any recovery on the speech. The Tenth
Circuit noted that the test for liability is not whether the speech was labeled as
"humor" or "fiction" but whether a reader would reasonably understand the
publication "as describing actual facts about the plaintiff or actual events in which
she participated."\(^{79}\) The published story in *Pring* lampooned the Miss America
contest and described how Miss Wyoming imagined she would win because of her
special talent. That talent was causing men to levitate as she performs an act of
fellatio on them. The article describes Miss Wyoming doing these acts on national
television. The real Miss Wyoming in the Miss America contest sued *Penthouse*
magazine for defamation, invasion of privacy (false light) and intentional infliction
of emotional distress.\(^{80}\)

Ruling for *Penthouse*, the court described the article as rhetorical hyperbole
and obviously a complete fantasy.\(^{81}\) No one would take the article literally or as
conveying statements of fact. Miss Wyoming thus had no claim for libel recovery
because the story contained no falsity because it was not believable. The facts of
*Pring* are remarkably similar to the facts of *Falwell*, yet the outcome entirely
opposite. The Fourth Circuit in *Falwell* failed to address the falsity or
believability of ad parody and focused solely on Flynt's intent as evidenced by his
deposition. Yet the Tenth Circuit in *Pring* declared that "it would serve no
useful purpose to treat separately the . . . 'outrageous conduct' doctrine . . . as
the same First Amendment considerations must be applied."\(^{82}\) Constitutional actual
malice (intentional or reckless disregard of the truth) thus does not equal common
law malice of emotional distress (ill will or spite). Meeting the first prong of the
emotional distress test does not satisfy all constitutional concerns. The

\(^{77}\) *Falwell*, 797 F.2d at 1271.


\(^{79}\) *Pring*, 695 F.2d at 442.

\(^{80}\) *Id.* at 440-42.

\(^{81}\) *Id.* at 443.

\(^{82}\) *Id.* at 442.
constitutional actual malice test must override and permeate all claims for recovery.

If emotional distress claims do not rise and fall with accompanying defamation claims then defendants may be held liable for otherwise constitutionally protected opinion. An opinion cannot be libelous because an opinion is never false. Yet under the second approach mere expression of opinion can be punishable and thus chilled if the opinion causes someone severe emotional distress.

The Fourth Circuit in *Falwell* successfully evaded the implications of punishing constitutionally protected opinion through severe emotional distress recovery. The court simply said "[w]e need not consider whether the statements in question constituted opinion, as the issue is whether their publication was sufficiently outrageous to constitute intentional infliction of emotional distress."83 It is fairly obvious though, that Flynt was conveying a highly unfavorable opinion of Falwell and his conservative political and ideological views.

Writers, editorialists, cartoonists and the like convey their opinions of people publicly. Unflattering cartoons and spoofs about famous people appear in newspapers every day. Those who are lampooned regularly sue those newspapers. An example is *Keller v. Miami Herald Publishing Co.*84 in which a nursing home brought suit against The Miami Herald over a cartoon it published portraying gangsters in a decaying building identified as a nursing home which had been closed down by the state. The gangsters were shown holding moneybags. The caption read "Don't worry, Boss, we can always reopen it as a haunted house for the kiddies."85 The United States Court of Appeals for the Eleventh Circuit said that "cartoonists employ hyperbole, exaggeration, and caricature to communicate their messages to the reader. One cannot reasonably interpret a cartoon as literally depicting an actual event or situation . . . . Rather the cartoonist must be viewed as having utilized the art of exaggeration to express [his opinion]."86 The Eleventh Circuit's reasoning applies to the *Falwell* case and is consistent with the contingency approach. Only looking at whether an individual was "distressed" by a cartoon or spoof ignores important first amendment protections for opinion.

Courts should not treat emotional distress claims and defamation claims as separate and distinct entities because the former ignores precedent of constitutional dimension that goes to great lengths to preserve freedom of speech. The test for malice is not the same under each cause of action as the Fourth Circuit believes. The same interests are not protected by each, and when both are brought in a suit, the federal constitutional interest in freedom of speech must override the state created common law interest in protecting an individual's peace of mind.

83 *Falwell*, 797 F.2d at 1276.

84 778 F.2d 711 (1985).

85 *Id.* at 713.

