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## **FALWELL V. FLYNT: LAMPOONING OR LIABILITY; THE REALIZATION OF A THREE-PRONGED TORT APPROACH FOR ESTABLISHING MEDIA LIABILITY FOR FICTIONAL DEFAMATION**

Historically, in most states, the law of defamation protected an individual's right to personal security which included the individual's entitlement to enjoyment of his reputation.<sup>1</sup> Prior to the United States Supreme Court's decision in *New York Times v. Sullivan*,<sup>2</sup> an action for defamation was governed by state common law without any First Amendment protections.<sup>3</sup> Since this decision, courts have subjected the law of defamation to a plethora of legal tests which attempt to balance an individual's right to a good reputation against the media's constitutional freedoms of speech and press.<sup>4</sup> One observer (Wade) of this tort-law evolution foresaw the possibility that defamation actions might eventually be based upon one if not all of the following tort theories of liability: Invasion of Privacy; Libel; Intentional Infliction of Emotional Distress.<sup>5</sup> Each theory of liability has developed separately and until this time with little practicality of convergence.<sup>6</sup> Wade further predicted that the latter tort (which itself was rapidly developing) would eventually circumvent and supplant the former dignitary torts and provide "a single integrated system of protecting plaintiff's peace of mind against acts of the defendant. . . ."<sup>7</sup> However, it was Mead who assembled statistical data that revealed the trend during the late 1970's toward multiple pleadings of these independent torts in defamation actions.<sup>8</sup> Mead predicted that if this trend continued, it would create confusion among the courts and disrupt their carefully delineated deci-

<sup>1</sup>Fuller v. Edwards, 180 Va. 191, 197, 22 S.E.2d 26, 29 (1942).

<sup>2</sup>376 U.S. 254, *motion denied*, 376 U.S. 967 (1964).

<sup>3</sup>Note, *Toward a New Standard of Liability for Defamation in Fiction*, 58 N.Y.U.L. REV. 1115 (1983) [hereinafter cited as Note, *New Standard*]. The previous standard was one of strict liability. *Maynard v. Port Publications*, 98 Wis. 2d 555, 564-65, 297 N.W.2d 500, 505-06 (1980).

<sup>4</sup>Van Alstyne, *First Amendment Limitations on Recovery from the Press — An Extended Comment on "The Anderson Solution"*, 25 WM. & MARY L. REV. 793, 815 (1984) [hereinafter cited as Van Alstyne]. See Spahn, *Libel and Slander*, 17 U. RICH. L. REV. 769 (1983); Clarke, *Freedom of Speech And The Problem of The Harmful Public Reaction: Adult Use Cases of Renton And Mini Theatres*, 20 AKRON L. REV. 187, 200 (1986) [hereinafter cited as Clarke, *Freedom of Speech*]. The First Amendment guards against unreasonable self-censorship. *Id.*

<sup>5</sup>Mead, *Suing Media For Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 WASHBURN L.J. 24 (1983) [hereinafter cited as Mead], (citing Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962) [hereinafter cited as Wade]).

<sup>6</sup>Mead, *supra* note 5, at 25-26. See also Magruder, *Mental and Emotional Disturbances in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

<sup>7</sup>Mead, *supra* note 5, at 24. Note his discussion that multiple pleadings may allow plaintiffs to avoid pre-trial losses or summary judgment rulings.

<sup>8</sup>Mead, *supra* note 5, at 29-37, referring to *Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972), *aff'd in part and rev'd in part*, 487 F.2d 986 (2d Cir. 1973); *Hutchinson v. Proxmire*, 579 F.2d 1027 (7th Cir. 1978), *rev'd*, 443 U.S. 111 (1979); *Weingarten v. Block*, 102 Cal. App. 3d 129, 162 Cal. Rptr. 701, *cert. denied* 449 U.S. 899 (1980).

sions as to liability under each separate tort.<sup>9</sup>

Mead's prediction appears to be well-founded given the 1986 decision in *Falwell v. Flynt*.<sup>10</sup> *Falwell* is an important decision because it is one of the first cases under this multiple pleading format to allow a public figure plaintiff to recover damages for defamation-type injuries without proving libel on a fictional publication.<sup>11</sup>

This article will discuss the appellate court's interpretation and application of the three tort theories of liability. It will also analyze the potential floodgate effect this case may have on future defamation actions against the media for publishing fictional publications, including political cartoons.

