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# The First Amendment Goes to Tactical: News Media Negligence and Ongoing Criminal Incidents

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# COMMENTS

## THE FIRST AMENDMENT GOES TACTICAL: NEWS MEDIA NEGLIGENCE AND ONGOING CRIMINAL INCIDENTS

At 4:15 A.M. on December 5, 1987, Escondido Police received a call reporting shots fired within a local condominium complex.[1] When Escondido officers arrived, they found Robert Gary Taschner barricaded in his condominium and unwilling to talk to police.[2] Escondido Police called for the San Diego County Sheriff's Department's Special Enforcement Detail ("SED").[3] SED attempted to storm Taschner's condominium, but Taschner was lying in wait for the deputies. In the ensuing gun battle, Taschner killed Deputy Lonnie Brewer and wounded two other deputies.[4] SED deputies then withdrew and attempted to negotiate with Taschner.[5] SED also called for the assistance of the San Diego Police Department's Special Weapons and Tactics Team ("SWAT").[6] Taschner refused to surrender after several hours of negotiation and SED decided to use chemical agents (often called tear gas) to drive Taschner from his condominium.[7] San Diego Police SWAT parked their Victim Rescue Vehicle ("VRV"), an armored personnel carrier, near the front door of Taschner's condominium to provide cover for officers deploying the chemical agents.[8] SWAT deployed the chemical agents, and moments later the condominium caught fire. Taschner ran out of the front door, around the rear of the VRV and down the driveway toward the street. As Taschner neared the end of the driveway, he began shooting at deputies on

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1. H.G. Reza, *Taschner's Saga: From Jail to Gun Store to Shoot-Out*, L.A. TIMES (San Diego County Ed.), Dec. 16, 1987, at B11.

2. *Id.*

3. *Id.* The Special Enforcement Detail is a Special Weapons and Tactics Team.

4. *Id.*

5. Telephone Interview with Lt. Sid Heal, L.A. County Sheriff's Dept., Emergency Operation Bureau (Sept. 4, 1994).

6. *Id.*

7. *Id.*

8. Telephone Interview with G.R. Cason, San Diego Police Dept., SWAT (Sept. 3, 1994).

the perimeter of the scene.[9] One SWAT team member leapt out of the VRV behind Taschner in an attempt to stop him before he killed anyone else.[10] As the officer sighted in on Taschner, he realized that a television camera crew was directly behind Taschner.[11] Fearing that he might hit the camera crew if he missed Taschner, the officer decided not to shoot.[12] As Taschner reached the end of the driveway, he turned onto the sidewalk and shot a San Diego Sheriff's Deputy in the hand, forcing him to drop his gun and leaving him defenseless.[13] Taschner's rifle then malfunctioned, and he was tackled before he could kill the deputy.[14] In the fight that ensued on the ground, Sheriff's deputies were forced to shoot Taschner in the head, resulting in his death.[15]

Incidents such as this have raised serious questions about allowing the media access to "Ongoing Criminal Incidents"[16] and whether the media[17] can be held liable when their actions cause the death or injury of a hostage or responding police officer.

## I. INTRODUCTION

With the advent of new technologies such as satellite uplinks and remote camera crews, television has displaced newspapers and radio as the predominant news medium.[18] This shift has enabled the media to bring stories to the public *as they happen* rather than reporting them the next day.

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9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Telephone Interview with Sgt. Don Borinski, San Diego Police Dept., SWAT (Aug. 27, 1994).

14. *Id.*

15. *Id.* Following the shooting, the media strongly criticized both SWAT teams for the shot that was fired at Taschner while he was on the ground fighting with deputies. *See, e.g.*, Barry M. Horstman, *Gunman was 'Executed,' His Mother Claims*, L.A. TIMES (San Diego County Ed.), Dec. 7, 1987, at B1; Eric Bailey and Nancy Ray, *Officials Admit Shot Fired Point Blank at Gunman On Ground. Department Says Action by SWAT Deputy at End of Escondido Siege Was Legitimate*, L.A. TIMES (San Diego County Ed.), Dec. 8, 1987, at B1; Anthony Perry, *Gunman was Alive on Ground When Deputy Shot Point Blank*, L.A. TIMES (San Diego County Ed.), Feb. 2, 1988, at B1. This criticism is particularly ironic considering that had the media not been present, G.R. Cason, the officer who had Taschner in his sights, might have been able to stop him before the situation reached this point.

16. The term "Ongoing Criminal Incident" will be used in this Comment to describe barricaded suspects, hostage situations and terrorist incidents.

17. This Comment will use the term "media" to cover all forms of reporting. However, since television news has the greatest potential to create harm, this Comment will deal primarily with television media.

18. GEORGE COMSTOCK, TELEVISION IN AMERICA 7 (2d ed. 1991).

By sending out a remote camera crew, the news media is now able to report breaking stories live, allowing the public to see first-hand everything from terrorist attacks to natural disasters. Although in the past police could provide reporters with interviews and access after the fact, this is no longer sufficient. The media now aggressively pursues breaking stories and demands complete access to ongoing situations. Although live coverage has lead to a well informed public, it has also created serious problems for law enforcement and in some cases risked the lives of hostages and responding officers.[19]

This Comment will argue that when the media's actions lead to the death or injury of a hostage or police officer, the media should be liable for damages that result, if those damages were the foreseeable consequence of their actions.[20] Part II of this Comment will explore how newsgathering and broadcasting during Ongoing Criminal Incidents can endanger the lives of hostages and police officers. Part III will discuss the historical requirements for a negligence cause of action and apply those requirements to the media's activities during Ongoing Criminal Incidents. Part IV will consider the plausible tort defenses to negligence liability. Part V will discuss whether the First Amendment will bar the imposition of negligence liability on the media. Finally, Part VI will propose and discuss a new standard for media liability that would allow compensation for the victims of media negligence, while still protecting the First Amendment rights of the media. Part VI will also discuss how the adoption of such a standard would eliminate many of the problems associated with the current law on media negligence.

## II. DANGERS OF MEDIA ACCESS TO ONGOING CRIMINAL INCIDENTS

During an Ongoing Criminal Incident, the job of the media is to disseminate information to the public in the most timely manner possible. This objective involves two different activities: newsgathering[21] and

19. *See infra* part II.

20. This Comment will only consider potential causes of action against the media by hostages and police officers who are harmed by the actions of the media. It will not discuss the possibility of imposing liability for harm that occurs to others, including third party bystanders, spectators, and other members of the media.

21. As used in this Comment, "newsgathering" means all activities conducted by the media to obtain information about an Ongoing Criminal Incident. These include, but are not limited to, interviews with police, official press releases, interviews with hostages and suspects, research into the background of the hostage taker, and observing police activities.

broadcasting.[22] Conducted responsibly, neither of these activities increases the danger to hostages and police officers; conducted irresponsibly, however, both newsgathering and broadcasting activities can significantly increase the danger involved and can lead to the death or injury of a hostage or police officer. Unfortunately, the battle for ratings, associated with television news, acts as a disincentive to responsible reporting.

"The electronic media in the United States live or die by their ratings, the number of viewers they attract. As a result, each network wants to be the first with the most on any big story."[23] Although most reporters maintain high professional standards and endeavor to report responsibly, "high standards of professionalism do not guide every media organization nor every reporter."[24] The intense competition between networks to be the first to report a particular story sometimes leads reporters to engage in dangerous newsgathering and broadcasting activities. This section will explore how these irresponsible newsgathering and broadcasting activities can lead to the death or injury of a hostage or police officer.

### *A. Dangers Created by Newsgathering*

The media's first job during an Ongoing Criminal Incident is to gather information about the situation. While there are safe ways for the media to accomplish this (*e.g.*, attending official press conferences or conducting post-resolution interviews), unsafe methods often provide information faster. Occasionally, the media's desire to be the first to report a particular Ongoing Criminal Incident compels the use of these unsafe methods. When this occurs, the media can become active participants in the situation, increasing the danger to both hostages and police officers. Newsgathering tactics such as arriving at the scene of an incident before police, crossing police lines to obtain a vantage point, and making direct contact with the suspect can eliminate the element of surprise for police, prevent police from protecting themselves, and hinder, or even stalemate, police negotiations with the suspect.

The element of surprise is important to the peaceful resolution of an Ongoing Criminal Incident.[25] When police surprise a suspect, it is

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22. As used in this Comment, "broadcasting" means the act of disseminating news gathered by the media to the public.

23. Katherine Graham, *Terrorism and the Media*, L.A. DAILY J. - DAILY J. REP., May 2, 1986, at 10, 15.

24. *Id.* at 16.

25. Telephone Interview with Lt. Sid Heal, L.A. County Sheriff's Dept., Emergency Operations Bureau (Dec. 23, 1994).

difficult for the suspect to offer resistance.[26] This places the suspect in a "tactical dilemma," a state where "surrender is likely but resistance is futile."[27] A suspect who is in a tactical dilemma is considerably less likely to resist and therefore less likely to react violently to police.[28] Consequently, the likelihood of a surprised suspect shooting a police officer or hostage is greatly reduced.[29] Nonetheless, reporters occasionally receive information about the future actions of law enforcement and, in preparing to cover the story, arrive at the scene before police.[30] This can alert the suspect to the pending actions of police and provide an opportunity for the suspect to prepare a defense.[31] When this occurs, the likelihood that police will be harmed in the process or that a hostage will be injured in a crossfire increases dramatically.[32]

One example of this occurred during the Bureau of Alcohol, Tobacco, and Firearms ("ATF") raid on the Branch Davidian compound near Waco, Texas (hereinafter "Waco Raid").[33] Shortly before the Waco Raid, eleven reporters "arrived at the scene early and travelled up and down the roads around the Compound as they prepared to cover the story. One of their number, KWTX cameraman Peeler, became lost, and, in asking for directions, unwittingly tipped a cult member that a raid was imminent."[34] The cult member took this information and alerted David Koresh, the cult leader.[35] When ATF agents arrived at the compound, they were ambushed by cult members, resulting in the death of four ATF agents and the injury

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26. Lt. Sid Heal, Basic Hostage Rescue Training — Lesson Plans, (Fundamental Tactical Concepts Sec.) 16 (1993).

