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INVASION OF PRIVACY: FALSE LIGHT OFFERS FALSE HOPE

Television producer Arthur Fellows was the subject of an article in the August 17, 1982 issue of the *National Enquirer* ("the Enquirer"). The article showed a picture of Fellows and actress Angie Dickinson and stated: "Gorgeous Angie Dickinson's all smiles about the new man in her life—TV producer Arthur Fellows. Angie's steady-dating Fellows all over Tinseltown, [sic] and happily posed for photographers with him as they exited the swank Spago restaurant in Beverly Hills."¹ That article was the start of *Fellows v. National Enquirer, Inc.*² ("Fellows").

Shortly after publication, Fellows' attorney wrote a letter to the Enquirer asserting that the article was false and demanding an immediate retraction. The Enquirer's attorney replied, expressing confusion as to the alleged falsity. Fellows' attorney responded in a second letter stating that "[t]he article was false because Fellows has never dated Miss Dickinson, is not 'the new man in her life' and has been married to Phyllis Fellows for the last eighteen years."³ The Enquirer continued to refuse Fellows' request for a retraction and he brought an action for libel, false light invasion of privacy, intentional and negligent infliction of emotional distress and "conscious disregard."⁴

Fellows' libel count was supported both by information contained in the article and on the fact that those who read the article and knew of his marital status would think that he was engaged in improper and immoral conduct.⁵ The privacy cause of action was based on the same factual allegations. Both causes of action alleged that the Enquirer published the article with knowledge of its falseness or with reckless disregard for the accuracy of the statement. Fellows sought general damages for his loss of reputation, shame, mortification and hurt feelings.⁶ He also claimed special damages for loss of business.⁷

The Enquirer demurred to the complaint. First, it asserted that Fel-

1. NATIONAL ENQUIRER, Aug. 17, 1982, at 15.

2. 42 Cal. 3d 234, 721 P.2d 97, 228 Cal. Rptr. 215 (1986).

3. *Id.* at 236 n.3, 721 P.2d at 98 n.3, 228 Cal. Rptr. at 215 n.3.

4. Although Fellows asserted a claim for "conscious disregard," the nature and purpose of that claim is unclear.

5. *Fellows*, 42 Cal. 3d at 236, 721 P.2d at 98, 228 Cal. Rptr. at 217. The applicability of California Civil Code § 45a became an issue because information in addition to that contained in the article was necessary to make it defamatory.

6. *Id.* at 237, 721 P.2d at 98, 228 Cal. Rptr. at 217.

7. *Id.*

lows had not plead special damages with sufficient certainty to satisfy the statutory requirement of California Civil Code section 45a⁸ with respect to the claims of libel or false light. Second, the Enquirer argued that the false light claim was duplicative of defamation and therefore should be dismissed. The trial court ruled against the motion for a demurrer, stating that the Enquirer was free to raise the special damages issue at trial. The court then dismissed Fellows' false light count, agreeing with the Enquirer that the claim was duplicative.⁹

Fellows' first amended complaint stated the same causes of action and continued to assert special damages for the libel count, but claimed only general damages for the false light count. At oral argument, Fellows' counsel conceded that it was highly unlikely that there would be any special damages. The court then sustained the demurrer on the libel and false light counts because of the absence of special damages.¹⁰

Fellows' final amended complaint stated only a claim for false light invasion of privacy.¹¹ He sought only general damages for shame, mortification and hurt feelings. The Enquirer again demurred, asserting that Fellows' failure to claim special damages barred his cause of action for false light. The trial court agreed and sustained the demurrer without leave to amend.¹²

Fellows appealed the ruling, claiming that the special damage requirement for libel should not apply to an action for false light invasion of privacy. He argued that false light is an independent tort designed to redress injuries separate and distinct from those redressed by the tort of libel, and therefore the statutory requirements for a libel suit were not applicable. The court of appeals agreed and reversed the trial court's ruling.¹³

The California Supreme Court ruled that a false light invasion of privacy claim, based on an allegedly defamatory publication, required the pleading of special damages. The court concluded that false light claims present as great a threat to freedom of speech as defamation suits and

8. California Civil Code § 45a provides:

A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code.

CAL. CIV. CODE § 45a (West 1982).

9. *Fellows*, 42 Cal. 3d at 237, 721 P.2d at 98, 228 Cal. Rptr. at 217.

10. *Id.*

11. *Id.* at 237-38, 721 P.2d at 99, 228 Cal. Rptr. at 217-18.

12. *Id.* at 238, 721 P.2d at 99, 228 Cal. Rptr. at 218.