#### STATEMENT OF FACTS

The plaintiff, Reverend Jerry Falwell, is a well-known pastor and an influential commentator on political issues.<sup>12</sup> Falwell sued publishers Larry Flynt and Hustler Magazine, Inc. in the United States District Court of the Western District of Virginia because of an advertisement parody that was published in the defendant's magazine.<sup>13</sup>

The parody (cartoon) satired a Campari Liqueur advertisement, that featured celebrities, by using a photograph of the plaintiff with accompanying dialogue text attributed to him.<sup>14</sup> The text contained statements in which the plaintiff allegedly detailed an incestuous relationship with his mother behind an outhouse.<sup>15</sup> The text also included references about their immoral and drunken dispositions.<sup>16</sup> The defendants' cartoon included a disclaimer at the bottom of the cartoon which stated "Ad Parody — not to be taken seriously."<sup>17</sup>

Falwell sued on three separate counts of libel, invasion of privacy and intentional infliction of emotional distress.<sup>18</sup> The trial court dismissed the invasion of privacy claim but sent the remaining claims to the jury.<sup>19</sup> The jury found for the defendants on the libel claim on the basis that no reasonable

<sup>9</sup>Mead, *supra* note 5, at 55.

<sup>10</sup>*Falwell v. Flynt*, Nos. 85-1417(L), 85-1480 W.D.Va. (1985), *aff'd*, 797 F.2d 1270 (4th Cir. 1986), *reh'g en banc denied*, 805 F.2d 484 (4th Cir. 1986). The trial court's opinion is unreported.

<sup>11</sup>*Skin Mag Loses*, 72 A.B.A.J. 80 (November 1, 1986) [hereinafter cited as ABA Journal].

<sup>12</sup>*Falwell*, 797 F.2d at 1272. (The parties agreed that Falwell was public figure).

<sup>13</sup>*Id.* at 1270. Flynt Distributing Company was a co-defendant in the district court suit only. Note that the parody was published in November 1983 and in March 1984. *Id.* at 1272.

<sup>14</sup>*Id.* at 1272. The real Campari ads contained pictures and interviews with celebrities in which they detailed the "first time" they drank Campari. The parody played on this first time theme to mean sex. *Id.*

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 1273.

reader would believe that the parody described actual facts about Falwell.<sup>20</sup> The jury found the defendants liable on the intentional infliction of emotional distress claim and awarded \$200,000 in damages.<sup>21</sup> The defendants appealed and the plaintiff cross-appealed the verdicts.<sup>22</sup> The United States Court of Appeals (Fourth Circuit) affirmed the District Court's decision.<sup>23</sup> Despite a strong dissent, the majority of the appellate court denied the defendants' petition for a rehearing en banc.<sup>24</sup>

#### COURT OF APPEALS DECISION

In deciding the *Falwell* appeal, the Court considered the availability and requirements involved in applying all three theories of liability in light of the State of Virginia's common law and general constitutional principles.<sup>25</sup>

The Court stated that although at one time a plaintiff's sole remedy for defamatory publications rested in proving libel, it recognized the trend toward allowing multiple tort claims for allegedly defamatory statements.<sup>26</sup> The Court admitted that when the plaintiff is a public official,<sup>27</sup> public figure<sup>28</sup> or claims invasion of privacy<sup>29</sup> a media defendant is entitled to the same First Amendment protection.<sup>30</sup> In a defamation suit, this protection requires such plaintiffs

<sup>20</sup>*Id.* This test can negate a defamation claim. See *James v. Gannett Co.*, 40 N.Y.2d 415, 353 N.E.2d 834, 386 N.Y.S.2d 871 (1976). See generally Note, *New Standard*, *supra* note 3, for a discussion of fictional libel and the rationale for treating such libel differently from false statements of fact.

<sup>21</sup>*Falwell*, 797 F.2d at 1273. The jury awarded \$100,000 in actual damages, \$50,000 in punitive damages against both Flynt and Hustler and nothing against Flynt Distributing Company. *Id.* Notice the deposition of Flynt where he testified about his intent to assassinate Falwell's character. *Id.*

<sup>22</sup>*Id.* at 1272. The court classified the issues on appeal into four groups: constitutional (defamation); common law tort regarding emotional distress; evidentiary; and the dismissal of the invasion of privacy claim. *Id.* Discussion of the evidentiary claim is beyond the scope of this article.

<sup>23</sup>*Id.*

<sup>24</sup>*Falwell*, 805 F.2d 484 (4th Cir. 1986). Justice Wilkinson's dissenting opinion raises serious questions about the appellate court's decision.