27. *Id.* at 11.

28. Telephone Interview with Lt. Sid Heal, L.A. County Sheriff's Department, Emergency Operations Bureau (Dec. 23, 1994).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. On February 28, 1993, ATF agents attempted to execute search and arrest warrants at the Apocalypse Ranch which was owned by the Branch Davidians, a religious cult. Cult members, led by David Koresh (a.k.a. Vernon Wayne Howell), ambushed agents and a 51 day standoff began when agents were forced to withdraw. On April 19, 1993, FBI agents began pumping teargas into the compound. In response to this, Davidian Cult members set fire to the compound, which burned to the ground, resulting in the death of more than 95 cult members. Sue Anne Pressley, *Waco Siege Ends in Dozens of Deaths As Cult Site Burns After FBI Assault: Davidians Set Blaze, Officials Say*, WASH. POST, Apr. 20, 1993, at A1.

34. U.S. DEP'T OF THE TREASURY, REP. OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS INVESTIGATION OF VERNON WAYNE HOWELL ALSO KNOWN AS DAVID KORESH 161 (1993) [Hereinafter "Waco Report"].

35. *Id.* at 162.

of at least twenty-eight other ATF agents.[36] While it is difficult to know what would have occurred if the media had not alerted the cult to the ATF's actions, there is little question that "the media's conduct posed a substantial danger not only to the security of ATF's operation but also to the lives of agents and civilians alike."[37]

In addition to eliminating the element of surprise, newsgathering during Ongoing Criminal Incidents can also physically interfere with police officers and deprive them of the ability to protect themselves. When a suspect begins to move between locations, police must have the option of shooting in *any* direction the suspect may flee. This is one reason that police prevent public access to the scene of an incident. Despite police restriction, members of the media occasionally cross police lines in search of a vantage point. When this occurs, reporters can unknowingly provide a "safe zone" into which the suspect can flee, but into which police cannot shoot without the danger of hitting a reporter. Since the primary concern of the suspect is survival, the presence of reporters is not likely to prevent the suspect from shooting in any particular direction. Police officers, on the other hand, are concerned not only with their own safety, but with the safety of the reporters as well. Thus, police generally will not shoot in a direction where there is a danger of injuring a reporter. Consequently, if suspects position themselves between police and a reporter, they will be able to shoot at police, but police will not be able to return fire.[38] This increases the likelihood that an officer will be injured or killed by a suspect. The Taschner incident in Escondido provides an example.[39] The media set up across the street from the condominium complex, inside the perimeter drawn for the public. When the suspect began to move, police had to forego shooting the suspect for fear of hitting a reporter. This allowed the suspect to reach the end of the driveway and shoot a deputy sheriff. Another example occurred during the Waco Raid. When the ATF raid team arrived at the Branch Davidian compound, reporters followed them onto the property. According to the Waco Report that followed the incident, "[m]any agents were angry with media personnel who had been in the midst of the shoot-out, distracting agents while they were under fire and whom agents had almost shot accidentally, fearing they were cult

36. *Id.* at 102-03.

37. *Id.* at 163.

38. A collateral issue is that police could also possibly incur civil liability if they did shoot in an area where reporters were stationed and a reporter was injured. Although a discussion of this is beyond the scope of this Comment, the concern for civil liability is certainly another factor which police officers must consider in this type of situation.

39. *See supra* notes 1-15 and accompanying text.

members."[40] In both cases, the reporters' mere presence complicated the operation for police and increased the likelihood of a police officer being injured or killed.

Notwithstanding the increased danger caused by eliminating the element of surprise and physically interfering in police operations, the most serious problem created by newsgathering during Ongoing Criminal Incidents is that the actions of reporters can hinder or even stalemate negotiations between the suspect and police. This occurs when the media's desire to "scoop" its competition leads it to contact a suspect or hostage taker directly by telephone. This can prolong the situation, escalate a hostage taker's instability, and possibly lead the hostage taker to harm a hostage in response to a conversation with the media.

When the media talk directly to a suspect, both the phone lines and the suspect are unavailable to police. Since no negotiations are possible, the time spent by the suspect with the media simply adds to the duration of the event. On two separate occasions during the Waco standoff, David Koresh received emergency breakthroughs[41] from reporters while negotiating with government agents.[42] Both times, Koresh disconnected the negotiator to talk to the reporter.[43] This added to the length of the standoff and the emotional trauma of any unwilling participants in the compound. Similarly, during the 1977 Hanafi Muslim Siege in Washington, D.C.,[44] numerous reporters called the hostage takers for interviews.[45] One of these reporters "rekindled the rage of the terrorist leader, who had been on the point of surrender."[46] The leader did not surrender.

However, an even greater danger posed by direct media contact is that reporters may agitate the suspect and cause him or her to injure or kill a hostage. As former District of Columbia Assistant Chief of Police, Robert L. Rabe noted:

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40. Waco Report, *supra* note 34, at 110.

41. Emergency breakthroughs are an interruption of a telephone conversation by an operator at the request of another person to tell one of the parties that an emergency call will soon be coming through.

42. Telephone Interview with Jack Killorin, Executive Assistant for Liason and Public Information, Bureau of Alcohol, Tobacco, and Firearms (Mar. 15, 1995).

43. *Id.*

44. On March 9, 1977, in Washington, D.C., Hanafi Muslims took over the headquarters of B'nai B'rith, a Jewish service organization, the city's Islamic Center, and City Hall, taking 134 hostages and killing one. The incident occurred while Israeli Prime Minister Yitzhak Rabin was meeting with President Jimmy Carter. The terrorists eventually surrendered with no further loss of life. Graham, *supra* note 23, at 10.

45. *Id.* at 12.

46. *Id.*

> Reporters must come to realize that they are not trained in the delicate and sensitive art of hostage negotiation. When you have inexperienced reporters talking to highly volatile terrorists, one wrong word, one slip of the tongue, or one question improperly phrased by a reporter could cause a hostage to lose his life.[47]

It is not difficult to conceive of a situation where a member of the media might ask the wrong question or say the wrong thing and provoke a volatile suspect to harm a hostage. An example of this occurred during the Hanafi Muslim siege. A radio reporter identified the terrorists, over the air, as black Muslims.[48] The terrorist leader, who was a Hanafi rather than black Muslim, heard the report.[49] Following the report, the terrorist leader announced that if the reporter did not publicly apologize for his statement, the terrorists would begin cutting off hostages' heads.[50] While it is impossible to know whether the terrorists would have carried out their threat, this incident is a clear indication of the dangers posed by the activities of the media. Of course, the dangers created by the media are not limited to newsgathering — broadcasting activities can also endanger the lives of hostages and police officers.

### *B. Dangers Created by Broadcasting*

Like responsible newsgathering, responsible broadcasting generally does not endanger the lives of others. However, because of competition between networks, Ongoing Criminal Incidents are frequently broadcast live. These live broadcasts pose a substantial danger to the response efforts of police and can lead to the injury or death of a police officer or hostage.

Before the use of satellites and remote camera crews, news often took a day to reach the public.[51] This provided news directors with an opportunity to "filter" the news and decide when and how to report a story.[52] This delay between discovery and dissemination usually eliminated the problems created by live broadcasts of Ongoing Criminal Incidents. However, as the time between discovery and dissemination has shortened,

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47. Robert L. Rabe, *The Journalist and the Hostage: How Their Rights Can Be Balanced, in* TERRORISM, THE MEDIA, AND THE LAW 69, 74 (Abraham H. Miller ed., 1982).

48. Susan Gregory Thomas, *All News Anniversary WTOP News Time is . . . 25 Years*, WASH. POST, Mar. 4, 1994, at C2.

49. *Id.*

50. *Id.*

51. Graham, *supra* note 23, at 15.

52. *Id.*

so too has the time to reflect on what is being reported. The result is that live news is often beyond the control of the news director and is left to the discretion of the reporter or the camera operator. This loss of editorial control can lead to the airing of information that *should not* be released.

Information such as the movement and locations of a SWAT team, status of negotiations, locations of escaped hostages and operational plans are all newsworthy items that allow reporters to attract viewers. However, until an operation is over, law enforcement has a vested interest in maintaining the secrecy of these details. Unfortunately, with live broadcasts, there is no way to prevent the release of dangerous information. As one commentator noted, "[t]he problem with live is that you give up a measure of editorial control and therefore you can't always prepare or anticipate what will happen. You always run the risk of showing something to the public [or suspect] that may in fact have some negative, harmful consequence."[53] "Indiscriminate live coverage of police operations on radio and television gives terrorists [or suspects] the latest information on police activities, a distinct tactical advantage not available to the police."[54] This type of information may allow the suspect to prepare for the actions of police. Moreover, it can also raise the anxiety of the hostage taker, perhaps making him or her more irrational and dangerous.[55] Although the damage caused by the release of this information is unintended, the result is the same: a more violent resolution of the situation and the risk of death or injury to a hostage or police officer.