13. *Id.*

that therefore false light actions should be subject to the same statutory requirements.¹⁴

California Civil Code section 45a was at issue.¹⁵ The court had to decide whether the special damage requirement of section 45a for libel actions should also apply to actions for false light invasion of privacy. Under section 45a, language that is not defamatory on its face is not actionable unless the plaintiff can prove special damages.¹⁶ In determining that false light claims are subject to the same statutory requirements as libel claims, the court relied on two basic findings. First, the court reasoned that false light claims are the same or substantially similar to defamation claims. Second, the court found that section 45a was enacted to secure uninhibited activity by the press and that to achieve its goal the statute must be applied as broadly as possible. Based upon those findings, the court reasoned that public policy and legislative intent requires that false light claims be subject to the special damages requirement of section 45a.

In support of its conclusion, the court explored the constitutional dimensions of false light. First, the court looked to the United States Supreme Court's analysis of defamation and false light cases. The court compared the standards and rationale of *New York Times Co. v. Sullivan*,¹⁷ a defamation case, with *Time, Inc. v. Hill*,¹⁸ a case involving a false light claim. The United States Supreme Court's requirement that the plaintiff prove actual malice in both false light and defamation cases led the California Supreme Court to conclude that the United States Supreme Court "balanced the competing interests in exactly the same manner."¹⁹ Next, the *Fellows* court examined *Readers Digest v. Superior Court*,²⁰ in which the California Supreme Court applied the constitutionally mandated standard of actual malice to a false light claim, holding that the "zone of constitutional protection"²¹ did not depend on the cause of action.²²

After finding support in these constitutional cases, the court examined several California decisions in which defamation statutes had

14. *Id.* at 251, 721 P.2d at 108-09, 228 Cal. Rptr. at 227.

15. The court stated that "[i]n this case we must decide whether the special damages rule of section 45a applies when a defamatory publication gives rise to an action for false light invasion of privacy rather than libel." *Id.* at 235-36, 721 P.2d at 97, 228 Cal. Rptr. at 216.

16. CAL. CIV. CODE § 45a (West 1982). See *supra* note 8 for the text of the statute.

17. 376 U.S. 254 (1964).

18. 385 U.S. 374 (1967).

19. *Fellows*, 42 Cal. 3d at 239, 721 P.2d at 100, 228 Cal. Rptr. at 219.

20. 37 Cal. 3d 244, 690 P.2d 610, 208 Cal. Rptr. 137 (1984).

21. *Id.* at 265, 690 P.2d at 624, 208 Cal. Rptr. at 151.

22. *Id.*

been applied to false light claims. First, the court looked at *Werner v. Times-Mirror Co.*²³ In *Werner*, a California appellate court held that California Civil Code section 48a,²⁴ which barred a plaintiff from recovering general damages in a defamation action if the plaintiff had not requested a retraction, applied to a false light action.²⁵ In reaching its conclusion, the *Werner* court determined that the legislative purpose of Civil Code section 48a was to provide a reasonable substitute for general damages through the printing of a retraction.²⁶ The court reasoned that providing a recovery for false light when the statutory requirement of section 48a had not been met would evade legislative intent and the policy behind section 48a.²⁷ The *Fellows* court not only relied on the *Werner* decision as to the intent of the legislature and the effect of not imposing defamation restrictions, it also found that the *Werner* decision implicitly determined "that privacy suits threaten the freedoms of speech and press in the same manner as defamation suits."²⁸

After addressing *Werner*, the court turned to *Kapellas v. Kofman*,²⁹ which involved a claim for both libel and invasion of privacy.³⁰ The *Fellows* court found that *Kapellas* had adopted the *Werner* holding.³¹ The *Fellows* court then referred to the *Kapellas* court's conclusion that a false light claim was equivalent to a libel claim, and therefore, all the requirements of a libel claim should apply.³²

In short, the court in *Fellows* found that a false light claim was not significantly different from a defamation claim. It reasoned that any theoretical difference between the two claims did not justify applying different standards to the two causes of action. The court looked to the purpose behind the libel statutes generally and found that they were in-

23. 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961).

24. CAL. CIV. CODE § 48a (West 1982).

25. *Werner*, 193 Cal. App. at 122-23, 14 Cal. Rptr. at 215-16. The California Supreme Court in *Kapellas v. Kofman*, 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969), approved the *Werner* holding as to false light torts; however, it expressly stated that section 48a did not apply to all privacy actions. *Kapellas*, 1 Cal. 3d at 35 n.17, 459 P.2d at 921 n.17, 81 Cal. Rptr. at 369 n.17.

26. *Werner*, 193 Cal. App. at 122, 14 Cal. Rptr. at 215. The court stated that "the Legislature could reasonably conclude that the retraction provisions of section 48a provide a reasonable substitute for general damages . . ." *Id.* (quoting *Werner v. Southern California Associated Newspapers*, 35 Cal. 2d. 121, 126, 216 P.2d 825, 828 (1950)).

27. *Id.* at 123, 14 Cal. Rptr. at 216.