<sup>25</sup>*Falwell*, 797 F.2d at 1274.

<sup>26</sup>*Id.*, (referring to Mead, *supra* note 5 at 24). Also see *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). Here, the court discussed fault levels and the historical application of strict liability on the media for false publication.

<sup>27</sup>*Id.* (citing *New York Times*, 376 U.S. 254). Generally the category of public officials includes those people who are classified as public officers including those public employees who exercise substantial governmental power. *Id.*

<sup>28</sup>*Id.* (citing *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967)). For the most part those who attain this status (of public figure) have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classified as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment. See generally, Ashdown, *Of Public Figures and Public Interest — The Libel Law Conundrum*, 25 WM. & MARY L. REV. 937 (1984).

<sup>29</sup>*Falwell*, 797 F.2d at 1274 (citing *Time, Inc. v. Hill*, 385 U.S. 374 (1967)). Invasion of privacy is generally described as the unconsented, unprivileged and unreasonable intrusion into the private life of an individual. See Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

<sup>30</sup>*Falwell*, 797 F.2d at 1274. This protection is not available where the plaintiff is a private figure. The rationale behind this requirement is that a private figure is unable to find adequate means to publicly rebut allegedly defamatory statements. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

to prove that the defendant published the statement with a high level of fault consistent with "actual malice."<sup>31</sup> The court emphasized that this intentional or reckless level of fault is comparable between actions lying either in libel or intentional infliction of emotional distress and therefore satisfies the First Amendment standards for protecting the press against unreasonable self-censorship.<sup>32</sup> Upon making this determination, the Court reasoned that under Virginia law<sup>33</sup> there was little problem in allowing an alternative claim for intentional infliction of emotional distress<sup>34</sup> notwithstanding Falwell's failure to prove libel due to the use of the reasonableness test.<sup>35</sup>

The court stated that Flynt's testimony revealed his intent to emotionally disturb Falwell.<sup>36</sup> Additionally, the Court found that the language contained in the parody, in combination with its republication sufficiently proved the outrageousness of the defendants' conduct.<sup>37</sup> The Court gave considerable weight to Falwell's testimony regarding his mental anguish after the parody's publication to establish the severity of his distress.<sup>38</sup>

The Court decided that the evidence presented<sup>39</sup> was sufficient to uphold the jury verdict of liability for intentional infliction of emotional distress under Virginia law.<sup>40</sup>

<sup>31</sup> *Falwell*, 797 F.2d at 1274 (citing *New York Times* rule that a public official plaintiff in a defamation action must prove actual malice). This means that the publication was made with the defendant's "knowledge that it was false or with a reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80. This was extended to public figures in *Curtis*, 388 U.S. 130. The purpose of this fault standard is to "assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times*, 376 U.S. at 269, (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). See, e.g., *Newspaper Publishing Corp. v. Burke*, 216 Va. 800, 224 S.E. 2d 132 (1976). Virginia requires this standard.

<sup>32</sup> *Falwell*, 797 F.2d at 1275.

<sup>33</sup> *Id.* at 1276, (citing *Raftery v. Scott*, 756 F.2d 335 (4th Cir. 1985)). The court apparently found that the trial court did not err as to the libel issue and assumed that the emotional distress issue required its full attention on appeal.

<sup>34</sup> *Id.*, cf. *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3rd Cir. 1979). The *Chuy* court allowed a semi-public figure to recover for mental anguish despite his failure to prove libel. *Id.* at 1276. *But see*, *Fischer v. Maloney*, 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978), which arguably disputes this practice, at least in New York.

<sup>35</sup> *Falwell*, 797 F.2d at 1276. The Court summarily dismissed the defendants' contention that the parody was an opinion and therefore privileged. This decision appears contrary to a body of defamation decisions dealing with fiction or political cartoons. See *Miller v. Charleston Gazette*, No. 84-C-428R (W. Va. C.C. 1983) 9 MEDIA L. REP. (BNA) 2540 (a public official was denied recovery due to an outrageous cartoon which contained sexual connotations); *Hanson v. Feuling*, 160 Wis. 511, 152 N.W. 287 (1915); *Myers v. Boston Magazine Co.*, 380 Mass. 907, 403 N.E.2d 380 (1980); *Naughton and Gilbertson, Libelous Ridicule by Journalists*, 18 CLEVE.-MAR. L. REV. 450 (1969).