86 *Id.* at 712.
The Balancing Approach

The third approach utilizes a sort of two-tiered balancing of instances in which a mental distress claim survives a libel claim. If a court is satisfied that a plaintiff has fulfilled all the requirements for recovery for emotional distress then a second inquiry is in order. The court will examine the particular speech at issue and determine its overall value in light of the goals of ensuring freedom of speech. For example, the court may find the speech to be educational or informative, or, it may find it to be merely entertaining or even exploitive. The court should then weigh the interest in protecting the type of speech against the individual's interest in recovering for damage to peace of mind. If the speech is the type that the first amendment was originally meant to promote then the plaintiff will lose on his emotional distress claim. If, on the other hand, the speech is of little value and it contributes little to the marketplace of ideas then a plaintiff's interest in peace of mind will rise above constitutional concerns and he can recover for distress. This balancing approach is a compromise between the separateness and contingency approach, not entirely sacrificing individual interest to constitutional interest or vice-versa. Moreover, Falwell is consistent with a balancing analysis.

The ad parody Hustler published was at best a tasteless joke and probably offensive to most people. The Fourth Circuit did not find the jury's conclusion erroneous that Falwell's distress was severe and that he fulfilled the four distress requirements. Having proven severe distress, then the court should have weighed Falwell's interests against the value of the speech at issue and concluded Falwell's interest in recovery outweighed any educational, informative or literary value the ad parody could possibly or remotely have.

This approach is not revolutionary or surprising. The Supreme Court has been making judgments as to speech's value for many years. Child pornography has no value for the Court \(^{87}\) and commercial speech only limited value \(^{88}\). The Court holds political speech, however, in high regard \(^{89}\). Depending on how important the speech is, the Court allows either minimal or substantial regulation of the speech.

The Fourth Circuit has suggested that only normal or legitimate hyperbole falls under constitutional protection \(^{90}\). While the court found the Sports Illustrated article in *Time, Inc. v. Johnston* \(^{91}\) to be normal stylistic use of exaggeration, one can infer from the opinion that gross or perverse distortion of a public figure's

---


90 448 F.2d 378 (4th Cir. 1971).

91 Id.
private life may not be shielded by the first amendment.\textsuperscript{92}

Sometimes constitutional priorities defeat recovery on otherwise libelous speech. In \textit{Hutchinson v. Proxmire},\textsuperscript{93} the plaintiff sued Senator William Proxmire for defamation and intentional infliction of emotional distress arising out the Senator's awarding plaintiff the "Golden Fleece of the Month Award" for wasteful government spending. The plaintiff was a scientist who used government funds to study emotional behavior and aggression in animals. He claimed that as a result of the nationwide publicity of him receiving the undesirable award his academic and professional standing had been damaged and he had suffered severe distress.\textsuperscript{94}

The Seventh Circuit ruled in Senator Proxmire's favor holding that the statements were constitutionally protected by the Speech or Debate Clause\textsuperscript{95}, and thus the alleged defamatory statements were privileged. The Supreme Court reversed, but on the grounds that the statements were not made on the floor of Congress or in Congressional debate and thus were not protected under Speech or Debate Clause immunity. The Court seemed to say that if the statements had fallen under that qualified privilege the plaintiff would have no recognizable claim for recovery. The importance of constitutional qualified privilege in that instance outweighed the plaintiff's interest in recovery for injury to his peace of mind. Because the speech was so important, individual interest had to be sacrificed. As the Seventh Circuit noted in regards to plaintiff's emotional distress claim "[w]e view these additional allegations of harm as merely the results of the statements made by the defendants. If the alleged defamatory falsehoods themselves are privileged, it would defeat the privilege to allow recovery for the specified damages which they caused."\textsuperscript{96}

\section*{Critique of the balancing approach}

A two-tiered type of balancing approach poses some unique problems. Whereas the foregoing analyses of the separateness approach and the contingency approach reflect the advantages and disadvantages of each other, the balancing approach requires a separate critique. First, although this observation may apply to the first two approaches as well, the quality and quantity of proof needed to establish severity of emotional distress may be declining if \textit{Falwell} is any indication of the current trend. The only evidence Falwell presented of the severity of his distress was his own assertion that the ad caused him anguish. In addition, a colleague of his testified that Falwell's enthusiasm seemed to have

\begin{itemize}
  \item \textsuperscript{92} \textit{Id.} at 380.
  \item \textsuperscript{93} 579 F.2d 1027 (7th Cir. 1978), \textit{rev'd}, 443 U.S. 111 (1979).
  \item \textsuperscript{94} \textit{Id.}
  \item \textsuperscript{95} U.S. Const. art. I, § 6.
  \item \textsuperscript{96} Proxmire, 579 F.2d at 1035.
\end{itemize}
diminished after he saw the Hustler ad. Such subjective, self-serving testimony should not be sufficient to establish "severe" distress. Falwell's distress does not come close to the examples of severe distress cited in the Restatement of Torts. A ready finding of severe distress comes close to a situation where first amendment freedoms may be unnecessarily sacrificed.

