University of Arkansas at Little Rock Law Review

Volume 23
Issue 1 *The Ben J. Altheimer Symposium: Media Law and Ethics Enter The 21st Century*

Article 13

2000

All Monica, All of the Time: The 24-Hour News Cycle and the Proof of Culpability in Libel Actions

David A. Logan

ALL MONICA, ALL OF THE TIME: THE 24-HOUR NEWS CYCLE AND THE PROOF OF CULPABILITY IN LIBEL ACTIONS

David A. Logan[*]

A confluence of unprecedented forces is reshaping the context in which contemporary journalists work. First is the explosion of sources of information spawned by the arrival of cable TV and especially the Internet.[1] Second is a pervasive emphasis on the bottom line, in part due to the rapid concentration of media outlets, with corporate managers insisting that news divisions become profit centers.[2] These forces have created the "24-hour news cycle," a beast with a voracious appetite for both quantity of "content" and speed of delivery that pressures journalists to get the news first and fast, rather than first and right.[3]

This essay contains three parts. Part I traces the history of the 24-hour news cycle. Part II surveys the impact of these developments on newsgathering and reporting and critiques media coverage of the Monica Lewinsky/Bill Clinton affair. Part III considers how this changed landscape should influence the law, specifically, the requisite proof of culpability in a libel action. At present, decisional law appears to lower the amount of care expected of a journalist who is faced with a deadline. I argue that in a world characterized by the 24-hour news cycle, a journalist who insists on publishing a story in response to a self-imposed deadline, and who justifies this by pointing to the evolving journalistic custom to publish first and verify later, should be held to have assumed some risk that the resulting story may contain misstatements of fact, and that in any subsequent libel action the journalist should not be able to use that deadline as an excuse for inaccurate reporting, at least in claims brought by private plaintiffs.

I. THE BIRTH AND GROWTH OF THE 24-HOUR NEWS CYCLE

Once upon a time, not so long ago, Americans got their news from a handful of sources. Most news came via the daily newspaper, and in larger markets, there was a choice from among a handful of newspapers, available in the morning and evening. Many of these papers were

---

* Professor of Law, Wake Forest University. Thanks to Ron Wright and Wayne Logan for their helpful comments on an earlier draft of this essay.

1. *See infra* notes 6-14 and accompanying text.

2. *See infra* notes 15-16 and accompanying text.

3. *See* Alicia C. Shepard, *The Incredible Shrinking News Cycle*, WORLD & I, June 1998, at 80.

owned and operated by powerful families, who mixed a desire to turn a profit with a commitment to improving the life of their communities.[4] Daily papers had up to 24 hours to reach conclusions about the veracity and, just as importantly, the significance of the stories that might be reported. On the print side, there were also the weekly mass circulation newsmagazines, primary among them *Time*, *Newsweek*, and *US News*, which had the luxury of up to a week's time to research and write the news.[5]

A. The Emergence of CNN

In the 1970s, Americans increasingly got their news from broadcast media, especially television, and tens of millions tuned into the evening broadcasts of the three networks. Then, in 1980, came an upstart, the Cable News Network, which provided around-the-clock news. CNN labored in relative anonymity (at least outside the Beltway) until the Persian Gulf War in 1991. With cameras and reporters perched behind the battle lines, beaming seventeen uninterrupted hours of live footage of Coalition munitions lighting up the Baghdad sky, CNN was catapulted into the public's consciousness. This on-the-spot, unscripted drama riveted not just American audiences, but, through the miracle of satellite broadcasting, instantly made CNN the breaking news choice for the world, including Saddam Hussein.[6] CNN garnered the highest ratings of all the networks during that period and demonstrated that saturation coverage of public affairs had the potential to be more than a market niche.[7] CNN's all-news focus has since been replicated by Fox and MSNBC, with numerous spin-offs.[8]

---

4. *See* Marvin Kalb, *The Industrialization of the News*, NEW PERSP. Q., Fall 1998, at 42.

5. In addition, important information may come from publications that provide journalists even more time to research, write, and edit a story. The *New Yorker*'s fact-checking is legendary. *See* Nat Hentoff, *Blurring Nonfiction and Fiction*, THE VILLAGE VOICE, Dec. 21, 1999, at 44.

6. *See* Arthur Salm, *CNN Chief Sees Good Media for the Future*, SAN DIEGO UNION TRIB., Aug. 7, 1995, at D6 (reporting that Saddam Hussein watched CNN on one of the 36,000 satellite dishes that his troops looted from Kuwait).

7. *See* Shepard, *supra* note 3, at 80. Of course, not all important events garner large audiences despite the close attention of the media; one need only watch as the camera pans over an empty Senate chamber and galleries during CSPAN's gavel-to-gavel coverage of Congress at work.

8. *See* Ed Burmila, *Quantity Over Quality* (visited June 30, 2000) <http://www.uwire.com> (discussing CNBC and CNN's Headline News); Felicity Barringer, *MSNBC.com: The Shape of Journalism to Come*, GREENSBORO NEWS & REC., Jan. 10, 2000, at D6 (discussing hybrid news organizations such as MSNBC.com, which

B. The Impact of the Internet

Perhaps no single invention has so quickly altered so much of our lives. For both journalists and non-journalists alike, it provides instant access to up-to-the-minute electronic versions of almost all magazines and daily newspapers, as posting news on websites gains publicity for both the site and the mother publication, as well as a national audience for its scoops.[9] The Internet also provides access to original documents and sources, allowing the reader to bypass the filter provided by the news editor.[10] There are even Internet sites that summarize news found on other Internet sites.[11] Also important are the many sites created especially for electronic audiences, like *Slate* and *Salon*, plus tens of thousands of web 'zines, newsrooms, and chat groups, where a keystroke can, in seconds, disseminate a fact or a falsehood to millions of readers, including reporters.[12] In short, the explosion of available information has dramatically altered the environment in which reporters and editors work.

The availability of web pages, and the temptation to use them to post breaking developments, requires editors to make on-the-spot decisions about whether to report a story or hold for more research, a challenge familiar to wire services and broadcast outlets, but decidedly

---

take advantage of the Internet).