28. *Fellows v. National Enquirer, Inc.*, 42 Cal. 3d 234, 241, 721 P.2d 97, 101, 228 Cal. Rptr. 215, 220 (1986).

29. 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969).

30. *Id.* at 26, 459 P.2d at 914, 81 Cal. Rptr. at 362.

31. *Fellows*, 42 Cal. 3d at 241, 721 P.2d at 101, 228 Cal. Rptr. at 220.

32. *Id.* at 242, 721 P.2d at 102, 228 Cal. Rptr. at 221.

tended to protect the media from the chilling effect of lawsuits. It concluded that this purpose would best be served by applying the statutory limitations of libel, regardless of the cause of action. Finally, the court reasoned that since most factual situations that support an action for libel also support an action for false light, failure to apply the libel standards to false light action would allow plaintiffs to circumvent legislative intent.³³

SPECIAL DAMAGES ARE UNNECESSARY AND UNDESIRABLE IN A FALSE LIGHT ACTION

The holding in *Fellows*, that the special damage requirement of California Civil Code section 48a applies to false light actions, may seriously undermine an individual's protection from false publicity. The decision makes it extremely difficult for an individual to redress harm inflicted by the press. As a result of the *Fellows* decision, a plaintiff who has suffered emotionally from a false publication, printed with the knowledge of its falseness or with reckless disregard for its truth, will be unable to recover unless monetary loss can be proven.

The effect of the court's holding, for all practical purposes, is an end to the tort of false light in California. The special damages requirement for libel, while reasonable for actions which deal with harm to reputation, is intrinsically inconsistent with a false light claim. A false light claim by its very nature is not readily amenable to a finding of special damages. As defined by statute, special damages are damages to property, business, trade, profession or occupation.³⁴ Because the false light tort redresses only harm resulting from shame, mortification and hurt feelings, it is not likely that there would be a finding of special damages in a false light case.³⁵ Therefore, a requirement for special damages effec-

33. *Id.* at 251, 721 P.2d at 108, 228 Cal. Rptr. at 227.

34. CAL. CIV. CODE § 48a (West 1982). Section 48a (4)(b) states: "'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other.'" *Id.* § 48a (4)(b).

35. False light compensates the plaintiff only for emotional harm and therefore special damages cannot be recovered in false light actions. The court in *Werner* stated:

The gist of the cause of action in a privacy case is not injury to the character or reputation, but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community. . . .

The right of privacy concerns one's own peace of mind, while the right of freedom from defamation concerns primarily one's reputation.

Werner v. Times-Mirror Co., 193 Cal. App. 2d 111, 116, 14 Cal. Rptr. 208, 211 (1961) (quoting *Fairfield v. American Photocopy Equipment Co.*, 138 Cal. App. 2d 82, 86, 291 P.2d 194,

tively eliminates the long recognized tort of false light invasion of privacy.

In reaching its conclusion, the court failed to address several very important considerations. First, the court failed to adequately recognize the significant differences between false light invasion of privacy and libel. Second, the court extended California Civil Code section 45a without properly addressing the need for and effect of doing so. By extending section 45a to include false light actions, the court went far beyond the original scope and purpose of the statute. Third, the court did not consider the harm suffered by the plaintiff and the hardship caused by his inability to redress his injury. Instead of balancing the plaintiff's rights with the interests of the press, the court focused only on the interests of the press. Finally, the court did not consider the ample protection already provided to the press in false light actions.

LIBEL AND FALSE LIGHT INVASION OF PRIVACY: TWO SEPARATE TORTS

The false light tort has been recognized by the California courts as a separate and independent tort for almost fifty years.³⁶ The *Fellows* court, however, chose not to address false light as separate and distinct from libel. Instead of deciding the case based on the purpose, protection and requirements of the false light tort, the court decided the case as if false light actions were identical to libel actions. Never acknowledging that a false light claim provides recovery for a different harm than a libel claim, the court stated that the "conceptual difference in the two torts does not justify making actionable an otherwise protected statement."³⁷

Although the torts are similar in that the same action by a publisher, printing a story with knowledge of its falseness or reckless disregard for the truth, creates a cause of action for both false light invasion of privacy and libel, the differences between the two torts are more than merely conceptual. The purpose of a libel action is unquestionably to protect a person from harm to his reputation.³⁸ False light, on the other hand,

197 (1955)). It is, however, possible that expenses for psychotherapy may satisfy the special damage requirement. Although the court has never ruled on whether expenses for psychotherapy satisfy the special damage requirement of § 45a, one court classified psychotherapy expenses as special damages. *Diaz v. Oakland Tribune, Inc.*, 139 Cal. App. 3d 118, 136-37, 188 Cal. Rptr. 762, 774 (1983). The effect of the *Diaz* case, however, is questionable. Because *Diaz* involved public disclosure of private facts, special damages were not a necessary element of the plaintiff's case.