For example, in 1990, a gunman took thirty-three customers hostage in Henry's Publick House and Grille in Berkeley, California.[56] As the SWAT team set up and began negotiations, several press agencies prepared to cover the story and to relay the gunman's demands to the public.[57] "For much of the seven-hour hostage drama, Dashti [the hostage taker] was glued to the television set . . . ."[58] Although the media knew Dashti had a television, "one reporter had announced on the air that the police SWAT team was 'set up across the street and that the area was surrounded.'"[59]

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53. Chevel Johnson, *Suicide on TV Sparks Debate*, ORANGE COUNTY REG., Sept. 17, 1994, at 10 (quoting Roy Peter Clark, senior scholar at the Poynter Institute for Media Studies).

54. Rabe, *supra* note 47, at 74.

55. Patrick V. Murphy, *The Police, The News Media, and the Coverage of Terrorism, in* TERRORISM, THE MEDIA, AND THE LAW 76, 83 (Abraham H. Miller ed., 1982).

56. Dawn Garcia, *KPIX Apologizes to Berkeley Hostages*, S.F. CHRON., Oct. 6, 1990, at A3.

57. An example of Dashti's irrational demands was his demand that the San Francisco Chief of Police drop his pants on local television news. *Id.*

58. *Id.*

59. *Id.*

Even worse, several stations reported that Dashti was "deranged" and that police described his demands as "irrational and strange."[60] According to one hostage, "[n]ot only was the terrorist aroused by these comments, but frustrated and angered, believing that his demands, because he was publicly acknowledged as deranged, were not being taken seriously."[61] The incident ended when Berkeley SWAT members entered the bar and were forced to shoot Dashti, who later died from his wounds.[62]

Following the Berkeley incident, public outrage about the media's conduct prompted one television station to issue an apology for what it called "a serious error in judgment."[63] While no police officers, hostages or bystanders were killed as a result of the media's actions, the Berkeley incident raises one question: Would a police officer or hostage who is harmed by the negligent actions of the media have any means of recourse? The next three sections will explore the possibility of an injured hostage or police officer recovering against the media for negligence.[64]

## III. MEDIA NEGLIGENCE: A CAUSE OF ACTION?

To establish a cause of action for negligence, a plaintiff must prove: (1) the defendant had a legal duty to conform to a certain standard of conduct for the protection of another; (2) the defendant breached that duty; (3) there is a close causal connection between that failure and the resulting injury; and (4) actual loss or damages occurred as a result of the defendant's conduct.[65] This section will explore the possibility of an injured police officer or hostage establishing a cause of action for media negligence.[66]

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60. *Id.*

61. Garcia, *supra* note 56.

62. *Id.*

63. *Id.*

64. Since the media would likely never intend for their actions to cause harm, the only plausible civil cause of action would be for negligence. Thus, this will be the only theory of recovery discussed by this Comment.

65. Nola M. v. Univ. of S. Cal., 16 Cal. App. 4th 421, 426 (1993).

66. A collateral issue to the media's liability is the possibility of a negligence action against police. If police allow the media to be present, or fail to take actions to remove them when they become aware of the media's presence, and this leads to the death or injury of a hostage, it is arguable that police may be liable for the harm that occurs. However, as the exploration of this area would require a lengthy analysis of the tort doctrine of special relationships, state law "Tort Claims Acts" and governmental immunities, it is beyond the scope of this Comment.

### A. Duty

A duty is a "standard of conduct imposed by the law . . . based upon what society demands generally of its members . . . ."[67] In other words, a duty is a legal responsibility to act as a reasonably prudent person would in the same circumstances.[68] Generally, there is no duty to protect other people from the illegal or tortious acts of a third person.[69] However, "[i]f the likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent, such reaction . . . does not prevent the actor from being liable for the harm caused thereby."[70] Thus, where a third party's actions, or reactions, are the foreseeable consequence of the actor's conduct, a duty to refrain from that conduct may still be imposed.[71]

Whether the court will impose such a duty, however, depends on three factors: (1) the foreseeability or probability of harm occurring from the conduct; (2) the gravity of harm that could occur; and (3) the social value of the actor's conduct.[72] Courts generally balance these factors by taking the probability of harm occurring from the actor's conduct, combined with the potential gravity of that harm, and weighing it against the social interests advanced by the conduct.[73] When the social value of the actor's

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67. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 169 (5th ed. 1984).

68. Caldwell v. Bechtel, Inc., 631 F.2d 989, 997 (D.C. Cir. 1980).

69. Matthias v. United Pac. Ins. Co., 260 Cal. App. 2d 752, 755 (1968). *See also* RESTATEMENT (SECOND) OF TORTS § 315 (1965).

70. Weirum v. RKO General, Inc., 539 P.2d 36, 40 (Cal. 1975).

71. For example, in *Weirum*, the California Supreme Court found that a radio station owed a duty to a motorist who died as a result of third party negligence caused by the station's promotion. 539 P.2d 36, 40 (Cal. 1975). The promotion consisted of a disc jockey ("D.J.") driving to a particular location in the city and then announcing where he was. The first listener to reach him and fulfill a particular condition (*e.g.*, answer a question or bring him an item of clothing) received cash prizes and a brief radio interview. Two listeners, disappointed that they had missed the D.J. at one location, began to follow him at a high rate of speed to the next location. In the process of vying for the position closest to the D.J.'s car, they forced a motorist off the road, resulting in his death. Finding liability against the station, the court reasoned that "[i]t was foreseeable that defendant's youthful listeners . . . would race to arrive first at the next site and in their haste would disregard the demands of highway safety." *Id.* at 40. Since it was foreseeable that this would occur, the court found the radio station had a duty to refrain from the promotion and that continuing it subjected them to liability. *Id.*

72. *Id.* at 40. Although the California Court of Appeal in Musgrove v. Ambrose Properties, 87 Cal. App. 3d 44, 53 (1978), added a fourth element of "ease in preventing harm," this is not applicable to cases where "[l]iability is not predicated upon [a] defendant's failure to intervene for the benefit of [another] . . . ." *Weirum*, 539 P.2d at 41.

73. *Weirum*, 539 P.2d at 40.

conduct is outweighed by the probability and gravity of harm, it is likely that the conduct will be seen as unreasonable and a duty will be imposed.[74] Conversely, when the harm that occurs is seen as improbable, the gravity of harm is low, or the probability and gravity of harm are outweighed by the social value of the conduct, a duty will not be imposed. Thus, as the gravity of potential harm increases, the probability of harm required to establish a duty decreases, as does the likelihood that the harm will be outweighed by the conduct's social value.[75] Consequently, conduct which risks the death of another person is considerably more likely to establish a duty than conduct that risks only property damage.

Direct interference by the media (*e.g.*, talking to hostage takers or broadcasting team positions) in an Ongoing Criminal Incident creates a high degree of foreseeable risk of harm to both police and hostages.[76] Since the media are not trained in the dynamics of these situations or in tactical planning, the probability of harm resulting from their conduct is high. Moreover, since the gravity of harm can be serious injury or death, direct media interference will likely lead to the finding of a duty.[77] By contrast, in cases where the media's interference is indirect, such as the Escondido incident that began this Comment, their conduct will not likely give rise to a duty. Although the gravity of harm that may occur from indirect interference is the same as it would occur from direct interference, it would be difficult for the media to foresee the potential harm that would result from innocuous conduct, such as being set up across the street from the incident.

However, even if media conduct is seen as having a high probability of causing serious harm, it may still be found reasonable if the social benefits of the conduct outweigh its dangers.[78] Although reporting information to the public about Ongoing Criminal Incidents has tremendous social value, the overall purpose for the media's conduct is not the issue. Rather, the social value of an activity is determined by the specific actions taken. Thus, "[c]onsideration must also be given to any alternative course

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74. *Id.*

75. Since the idea of social value is a utilitarian one which looks at the total value of conduct to society as a whole, conduct which risks the injury or death of another person is likely to be seen as having little social value. Thus, no matter what other values a particular conduct may have, as the gravity of harm increases, it is likely true that the social value decreases.

76. *See supra* part II.

77. *See, e.g.*, Blueflame Gas, Inc. v. Van Hoose, 679 P.2d 579, 587 (Colo. 1984) (finding that the greater the risk involved in the conduct, the greater the degree of care required).

78. *See, e.g.*, Eckert v. Long Island R.R. Co., 43 N.Y. 523 (1871) (finding that rushing in front of an oncoming train, to save the life of a child, was reasonable under the circumstances).

[of action] open to the actor."[79] When sufficient alternative means of accomplishing the same result exist, conduct that has tremendous social value may be found unreasonable.[80] Consequently, to determine an action's social value, newsgathering tactics themselves, and the timing of broadcasts, will be considered in light of alternative means of serving the social interest. In this regard, two factors weigh strongly against the media: (1) the level of cooperation that exists between the media and law enforcement[81] makes information available without the need to engage in dangerous reporting tactics;[82] and (2) that most Ongoing Criminal Incidents are short in duration makes it possible to wait until the situation is resolved to report it.[83] When these alternatives are considered, it is clear that the media does not need to engage in dangerous reporting tactics to report information about Ongoing Criminal Incidents.[84] Since risky reporting tactics are unnecessary, it is likely that such conduct will be found to be unreasonable and a duty will be imposed.

### *B. Breach*

If the court finds the media actor was under a legal duty to protect the plaintiff, the plaintiff will next be required to establish that the actor breached that duty of care.[85] The existence of a breach is not dependent upon subjective awareness of the risk: "In most instances, [negligence] is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his act."[86] Whether or not a breach of duty will be found for media conduct will depend upon the

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79. KEETON ET AL., *supra* note 67, § 31, at 172.