9. *See* Kelly Heyboer, *When Posting a Scoop Backfires*, AM. JOURNALISM REV., Nov. 1, 1999, at 30. Some of these sites are very successful, with the web sites of the *New York Times* and *USA Today* each attracting millions of visitors daily. *See* Howard Kurtz, *All Aboard the E-Train: For the Media, the Internet Is the Hottest Thing Since Gutenberg*, WASH. POST, Oct. 21, 1999, at C01.

10. *See* Leonard Steinhorn, *90s Will Be Known as the 'Decade of the Media'*, CINCINNATI ENQUIRER, Aug. 1, 1999, at B4. Similarly, the Internet facilitates "distance journalism," as reporters are no longer required to physically go to where the sources of information are. *See* Wendell Cochran, *Journalism's New Geography: How Electronic Tools Alter the Culture and Practice of Newsgathering*, 7 ELECTRONIC J. COM. No. 2, 1997 *archived at* <http://www.cios.org/www/ejcmain.htm>. *Cf. The Smoking Gun* (visited June 30, 2000) <http://www.thesmokinggun.com> (providing electronic access to documents culled from, inter alia, law enforcement sources, Freedom of Information requests, and court files).

11. *See* Ilan Greenberg, *Selling News Short*, BRILL'S CONTENT, Mar. 2000, at 64.

12. *See* Elizabeth Weise, *Does the Internet Change News Reporting? Not Quite*, 11 MEDIA STUD. 159 (1997) (detailing how experienced reporter Pierre Salinger held a press conference to reveal the contents of what he erroneously thought was an official government document; it in fact was an email that had been widely disseminated, but was impossible to trace for veracity). *Cf. DoubtCome.com* (visited June 30, 2000) <http://www.doubtcome.com/index.html>. DoubtCome is my favorite website; it is a conspiracy buff's dream, with the slogan "If you doubt, come and say it." *Id.*

unfamiliar to those raised in the culture of the one-deadline-a-day daily news cycle.[13] Andrew Glass, senior Washington correspondent for Cox Broadcasting, observed:

> In the old days, on the first day we would report what happened. On the second day, we would tell what the reaction was. On the third day, we would analyze what it means. Now CNN tells you what happened and five minutes later some Professor from Fordham University is telling you what it means .... We have to find a way to package it all the first day or we're out of business.[14]

The merger of entertainment and news has also affected journalism. Concern has grown about the shrinking market share for hard news, prompted by outlets garnering respectable ratings by focusing on soft news.[15]

The shifting business model has also played a role. Traditionally, the news divisions of broadcast networks were not expected to turn a profit. Indeed, many were run as loss leaders, while many newspapers were run by family dynasties with an expressed commitment to missions beyond profit. Today, news divisions are often considered merely one of many profit centers in a media conglomerate. The scramble for ratings and circulation, which form the basis for advertising rates, has caused both a souping up and a dumbing down of the information presented.[16] Also contributing to these changes is the fact that fewer and fewer companies control much of the delivery systems for the world's information: Time Warner, Disney (ABC's parent), Sony, General

---

13. *See* Heyboer, *supra* note 9.

14. John Herbers & James H. McCartney, *The New Washington Merry-Go-Round*, AM. JOURNALISM REV., Apr. 1, 1999, *archived at* <http://ajr.newslink.org/special/part10.html>.

15. *See* James Fallows, *Rush from Judgment*, AM. PROSPECT, Mar. 1, 1999, at 18. "Hard news" is information of immediate importance to the public as citizens, while "soft news" focuses more on culture, people behind the news, business trends, travel, community events, and "human interest" stories. *See* Lisa Brown, Note, *Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525, 1567 n.109 (1989).

16. *See id.* This is not to say that the media have either a uniform or long history of serious coverage of hard news. *See* John H. Fuson, *Protecting the Press from Privacy*, 148 U. PA. L. REV. 629, 644-45 (1999) (tracing the evolution of sensationalistic news from William Randolph Hearst to Rupert Murdoch). Even de Tocqueville noted the tendency of the American media toward "coarse," market-driven pandering. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 168 (G. Lawrence trans., 1966). *See also* David A. Logan, *'Stunt Journalism,' Professional Norms, and Public Mistrust of the Media*, 9 U. FLA J.L. & PUB. POL'Y 151, 166-67 (1998) (tracing the increasing "tabloidization" of television news).

Electric (NBC's parent), AT&T, News Corp., Viacom (CBS' parent), Seagrams, and Bertelsmann, with the recent announcement of AOL's merger with Time Warner underscoring the potential for both horizontal and vertical consolidation.[17]

Together these changes have created a hypercompetitive environment and what veteran journalist Marvin Kalb has called "the industrialization of the news."[18] The next section details the operation of the 24-hour news cycle by focusing on Monicagate.

II. THE 24-HOUR NEWS CYCLE IN ACTION

In an important recent book, *Warp Speed: America in the Age of Mixed Media*, two experienced journalists, Bill Kovach and Tom Rosenstiel, evaluate media coverage of the events leading up to the impeachment of President Bill Clinton.[19] The authors looked closely at a new environment in which "the cultures of entertainment, infotainment, argument, analysis, tabloid, and mainstream press not only work side by side but intermingle and merge,"[20] undermining the classic function of journalism: to "sort out (and present) a true and reliable account of the day's events."[21]

---

17. *See* Paul Wellstone, *Growing Media Consolidation Must Be Examined to Preserve Our Democracy*, 52 FED. COMM. 551 (2000). *See also* Robert McChesney, RICH MEDIA, POOR DEMOCRACY (1999) (providing a critical appraisal of this consolidation); *The Project on Media Ownership* (visited Aug. 31, 2000) <http://www.midwestbookseller.com/guest.html> (tracking the various holdings of media giants). The award-winning movie *The Insider* gives a gripping portrayal of the impact of "corporate" upon the "newsies" in the conglomerate context. *See* THE INSIDER (Touchstone Pictures 1999). For a more benign view of the impact of consolidation, see Paul Farhi, *How Bad Is Big?*, 21 AM. JOURNALISM REV., Dec. 1, 1999, at 28 ("Rather than a conspiracy to dominate the channels of communications, consolidation and mergers reflect just the opposite: a corporate class struggling to keep up with a media and cultural landscape that grows more disheveled, more competitive and more anarchic by the month.").