<sup>36</sup> *Falwell*, 797 F.2d at 1276.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1276-77 (the court found that evidence of Falwell's suffering appeared through Flynt's deposition, Falwell's testimony and that of a colleague, language in the parody and its republication). It appears that the jury presumed the severity of Falwell's emotional distress. The resulting symptoms do not appear to be more than a reasonable man could endure. See RESTATEMENT (SECOND) OF TORTS § 46 (1965). See *Harris v. Jones*, 281 Md. 560, 380 A.2d 611 (1977) for an illustration of outrageousness and severity.

<sup>40</sup> *Falwell*, 797 F.2d at 1276-77 (citing *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145, 149 (1974)). In Virginia an action for emotional distress will lie where the defendant's conduct was intentional or reckless;

The Court also reviewed the Virginia invasion of privacy statute<sup>41</sup> and reasoned that the defendants' use of Falwell's photograph did not violate the statute because such use would not allow a reader to reasonably believe the false statement.<sup>42</sup>

### ANALYSIS

The Court of Appeals decision raises serious practical and theoretical implications by affording a public figure<sup>43</sup> redress for emotional injuries in an area traditionally covered by libel law.<sup>44</sup> Allowing the substitution of an emotional distress claim for libel in a defamation action for a fictional publication may create a chilling effect on the intercourse of vigorous public debate and unduly penalize the media.<sup>45</sup> The *Falwell* decision in effect allows a public figure plaintiff to recover damages for injuries that were traditionally available only after proof of libel.<sup>46</sup> This decision creates a dilemma for the media when it equates outrageousness with publication of a fictional work.<sup>47</sup> The purpose of political satire and parody is to cause the subject some degree of distress.<sup>48</sup> Certainly in cases like this, "a certain toughness of the mental hide (would be) a better protection than the law could ever be."<sup>49</sup> The trial court jury obviously believed

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offends set standards of decency and morality; a causal connection between the conduct and the plaintiff's emotional distress, which distress was severe. *Id.* at 1275, note 4.

<sup>41</sup>V.A. CODE § 8.01-40 (1985). The pertinent text reads as follows:

Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.

This statute is primarily concerned with restricting the use of a person's name or picture for use in trade.

<sup>42</sup>*Falwell*, 797 F.2d at 1278. The Court found no Virginia decisions which construed this statute and opted to review New York State's similar "privacy" statute and cases which construe the statute. *Id.* The Court's discussion of the reasonable reader test refers to *Hicks v. Casablanca*, 464 F. Supp. 426 (S.D.N.Y. 1978).

<sup>43</sup>*Falwell v. Flynt*, 805 F.2d 484 (Wilkinson, C.J. dissenting). The chief justice strongly argued that Falwell is more than a public figure and is actually closer to the public official status due to his extensive involvement in political affairs.

<sup>44</sup>*Id.* at 485 (provides a good analysis of the implications in light of current law). See Wilson, *The Law of Libel and the Art of Fiction*, 44 LAW & CONTEMP. PROBS. Nos. 4, 27, 28 and 46-49 (1981).

<sup>45</sup>*Falwell*, 805 F.2d at 484-85 (citing *Hutchinson*, 443 U.S. at 133-34). Also see *Yorty v. Chandler*, 13 Cal. App. 3d. 467, 476, 91 Cal. Rptr. 709, 715 (1985); and *Greenbelt Co-op Pub. Ass'n v. Bresler*, 398 U.S. 6, 10 (1970).

<sup>46</sup>*Falwell*, 805 F.2d at 484-85 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971) and *Gertz*, 418 U.S. at 350). Damages for mental suffering are available after proving libel. The effect of meaning reputational and mental damages is exemplified in *McHale v. Lake Charles American Press*, 390 So. 2d 556, 568-69 (La. Ct. App. 1980).

<sup>47</sup>*Falwell*, 805 F.2d at 487.

<sup>48</sup>*Id.* While political humor is often in bad taste (both appellate courts felt this parody was extremely base) the courts have generally protected even the most repulsive of speech. See *Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974); *Miller, supra* note 35, at 2546.

<sup>49</sup>*Magruder, Mental and Emotional Disturbances in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

this when they found the defendants not liable for libel.