80. *Id.*

81. An example of this cooperation is the Arcadia, California, Police Department's media policy which states: "Members of this department shall not abridge the right of the press to the reasonable and lawful access to information nor shall they interfere with the publication of such information." ARCADIA POLICE DEPT., MEDIA POLICY, at 2.

82. For example, police press conferences following the incident, interviews with hostages following the incident, videotaping rather than live broadcasting and even post incident interviews with the hostage taker or hostages provide information without having to engage in dangerous tactics.

83. This is not true of many situations outside the limited area of Ongoing Criminal Incidents. In the case of earthquakes, natural disasters, and other catastrophes, live news reports are essential to the public safety and should *not* be subject to this type of restriction.

84. This assumes that law enforcement cooperates with the media and that the situation is relatively short in duration. In instances where law enforcement does not provide the media with information, or the incident drags on for weeks as did Waco, these factors would be considered by the court and would likely make otherwise unreasonable conduct, reasonable.

85. Nola M. v. Univ. of S. Cal., 16 Cal. App. 4th 421, 426 (1993).

86. KEETON ET AL., *supra* note 67, § 31, at 169.

judicial construction of the duty owed. In most cases, the media's duty will be to refrain from any *direct* actions which could foreseeably lead to the injury or death of a hostage or police officer. Thus, a breach analysis will be closely tied to the *reasonableness* analysis conducted to determine if a duty existed in the first place.[87] Consequently, if the court finds that the media's conduct was unreasonable, and thereby imposes a duty, a breach will also be established.[88] On the other hand, if the court finds that the media's actions were reasonable, it will not impose a duty, and a breach analysis will be moot.

### *C. Causation*

The next element that a plaintiff must establish to prevail in a negligence action is causation. For causation to be satisfied, "there [must] be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered."[89] Causation consists of two elements: (1) the defendant's action must be the cause-in-fact ("but-for cause") of the plaintiff's harm; and (2) the defendant's conduct must be the legal cause ("proximate cause") of the plaintiff's harm.[90] To establish liability, the plaintiff must prove both elements.

#### 1. Factual Causation

Factual causation is based on the idea that "[a]n act or an omission is not regarded as a cause of an event if the particular event would have occurred without it."[91] Thus, the most common test for determining factual causation is to determine if the injury would not have occurred *but-for* the defendant's conduct.[92] For example, a fire caused by a child playing with matches would not have occurred *but-for* the child's actions. Conversely, a fire caused by an electrical short which took place while the child was playing with matches would have occurred despite the child's actions. Thus, in the second situation, the child is not the cause-in-fact of

87. *See supra* part III.A.

88. *See, e.g., Weirum*, 539 P.2d at 39 (where once a duty to refrain from conduct was established, a breach of that duty was assumed by the court and, in fact, not even discussed).

89. KEETON ET AL., *supra* note 67, § 41, at 263.

90. *Id.* § 30 at 165 (The plaintiff must prove "[a] reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as 'legal cause,' or 'proximate cause,' and which includes the notion of cause in fact.").

91. *Id.* § 41 at 265.

92. *Id.*

the fire.[93] Although cause-in-fact appears simple to determine, it becomes difficult when the injuries complained of were caused by a third person.

In a hostage situation, there is always a potential for injury and a likelihood of harm, despite the media's actions. Thus, separating the media's actions from those of the hostage taker may prove problematic. When the hostage taker's actions can be directly attributed to a particular action of the media, cause-in-fact will likely be found. For example, in the Hanafi incident discussed above,[94] if the terrorist leader had killed a hostage in response to the reporter "rekindling" his rage, cause-in-fact would be met. However, as media interference becomes less direct, the likelihood of establishing cause-in-fact decreases. Thus, the incident in Escondido that began this Comment would not likely establish cause-in-fact, since there is no way to know whether the officer shooting the suspect would have prevented the injury to the deputy.

### 2. Legal Causation

Assuming that a plaintiff can establish that the media's actions were the cause-in-fact of the plaintiff's injury, the issue then becomes how far liability will extend. This is proximate causation. Simply put, proximate causation is "the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct."[95] Courts currently use two different tests for determining whether an act is the proximate cause of an injury. First, the "foreseeability test" determines whether the injury to the plaintiff was a foreseeable result of the defendant's conduct.[96] Second, the "direct consequences" test determines whether the plaintiff's injury can directly be traced to the defendant's conduct.[97] This Comment will utilize the foreseeability test.

Under the foreseeability approach, the question is whether it was foreseeable that the media's conduct during an Ongoing Criminal Incident would lead to harm. As with cause-in-fact, foreseeability depends in part on how direct the media's actions were. For example, if harm had resulted from the media's actions during the Hanafi incident, these actions would likely be seen as foreseeable. On the other hand, the reporters' actions during the Escondido incident would likely be deemed unforeseeable.

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93. As Keeton points out, "[t]he omission of crossing signals by an approaching train is of no significance when an automobile driver runs into the sixty-eighth car." *Id.*

94. *See supra* note 44 and accompanying text.

95. KEETON ET AL., *supra* note 67, § 41, at 264.

96. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928).

97. Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U.S. 469, 475 (1876).

Between these two examples lies the limit of foreseeability. However, since the variety of situations that might occur is almost unlimited, it is sufficient to say that proximate causation, like cause-in-fact, is not a complete bar to liability for the media. Since proximate causation under either approach is determined by the jury, the determination of proximate cause will likely depend on what the jury believes is "just." If the fact-finder believes that society's interests are served by finding liability, proximate causation will likely be found. Since juries are likely to be very sympathetic to someone tormented and injured by a hostage taker or someone who was injured trying to rescue a hostage, a jury may be willing to stretch the boundaries of causation to allow recovery.

Further complicating proximate causation, however, are intervening causes. "An intervening cause is one which comes into active operation in producing the result *after* the negligence of the defendant,"[98] severing the chain of proximate causation and preventing the defendant from being held liable.[99] There are three types of possible intervening causes during an Ongoing Criminal Incident: (1) the hostage taker's criminal actions; (2) the rescue efforts of law enforcement; and (3) the hostage's efforts to escape.

Generally, the criminal or tortious acts of another person are intervening causes.[100] However, where such criminal or tortious acts are foreseeable, they will not act as an intervening cause.[101] Again, often the issue turns on what a jury believes is "just." If the jury believes that the danger of the media's actions was foreseeable, the hostage taker's acts will likely be found foreseeable. If one accepts the argument that hostage takers are generally mentally unstable, it is likely that a variety of actions would be foreseeable rather than intervening causes. Thus, the fact that a plaintiff's harm was caused by the illegal acts of a hostage taker will likely not prevent recovery.

A media defendant might also argue, however, that the rescue efforts of law enforcement are an intervening cause. Generally, efforts to rescue another person are not seen as intervening causes.[102] This is true not only when the rescue effort is spontaneous, but also where there is time for thought or planning.[103] Additionally, whether the person injured in the

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98. KEETON ET AL., *supra* note 67, § 44, at 301 (emphasis in original).

99. RESTATEMENT (SECOND) OF TORTS § 440 (1965).

100. KEETON ET AL., *supra* note 67, § 44, at 313.

101. *Weirum*, 539 P.2d at 40.

102. *See* Wagner v. International Ry. Co., 133 N.E. 437, 438 (N.Y. 1921) ("The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man.").

103. *See, e.g.*, Parks v. Starks, 70 N.W.2d 805, 807 (Mich. 1955) (holding that a lapse of nine hours from the original negligence was not sufficient to prevent liability to the tortfeasor for

attempted rescue is the rescuer or the person being rescued, the original wrongdoer is still liable.[104] Thus, police actions in attempting to rescue a hostage will not be seen as an intervening cause in either a suit by the hostage or an officer.

Finally, actions taken by hostages, such as escape attempts, may also be seen as intervening causes. However, like the rescue efforts discussed above, actions taken by one who is fleeing danger are generally viewed as foreseeable rather than intervening causes.[105] This is true whether the act is instinctive or occurs after time for reflection; and whether the resulting injury is to the person attempting to escape, or to another.[106] Thus, any actions taken by a hostage to escape are unlikely to provide the media with a defense to liability.

### *D. Damages*

The final requirement for establishing a negligence cause of action is damages. To recover, the plaintiff must establish that he or she suffered some actual harm as a result of the defendant's negligence.[107] "Nominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred. The threat of future harm, not yet realized, is [also] not enough."[108] Damages for emotional distress may or may not be recoverable depending on the jurisdiction,[109] but if the emotional distress is accompanied by physical injury, the probability of recovery increases.[110] In either case, the plaintiff must prove some actual damage in order to prevail. Plaintiffs will have little difficulty establishing damages if there is a real and cognizable injury. When direct interference occurs and leads to physical injury, damages should be easy to establish (*e.g.*, a gunshot wound or other physical injury that occurred immediately after the actions of the media). Conversely, where only emotional harm

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injuries incurred by a rescuer).

104. KEETON ET AL., *supra* note 67, § 44, at 307.

105. *See, e.g.*, Tuttle v. Atlantic City R.R. Co., 49 A. 450, 451 (N.J. 1901) (plaintiff's leaping from a moving vehicle to escape danger was not sufficient to eliminate defendant's liability for negligence that created the danger).