18. Kalb, *supra* note 4.

19. BILL KOVACH & TOM ROSENSTIEL, WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA (1999) [hereinafter WARP SPEED]. Kovach is curator of the Nieman Foundation for Journalism at Harvard. *See id.* Rosenstiel is director of the Project for Excellence in Journalism at Columbia. *See id.* Under the auspices of the Committee of Concerned Journalists, they performed three major content studies of media coverage of the Clinton scandal and sponsored three public forums involving some of the working journalists who covered the story. *See id. Warp Speed* is the result of their efforts. *See id.*

20. *See id.* at 4.

21. *See id.* at 5.

This new "Mixed Media Culture," which according to the authors is replacing "the traditional journalism of verification," has the following characteristics:[22]

1. The never-ending news cycle, in which the press is as concerned with ferrying accusations as with ferreting out the truth[23]—the cycle is a nonstop multimedia news-talk festival, in which the need for the content to fill hundreds of hours and thousands of pages per week triggers the reporting of allegations with neither the traditional concern for verification nor the time to sort out which stories are important enough to be reported;[24]
2. A race to the ethical bottom, where the lower standards of what used to be fringe journalism pressure and often prompt the mainstream press to launch a report or face the prospect of being viewed as hopelessly behind the curve and suffer an attendant loss of market share, and thus revenues;[25] and
3. An obsession with reporting the blockbuster, a story that typically contains large doses of celebrity, sex, and scandal[26]—these stories provide a short-term boost to market share and often are cheaper to report and produce than stories reflecting measured coverage of a diversified menu of news.[27]

The authors found all of these forces displayed in the coverage of Monicagate, and media behavior in the first few days of the scandal exemplify the dangers associated with the 24-hour news cycle.[28]

On January 18, 1998, hundreds of journalists around the country awoke to the *Drudge Report*, an email from Matt Drudge, a Los Angeles-based Internet columnist.[29] The "World Exclusive" screamed that *Newsweek* had at the last minute killed a story "destined to shake official

22. *Id.* at 6-8.
23. *See id.* at 6.
24. *See id.*
25. *See* WARP SPEED, *supra* note 19, at 7.
26. *See id.*
27. *See id.*
28. *See id.* at 5.
29. Drudge already had a reputation for slack fact-checking. *See* Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 181 (1998) (characterizing the Drudge Report as "a source of instant, largely unedited, and occasionally accurate scandal mongering"). *See also* David McClintick, *Town Crier for the New Age*, BRILL'S CONTENT, Nov. 1998, at 112, 125 (reporting that almost two thirds of Drudge's stories were either false or debatable).

Washington to its foundation: a White House intern carried on a sexual affair with the President of the United States!"[30] Within hours, Drudge's scoop was mentioned on ABC-TV's *This Week with Sam Donaldson and Cokie Roberts*, and hit mainstream newspapers on January 21, with items in the *Washington Post* and *Los Angeles Times*, attributed to "sources close to the investigation."[31] Flushed out by these events, a frustrated *Newsweek* posted its 4,000 word story on its web site.[32] ABC, CBS, and NBC soon followed with reports that someone, but not anyone on their staffs or anyone they had actually interviewed, had learned of the President's illicit affair by listening to surreptitiously-obtained tape recordings of conversations with the intern, Monica Lewinsky.[33] Within twenty four hours, Drudge and Mike Isikoff, the lead *Newsweek* reporter on the story, were featured guests on the *Today Show*, *Larry King Live*, and *Geraldo*.[34] CNN and MSNBC devoted entire programs to the allegations, and hard news icon Ted Koppel added gravitas to the story by covering it on *Nightline*.[35] By the time that the next wave of Sunday talk shows aired, virtually all the major media outlets were pumping out stories in reliance on a single confidential source who claimed to have heard part of the tapes, and reporters took turns speculating on a Clinton resignation or impeachment before any evidence of the misconduct was independently confirmed by the news organizations who were doing the prognosticating.[36]

Kovach and Rosenstiel concluded that by the end of the first week of the scandal, forty-one percent of all reportage had not been factual reporting, but rather journalists' own analysis, opinion, speculation, or

---

30. WARP SPEED, *supra* note 19, at 12. Drudge's tip was not totally accurate; *Newsweek* didn't kill the story, but delayed it to continue fact-checking. *See id.* at 11. Also, Drudge accurately characterized the Clinton-Lewinsky relationship only if several episodes of "oral sex" constituted a "sexual affair," a distinction that came to be quite significant to the later allegations that Clinton lied under oath. *See* Harvey Berkman, *If Indicted, Clinton Has Weak Defenses*, NAT'L. LAW J., Dec. 7, 1998, at A1.

31. WARP SPEED, *supra* note 19, at 13.

32. *See id.*

33. *See id.*

34. *See id.*

35. *See id.* at 14. Drudge's key role in the unfolding Monicagate saga earned him a spot on *Newsweek*'s list of that year's most influential people in the media, and earned him his own show on the Fox-TV news channel. *See* Matt Zoeller Seitz, *Media Coverage Burned the Scandal at Both Ends*, NEW ORLEANS TIMES-PICAYUNE, Feb. 14, 1999, at 14A. After the end of the media interest in Monicagate, Drudge's ratings went down and his show was canceled. *See Fox Cancels Drudge*, 18 ELEC. MEDIA, Nov. 22, 1999, at 28.

36. *See* WARP SPEED, *supra* note 19, at 14-15.

judgments—essentially "commentary and pundrity."[37] Another twelve percent had been reporting attributed to other news organizations and totally unverified by the outlet repeating it.[38] This explosion began a stream of inaccuracies and half-truths which for a time were passed on as the gospel truth, as Kovach and Rosentiel detail.[39] They starkly point out the harm caused by the willingness of journalists at tabloids and on the Internet to publish with scant verification and the adverse effect this has on the journalistic standards of the mainstream media.[40]

It is a mistake to view the incredible media circus surrounding Monicagate as representative of the workaday world of reporting, just as the coverage of O.J. Simpson's murder trial was atypical for a criminal case. The coverage of the Atlanta Olympic bombing, however, provides yet another powerful example of relentless, careless pack journalism, which caused NBC and CNN to settle lawsuits for substantial sums.[41]

Local media are also vulnerable to the forces sweeping national outlets, as the coverage of Richard Jewell by the Atlanta newspapers underscored.[42] The ability of public affairs and news reporting to garner strong ratings at minimal cost has caused a change in both the nature of local television reporting (where "if it bleeds it leads" is the credo) and in the number of hours devoted to news programming, which has skyrocketed, reaching the estimated 80 million Americans who consider local TV news their primary information source.[43] The next section

---

37. *See id.* at 17.