36. *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P.2d 577 (1942).

37. *Fellows*, 42 Cal. 3d at 248, 721 P.2d at 106, 228 Cal. Rptr. at 225.

38. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

protects a person's interest in privacy, not reputation.³⁹ This privacy interest has been defined as peace of mind and freedom from emotional disturbances.⁴⁰ While libel redresses an injury caused by the effect of false publicity on one's standing in the community, false light redresses the mental suffering caused by the publicity, irrespective of any harm to reputation.⁴¹

In addition to the different interests protected by each of these torts, the requirements for establishing a cause of action for each is also different. To succeed on a false light claim, the plaintiff must show that he was placed before the public in a false light that would be highly offensive to a reasonable person and that the defendant had knowledge of the falsity or acted with a reckless disregard for the truth.⁴² Prior to *Fellows*, there was no requirement of special harm, except for the plaintiff's own emotional suffering.⁴³ To support a libel claim, on the other hand, the false statement must expose the plaintiff to "hatred, contempt, ridicule, obloquy, or cause him to be shunned or avoided, or which has a tendency to injure him in his occupation."⁴⁴ There is no requirement in a libel action that the defamatory statement be circulated before the public at large, nor is the defendant required to have acted with knowledge of the falsity or reckless disregard for the truth.⁴⁵

The interests protected by false light, the history of its development and the requirements for establishing the cause of action, all indicate that false light is distinct from libel. The mere fact that the false light cause of action developed and was accepted as legitimate, in spite of the availability of a libel action, strongly suggests its independent nature. In short, false light is a separate tort which serves a function and addresses a need not satisfactorily met by a libel action.

IMPROPER EXTENSION OF CIVIL CODE SECTION 45A

Because *Fellows* did not assert a claim of libel and because false light differs significantly from libel, the court's application of California

39. *Werner*, 193 Cal. App. 2d at 116, 14 Cal. Rptr. at 211. See *supra* note 35.

40. *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 278, 239 P.2d 630, 634 (1952).

41. *Id.* at 276, 239 P.2d at 632. In defining the right to privacy the court stated that "[r]ecognition has long been given to a right of privacy, independent of the common rights of property, contract, reputation and physical integrity." *Id.*

42. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

43. *Werner*, 193 Cal. App. 2d at 116, 14 Cal. Rptr. at 211. See *supra* note 35.

44. CAL. CIV. CODE § 45 (West 1982).

45. *Id.* Although there is no statutory requirement that the defendant act with knowledge of the falsity or reckless disregard for the truth, any libel action by a public official or public figure is of course subject to the constitutional requirement of actual malice. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Civil Code section 45a was unnecessary. First, section 45a speaks only to libel and is silent as to false light.⁴⁶ The statute, by its language, does not attempt to create a general immunity for false publication, but instead applies only to libel which is defamatory.⁴⁷ Even though section 45a was inapplicable on its face, the court found it necessary to apply the special damage requirement to carry out the legislative intent and prevent circumvention of the statute.⁴⁸

In support of its application of section 45a to a false light case, the court looked to cases addressing limitations on libel. It concluded that where an action is based on a defamatory statement, courts have not allowed plaintiffs to avoid statutory defamation limits merely by pleading an alternative theory.⁴⁹ The court based its reasoning on three distinct lines of cases. First, the court examined cases which had specifically imposed libel restrictions on false light actions. Next, the court discussed cases which stated in general terms that false light actions should be subject to all the requirements of libel actions. Finally, the court made reference to situations in which statutory protection for the press had been extended beyond its original purpose.

Although the court referred to a variety of cases in concluding that section 45a should apply to a false light tort, a closer examination of these cases, their holdings and rationales, does not compel or even suggest the conclusion reached by the *Fellows* court. These cases, instead, suggest a much different approach.

First, the court looked at the libel restrictions already applicable to false light cases. Those restrictions are the actual malice standard under the United States Constitution and the retraction requirement of California Civil Code section 48a.⁵⁰ The applicability of the malice require-

46. CAL. CIV. CODE § 45a (West 1982). See *supra* note 8 for text of the statute.

47. *Id.*

48. *Fellows v. National Enquirer, Inc.*, 42 Cal. 3d 234, 251, 721 P.2d 97, 108, 228 Cal. Rptr. 215, 227 (1986). The court stated that "[p]ermitt[ing] a plaintiff to circumvent the statutory requirement by labeling the action as one for false light invasion of privacy would defeat the legislative purpose of providing a zone of protection for the operation of a free press." *Id.*

49. *Id.* In reaching its conclusion, the court found that:

[C]ourts of this state have traditionally looked behind the label affixed to the complaint and examined the gravamen of the claim. Where the complaint is based on an offensive statement that is defamatory, plaintiffs have not been allowed to circumvent the statutory limitation by proceeding on a theory other than defamation.

Id.