Several commentators argue that although the tort of mental distress is composed of four elements, they blur into one determining factor—the outrageousness of the defendant's conduct. The jury has no objective guide in judging what speech is outrageous; their decision is based on a subjective "gut feeling" more than anything else. The Restatement of Torts merely states the test as whether the conduct would arouse the ire of the average member of the community.

A substantial danger exists in hinging first amendment freedoms on local community standards. Legitimate criticisms of public figures may be punished simply because members of a particular jury find the criticism offensive. One commentator postulates that tort liability should not be imposed on what might be found to be extreme and outrageous conduct or speech because censorship of unpopular ideas will result. Juries can simply chill speech by imposing liability for ideas or utterances they view as outrageous. An example of the resulting

---

97 Falwell, 797 F.2d at 1277.

98 Restatement (Second) of Torts § 46 (1965). The fact that Falwell reproduced the parody and included it in his religious mailings brings the sincerity of his distress into question!


100 Restatement (Second) of Torts § 46 comment d (1965).


102 An obvious danger arises when community standards become the sole determinant factor a jury uses when deciding whether a defendant will be punished for his speech. Author Richard Bernstein had this to say about the tort of emotional distress being applied to the first amendment:

First, extreme and outrageous language will often be associated with unpopular ideas (and in the Falwell case an unpopular defendant as well). Second, it will be very difficult for an appellate court to determine whether it is such language or rather the accompanying message that is the real object of the trier of fact's disapproval. The Supreme Court is not likely to find that judges and juries can be relied on to divorce their perceptions of what kind of language is extreme and outrageous from their perceptions of what ideas are extreme and outrageous.

Allowing unfettered regulation of these utterances that can be characterized as extreme and outrageous would produce even greater opportunities to censor unpopular ideas.
self-censorship can be seen in the recent pulling of the Doonsebury comic strip from many papers across the country because the "Sleaze Parade" series was judged to be in poor taste and possibly defamatory. The strip portrayed members of the Reagan Administration that were fired or left under suspicious circumstances. One editor commented that their largely conservative readership might find the cartoon objectionable. The possibility of being sued over the cartoons' publication likely played a role in their decision to pull the strip.

A look at the language of *Cohen v. California* may be helpful in understanding the danger the Supreme Court has recognized in allowing government to regulate communications as offensive or profane. The Court predicted that government could stifle the expression of unpopular views under the guise of censoring offensive or profane words. Again the Supreme Court emphasized that freedom of expression warrants great protection. "One of the prerogatives of American citizenship is the right to criticize public men and measures--and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." The Court in *Cohen* noted too that words are selected as much for their emotive force as their cognitive force.

Fear of juries running roughshod over freedom of speech may be overblown. At the same time the Supreme Court gave communities power to decide what was obscene and what was not, the Court limited jury discretion to do so. In *Jenkins v. Georgia* a jury found the film *Carnal Knowledge* to be obscene and thus

---


The Restatement directs the trier of fact to use the following guide for the tort of emotional distress:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim: "Outrageous!"

Restatement (Second) of Torts, § 46 comment d (1965).

---


104 403 U.S. 15 (1971). In *Cohen* a young man was convicted for wearing a jacket that displayed the phrase "Fuck the Draft" on it. He wore the jacket inside a courthouse. The Supreme Court overturned his conviction saying that what some may find offensive may be another man's lyric. *Id.* at 25.

105 *Id.* at 26.

106 *Id.* (quoting *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944)).


prohibited its showing in local theaters. The Supreme Court reversed, declaring that juries do not have unbridled discretion in determining what is patently offensive.\textsuperscript{109} Mere scenes of nudity did not qualify the film as obscene. The Court therefore overrode community standards, second-guessing a jury finding. The Court may feel compelled to do the same if a jury, for example, finds a simple insult to constitute extreme and outrageous conduct. Juries thus may not have complete discretion in judging the legitimacy of an emotional distress claim.