38. *See id.*

39. *See id.* at 22-32. For example, both the *Dallas Morning News* and the *Wall Street Journal* incorrectly reported that a witness had testified to a grand jury that he had actually seen the President and the intern in a "compromising" position in a study near the Oval office. *See id.* at 28. This "bombshell" replicated on the Internet so quickly that by the time *Nightline* aired that night, ABC reported this development as fact. *See id.* at 27. The *Morning News* ran the story despite the fact that it did not satisfy the paper's two-source rule, and the other outlets passed along the story without doing any independent verification. *See id.* at 28. The next day, the paper retracted its story. *See id.* It turned out that the witness instead had testified only that he had seen the President and the intern in an "ambiguous" situation. *See id.*

40. *See generally* Meredith O'Brien, *Power Shift*, QUILL, May 1, 1999.

41. *See* Symposium, *Panel I: Accountability of the Media in Investigations*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 401, 402 & n.3 (1997).

42. *See generally* Ann Woolner, *Just Doing Our Jobs*, BRILL'S CONTENT, Apr. 2000, at 86 (detailing media coverage of the bombing at the Atlanta Olympics).

43. Carol Guensburg, *Taming the Beast*, AM. JOURNALISM REV., July 1, 1999, at S1 (reporting that local news typically contains "a heavy dose of violence, a heavy dose of triviality [and] a tremendous amount of commercials;" deadline pressures are "constant and intense;" and that "ratings, competition [and] money" affect "almost everything").

considers how this changed news environment should impact the requisite proof of culpability in a libel action.

III. THE CLOCK AND THE COURTS

It has long been established that a false statement published by the media is protected from the strict liability of the common law of libel by operation of the First Amendment; the degree of fault that the plaintiff has to prove depends upon the plaintiff's "status."[44] *New York Times v. Sullivan*[45] and its progeny impose upon public officials and public figures a daunting burden: proof of "actual malice," that the defendant published knowing that the statement was false or with reckless disregard for the truth,[46] and this must be proven with "convincing clarity."[47] This is a subjective standard, focusing on state of mind, asking whether the defendant "in fact entertained serious doubts about the truth of the publication."[48] Examples of the sort of proof of "bad faith" that satisfy this exacting standard include a defendant who fabricates the story or who publishes unverified information obtained from an anonymous source, or if the statements themselves were published despite being so "inherently improbable" that only a reckless

---

44. It is unclear whether strict liability applies to claims brought by a private plaintiff arising out of a statement of purely private concern. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (holding that the unique common law damage rules, which greatly favor plaintiffs in libel actions, did not conflict with the First Amendment when the defendant's defamatory statement was made about a private plaintiff, as long as the subject was a matter of "purely private concern"). In such a context, the state's interest in protecting reputation outweighed the diminished free speech interests implicated by the subject matter of the speech. *See id.* at 760-61. Most commentators have concluded that the Court's rationale in *Dun & Bradstreet* regarding damages would lead to an analogous holding that the strict liability of the common law applies in private plaintiff/matter of private concern cases. *See, e.g.*, RODNEY A. SMOLLA, THE LAW OF DEFAMATION § 3:17 (3d ed. 1999). Because, a fortiori, the media will only publish matter that is of public concern, *Dun & Bradstreet* is inapplicable to libel actions brought against the media. *See* Huggins v. Moore, 726 N.E.2d 456, 460 (N.Y. 1999) (holding that the New York courts defer to editors on the question of what topics are of public concern).

45. 376 U.S. 254 (1964).

46. *Id.* at 279-80.

47. *Id.* at 285-86. The Court elsewhere has used the phrase "clear and convincing" evidence. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). Under either formulation, it is clear that the First Amendment requires a greater quantum of proof than is required of a plaintiff in a garden-variety civil action, which uses a preponderance of the evidence standard. *See* SMOLLA, *supra* note 44, § 3:25. The Court has also construed the First Amendment to require de novo judicial review of jury findings of actual malice. *Id.* § 12:83.

48. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

person would put them into circulation.[49] Another example from this limited class of outrageous conduct that supports a libel award for a public plaintiff is the defendant's willful blindness, a deliberate effort to avoid the truth, as when a reporter fails to check an obvious and accessible source.[50] Neither proof of negligence or even gross negligence is sufficient to support a libel award for a public plaintiff.[51]

When the claim is brought by a private plaintiff, the balance between the defendant's free speech rights and the state interest in protecting reputation requires a less speech-protective outcome. According to the Court in *Gertz v. Robert Welch, Inc.*,[52] a private plaintiff typically lacks access to the media to rebut an attack, so she is more vulnerable to harm caused by published falsehoods; further, she is more deserving of protection than a public plaintiff because she has not assumed the risk of public comment on her affairs.[53] While the *Gertz* Court concluded that the common law of strict liability was unacceptable for libel actions brought by private plaintiffs (because to "guarantee the accuracy of factual assertions may lead to intolerable self-censorship"),[54] it declined to require proof of actual malice.[55] Rather, states were free to set the degree of culpability necessary to support a private figure libel action "as long as they do not impose liability without fault."[56] Almost all states have accepted the Court's invitation to let private plaintiffs recover damages upon a less demanding standard than actual malice; indeed, the vast majority only require proof of negligence.[57] The next section considers whether self-imposed time

49. *Id.* at 732.

50. *See* Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 685 (1981). While a failure to verify is generally not actual malice, in some circumstances it may support such an inference, as when the reporter fails to ask the key question of source for fear that it would undermine the story. *See* SMOLLA, *supra* note 44, §3:52.