106. KEETON ET AL., *supra* note 67, § 44, at 307.

107. Cannon v. Sears, Roebuck & Co., 374 N.E.2d 582, 584 (Mass. 1978).

108. KEETON ET AL., *supra* note 67, § 30, at 165 (citations omitted).

109. RESTATEMENT (SECOND) OF TORTS § 436A (1965). *Compare* Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970) (holding that damages for serious emotional distress may be recovered without the presence of physical injury) *and* Payton v. Abbott Labs, 437 N.E.2d 171, 181 (Mass. 1982) (requiring an objective physical manifestation to recover emotional damages).

110. KEETON ET AL., *supra* note 67, § 54, at 361.

occurs, proving damages will be more problematic.[111] Since the types of damages allowed vary by jurisdiction and are a question for the fact-finder, establishing damages will depend upon the facts of each case. Unfortunately, the vast number of potential injuries prohibits an exhaustive list of conditions when recovery would be allowed. The important thing to note is that some "real" injury must be proven. Thus, the more physical the injury, the greater the likelihood of recovery.

Assuming that a plaintiff can establish all of the required elements, a media defendant will still have a number of tort defenses against liability.

## IV. TRADITIONAL TORT DEFENSES

Once a plaintiff has established a prima facie case of negligence, a media defendant can raise a variety of tort defenses. The two most plausible tort defenses to media negligence are: (1) assumption of risk; and (2) comparative negligence.[112] This section will explore these two defenses.

### *A. Assumption of Risk*[113]

Where a plaintiff is aware that a risk exists and voluntarily encounters it, he or she assumes the risk involved and liability will not be imposed upon the defendant.[114] To establish an assumption of risk defense, the defendant must prove two separate elements: (1) the plaintiff was aware

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111. For a thorough discussion of emotional distress damages in the absence of physical injury, see Virginia E. Nolan & Edmund Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583 (1982).

112. Another negligence defense which would be viable for use in a media negligence action would be contributory negligence. This provides that if a plaintiff's negligence is partially responsible for their injury, they are barred from recovery. However, the Supreme Court of Kentucky found that forty-one states had adopted a comparative negligence rather than contributory negligence approach. Hilen v. Hays, 673 S.W.2d 713, 716 n.3-4 (Ky. 1984). Since contributory negligence is no longer used in the majority of jurisdictions, this Comment will analyze only comparative negligence.

113. There are actually two types of assumption of risk: express and implied. An express assumption of risk generally occurs in employment situations where an employee signs a waiver acknowledging his or her acceptance of the risks of their job. Implied assumption of risk occurs when plaintiffs do not expressly consent to the danger, but their acceptance can be inferred from their conduct. Blackburn v. Dorta, 348 So. 2d 287, 290 (Fla. 1977). Since a hostage situation would not give rise to an express assumption of risk, implied assumption of risk will be the only one discussed by this Comment.

114. *Blackburn*, 348 So. 2d at 291. *See also*, KEETON ET AL., *supra* note 67, § 68, at 480-81.

of the nature of the risk he or she confronted; and (2) he or she voluntarily encountered that risk.[115]

For a hostage who is harmed by the actions of the media, it is unlikely that he or she will be aware of the danger created by the media's conduct. It is also unlikely that he or she could understand the risk involved. However, even if the first element of assumption of risk were established, the fact that a hostage is an involuntary participant in the situation eliminates the possibility that he or she could ever assume the risk voluntarily. Consequently, in a suit brought by a hostage, assumption of risk will not protect the media from liability.

On the other hand, in an action brought by a police officer, assumption of risk may provide a defense. Unlike a hostage, a police officer may know of the actions of the media and the risks created by them.[116] However, whether an officer who is ordered to rescue someone is *voluntarily* assuming the risk involved is unclear. It is generally true that a plaintiff does not assume a risk when they are left with no reasonable alternative course.[117] An officer ordered to attempt a rescue is not making this attempt voluntarily. He or she is under a direct order, and arguably, a legal duty.[118] Thus, under a traditional analysis, assumption of risk is not likely to be a defense against potential liability.

Some jurisdictions however have "Fireman's Laws" or "Professional Rescuer Rules."[119] In these jurisdictions, firefighters and police officers[120] are presumed to be aware of the risks involved in their jobs and

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115. *Blackburn*, 348 So. 2d at 291.

116. For instance, a SWAT team member's awareness that the team movements are being broadcast, or that the media is talking to the hostage taker, may be sufficient knowledge to constitute awareness of the risk.

117. KEETON ET AL., *supra* note 67, § 68, at 490-91.

118. Although police generally have no duty to rescue any individual member of society, once they have undertaken a rescue, a duty to do so "reasonably" may be imposed. Since closing off the area, preventing others from attempting a rescue, and then failing to attempt a rescue themselves might be seen as unreasonable, there is probably a duty to reasonably attempt a rescue. *See, e.g.*, Morris v. Musser, 478 A.2d 937, 939-40 (Pa. Commw. Ct. 1984) (finding that police may be held liable for failure to rescue if a special relationship exists between the individual harmed and police).

119. *See generally* Neighbarger v. Irwin Ind., Inc., 882 P.2d 347 (Cal. 1994); Lenthall v. Maxwell, 138 Cal. App. 3d 716 (1982); Winn v. Frasher, 777 P.2d 722 (Idaho 1989); Fox v. Hawkins, 594 N.E.2d 493 (Ind. Ct. App. 1992); Griffiths v. Lovelette Transfer Co., Inc., 313 N.W.2d 602 (Minn. 1981). *But see* MINN. STAT. § 604.60 (1988) (legislatively abolishing Fireman's Law); Christensen v. Murphy, 678 P.2d 1210, 1216-18 (Or. 1984) (Supreme Court of Oregon refusing to impose Professional Rescuer Rule in Oregon).

120. *See, e.g.*, City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 207 (1985) (holding that "Fireman's Rule" in California applies to police officers as well as firefighters).

to have voluntarily assumed those risks.[121] Thus, a police officer is precluded from recovering for injuries caused by another person's negligence in the majority of cases. The only exceptions to this rule are risks which are seen as "extraordinary,"[122] hidden from the officer,[123] or created by the actions of parties who are not participants in the event that gave rise to the officer's presence.[124]

Media negligence during an Ongoing Criminal Incident might be seen as independent of the risk that gave rise to the officer's presence. Although the actions of a hostage taker may normally be encountered by police, these actions, when brought on by the media's negligent conduct, might be viewed as independent. If they are seen as independent, the Professional Rescuer's Doctrine will not block recovery for the officer.[125] If not, an officer will be barred from recovery. This would, of course, depend on the jurisdiction involved and the judicial construction of the Professional Rescuer's Rule. Either way, there *is* a possibility that a police officer would be barred from recovery in a jurisdiction that has adopted a Professional Rescuer's Rule.

### *B. Comparative Negligence*[126]

In addition to assumption of risk, a plaintiff's own negligence may also limit recovery. If a plaintiff fails to use due care to prevent his or her own injury, he or she is comparatively negligent.[127] Although considered a defense to a negligence cause of action, comparative negligence is not a

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121. *See, e.g., Lenthall*, 138 Cal. App. 3d at 719 (barring recovery for a police officer shot by a suspect he was trying to subdue).

122. *See, e.g.*, Chinigo v. Geismar Marine, Inc., 512 So. 2d 487 (La. Ct. App. 1987).

123. *See, e.g., Griffiths*, 313 N.W.2d at 605.

124. *See, e.g.*, Shaw v. Plunkett, 135 Cal. App. 3d 756, 760 (1982) (refusing to apply the California "Fireman's Rule" to an action brought by a police officer intentionally struck by a car driven by a customer of the prostitute he was arresting).

125. *See, e.g.*, Lipson v. Superior Court, 644 P.2d 822, 829 (Cal. 1982) (finding the Professional Rescuer's Rule "does not provide protection to a defendant who commits independent acts of misconduct after the firefighters have arrived on the premises"). *See also* Neighbarger v. Irwin Industries, Inc., 882 P.2d 347 (Cal. 1994).

126. It is important to note before discussing comparative negligence, that in many of the jurisdictions that have adopted comparative negligence, implicit assumption of risk is no longer a defense. *See, e.g., Blackburn*, 348 So. 2d at 292; Salinas v. Vierstra, 695 P.2d 369, 373 (Idaho 1985). In these jurisdictions, implicit assumption of risk is simply treated as comparative negligence. *See, e.g.*, Li v. Yellow Cab Co., 532 P.2d 1226, 1242 (Cal. 1975). It remains unclear however, whether statutory assumptions of risk (*e.g.*, Professional Rescuer Rules) will be treated as comparative negligence or will remain a bar to a police officer's action for negligence.

127. KEETON ET AL., *supra* note 67, § 67, at 468-70.

defense to the imposition of liability.[128] Rather, in the majority of jurisdictions, the plaintiff's recovery is simply reduced by the percentage that he or she is found to be at fault.[129]

In establishing comparative negligence, a defendant is required to prove that the plaintiff breached a duty of care owed to themself, and that his or her breach constituted a partial cause of the damages that he or she suffered.[130] A duty presumptively exists to act with due care to avoid injury to oneself.[131] If a defendant can establish that the plaintiff partially caused his or her own injury, a breach of the duty to oneself is automatic. In proving causation, the defendant must establish both cause-in-fact and proximate causation.[132] Like assumption of risk, the dangerous actions of hostages (*e.g.*, attempting escape) are generally not considered negligent. Thus, they will not give rise to a comparative negligence defense. Police officers are also unlikely to be found comparatively negligent unless their rescue attempt significantly departs from the conduct of a reasonable officer.[133] In either case — hostage or police officer — whether comparative negligence would partially offset the plaintiff's damages would depend a great deal on the facts and circumstances of the case.