50. CAL. CIV. CODE § 48a (West 1982). Section 48a provides in pertinent part:

1. Special Damages; notice and demand for correction. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. . . .
2. General, special and exemplary damages. If a correction be demanded

ment and section 48a to false light actions demonstrates that in some situations, the extension of libel standards is necessary or desirable. However, neither the fact that these libel standards apply to false light, nor the rationale of the courts in extending these standards, supports the extension of Civil Code section 45a to false light. These cases do, however, offer guidance as to how these situations should be analyzed.

The United States Supreme Court in *Time, Inc. v. Hill*,⁵¹ a false light case, did apply the libel standard of actual malice to false light.⁵² More important than the Court's holding, however, is the manner in which it was reached. The Court did not make a broad or expansive conclusion about false light claims or when they should be subject to libel restrictions. In fact, the Court made it quite clear that its decision was not reached "through blind application of *New York Times v. Sullivan*."⁵³ Instead, the Court went through a complex analysis of the plaintiff's interests, the harm done, the threat to the press and the chilling effect on First Amendment expression. Although the Court acknowledged that the First Amendment principles of *New York Times* guided its conclusion, that conclusion was reached by applying those principles to the unique situation presented by a false light action.⁵⁴

Similarly, before the California Supreme Court extended section 48a's retraction requirement to false light cases, it analyzed the principles, purposes and implications of applying the restriction. California Civil Code section 48a requires a plaintiff to request a retraction before he can proceed in a libel suit for general damages.⁵⁵ In extending that

within said period and be not published or broadcast in substantially as conspicuous a manner . . . within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages

4. Definitions. . . .

(a) "General damages" are damages for loss of reputation, shame, mortification and hurt feelings;

(b) "Special damages" are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other;

Id.

51. 385 U.S. 374 (1967).

52. *Id.* at 390.

53. *Id.*

54. *Id.* The Supreme Court chose to apply the *New York Times Co.* standard of knowing or reckless falsehood "only upon consideration of factors which arise in the particular context of the application of the New York statute in cases involving private individuals." It then stated that "we reach that conclusion only by applying these principles in this discrete context." *Id.* at 390-91.

55. CAL. CIV. CODE § 48a (West 1982). See *supra* note 50 for the text of the statute.

requirement to false light cases, the court in *Werner v. Times-Mirror Co.*,⁵⁶ did not rely on general assertions about false light. Instead, the court looked at the public policy behind section 48a to determine if that policy was equally applicable to false light.⁵⁷ Relying on *Werner v. Southern California Associated Newspapers*,⁵⁸ the court found that section 48a was intended to provide a reasonable substitute for general damages, thereby reducing the danger of lawsuits against the press.⁵⁹ The court reasoned that this policy applied to false light actions with equal force and therefore chose to extend section 48a.

In addition to the cases which specifically extended libel restrictions to false light cases, the court relied heavily on the broad language of several cases suggesting that libel and false light should be treated the same. The court referred to the language in both *Kapellas v. Kofman*⁶⁰ and *Briscoe v. Reader's Digest*.⁶¹ Although the court in *Kapellas* stated that false light claims should be met with all the same requirements of libel, it specifically enumerated those requirements: actual malice and the retraction requirement of section 48a.⁶² The facts of *Kapellas* support a cause of action for public disclosure of private facts and it was treated as such by the court.⁶³ The potential false light action was addressed by the

56. 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961).

57. *Id.* at 122, 14 Cal. Rptr. at 216.

58. 35 Cal. 2d 121, 216 P.2d 825 (1950).

59. *Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 122-23, 14 Cal. Rptr. 208, 215-16 (1961). The court stated that:

There are at least two bases on which the Legislature could reasonably conclude that the retraction provisions of section 48a provide a reasonable substitute for general damages in actions for defamation against newspapers and radio stations, namely, the danger of excessive recoveries of general damages in libel actions and the public interest in free dissemination of the news. . . . [I]t stands to reason that a full and frank retraction of the false charge . . . is usually in fact a more complete redress than a judgment for damages.

Id. (quoting *Werner v. Southern California Associated Newspapers*, 35 Cal. 2d 121, 126, 133, 216 P.2d 825, 828, 833 (1950)).

60. 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969).

61. 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

62. *Kapellas*, 1 Cal. 3d at 35 n.16, 459 P.2d at 921 n.16, 81 Cal. Rptr. at 369 n.16. The court stated:

Insofar as the instant plaintiff's right to privacy action is of the "false light in the public eye" variety, resting on the allegedly false nature of the editorial statements, we find the action is in substance equivalent to the children's libel claim, and should meet the same requirements of the libel claim on all aspects of the case, including proof of malice. (Citations).

Id. (citations omitted).