51. *See* ROBERT D. SACK, SACK ON DEFAMATION 5-59 (3d ed. 1999) ("The defendant's conduct is not to be judged by a 'professional standards rule' the *New York Times* standard is not equivalent to or met by a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.") (quoting Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (plurality opinion)). Because the professional standard is irrelevant to the determination of actual malice, evidence of journalistic custom is irrelevant in public plaintiff cases. *See* SACK, *supra*, § 5.5.2.4.

52. 418 U.S. 323 (1974).

53. *See id.* at 344.

54. *Id.* at 340.

55. *Id.* at 352.

56. *Id.* at 347. *Gertz* also restricted the availability of the common law damages rules that favored plaintiffs, allowing the award of either "general" or punitive damages only upon proof of actual malice. *See id.* at 349-50.

57. *See* BRUCE W. SANFORD, LIBEL AND PRIVACY § 8.3 (2d ed. 1997).

pressures should shield media defendants from liability for defamatory misstatements under either the actual malice or negligence regimes.

A. Actual Malice and Time Pressures

The Supreme Court considered the impact of time pressures on libel actions brought by public plaintiffs in a pair of 1967 decisions which were consolidated under the name *Curtis Publishing Company v. Butts*.[58] In *Associated Press v. Walker*, a wire service reporter was covering a fast-breaking news story under what amounted to emergency conditions, specifically, the efforts of a staunch segregationist (and retired U.S. Army general) to encourage a volatile crowd to resist the forced integration of the University of Mississippi by federal officials.[59] The companion case of *Curtis Publishing Co. v. Butts* involved a very different journalistic setting: the publication by a magazine of a feature story on misconduct by a college athletic director, for which the reporter had no deadline pressure.[60] The Court was highly fragmented on the central question of the appropriate standard of culpability to be applied when the plaintiffs were not "public officials," but instead were "public figures."[61] A clear majority, however, believed that the different reportorial contexts justified an award for Butts, but not for Walker.[62]

58. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (consolidated with *Associated Press v. Walker*).

59. *See id.* at 140.

60. *See id.* at 135, 158.

61. Justice Harlan's opinion proposed that a requirement of actual malice in public official claims be rejected and instead urged a less burdensome requirement of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible reporters." *Id.* at 155. This position garnered the support of Justices Clark, Stewart, and Fortas. *See id.* at 133. Chief Justice Warren wrote for himself, and argued for an actual malice standard for all public plaintiff cases. *See id.* at 162 (Warren, C.J., concurring). Justices Brennan and White agreed with the Chief Justice on the appropriate legal standard, but urged a retrial in front of a properly instructed jury. *See id.* at 174 (Brennan, J., concurring and dissenting). Justices Black and Douglas argued for absolute immunity. *See id.* at 170 (Black, J., concurring and dissenting). Read together, a 5-4 majority of the Court believed that a public figure, like a public official, had to prove actual malice to recover damages in libel action. This is now recognized as the appropriate standard. *See* SMOLLA, *supra* note 44, § 2:8.

62. Because the Chief Justice incorporated Justice Harlan's discussion of the record into his own analysis, Justice Harlan's analysis of the time factor should be treated as if it also reflected the views of a total of seven justices. *See Butts*, 388 U.S. at 169-70. Indeed, because the justices who did not specifically endorse Justice Harlan's evaluation of the record (Justices Black and Douglas) argued for absolute immunity for journalists, one can presume that they would agree with the other seven justices on the narrower question of the relevance of deadlines to a finding of actual

Justice Harlan wrote that "[t]he evidence showed that the Butts story was in no sense 'hot news' and the editors of the magazine recognized the need for a thorough investigation of the serious charges."[63] The opinion continued, "In contrast to the *Butts* article, the dispatch which concerns us in *Walker* was news which required immediate dissemination."[64] Justice Harlan went on to consider the other distinctions between the cases, including the fact that the story in *Walker* was based upon an eyewitness account by the reporter, whose dispatches "gave every indication of being trustworthy and competent."[65] As a result, only the judgment for *Butts* was upheld.[66]

Walker and *Butts* have been read to prevent a finding of actual malice based upon a reporter's failure to verify facts due to time pressure.[67] This position was justified by Judge Skelly Wright of the United States Court of Appeals for the D.C. Circuit:

> Verification . . . is a time consuming process, a factor especially significant in the newspaper business where news quickly goes stale, commentary rapidly becomes irrelevant, and commercial opportunity in the form of advertisements can easily be lost. In many instances considerations of time and distance make verification impossible . . . . We should be hesitant to impose responsibilities upon newspapers which can be met only through costly procedures or through self-censorship designed to avoid the risks of publishing controversial material.[68]

The logic behind the actual malice standard, as well as the policies promoted by it, are generally consistent with Judge Wright's conclusion. Actual malice requires proof of subjective awareness of probable falsity, which necessitates an inquiry into the journalist's state of mind. The Court has said that "[f]ailure to investigate does not in itself establish bad faith."[69] So, delaying publication serves only to increase the risk that the reporter will learn of information that raises doubt about the accuracy of the report; if she then goes with the story, despite possession of the conflicting information, she may be guilty of actual malice, and

---

malice.

63. *Id.* at 157.
64. *Id.* at 158.
65. *Id.*
66. *See id.* at 161-62.
67. *See* SMOLLA, *supra* note 44, § 3:55.
68. Washington Post Co. v. Keogh, 365 F.2d 965, 972 (D.C. Cir. 1966).
69. St. Amant v. Thompson, 390 U.S. 727, 733 (1968).

subject to liability.[70] By "putting a premium on ignorance," the Court recognized that it protected the irresponsible journalist who publishes first and verifies later.[71] All journalists operate under some time pressure,[72] and allowing the media to point to the time pressures endemic to the 24-hour news cycle further promotes irresponsible journalism. Nevertheless, unless the Supreme Court revisits the actual malice issue, and expands the notion of "willful blindness" to include conscious decisions to rush to print,[73] it is likely that the increasing tendency of the media to yield to the demands of the 24-hour news cycle will serve to shield a journalist from liability for the publication of false statements made about public plaintiffs.[74]

B. Negligence and Time Pressures

Because of the decreased free speech interests in reporting on private plaintiffs, as well as the strong state interest in protecting private reputation, in almost all jurisdictions a private plaintiff need only prove negligence in order to secure an award of actual damages in a libel action.[75] *Gertz* allowed states to decide whether to require proof of

---

70. *See id.* at 731. *See also* William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169, 186 ("[B]y making immediate (inaccurate) coverage relatively cost free, the Court renders more thorough investigations unnecessary and potentially more risky."). There is also the incongruous consequence that publications that have a reputation for meticulous fact-checking may be held to a higher standard of care than tabloids, which tend to shoot first and ask questions later. As the Ninth Circuit recognized in *Masson v. New Yorker Magazine*:

> We are aware that this puts publishers like *The New Yorker* "whose practice it is to investigate the accuracy of its stories" at a disadvantage compared to other publishers such as newspapers and supermarket tabloids that cannot or will not engage in thorough fact-checking. After all, publications that check their stories . . . are more likely to develop "obvious reasons to doubt" than those that do not.