## V. THE FIRST AMENDMENT AS A BAR TO LIABILITY

If a plaintiff can establish a negligence cause of action and survive traditional tort defenses, a media defendant will certainly raise the First Amendment as a bar to liability.[134] The First Amendment states that "Congress shall make no law . . . abridging the freedom . . . of the

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128. *Li*, 532 P.2d at 1243.

129. *See, e.g.*, Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Alvis v. Ribar, 421 N.E.2d 886 (Ill. 1981); Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982); Hilen v. Hayes, 673 S.W.2d 713 (Ky. 1984); Kirby v. Larson, 256 N.W.2d 400 (Mich. 1977); Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983); Scott v. Rizzo, 634 P.2d 1234 (N.M. 1981). *But see* Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979) (finding that if a plaintiff is found to be more than fifty percent at fault, recovery is barred).

130. *Hilen*, 673 S.W.2d at 720.

131. *See, e.g.*, Bartlett v. MacRae, 635 P.2d 666, 669 n.3 (Or. Ct. App. 1981) (affirming jury instruction which read in part, "[i]t is the continuing duty of all people to keep and maintain a reasonable lookout for their own safety").

132. KEETON ET AL., *supra* note 67, § 67, at 474.

133. *See, e.g.*, City of Winter Haven v. Allen, 541 So. 2d 128, 135 (Fla. Dist. Ct. App. 1989).

134. The media may also raise the First Amendment as a bar to the negligence action itself. Although this would lead to the First Amendment issues being dealt with prior to the negligence action, it would not substantially change the First Amendment analysis.

press."[135] This prohibition against congressional infringement, made applicable to the states by the Fourteenth Amendment,[136] "is not limited to the . . . idea that freedom of the press means only freedom from restraint prior to publication."[137] Rather, it has been construed to include punishment after publication as well. Although the majority of First Amendment cases deal with criminal punishment after the expression, the Supreme Court has held that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."[138] This would also seem to hold true of media negligence liability. The imposition of civil damages regulates speech the same way that criminal punishment does.[139] Thus, a plaintiff will be required to establish the constitutionality of imposing liability in order to recover damages.

Since the media's activities at Ongoing Criminal Incidents consist of both newsgathering and broadcasting, the First Amendment raises two different questions: First, whether the imposition of liability for negligence during *newsgathering* violates the First Amendment; and second, whether the imposition of liability for negligence in *broadcasting* violates the First Amendment.

### *A. First Amendment Protection of Newsgathering*

Most of the dangerous conditions created by newsgathering are created by conduct rather than by speech. Although the First Amendment does not explicitly mention conduct, the First Amendment has been construed to protect conduct that contains sufficient elements of communication.[140] To determine whether conduct is protected, the Court has generally asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."[141] However, since newsgathering is not intended to convey a message, but to obtain information, "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering."[142] Thus,

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135. U.S. CONST. amend. I.
136. Gitlow v. New York, 268 U.S. 652, 666 (1925).
137. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 n.3 (1942).
138. New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).
139. *Id.*
140. Texas v. Johnson, 491 U.S. 397, 404 (1989).
141. *Id.* (citing Spence v. Washington, 418 U.S. 405, 410-11 (1974)).
142. Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971).

imposition of civil and criminal liability for illegal wiretapping,[143] disorderly conduct,[144] trespass,[145] and invasion of privacy[146] during newsgathering have all been held constitutional.

Some commentators have argued, however, that protection of newsgathering is implicit in the First Amendment Free Press Clause.[147] This position depends in part on dicta from the landmark case of *Branzburg v. Hayes*.[148] In *Branzburg*, the Court noted that "without some protection for seeking out the news, freedom of the press could be eviscerated."[149] Relying upon this language, commentators argue that some protection exists for newsgathering activities. However, as the *Branzburg* Court noted, "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[150] Moreover, an examination of the Court's newsgathering jurisprudence shows that the Court has refused to recognize protections for newsgathering beyond the rights of the public, despite the dicta in *Branzburg*.[151] As the Court noted in *Zemel v. Rusk*,[152] "[t]he

143. *See, e.g.*, Shevin v. Sunbeam Television Corp., 351 So. 2d 723 (Fla. 1977), *appeal dismissed*, 435 U.S. 920 (1978) (holding that Florida statute that prohibited taping telephone conversations without all parties' consent did not violate the First Amendment).

144. *See, e.g.*, City of Oak Creek v. King, 436 N.W.2d 285 (Wis. 1989) (upholding the disorderly conduct conviction of a press photographer who crossed a police line at an airplane crash and holding that the rights of the media are the same as the general public).

145. *See, e.g.*, Stahl v. State, 665 P.2d 839 (Okla. Crim. App. 1983), *cert. denied*, 464 U.S. 1069 (1984) (upholding the criminal trespass conviction of nine reporters covering an anti-nuclear demonstration); Anderson v. WROC-TV, 441 N.Y.S.2d 220 (N.Y. Sup. Ct. 1981) (journalist's conviction for entering private home at the invitation of humane investigator executing search warrant not barred by the First Amendment). *But see* Magenis v. Fisher Broadcasting, Inc., 798 P.2d 1106 (Or. Ct. App. 1990) (holding mere trespass was not enough to impose liability on reporter).

146. *See, e.g.*, Ross v. Midwest Communications, Inc., 870 F.2d 271, 274 (5th Cir. 1989), *cert. denied*, 493 U.S. 935 (1989) ("[T]he constitution bar[s] liability for the dissemination of true, private information if no liability would exist under the common law tort.").

147. *See*, Tom A. Collins, *The Press Clause Construed in Context: The Journalists' Right of Access to Places*, 52 MO. L. REV. 751 (1987); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 (1992); Karen S. Precella, Comment, *Freedom of the Press: Does the Media Have a Special Right of Access to Air Crash Sites?*, 56 J. AIR L. & COM. 641 (1990).

148. 408 U.S. 665 (1972).

149. *Id.* at 681.

150. *Id.* at 682.

151. *See, e.g.*, Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978) ("[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public"); Pell v. Procunier, 417 U.S. 817, 834 (1974) (stating that newspersons have no constitutional right of access to "prisons or their inmates beyond that afforded to the general public").

152. 381 U.S. 1 (1965).

right to speak and publish does not carry with it the unrestrained right to gather information."[153] The imposition of liability for torts committed during newsgathering is nothing more than a law of general applicability that clearly falls outside the scope of First Amendment protections. Therefore, the First Amendment should not bar recovery for media negligence during newsgathering.

### *B. First Amendment Protection of Broadcasting*

Unlike newsgathering, news broadcasts are clearly "speech" within the protections of the First Amendment. Thus, the first question is whether the restriction is content-neutral or content-based. Content-neutral restrictions limit communication without regard for the message conveyed. "[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral."[154] Content-based restrictions, on the other hand, regulate speech based on the message conveyed and are imposed "because of disapproval of the ideas expressed."[155] Since the imposition of liability for broadcasts during Ongoing Criminal Incidents clearly depends on the content of the broadcast, it will certainly be treated as a content-based restriction.[156]

Content-based restrictions are presumptively unconstitutional.[157] Thus, to survive judicial scrutiny, the plaintiff must establish that either: (1) the regulation falls under one of the classes of unprotected or "less protected" speech previously defined by the Court; or (2) the regulation is necessary to serve a compelling government interest and is narrowly drawn to achieve that end.[158]

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153. *Id.* at 17.

154. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2459 (1994).

155. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992).

156. Although it could be argued that the imposition of liability on the media is content-neutral because it focuses solely on the "secondary effects" of the speech. Secondary effects, as defined by Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), were effects on the local community which were not caused by the speech itself, but rather by the impact large numbers of obscene theaters had on the local community. In the case of media negligence, the issue turns on what effect the "primary" impact of the speech, namely the hostage takers reaction, has. As the Court noted in *Boos v. Barry*, "[t]he emotive impact of speech on its audience is not a 'secondary effect . . . .' [When a restriction] regulates speech due to its potential primary impact, . . . it *must* be considered content-based." 485 U.S. 312, 321 (1988) (emphasis added).

157. *R.A.V.*, 112 S. Ct. at 2542.

158. Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983).

1. Negligent Broadcasting as Unprotected or Less Protected Speech

The Supreme Court has defined several categories of speech that are unprotected or less protected and may be regulated based on their content without violating the First Amendment. Each category of speech has its own test to determine whether a content-based restriction is constitutional.[159] Among the categories defined as unprotected or less protected speech are the following: Speech that incites others to unlawful conduct [160] or presents a clear and present danger of bringing about a substantive evil that Congress has a right to prevent ("the clear and present danger test");[161] speech that is obscene ("obscenity");[162] speech that proposes or concerns a commercial transaction ("commercial speech");[163] group defamation;[164] publication of purely private information ("invasion of privacy");[165] and libel.[166] Of these categories, only the clear and present danger test may apply to the imposition of liability for broadcasts during Ongoing Criminal Incidents.[167]

The clear and present danger standard was first articulated by the Supreme Court in *Schenck v. United States*.[168] In *Schenck*, the Court held that a content-based restriction of speech could be upheld when the words "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[169] From this, the Court has developed

159. Although each unprotected class of speech uses its own test, these tests are all based upon strict scrutiny which requires that a regulation of speech be supported by a compelling government interest and be narrowly tailored to serve that interest. *See infra* part V.B.2.