When a public person is involved, that person has adequate means in which to counteract the adverse effects of the publication.<sup>50</sup> The situation is different when a "private" person is involved and the courts consistently have recognized a greater need to protect these persons from all harm.<sup>51</sup>

The *Falwell* decision appears to have no limiting effects on defamation lawsuits against the media.<sup>52</sup> It seemingly allows a public official or a public figure to recover for: mental anguish from a true but outrageous statement,<sup>53</sup> or any statement which intends to inflict harm,<sup>54</sup> while basing liability on a presumption of severe emotional injuries.<sup>55</sup>

Other jurisdictions including California, New York and Oregon, have explicitly refused to allow recovery on these alternative tort theories when a public figure plaintiff has failed to prove libel for defamatory statements.<sup>56</sup> In fact, a United States District Court in *Ault v. Hustler Magazine, Inc.*, reviewed the *Falwell* opinions before deciding that this alternative pleading format was intellectually incorrect.<sup>57</sup> The plaintiff in *Ault*, sued for libel, invasion of privacy, intentional infliction of emotional distress and other similar theories of liability.<sup>58</sup> The plaintiff was unable to prove that the defendant's publication of an embarrassing photograph accompanied with an article that portrayed her mental deficiencies constituted libel.<sup>59</sup> The court concluded, that allowing the plaintiff to restate the libel claim in terms of intentional infliction of emotional distress would improperly allow her to avoid the stricter malice standard required under the Constitution.<sup>60</sup> The court stated:

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<sup>50</sup>*Falwell*, 805 F.2d at 485, 487. The Court also commented on a related suit brought by the defendants in the Ninth Circuit Court of Appeals which upheld *Falwell's* use of the cartoon in mass mailings to his followers in an attempt to raise funds. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986).

<sup>51</sup>*See*, *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976); *Pring v. Penthouse Int'l.*, 7 MEDIA L. REP. (BNA) 1101 (D. Wyo. 1981), *rev'd*, 695 F.2d 438 (10th Cir. 1982), *cert. denied* 103 S. Ct. 3112 (1983); *Arno v. Stewart*, 245 Cal. App. 2d 955, 54 Cal. Rptr. 392 (1966); *Ross v. Burns*, 612 F.2d 217 (6th Cir. 1980). In fact, since the *Gertz* decision, most states have adopted a lesser standard of negligence to determine fault when a private individual is allegedly defamed. 11 MEDIA L. REP. (BNA) § 1.17, 1-52, 1-53 (1982).

<sup>52</sup>*Falwell*, 805 F.2d at 488.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*, *see supra note 45*, which discusses the purpose (intent) of fictional or lampooning statements; *Garrison*, *supra note 26*, at 73-74.

<sup>55</sup>*Id.* Also *see Gertz*, 418 U.S. at 327. Punitive damages for injuries were presumed. In many states as the level of outrageousness increases there is a corresponding decrease in the severity requirement. *See generally* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

<sup>56</sup>*Ault v. Hustler Magazine, Inc.*, No. 86-381, (U.S.D.C. Ore. 1986), 13 MEDIA L. REP. (BNA) 1660 (1986). Here the court referred to *Flynn v. Higham*, 149 Cal. App. 3d 677, 197 Cal. Rptr. 145 (1983); and *Fischer v. Maloney*, 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978). These courts refused to allow the alternate claims.

<sup>57</sup>*Ault*, 13 MEDIA L. REP. (BNA) at 1662-63.

<sup>58</sup>*Id.* at 1658. The court gave a detailed opinion as to each claim. *Id.*

<sup>59</sup>*Id.* at 1661.

<sup>60</sup>*Id.*, at 1662.

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It is elementary that, although the gravamen of a defamation action is injury to reputation, libel [sic] also visits upon a plaintiff humiliation, mortification and emotional distress. In circumstances where a plaintiff states a case of libel [sic], such personal distress is a matter which may be taken into account in determining the amount of damages to which the plaintiff is entitled, but it does not give rise to an independent cause of action on the theory of a separate tort. To accede to the contentions of the plaintiff in this case would be, in the words of Prosser, a step toward "swallowing up and engulfing the whole law of defamation."<sup>61</sup>

Another court described the social dilemma of allowing multiple pleadings in that too broad of a scope of defamation "may curtail 'uninhibited, robust and wide-open' discussion as much as may too low a standard of proof."<sup>62</sup> The constitutional standards of proof, levels of fault, defenses and the similarity of compensable injuries highlight the dangerous impracticality of substituting or converging alternate tort claims in a defamation law suit.<sup>63</sup>

Regarding damages, in a traditional defamation action, a plaintiff must first prove reputational harm: any claim for mental anguish is considered parasitic and only after the former is proven is the latter compensated.<sup>64</sup> Mental anguish is the heart of damages under intentional infliction of emotional distress.<sup>65</sup> Likewise, although the fundamental difference between invasion of privacy and defamation claims is that the former concerns a person's own peace of mind rather than one's reputation, damages regarding the former also take into account mental suffering.<sup>66</sup> An award of damages under invasion of privacy can preclude recovery under libel as well due to the similarity of protected interests.<sup>67</sup> The *Falwell* decision overlooks this reasoning and could very well lead to the destruction of defamation law.