Masson v. New Yorker Magazine, Inc., 960 F.2d 896, 901 n.5 (9th Cir. 1992), *on remand from Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) (Kozinski, J.).

71. *St. Amant*, 390 U.S. at 731.

72. *See* SACK, *supra* note 51, at 5-68 n.397 ("No publication is made without time pressure or with the ability to ascertain absolutely every statement as anyone who has written a brief or opinion can attest. Rare, indeed, is the document that is error-free, irrespective of the relative leisure in which it was composed.").

73. *See supra* note 70 and accompanying text.

74. *See* McFarlane v. Esquire Magazine, 74 F.3d 1298, 1308 (D.C. Cir. 1996) ("The standard of actual malice is a daunting one."). Data collected by the Libel Defense Resource Center proves how rarely a public plaintiff ever recovers damages. *See* Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1774-79 (1998).

75. *See supra* note 57 and accompanying text. For similar reasons, various other

negligence in private plaintiff cases, and it also therefore left open for common law development two important collateral questions that bear upon media liability in a world with a 24-hour news cycle: first, whether a libel action should be treated as a garden variety tort action or rather as a form of professional malpractice, and, more specifically, what is the appropriate role of evidence of the industry custom to rush to release stories. The second question is, under what circumstances should journalists be able exculpate themselves by claiming that their story involved the exigent circumstances characteristic of "hot news."

C. The Role of Custom

In the garden-variety negligence action, the jury is the ultimate evaluator of the reasonableness of a defendant's conduct, in some cases assisted (but never bound by) expert testimony of what the custom is in the defendant's trade or profession.[76] In contrast, the central question in a negligence action brought against a professional is whether the defendant complied with the relevant custom in her profession.[77] For example, in a medical malpractice action, a failure by the plaintiff to adduce expert testimony that the physician failed to act in the customary manner typically guarantees a judgment for the defendant.[78] As a corollary, the jury is not free in a malpractice action to adopt a community-based "reasonable person in the circumstances" standard; rather it must adopt the standard of one of the expert witnesses proffered by the parties.[79]

There are several reasons offered for the distinctive doctrines applicable to negligence actions brought against professionals. First, it is presumed that laymen are ignorant about the ways of highly-trained and skilled professionals, so jurors should not be able to substitute their judgments for that of the relevant professional community.[80] Second,

---

protections accorded to defendants in public plaintiff cases may not be available in private plaintiff cases, such as the requirement that there be proof of culpability by "clear and convincing evidence" and the availability of de novo review of jury findings of culpability. The lower courts are split on these issues. *See* Gilles, *supra* note 74, at 1772.

76. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 33, 37 (5th ed. 1984).

77. *See id.* § 32.

78. *See id.*

79. *See id.*

80. *See id. See also* Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 608 (1959) (arguing that the malpractice model is appropriate for professionals because they have "undertaken long years of study to acquire

a professional impliedly represents to her client that she will follow customary methods, and thus it is only fair to expect the actor to provide the level of care promised.[81] Third, there is the likelihood that judges, engaged in the process of crafting the common law, recognize that the protections provided to doctors by the malpractice model also redound to the benefit of fellow lawyers sued for legal malpractice.[82] Finally, there is the presumption that the ethos of professionals, for example the Hippocratic Oath to do no harm, protects the public from the group responding to pressures to maximize profits by adopting irresponsible customary practices.[83]

This malpractice model has been adopted by a number of states for private person libel claims,[84] a result urged by the Restatement, which recommends that a journalist be evaluated against skill and experience "normally possessed by members of that profession."[85] This position is attractive to some because it "fulfills an important role as [an additional] first amendment buffer zone for the press, ... [and because it takes] into account the realities of the newsroom."[86]

Nevertheless, there are a range of reasons why the malpractice model should be rejected for libel actions brought by private plaintiffs and for limiting the significance of evidence that a defendant adhered to a customary practice to publish first and verify later. Most fundamentally, the malpractice model adopts as the standard of care the practices of a self-interested group of actors, who may well behave in a manner inconsistent with the public welfare. Prosser recognized the dangers of allowing defendants to prevail in negligence actions by cleaving to custom, noting that "[a]n entire industry, by adopting such careless methods to save time, effort or money, cannot be permitted to set its

---

knowledge").

81. *See* KEETON ET AL., *supra* note 76, § 32.

82. As Prosser noted, "Another explanation [for the malpractice model] is the healthy respect which the courts have had for the learning of a fellow profession." *Id.*

83. *See* Richard N. Pearson, *The Role of Custom in Medical Malpractice Cases*, 51 IND. L.J. 528, 536-37 (1976). Many commentators are skeptical about whether professionals are sufficiently disinterested to justify the protection provided by the malpractice model. *See, e.g.*, Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WISC. L. REV. 1193, 1213 ("With professional custom as the standard, the nation's physicians may lawfully adopt and follow practices that are patently negligent . . . under the standard of ordinary care to which all others are held. The medical community is answerable not for want of care but for want of conformity.").

84. *See* SMOLLA, *supra* note 44, § 3:89.