160. Brandenburg v. Ohio, 395 U.S. 444 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

161. *See* Schenck v. United States, 249 U.S. 47 (1919) *as modified by* Brandenburg v. Ohio, 395 U.S. 444 (1969); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

162. Miller v. California, 413 U.S. 15 (1973).

163. Breard v. Alexandria, 341 U.S. 622 (1951); Valentine v. Chrestensen, 316 U.S. 52 (1942).

164. Beauharnais v. Illinois, 343 U.S. 250 (1952).

165. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759-61 (1985); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

166. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

167. Clearly, media negligence is not obscenity, libel, publication of purely private information or group defamation. Although the broadcasting activities of the media are commercial in that the media is a business, they would not qualify as commercial speech as they do not propose a commercial transaction or deal primarily with the economic interests of the speaker and listener.

168. 249 U.S. 47 (1919).

169. *Id.* at 52.

two distinctly different versions of the clear and present danger test. Since it is unclear which of the two tests would be applied in evaluating media negligence, both standards will be considered.

The first approach to the clear and present danger standard was articulated by the Court in *Brandenburg v. Ohio*.[170] Although the Court did not specifically refer to the clear and present danger standard, it held that a state may not restrict speech that advocates using force or violating the law unless the speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[171] The *Brandenburg* opinion essentially collapses the clear and present danger standard into the incitement standard set out by *Chaplinsky v. New Hampshire*.[172] The court has interpreted this "incitement" approach to mean that "both specific intent and imminence with respect to a non-speech evil are required in order to punish [or restrict] speech."[173] Under this formulation, the imposition of media liability would require proof that the media intended to bring about the harm. Since it is unlikely that the media would ever intend harm to occur, it is unlikely that the *Brandenburg* formulation of the clear and present danger test would allow the imposition of liability on the media. In fact, the majority of courts confronting the issue of liability for broadcasts have used the incitement model as the standard for imposing liability and have denied recovery.[174] As one commentator noted, "[a]s a *bar* to liability for physical injury caused by

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170. 395 U.S. 444 (1969).

171. *Id.* at 447.

172. 315 U.S. 568 (1942). In *Chaplinsky*, the Court held that "insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" could be constitutionally regulated. *Id.* at 572. The language of *Brandenburg* seems to take this standard, combine it with the *Schenck* clear and present danger standard and add a specific intent requirement.

173. Donald L. Beschle, *An Absolutism That Works: Reviving the Original "Clear and Present Danger" Test*, 1983 S. ILL. U. L.J. 127, 145 (1983).

174. This position was adopted by the California Court of Appeal in Olivia N. v. Nat'l Broadcasting Co., 178 Cal. Rptr. 888 (1981), *cert. denied*, 458 U.S. 1108 (1982). In *Olivia N.*, the court upheld the dismissal of a suit filed by a minor female for an "artificial rape" inflicted on her by several other minors after they saw a similar act in a television movie. *Id.* at 891. Since an intent to cause such acts by broadcasting the movie could not be shown, the court found the First Amendment was a bar to the action for negligence and upheld dismissal. *Id.* at 894. *See also* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); Watters v. TSR, Inc., 715 F. Supp. 819 (W.D. Ky. 1989), *aff'd*, 904 F.2d 378 (6th Cir. 1990); Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199 (S.D. Fla. 1979); McCollum v. Columbia Broadcasting Sys., Inc., 249 Cal. Rptr. 187 (1988); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989); and DeFilippo v. Nat'l Broadcasting Co., Inc., 446 A.2d 1036 (R.I. 1982).

speech, the incitement standard works well."[175] Unfortunately, as a standard for media negligence, it does not.

The second interpretation of the clear and present danger test was articulated by the Court in *Landmark Communications, Inc. v. Virginia.*[176] In *Landmark*, the Court held that "[p]roperly applied, the [clear and present danger] test requires a court to make its own inquiry into the imminence and magnitude of the danger . . . and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression."[177] Additionally, the Court held that consideration should be given to other less restrictive measures that would fulfill the state's interests.[178] Applied to a negligence action, the *Landmark* version of the clear and present danger test replaces the normal foreseeability test in evaluating whether liability should be imposed.[179] The effect of the *Landmark* test is to provide a constitutional standard that "retain[s] the incitement standard's focus on imminence without its emphasis on the strength of the defendant's efforts to induce action."[180]

In most cases, imposition of liability for media negligence during Ongoing Criminal Incidents would survive the *Landmark* approach. Direct interferences, as in the Hanafi or Berkeley incidents,[181] certainly pose a clear and present danger to both hostages and police officers.[182] Moreover, since the evils sought to be prevented by the imposition of liability are the infliction of personal injury and death, they are clearly evils that Congress, or a state, has the power to prevent. On the other hand, indirect interferences most likely do not create a clear and present danger under *Landmark*. Although the potential injury remains the same, the foresee-

175. David A. Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71, 75 (1990).

176. 435 U.S. 829 (1978).

177. *Id.* at 842-43.

178. *Id.* at 843.

179. Anderson, *supra* note 175, at 74-75.

180. *Id.* at 75. This approach was used by the Supreme Court of Georgia in Walt Disney Prods., Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981). The plaintiff in *Shannon* was a minor who was injured while trying to duplicate a sound effects trick he had seen on the *Mickey Mouse Club* television show. The court, although not citing to *Landmark*, adopted a formulation of the *Schenck* standard very similar to that articulated in *Landmark*. According to the court, "[t]he substantive evil which the tort law seeks to redress is the infliction of personal injury." *Id.* at 582. Thus, liability could be imposed if the broadcast at issue posed a clear and present danger of personal injury. Although the court found the defendant's broadcast did not rise to that level, its adoption of this interpretation of the test represents the first and only time it has been used in a media context.

181. *See supra* part II.

182. *See supra* part III.A.

ability of harm decreases drastically. Thus, the imminence prong of *Landmark* would not be met.

However, even if the actions complained of are found to pose a clear and present danger, the *Landmark* approach also requires consideration of less restrictive measures that would equally serve the state's interests.[183] Imposing liability for media negligence during Ongoing Criminal Incidents would serve the following state interests: (1) protecting the lives and safety of hostages and police officers by deterring members of the media from acting negligently; (2) compensating victims of media negligence for their injuries; (3) providing a clear standard for the imposition of liability, which prevents the "chilling" of protected speech; (4) promoting the peaceful resolution of Ongoing Criminal Incidents and preventing harm to the perpetrator; and (5) insuring that the public continues to be informed about Ongoing Criminal Incidents. The crucial question is whether any alternative means can further these interests without placing the same restrictions on speech.

One alternative measure that a state could take would be to entirely eliminate press access to Ongoing Criminal Incidents. Although this would eliminate the problems created by the media, it would also completely eliminate this type of speech and prevent the public from overseeing the actions of law enforcement. Hence, this alternative does not adequately serve the state's interests. A second alternative would be to eliminate media liability entirely. Although this would be less restrictive of speech, it would also give the media *carte blanche* during Ongoing Criminal Incidents. This could encourage negligent conduct, increase the likelihood of injury, significantly hinder the actions of police, and fail to compensate those harmed by the media's negligence. Thus, this alternative would also fail to serve the interests of the state. A final alternative would be to allow media access only after the fact, or to provide a designated area near the incident for the media to receive reports on the situation's progress. Although the state's interests would be adequately served, a greater than necessary burden would be imposed on speech. Since the imposition of liability would hinder negligent speech, it is a less restrictive alternative than "after the fact" access and would be considerably more protective of speech. Consequently, "after the fact" access would not survive the *Landmark* analysis. Considering the three alternatives above, the imposition of negligence liability appears the least restrictive means to

183. *Landmark Communications, Inc.*, 435 U.S. at 843.

serve all of the state's interests. Thus, it is likely that the imposition of media liability would survive a *Landmark* analysis.

Of course, if the trial court applies the *Brandenburg* version of the clear and present danger test as opposed to the *Landmark* version, the imposition of liability would constitute a restriction of protected speech. If this occurs, the restriction will be judged by the ad hoc balancing process.

### 2. Media Liability Under Ad Hoc Balancing

Content-based restrictions that do not fall into unprotected or low value categories of speech are "presumptively invalid"[184] and the Court subjects these regulations to "the most exacting scrutiny."[185] This requires analysis of two separate issues: (1) whether there is a compelling state interest served by the imposition of media liability; and (2) whether the negligence standard adopted is both narrowly drawn and necessary to achieve the state's interests.[186]

As discussed above, the state has several interests in imposing liability on the media. Many of these interests (*e.g.*, safety of hostages and the police, and compensation of victims) are compelling. The real issue, however, is whether imposing liability on the media is necessary to further these interests and is narrowly drawn to achieve them. Although the Supreme Court has never clearly defined what narrow tailoring *is*, it has defined what it *is not*. A restriction is not narrowly tailored when "'a substantial portion of the burden [it places] on speech does not serve to advance the [State's] content-neutral goals.'"[187] It is also clear that a restriction is not narrowly tailored when a less restrictive alternative is readily available.[188] Thus, "narrowly tailored" means that the regulation at issue is the least restrictive alternative that is readily available and the regulation restricts only speech that is contrary to the state's interests. Under this definition, the necessity requirement collapses into the definition of narrowly tailored. Realistically, if a less restrictive means of furthering the state's interest is readily available, then the more restrictive standard is not really necessary. Conversely, if the statute at issue is the least restrictive means of achieving the state's interest, it is both necessary and

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184. *R.A.V.*, 112 S. Ct. at 2542.

185. *Boos*, 485 U.S. at 321.

186. *Perry Educ. Ass'n.*, 460 U.S. at 45.

187. Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 122 (1991) n.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

188. *Boos*, 485 U.S. at 329.

narrowly tailored. In either case, the Court presumes that the imposition of liability is invalid and the plaintiff has the burden to prove that it is not. Consequently, there is little chance for a plaintiff to recover damages if ad hoc balancing is applied.

Whichever First Amendment standard is applied by the court, plaintiffs seeking to recover damages for media negligence during an Ongoing Criminal Incident will find it difficult to prevail. Plaintiffs seeking recovery for newsgathering activities must establish a negligence cause of action that will survive tort defenses and then show that the activity at issue is "conduct" which is unprotected by the First Amendment. Despite this higher burden, plaintiffs asserting negligence liability arising from newsgathering are much more likely to prevail than plaintiffs asserting liability for broadcasting activities. Plaintiffs seeking recovery for broadcasting activities will not only have to establish a negligence cause of action and survive the assertion of tort defenses, but must also survive a complete First Amendment analysis. Further complicating this subject is the realization that media actions will not likely be composed of newsgathering or broadcasting alone, but rather a combination of both newsgathering and broadcasting activities. Thus, the court will likely apply the more protective standard of broadcasting and deny recovery to the plaintiff.

Clearly, the current state of the law is confusing, and as such, it fails to provide guidance which would allow the media to tailor their activities to avoid liability. This uncertainty promotes self-censorship as the media avoids otherwise permissible conduct to avoid liability. Moreover, as there are a variety of standards that might apply, inconsistent results in the lower courts are likely. Clearly, a new standard is needed for media negligence during Ongoing Criminal Incidents.

## VI. MEDIA NEGLIGENCE: A PROPOSAL FOR REFORM

By adopting the clear and present danger test articulated in *Landmark* and combining it with a modified negligence standard, a new standard can be developed which will better serve society's interests. This section will propose a new standard for use in media negligence actions that arise out of Ongoing Criminal Incidents and explore its application and advantages by applying it to several hypothetical situations.

### *A. The Standard: An "Unreasonable Risk" Approach to Media Negligence*

A more effective negligence standard for media activities during Ongoing Criminal Incidents would be:

A) When a member of the press, during an Ongoing Criminal Incident (*e.g.*, hostage situation, barricaded suspect, or terrorist attack), knew or should have known that his or her broadcasting or newsgathering activities created a clear and present danger of harm to a hostage, or any person engaged in a rescue or apprehension effort, he or she will be liable for the damages that occur to such hostage or rescuer/apprehender, when:

1) a reasonably prudent person, in the press member's position, would have foreseen the danger of his or her broadcasting or newsgathering activities; and

2) those activities were the factual and legal cause of the plaintiff's harm.

B) The tortious or illegal actions of a third party shall not be an intervening cause when those actions were foreseeable consequences of the press member's actions.

C) Damages available under this section are only for wrongful death, personal injury, and emotional damages that result from physical injury. No punitive, exemplary, or property damages shall be available under this section.

D) Neither assumption of risk nor the Professional Rescuer's Rule shall foreclose the recovery of any person engaged in a rescue or apprehension effort under this section.

### *B. Applying the Standard*

The following situations, both hypothetical and real, will explore how and when liability would be imposed under the new standard, as well as what types of media activities would give rise to liability.[189]

#### 1. Situation #1 — Hypothetical

A terrorist takes over an elementary school principal's office and takes several children hostage. As police set up to respond to the incident, a local television station camera crew calls the principal's office and arranges for a live interview with the hostage taker. A camera crew is dispatched to the location and interviews the terrorist live on the air, via cellular phone. The reporter asks the terrorist whether he would really injure one of

189. Since the imposition of liability for purely newsgathering activities does not pose a problem even under the current law, all of the situations used will involve either broadcasting activity or a combination of both broadcasting and newsgathering activities.

> the children if his demands are not met. To prove his sincerity, the terrorist shoots a child and throws him through a window so that the camera crew can see him. The child, a quadriplegic, now sues.

Under the unreasonable risk standard, this is a situation where liability would be imposed. It is foreseeable that the actions of the reporter, both in contacting the terrorist and in asking about his sincerity, would lead to harm. Moreover, a reasonably prudent person, in a press member's position, would not have acted in such a manner. Since the child's injury was in direct response to the reporter's actions, both legal and proximate causation would be met. Since the injury incurred by the child left him a quadriplegic, he could recover for the physical injury, its ramifications (*e.g.*, lost earnings, pain and suffering, etc.), and the emotional damages as well.

2. Situation #2 — The Lucasville Prison Riots

> An inmate disturbance occurs at a local prison. The media descends on the scene and begins to report the death threats made by inmates. A prison spokesperson holds a press briefing and in a radio interview states that the threats made by inmates are just part of the normal negotiation process and that the inmates have been making these types of threats all along. After hearing the interview live on the radio, the inmates kill a prison guard/hostage to show their sincerity.[190] The plaintiff is the dead guard's husband.

Despite its similarity to Situation #1, this situation would not give rise to media liability. Although the media broadcast the information that led to the guard's death, the negligent actions of a prison spokesperson would not be regarded as foreseeable. Moreover, causation would also not be established since the speech that caused the guard's death was uttered by a prison official rather than by a reporter. Further, the publication of official government statements to the press could never be seen as posing a clear and present danger of causing harm, whatever the statement's content.

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190. Paul Barton, *Experts Warn Media to Examine Their Role in Lucasville Riot*, Gannett News Service, Apr. 19, 1993, *available in* LEXIS, Nexis Library, Papers File.

### 3. Situation #3 — Hypothetical

> Police and the media respond to a barricaded suspect at a liquor store. The media begins live coverage of the standoff and reports that the SWAT team is attempting to break into the back door of the store. The suspect, who is watching the broadcast, immediately begins firing through the door, hitting and seriously injuring two SWAT team members in the process. The plaintiffs are the injured officers.

In this situation, the officers could recover under the unreasonable risk standard. It was foreseeable that the suspect would react violently to the covert entry of police. Thus, the broadcast posed a clear and present danger of harm to the officers since broadcasting the SWAT team's location would compromise their covert entry. Since the actions of the suspect are directly traceable to the timing of the broadcast, causation would also be met. Most importantly, this situation illustrates why the unreasonable risk standard provides an exception to the Professional Rescuer Rule. Under the current state of the law, the plaintiff officers would presumptively assume the danger of being shot by a suspect. Thus, the officers would be barred from recovery. However, in this situation, the officers certainly would not expect someone on the outside of the building to provide the suspect with information about their plans. Thus, recovery would be allowed under the unreasonable risk standard, despite the fact that under the current law, the officers would not recover.

### 4. Situation #4 — Escondido

> A barricaded suspect flees his condominium and runs down the condominium's driveway, shooting at police with an assault rifle. A SWAT team member leaps out of a vehicle in an attempt to shoot the suspect before he reaches the end of the driveway. The officer is forced to forego shooting the suspect to avoid hitting a camera crew who is stationed across the street. The suspect turns the corner and shoots a deputy sheriff, seriously injuring him. The plaintiff is the injured deputy.

As in situation #2, this is not a situation where liability would be imposed under the unreasonable risk standard. Although the media clearly interfered and was, arguably, a causal link in the deputy's injury, the consequences of the media's actions would have been almost impossible to foresee. Thus, liability would not be imposed.

### *C. The Advantages and Disadvantages of the Unreasonable Risk Standard*

The adoption of the unreasonable risk standard for media negligence during Ongoing Criminal Incidents would provide four distinct advantages over the current law. First, it would provide a clear standard for the media to evaluate their activities and allow the media to make informed decisions about what risks to undertake. This, in turn, would be more protective of speech as the media would not be forced to "over-censor" their speech for fear of liability. Additionally, the unreasonable risk standard would allow for a uniform application of the law and eliminate the varying approaches currently being used. Second, the adoption of this standard would deter members of the media from engaging in dangerous reporting activities for fear of incurring liability. Although this would lead to some self-censorship, this is not necessarily bad. One of the purposes of tort law is to deter conduct which puts others at risk. Media self-censorship would stand to protect the interests of society as a whole and prevent harm to others. Moreover, self-censorship already occurs under the current state of the law where the media cannot discern which activities may give rise to liability. Eliminating this form of self-censorship and replacing it with a more beneficial approach can only stand to improve the position of the media. Finally, adoption of the unreasonable risk standard would provide compensation for the victims of media negligence, where little or none currently exists. As discussed above, the current state of the law makes recovery for media negligence unlikely. Adoption of the unreasonable risk standard would eliminate this problem and enable these victims to receive compensation for their injuries.

## VII. CONCLUSION

The current state of the law offers little guidance for media negligence actions. This creates a disincentive for responsible reporting and increases the danger of harm resulting from the actions of the media. Adoption of the unreasonable risk standard would eliminate most of these problems and better serve the interests of both society and the media. By providing a clear standard, the unreasonable risk approach would allow the media to better tailor its actions to avoid liability, which in turn is more protective of both hostages and police officers. Although there will certainly be a limited amount of media self-censorship, such self-censorship is certainly more desirable than encouraging negligent conduct. Protecting the tortious acts of the media is certainly not the purpose of the First Amendment. As

the California Supreme Court once noted, "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."[191] Unfortunately, until the courts adopt a standard similar to the unreasonable risk approach proposed by this Comment, the First Amendment will not only continue to sanction harm, it may even encourage it.

*Jonathan B. Becker**

191. Weirum v. RKO General, Inc., 539 P.2d 36, 40 (Cal. 1975).

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