Allowing courts to choose certain types of speech over others on the basis of the inherent value of the speech is arguably against much precedent, especially for speech similar to that in Falwell. The following quote from \textit{Pring v. Penthouse}\textsuperscript{110} with facts similar to \textit{Falwell} illustrates the point well.

The story is a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants. It has no redeeming features whatever. There is no accounting for the vast divergence in views and ideas. However, the First Amendment was intended to cover them all. The First Amendment is not limited to statements, or positions which are accepted; which are not outrageous; which are decent and popular; which are constructive or have some redeeming element; or which do not deviate from community standards and norms; or which are within prevailing religious or moral standards. Although a story may be repugnant in the extreme to an ordinary reader, and we have encountered no difficulty in placing this story in such a category, the typical standards and doctrines under the First Amendment must nevertheless be applied . . . . The First Amendment standards are not adjusted to a particular type of publication or particular subject matter.\textsuperscript{111}

This lengthy but enlightening passage directly conflicts with the analytical method of the balancing approach—judging the value of the speech in question to determine whether it deserves protection in the face of an emotional distress claim. In sum, the third approach is appealing because it strikes a compromise and falls between the extremes of the first two approaches. At the same time, some will feel that individual interests in mental peace are not given enough weight, while first amendment champions will be disturbed by possible speech repression.

Conclusion

Plaintiffs are pleading intentional infliction of emotional distress as well as defamation in increasing numbers.\textsuperscript{112} Courts should try to establish a uniform method for handling situations where a libel claim fails but an emotional distress claim survives based on the same facts. This article advances three approaches to resolution of this problem.

First, a court may follow \textit{Falwell} and treat distress and libel as totally separate, independent claims. Second, a court can declare a distress claim's success to be contingent on the establishment of a viable libel claim, given that a

\textsuperscript{109} \textit{Id.} at 160.

\textsuperscript{110} 695 F.2d 438 (1982).

\textsuperscript{111} \textit{Id.} at 443.

\textsuperscript{112} See supra note 9.
public figure or matter of public interest is involved and no false facts are asserted in the communication. Third, a court may employ a two-tiered balancing test. Upon satisfaction of emotional distress elements a court will then determine the value of the speech at issue. If the speech is valuable plaintiff's distress claim must fail. If the speech holds little value then plaintiff's distress claim will survive a failed libel claim. This author favors the contingency approach primarily because constitutional guarantees of freedom in the Bill of Rights are the basis of our entire legal system. Not repressing bad speech ensures that good speech will be heard as well. It is unfortunate but necessary that a few severely distressed plaintiffs will suffer in the wake of first amendment guarantees.

As Judge Wilkinson accurately points out "Hustler magazine . . . is a singularly unappealing beneficiary of First Amendment value and serves only to remind us of the costs a democracy must pay for its most precious privilege of open political debate." Few would deny that the ad parody in dispute was tasteless and ridiculous. At the same time its publication did not defame Falwell. To disallow Falwell's libel claim while allowing recovery under his emotional distress claim creates an end run around the requirement of constitutional actual malice for defamation recovery. To permit recovery under a tort of a different name asserted on the exact same set of facts defeats the purpose of the first amendment and the license it gives us for uninhibited debate.

The decision in Falwell v. Flynt undoubtedly chills the exercise of free speech. The idea behind freedom of speech is that good speech will correct bad speech and that competition of ideas is healthy. The marketplace is the means to regulate political speech. In this instance the Reverend Falwell as a public figure has immediate, practically unlimited access to media channels to respond to Flynt's communication.

If the thrust of New York Times and its progeny is indeed intent, fault, and culpability as a basis for liability then the Fourth Circuit has interpreted the law correctly. Maybe Falwell is an exceptional case and only publications like the ad parody, which admittedly hold little if any literary or informational value, will come under the rule of recovery for emotional distress. Unfortunately, Falwell may only be the first step down a slippery slope leading to pre-New York Times era when ill will was enough to punish a publisher for communicating something that was not false.

If the real heart of New York Times is truth or falsity of a communication then the Fourth Circuit has made an unfortunate mistake. Dangerous precedent has been set in Falwell. To allow a public figure plaintiff to recover merely because his feelings were hurt necessarily means that plaintiffs could recover for true statements. Such a result is without precedent and flies in the face of the purpose of the first amendment. Placing in the hands of the jury the discretion to determine whether someone can be punished for expression that does not fall under community standard of acceptability or non-offensiveness surely means that "we have entered a brave new world of First Amendment jurisprudence."114

113 Falwell, 805 F.2d at 484.

114 Id. at 488.