85. RESTATEMENT (SECOND) OF TORTS, § 580B cmt. g (1977).

86. SMOLLA, *supra* note 44, § 3:122.

own uncontrolled standard."[87] As pointed out above,[88] there are many examples of the media responding to the intensely competitive atmosphere created by the 24-hour news cycle, by rushing to publish reports, recycling rumors, and the like. Such profit-driven, self-interested behavior is more likely to be excused under the malpractice model, even though the public interest in careful journalism is at its zenith in the context of possible false reports that damage the reputations of private individuals.[89]

Further, allowing a group of actors to defeat negligence actions by pointing to their compliance with their own industry's customs undercuts incentives to make progress in the direction of safety.[90] Whether the primary goal of the negligence system is to deter unreasonably dangerous behavior,[91] to encourage the optimal allocation of society's scarce resources,[92] or to facilitate corrective justice,[93] market-driven forces should not be allowed to trump other legitimate public interests, as is often the result under a malpractice regime.[94] As libel scholar Rod Smolla points out, there is a real danger associated with journalists racing to the bottom: "[b]ecause the professional model invites the members of the profession to set their own standards of care, there is the concern that the whole industry will collectively downgrade its officially recognized principles of conduct."[95] Thus, allowing a

---

87. *See* KEETON ET AL., *supra* note 76, § 33.

88. *See supra* notes 30-39, and accompanying text.

89. *See also* Marshall & Gilles, *supra* note 70, at 186-87 (arguing that the current state of the law sends the message to the press that "if it covers immediate events, it will enjoy the benefit of a more lenient standard of review," which in turn promotes "superficial reporting to the detriment of serious investigation").

90. *See* KEETON ET AL., *supra* note 76, § 33.

91. *See id.* § 3.

92. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 1 (1987).

93. *See* Catherine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudiction*, 88 MICH. L. REV. 2348 (1990).

94. *See* James A. Henderson, Jr. & John A. Siliciano, *Universal Health Care and the Continued Reliance on Custom in Determining Medical Malpractice*, 79 CORNELL L. REV. 1382, 1388 (1994) ("Homogeneity of knowledge, resources, and attitudes toward risk helps generate custom, but these factors do not necessarily ensure that such customs will represent the kind of socially optimal responses to risk to which courts should defer."); *see also* PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 142-43 (1985) (discussing how customary care is not necessarily socially optimal care in the medical malpractice context).

95. *See* SMOLLA, *supra* note 44, § 3:126. *See also* David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 455 (1975) (arguing that the malpractice model "discriminate[s] unjustifiably against media or outlets whose philosophies and methods deviate from those of the mainstream").

journalist defendant in a libel action to excuse inaccurate reporting by pointing to evidence of the journalistic custom to get the story first, whether or not the story is right, serves to encourage careless reporting.

In addition, the malpractice model is justified only to the extent that the group in question shares the essential characteristics of a profession: substantial formal training; self-regulation (often in the form of licensing); the provision of services, the quality of which the client cannot adequately evaluate; and, the obligation to sublimate self-interest to the common good. As I have pointed out elsewhere,[96] journalism lacks most, if not all, of these characteristics.

Another difficulty created by the malpractice model for libel actions is the proliferation of standards. By analogy to medical malpractice, would the defendant be compared to a journalist in the "same or similar locality?" Should there be different standards for a news anchor and the journalist working in the field? The tabloid or the somber political journal? This "tricky business of establishing a defendant standard,"[97] and the concomitant proliferation of standards, is inconsistent with the general tort goal of evaluating all actors by an objective, external standard.[98]

Similarly, unlike the circumstance presented by a claim that a physician negligently performed surgery or some other complex medical procedure, juries are not so lacking in knowledge as to be unable to competently evaluate the care exercised by journalists.[99] As one court observed, "[t]he elementary standards of basic news reporting are common knowledge. News articles and broadcasts must contain the answers to the essential inquiries of who, what, where, when, why and how."[100] Additionally, as in the case of medical malpractice, the centrality of expert testimony to a professional negligence action could unfairly handicap libel plaintiffs who have difficulty enlisting the services of an expert due to the "conspiracy of silence;"[101] even if a plaintiff is able to locate and pay for a qualified expert, there is the risk that the jury would be unduly impressed by the testimony of a deep-pocket defendant's expert.[102]

---

96. *See* Logan, *supra* note 16, at 157-59.

97. SMOLLA, *supra* note 44, § 3:123.

98. *See* KEETON ET AL., *supra* note 76, § 32.

99. *See* Little Rock Newspapers, Inc. v. Dodrill, 281 Ark. 25, 34, 660 S.W.2d 933, 938 (1983); Kohn v. West Hawaii Today, Inc., 656 P.2d 79, 83 (Haw. 1982).

100. Greenberg v. CBS, Inc., 419 N.Y.S.2d 988, 998 (1979). *See also* Schrottman v. Barnicle, 437 N.E.2d 205, 214 (Mass. 1982).

101. *See* SMOLLA, *supra* note 44, § 3:126.

102. *See* Phillip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature*

For of all these reasons, courts should take steps to limit the influence of evidence that a journalist complied with the industry custom by rushing to publish a story about a private plaintiff. At a minimum, the medical malpractice model that makes a defendant's compliance with industry custom conclusive on the due care issue should be rejected.[103] Similarly, the libel plaintiff should never be burdened by a requirement to adduce expert testimony on the defendant's non-compliance with journalistic custom. Furthermore, the trial judge should retain the right to strike evidence of compliance with custom in those presumably rare circumstances when such conduct was patently unreasonable or when the defendant proceeded to act knowing full well of the dangers created by adherence to custom.[104] Finally, even if evidence of the defendant's compliance with journalistic custom is admissible, the trial judge should be sure to carefully instruct the jury that such evidence is only "some evidence" of reasonable care, and that they are the ultimate arbiters of that issue.[105]

D. Journalistic "Emergencies"

The central question in a negligence action is always: did the defendant engage in conduct that created an unreasonable risk of harm *in the circumstances*.[106] As a result, less care is expected from a defendant who fires a gun in the woods than one who fires an identical gun, at an identical time, but in the city.[107] A similar concern with the context in which a defendant acted is recognized in libel law.[108]

One result of this focus on the circumstances in which a defendant acts is the "emergency doctrine:" a defendant who is confronted by an emergency is not expected to exercise the same amount of care as is a

---

Conclusions, 31 ARIZ. ST. L.J. 1277, 1312 (1999).

103. *See* RESTATEMENT (SECOND) OF TORTS § 580B cmt. g (1977).