63. *Id.* The plaintiff did not specify the type of privacy tort alleged or make any claim that the publication was inaccurate. The complaint merely alleged that "the editorial constituted an actionable invasion of privacy . . ." *Id.* at 34-35, 459 P.2d at 921, 81 Cal. Rptr. at 369. The court proceeded to analyze the claim as a public disclosure of private facts. In its analysis,

court only in a short footnote. In fact, the *Kapellas* court made no attempt to analyze the problems or limitations of false light actions.⁶⁴ It is therefore unlikely, as the court in *Fellows* implied, that the *Kapellas* court intended, in dicta, to create sweeping reforms to the false light tort. Instead, the *Kapellas* court merely restated the already existing restrictions on false light, namely actual malice and the retraction requirement of section 48a.⁶⁵

If the *Briscoe* court did reaffirm the holding of *Kapellas*, as the *Fellows* court claimed it did, it did so only to the extent of requiring the plaintiff to comply with section 48a.⁶⁶ Although the *Briscoe* case involved a false light claim, the court made no attempt to address any broad issue involving false light. It merely quoted *Kapellas* for the proposition that false light should be met with the same requirements as libel.⁶⁷ In *Briscoe*, as in *Kapellas*, the court specified those requirements: actual malice and a retraction request.⁶⁸ The *Briscoe* court then held that because the plaintiff had not complied with the retraction requirement of section 48a, he could only recover if he were able to prove special damages.⁶⁹ Neither *Kapellas* nor *Briscoe* support the sweeping proposition that false light and libel are the same, or that they should be subjected to the same limitations. These cases merely support the continued application of preexisting false light restrictions.

Finally, the *Fellows* court discussed other statutory protection for the press and their extension to other actions in general. Specifically, the court relied on California Civil Code section 47,⁷⁰ its statutory requirements and the cases which have interpreted it. Section 47 defines certain publications, such as legislative and judicial proceedings, which are privi-

it relied on the unwanted publicity and not any inaccuracy in the statements. *Id.* at 35, 459 P.2d at 921, 81 Cal. Rptr. at 369.

64. *Id.* at 35 n.16, 459 P.2d at 921 n.16, 81 Cal. Rptr. at 369 n.16.

65. *Id.*

66. The possible applicability of Civil Code § 45a was neither raised nor discussed. Instead, the court focused on the fact that the plaintiff had failed to meet the retraction requirement of Civil Code § 48a and therefore would not be able to amend his complaint unless he alleged special damages. *Briscoe*, 4 Cal. 3d at 543, 483 P.2d at 44, 93 Cal. Rptr. at 876.

67. *Id.*

68. *Id.*

69. *Id.*

70. California Civil Code § 47 provides in pertinent part:

A privileged publication or broadcast is one made—

1. In the proper discharge of an official duty.

2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law

. . . .

4. By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or

leged and therefore exempt from lawsuits relating to their content.⁷¹ The *Fellows* court stated that although the statute was originally applied only to defamation actions, it has been expanded and "applied the privilege to defeat tort actions which, however labeled and whatever the theory, are predicated upon the publication in protected proceedings of an injurious falsehood."⁷² The court stressed that recovery would defeat legislative intent and deter otherwise protected communications.⁷³

However valid the court's analysis of Civil Code section 47 may be, it has little bearing on the *Fellows* case. *Fellows* involved only section 45a. The two code sections have very different purposes. Section 47 seeks to create a special class of publications which are privileged. It is therefore not surprising that the court would apply the protection of section 47 to all privileged publications, regardless of the theory under which a plaintiff seeks to attack the publication. The statute, on its face, creates an immunity for specific types of publications.⁷⁴ On the other hand, Civil Code section 45a is more limited; it only addresses libel.⁷⁵ Section 45a does not attempt to create immunity for publications. Instead, it sets forth statutory requirements for a libel action.⁷⁶ In short, section 47 protects certain types of publications, without regard to the type of actions brought, while section 45a limits only certain types of libel actions and does not create an immunity for publications.

The *Fellows* court decided to extend section 45a to false light actions without first examining the policy behind the statute. The court disagreed with the appellate court's narrow interpretation of the statute's policy. However, that interpretation was based on the California Supreme Court's analysis of the statute as set forth in *MacLeod v. Tribune Publishing Co.*,⁷⁷ which was never squarely addressed by the *Fellows* court. Instead, the *Fellows* court merely restated the reasoning of *MacLeod*, then broadly addressed the freedom of the press and the scope of

(5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued.

5. By a fair and true report of (1) the proceedings of a public meeting . . .

(2) the publication of the matter complained of was for the public benefit.

CAL. CIV. CODE § 47 (West 1982).

71. *Id.*

72. *Fellows v. National Enquirer, Inc.*, 42 Cal. 3d 234, 244, 721 P.2d 97, 103, 228 Cal. Rptr. 215, 222 (1986) (quoting *Block v. Sacramento Clinical Labs, Inc.*, 131 Cal. App. 3d 386, 390-91, 182 Cal Rptr. 438, 440-41 (1982)).