When the media is sued for publishing a fictional portrayal of persons, the courts should limit the cause of action to one solely in defamation. This way, the media can respect the historical limitations on their rights to free speech and press when they choose to lampoon public figures. Additionally, it allows the courts to award damages to persons injured by the media's publication of untrue facts, rather than the coveted protected expressions of opinion. The use of the reasonable reader test insures that the jury can make the distinction be-

<sup>61</sup>*Id.* See *Grimes v. Carter*, 241 Cal. App. 2d 694, 50 Cal. Rptr. 808 (1966). The *Grimes* court reasoned that the substitution of claims would render defendant's affirmative defenses (i.e. justified by truth) inoperable. *Id.* at 702, 50 Cal. Rptr. at 816.

<sup>62</sup>*Southard v. Forbes, Inc.*, 588 F.2d 140 (5th Cir. 1979), *cert. denied*, 444 U.S. 832 (1980).

<sup>63</sup>*Ault*, 13 MEDIA L. REP. (BNA) at 1662.

<sup>64</sup>*Gobin v. Globe Publishing Co.*, 232 Kan. 1, 6, 649 P.2d 1239, 1244 (1982).

<sup>65</sup>*Angelotta v. ABC*, (D.C.N.D. Ohio, 1985), 12 MEDIA L. REP. (BNA) 1491.

<sup>66</sup>*Warren & Brandeis, The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890). This article is considered as the original framework for the invasion of privacy cause of action.

<sup>67</sup>*Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 252 (1984).

tween fact and opinion in deciding whether a person has been harmed.<sup>68</sup>

### CONCLUSION

This note has hopefully highlighted evidence that Wade and Mead correctly identified the trend toward plaintiffs creatively using the three-pronged pleadings format to recover damages where none were available in libel.<sup>69</sup> The similarity between privacy and libel actions is demonstrated by the use of the reasonable reader test. No such test is used under an intentional infliction of emotional distress claim. However, Justice Wilkinson's dissenting opinion in *Falwell* revealed the danger such a trend poses to "society's interest in uninhibited, robust and wide open debate" when applied to fictional publications about public officials or figures which "may include vehement, caustic, and sometimes unpleasantly sharp attacks."<sup>70</sup> This decision appears to undermine the First Amendment's<sup>71</sup> purposes and disrupts the historical balance between an individual's right to a good reputation and the freedoms of speech and press enjoyed by the media.<sup>72</sup> One can easily imagine the chilling effect (self-censorship) this decision will have on future publishers' and editors' attempts to criticize, comment upon or lampoon public persons.

Additionally, the *Falwell* decision, which carries the threat of liability for publishing non-libelous material, appears to be in conflict with two recently decided Supreme Court rulings.<sup>73</sup> These decisions appear to make it more difficult for plaintiffs to sue the media for defamation by requiring strict adherence to high standards of proof of falsity or malice.<sup>74</sup> Unfortunately, before the Supreme Court is asked to address the issues raised in the *Falwell* court's application of the multiple pleading format, the media is well advised to beware of the risks of lampooning public persons.

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<sup>68</sup>See generally, *Franklin v. Friedman*, (N.Y. Sup. Ct. 1985), 12 MEDIA L. REP. (BNA) 1146.

<sup>69</sup>Mead, *supra* note 5, at 24.

<sup>70</sup>*Falwell*, 805 F.2d at 488-89 (citing *Gertz*, 418 U.S. at 340).

<sup>71</sup>The First Amendment to the U.S. CONSTITUTION provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ." U.S. CONST. amend. I.

<sup>72</sup>See generally *Alstyne*, *supra* note 4.

<sup>73</sup>ABA Journal, *supra* note 11, at 81-82. See *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2508 (1986) (the court held that a public figure must prove actual malice with convincing clarity); and *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986). The Court held that a private individual must prove that libelous statements were false. *Id.*

<sup>74</sup>ABA Journal, *supra* note 11, at 82. See also, *Falwell*, 805 F.2d at 488.