104. *See* Donald E. Kacmar, *The Impact of Computerized Medical Literature Databases on Medical Malpractice Litigation: Time for Another* Helling v. Carey *Wake-Up Call*, 58 OHIO ST. L.J. 617, 635-39 (1997) (discussing circumstances in which courts have refused to allow a jury verdict for a physician despite evidence of compliance with medical custom).

105. *See, e.g.*, Darrell L. Keith, *Medical Expert Testimony in Texas Medical Malpractice Cases*, 43 BAYLOR L. REV. 1, 75 (1991).

106. *See* RESTATEMENT (SECOND) OF TORTS §§ 282-83 (1977).

107. *See* Richard A. Epstein, *The Ubiquity of the Benefit Principle*, 67 S. CAL. L. REV. 1369, 1398 (1994).

108. *See* RESTATEMENT (SECOND) OF TORTS § 580B cmt. h (1977) ("The standard of care does not change, but its application may vary with the circumstances.").

defendant not facing exigent circumstances.[109] But this rule has important limitations, relevant to time pressures self-imposed by journalists. The defendant's conduct in an emergency is evaluated under a less demanding standard *only* when the emergency was sudden and unexpected, such as to deprive the actor of reasonable opportunity to deliberate.[110] Similarly, the emergency cannot be of the defendant's own making, on the view that the defendant should not be able to "shield himself behind a situation resulting from his own fault."[111] Thus, a journalist should not be able to bootstrap from a self-imposed deadline to a conclusion that less care was appropriate because of the deadline.[112]

A final, related problem involves the assertion by a journalist that she needed to publish without further verification because the story involved "hot news." As pointed out earlier, the United States Supreme Court held that there was no actual malice in the "hot news" context facing the journalist in *Walker*,[113] and lower courts have often allowed deadline pressures to shield a journalist from a finding of actual malice.[114] Journalists have been given a similar dispensation in private plaintiff/negligence cases.[115]

---

109. *See* KEETON ET AL., *supra* note 76, § 76.

110. *See id.* § 33.

111. *See id.* § 33. *See also* RESTATEMENT (SECOND) OF TORTS § 283 cmt. e (1977) (noting that a defendant must "give impartial consideration to the harm likely to be done [to] the interests of the other as compared to the advantages likely to accrue to his own interests, free from the natural tendency of the actor, as a party concerned, to prefer his own interests to those of others").

112. It is also important to keep in mind that participants in many activities need special training so that they are equipped to cope with dangerous situations associated with those activities. *See* RESTATEMENT (SECOND) OF TORTS § 296 cmt. c (1977). *See also* Downs v. United States, 52 F.2d 990, 1002 (6th Cir. 1975) ("[T]he extent to which an actor will be excused for errors in judgment under [emergency] circumstances is qualified by the training and experience he may have, or be expected to have, in coping with the danger or emergency with which he is confronted."). Indeed, it is well-settled that physicians, by the very nature of their work, should expect emergencies, and be trained and behave accordingly. *See* Barry R. Furrow, *Forcing Rescue: The Landscape of Health Care Provider Obligations to Treat Patients*, 3 HEALTH MATRIX 31, 52-53 (1993). By the same token, journalists should be expected to anticipate the press of deadlines, and build into the reportorial process a reasonable degree of concern for the difficulty of fact-checking under pressure.

113. *See supra* note 66 and accompanying text.

114. *See* SMOLLA, *supra* note 44, §§ 3:75-76.

115. *See id.* § 3:111. *See generally* Lackland H. Bloom, Jr., *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 267-70, 359-60 (1985); Hugh J. O'Halloran, Comment, *Journalistic Malpractice: The Need for a Professional Standard of Care in Defamation Cases*, 72 MARQ. L. REV. 63, 86-89 (1988).

Nevertheless, a journalist's self-serving assertion that a particular story is "hot news" should not be treated as an abracadabra to which courts must defer. Just as courts will scrutinize a defendant's argument that under the First Amendment a particular libel plaintiff is a public figure (and therefore must prove actual malice),[116] courts should consider whether the asserted deadline pressure was bona fide. For example, was the subject of the report in fact "a matter of topical news requiring prompt publication to be useful?"[117] Relevant to this inquiry is the type of publication involved: a broadcaster or other purveyor of current events may more credibly claim deadline pressures than a magazine, as may the evening news program rather than the documentary.[118] Also relevant should be the type of item involved: was it a news headline as opposed to a feature story? In short, courts must be vigilant to rebuff unjustified efforts by the media to transform every reportorial context into "hot news."[119]

IV. CONCLUSION

The Supreme Court has provided the media a large measure of protection from liability for the publication of false statements, especially in the context of claims brought by public figures, but also in the private plaintiff context. Against this backdrop, the recent appearance of the 24-hour news cycle increases the risk that the roll call of the innocent victims of press calumny will be lengthening at warp speed unless legal doctrine adjusts to this new journalistic landscape. The press provides a vital public service but it also can do great harm if culpable misconduct results in the publication of a false and defamatory statement. The courts should be no more tolerant of a journalist rushing to publish a story without adequate verification than they are of a

116. *See* SMOLLA, *supra* note 44, §§ 2:11-19 (discussing Supreme Court decisions rejecting media efforts to characterize plaintiffs as public figures).

117. RESTATEMENT (SECOND) OF TORTS § 580B cmt. h. *See also* Hunt v. Liberty Lobby, 720 F.2d 631, 643 (11th Cir. 1983) ("[H]ot news" is information that "must be printed immediately or it will lose its newsworthy value."). *But see* Tom Rosenstiel, *The Myth of CNN*, NEW REPUBLIC, Aug. 22, 1994, at 33 (arguing that all "breaking news" is not "hot news").

118. *See* Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 895-96 (3d Cir. 1969) ("The need for constitutional protection in the circumstances [of 'hot news'] is much more apparent than in the cases of the so-called documentaries or feature stories where time is available to attempt to verify questionable material.").

119. *See* Bloom, *supra* note 115, at 360 ("Finally, deadline pressures must be attributable to the exigences of the news itself and not simply the predilections of the publisher.").

pharmaceutical company that rushes a new drug to market without adequate testing.