73. *Id.*

74. CAL. CIV. CODE § 47 (West 1982). See *supra* note 70 for the text of the statute.

75. CAL. CIV. CODE § 45a (West 1982). See *supra* note 8 for the text of the statute.

76. *Id.*

77. 52 Cal. 2d 536, 343 P.2d 36 (1959).

libel statutes generally. The broad considerations outlined by the court, however, conflict with the purpose of section 45a set forth in *MacLeod*.

The *MacLeod* court held that the purpose of section 45a is to protect publishers who make statements innocent in themselves and defamatory only because of extrinsic facts known to the reader.⁷⁸ It stated that because general damages for loss of reputation may be trivial, and the publisher's mistake innocent, it is not unreasonable to require a showing of special damages.⁷⁹

The extension of California Civil Code section 45a to false light cases is inconsistent with the purpose of that section. First, the *MacLeod* analysis suggests that the statute was designed to protect innocent publishers. The false light tort, however, requires knowing or reckless action.⁸⁰ Thus, an innocent publisher cannot be liable under a false light claim. Second, the *MacLeod* court specifically addressed loss to reputation.⁸¹ It did not mention any general harm resulting from the false publication, but instead dealt only with harm to plaintiff's reputation.⁸² More importantly, the court was concerned with preventing an action where damages for a loss of reputation were trivial. In effect, section 45a appears to be a screening device to control frivolous litigation against the press by requiring tangible evidence of harm. An attempt to control false light litigation in the same manner is unreasonable because the false light actions redress purely emotional harm.

THE NEED FOR BALANCING INTERESTS

Although the court acknowledged that the applicability of special damages to false light claims presented a question of first impression,⁸³ its analysis did not address the significance or novelty of the issues involved. The court did not adequately address the tort of false light or the purpose and scope of California Civil Code section 45a. Furthermore, it did not compare the need for protection of the press against the rights of individuals to be free from harm caused by published falsehoods. Instead, the court chose to treat false light as if it were identical to libel. By so doing, the court never considered the issues unique to false light. As a

78. *Id.* at 550, 343 P.2d at 43-44.

79. *Id.*

80. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

81. *MacLeod*, 52 Cal. 2d at 550, 343 P.2d at 43-44.

82. *Id.*

83. *Fellows v. National Enquirer, Inc.*, 42 Cal. 3d 234, 247, 721 P.2d 97, 105, 228 Cal. Rptr. 215, 224 (1986).

result, the court did not balance the competing interests of freedom of the press against the right to privacy.

The rights involved in *Fellows*, namely, the right of the press to be free from limitations and the right of the individual to be free from unwanted and inaccurate publicity, are highly valued in our society. These rights, however, necessarily infringe upon each other. Privacy torts, by their very existence limit the absolute freedom of the press. In fact, they were created for the purpose of limiting abuses of the press.⁸⁴ Similarly, the right to publish limits an individual's right to be free from unwanted publicity. Because these two rights compete, the question becomes one of how these rights should be balanced, so that both can continue to exist in a meaningful way. As the court stated in *Gill v. Curtis Publishing Co.*,⁸⁵ reconciling these two rights requires "balancing the public interest in the dissemination of news, information and education against the individual's interest in peace of mind and freedom from emotional disturbances."⁸⁶ However, the *Fellows* court failed to strike the proper balance because it never addressed the individual's interest in privacy or the need of the press for protection.

Essential to the balancing of interests is a recognition of the harm suffered by the plaintiff and his right to redress that harm. The court in *Fellows*, however, never addressed this right. A person's right to be free from intrusion into his mental tranquility has long been recognized as important.⁸⁷ Recognition of that right is the very foundation of the privacy torts. The right of privacy was first accepted in California as "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short, the right to be let alone."⁸⁸

The other interest involved, the public's interest in free dissemination of the news, was amply considered by the court. Throughout its decision, the court focused on the threat to freedom of speech. It expressed its general concerns about upsetting the balance between redressing injuries and vigorous debate in the press.⁸⁹ It also expressed concern "that privacy suits threaten the freedom of speech and press in the same manner as defamation suits."⁹⁰ The court, however, confronted the problem only in the abstract and did not consider the burdens im-

84. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

85. 38 Cal. 2d 273, 239 P.2d 630 (1952).

86. *Id.* at 278, 239 P.2d at 634.

87. *Id.* at 276-77, 239 P.2d at 632-33.

88. *Melvin v. Reed*, 112 Cal. App. 285, 289, 297 P. 91, 92 (1931).

89. *Fellows v. National Enquirer, Inc.*, 42 Cal. 3d 234, 248, 721 P.2d 97, 106, 228 Cal. Rptr. 215, 225 (1986).

90. *Id.* at 241, 721 P.2d at 101, 228 Cal. Rptr. at 220.

posed by a false light claim or the limitations intrinsic to the false light tort.

Recognition of the right of the press to publish, its need for "breathing space" and the pragmatic effect of tort law on those rights are essential to the balancing of interests. Courts have recognized the threat posed by tort law and have been willing to restrict tort actions where necessary to ensure that the press will be able to perform its vital function of disseminating news and ideas.⁹¹ However, this protection has never been absolute.⁹² Instead, it has been extended only where tort actions would unduly burden the press or discourage it from exercising its constitutional rights.⁹³ To determine whether a false light claim will unduly burden the press, protections already existing under false light actions must be considered.

The protection of First Amendment rights under a false light action is substantial. First, the plaintiff must show that the statement was false and that he was placed in a light that would be highly offensive to a reasonable person.⁹⁴ Second, the plaintiff must show that the defendant acted with malice or reckless disregard for the truth.⁹⁵ Third, the plaintiff must have requested a retraction within twenty days after discovering the false statement.⁹⁶ Therefore, absent the extension of section 45a, the press is only burdened if it prints a highly offensive false statement with malice or reckless disregard for the truth and, upon request, refuses to retract the false statement.

Any burden on the press would not be justified unless it benefited privacy rights. Although not acknowledged by the *Fellows* court, the practice of compensating persons for the emotional suffering caused by false publicity has long existed and is essential to protecting privacy rights.⁹⁷ However, by requiring special damages in false light actions, a

91. *E.g.*, *Time, Inc., v. Hill*, 385 U.S. 374, 389 (1967); *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1940). The court in *Gill* stated, "[t]he right to be let alone" and to be protected from undesired publicity is not absolute and must be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guarantees of freedom of speech and of the press." *Gill*, 40 Cal. 2d 224, 228, 253 P.2d 441, 443.

92. *E.g.*, *Gill v. Curtis*, 38 Cal. 2d 273, 277, 239 P.2d 630, 633 (1952). The court stated that "neither is freedom of speech and of the press unlimited" *Id.*

93. *Time*, 385 U.S. at 389-90.

94. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

95. *Id.*

96. CAL. CIV. CODE § 48 (West 1982). Section 48 was made applicable to false light claims in *Werner v. Times-Mirror Co.*, 93 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961).

97. *Gill v. Curtis*, 38 Cal. 2d 273, 276-77, 239 P.2d 630, 632-33 (1952).

plaintiff can no longer seek redress for purely emotional harm.⁹⁸ This requirement of special damages bars a plaintiff, unable to prove monetary losses, from recovering regardless of the extent of his emotional suffering.

In balancing the interests of the press with those of the individual, several factors are important. First, the extension of section 45a leaves the plaintiff without any means of redressing his emotional injury. Courts have been reluctant to limit privacy torts to such an extent as to leave the plaintiff without a remedy. For example, in *Werner v. Times-Mirror Co.*,⁹⁹ the only case which applied a defamation statute to a false light claim, the court paid particular attention to the alternative remedy, stating that the retraction requirement of section 48a "is usually in fact a more complete redress than a judgment for damages."¹⁰⁰ Second, the burden to the press, in light of the limitation already existing on false light claims would not be great. The United States Supreme Court has held that allowing actions against calculated falsehoods does not inhibit the essential function of the press.¹⁰¹ In fact, the Supreme Court found calculated falsehoods to be of "such slight social value . . . that any benefit that may be derived from them is clearly outweighed by social interest in order and morality."¹⁰² Because the extension of section 45a adds little to the press' freedom, while greatly diminishing the individual's privacy rights, the *Fellows* case was wrongly decided.

CONCLUSION

The court extended the special damage requirement of section 45a to protect freedom of the press. Section 45a's extension, however, was not necessary to ensure uninhibited activity by the press. Furthermore, the *Fellows* decision did nothing to enhance the role of the press in society or increase the flow of meaningful information or commentary. Instead, the court's decision merely isolates the press from liability for malicious and reckless publications. This protection is of little value to legitimate journalism. It does, unfortunately, allow the press to abuse its power by printing false and malicious statements, secure in the knowl-

98. Special damages, as defined by statute apply only to property, business, trade, profession or occupation and do not include mental suffering. CAL. CIV. CODE § 48a (West 1982).

99. 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961).

100. *Id.* at 123, 14 Cal. Rptr. at 216 (quoting *Werner v. Southern California Associated Newspapers*, 35 Cal. 2d 121, 133, 216 P.2d 825, 833 (1950)).

101. *Time, Inc., v. Hill*, 385 U.S. 374, 389 (1967).

102. *Id.* at 390 (quoting *Garrison v. State of Louisiana*, 379 U.S. 64 (1964)).

edge that an individual, unable to prove monetary loss, is powerless to challenge their actions.

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