Washington and Lee Law Review

Volume 47 | Issue 1 Article 2

Winter 1-1-1990

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WASHINGTON AND LEE
LAW REVIEW

Volume 47 Winter 1990 Number 1

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THE MODEL COMMUNICATIVE TORTS ACT

TABLE OF CONTENTS

PREFATORY NOTE

The Model Communicative Torts Act (the Act) represents an effort to codify and unify the diverse sources of tort liability arising from communication. The Act defines communicative torts as those sources of liability arising from communication including defamation, invasion of privacy, appropriation, product disparagement, fraud, incitement, harassment, breach of confidence, and other allied causes of action. The current law of communicative torts represents a patchwork of common-law doctrines. The rules of liability vary widely from jurisdiction to jurisdiction and subtle yet often inconsistent distinctions exist within the evolving common-law doctrines. The doctrines of limitation and privilege stemming from the first amendment add to the difficulties of interpretation and prediction. Beginning with *New York Times v. Sullivan*, 376 U.S. 254 (1964), constitutional limitations have required a restriking of the balance in many of the underlying torts, often fundamentally changing their character. While the constitutional limitations have focused largely on the tort of defamation, concerns about the application of constitutional limitations to the full range of communicative torts are now prominent as challenges in the fields of negligence, emotional distress, product disparagement, and fraud are taking place.

The purpose of the Model Communicative Torts Act is threefold. First, the Act attempts to consolidate the sources of tort liability to limit the expansion of the various communicative torts and to clarify the underlying policies reflected in each tort. Second, the Act attempts to strike a balance within the torts themselves to reflect the needed attention to first amendment concerns and at the same time to obviate the unsettling impact of constitutional privileges that courts have superimposed upon existing sources of tort liability. In other words, the Act incorporates first amendment concerns directly into the definitions of the torts themselves and the remedial provisions. Third, the Model Act establishes procedures and remedies that are tailored to the interest that each tort seeks to protect and that reflect the

realistic expectations of the parties. Thus, a central feature of the Act is the set of provisions that limits available damages and encourages corrections and retractions.

In these and other respects, the Act attempts to vindicate the legitimate interests of those who have been wronged, to avoid duplicative and overlapping sources of liability, to establish a more straightforward procedural system for adjudicating claims, and to protect individual and press interests in the publication of useful information that is free from unnecessary and inhibiting liability.

Article 1

Definitions

Section 1-101. Definitions.

As used in this [Act]:

1. ***Communication*** **means the intentional conveyance of information to a person.**
2. ***Customarily Confidential Relationship*** **means a nonpersonal relationship between two persons in which professional, business, or customary practice establishes an expectation that information revealed during the course of the relationship will not be disclosed to persons outside the relationship.**
3. ***Imminent*** **means impending and likely to occur before preventive measures can be taken.**
4. ***Improper Means*** **means any method of acquiring confidential information, except (1) acquiring information as a direct consequence of another person's breach of confidence; (2) acquiring information as a result of another person's negligent maintenance of confidential information; (3) acquiring information in accordance with an express agreement to receive and hold the information in confidence; or (4) acquiring information in the course of a customarily confidential relationship.**
5. ***Intimate Fact*** **means a personal fact about an individual, publication of which is reasonably within the control of the individual.**
6. ***Lawless Conduct*** **means conduct defined as a [felony] [serious misdemeanor] under the laws of this State.**
7. ***Likeness*** **means any reasonably identifiable representation of an individual.**
8. ***Misleading*** **means conveying a false impression of fact.**
9. ***Misrepresentation*** **means a communication, whether by statement, act, or omission, that amounts to an assertion substantially at variance with the truth.**
10. ***Newsworthy*** **means a matter of public concern. If not itself newsworthy, a fact within a publication is newsworthy if it is integral to a matter of public concern, such that the omission of the fact would substantially mislead or confuse the public as to the matter of public concern.**

11. ***Nonpersonal Relationship*** **means a relationship that is substantially based on business or professional ties.**
12. ***Person*** **means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, governmental subdivision or agency, or any other legal or commercial entity.**
13. ***Photograph*** **means any photograph or photographic reproduction, still or moving, or any videotape or live transmission, of any individual, so that the individual is readily identifiable.**
14. ***Publication*** **means a communication to a person other than the person claiming to be injured by the communication.**
15. ***Public Record*** **means any governmental information that is lawfully open to general public inspection.**
16. ***Reputation*** **means the perception of a person reasonably held by others in a community, as evidenced by the person's social, commercial, professional, or political relationships within the community.**

Comment to Section 1-101

The definition of misrepresentation in subsection 1-101(9) is intended to give courts wide latitude in applying the term. When deciding whether a communication constitutes a misrepresentation, courts should place greater emphasis on the substance of the communication at issue rather than on form. Subsection 1-101(9) incorporates the definition of communication contained in subsection 1-101(1). An "intentional conveyance of information" may be any type of communication. A communication may be a statement, act, or an omission to act.

Subsection 1-101(9) includes all false communications and avoids the necessity of distinguishing fact from opinion. Instead, the subsection recognizes that courts have imposed liability on statements that fall under the classic definition of opinion and also justifies the imposition of liability on other grounds. *See Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918) (stating, albeit in dicta, rule that person may be liable for statements of opinion if recipient does not stand "on an equality").

Subsection 1-101(9) also includes some statements of judgment as misrepresentations. To be actionable as a misrepresentation, a communication that refers to a judgment must be based on facts unknown to the recipient and falsely must imply that the person making the communication knows of facts that justify the judgment. A communication falsely implies a person's knowledge if the communication implies that the person making the communication knows of no facts inconsistent with the judgment or knows of facts that sufficiently justify the judgment and the person knows of no such facts. *See* RESTATEMENT (SECOND) OF TORTS § 539 (1977) (dealing with opinions that imply justifying facts). A judgment is based on facts unknown to the recipient if the recipient reasonably believes that the person possesses, or if the person actually possesses, greater knowledge or access to information regarding the judgment and the recipient reasonably cannot

acquire knowledge or information to render the person's judgment unreliable. *See Mears v. Accomac Banking Co.*, 160 Va. 311, 168 S.E. 740 (1933); *see also Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918) (explaining that law should treat differently opinion between chemist and layman and opinion between two chemists).

Article 2

Civil Liability in Tort Arising from Communication

Section 2-101. General Rule of Liability.

There shall be no liability in tort for injuries caused by communication except as provided in this [Act]; however, this [Act] shall not affect:

(a) liability explicitly imposed notwithstanding this [Act] by a statute or regulation of this State;

(b) liability for professional malpractice;

(c) liability for conduct that is related to or part of a communication to the extent that liability would apply to the conduct absent the communication;

(d) liability under the consumer protection laws of this State; and

(e) liability for copyright, trademark, or trade name infringement.

Comment to Section 2-101

Article 2 is the central provision of the Act. The Act's basic purpose is to supplant existing and varied sources of tort liability based on communication with a limited number of causes of action. Existing tort liability, whether of common-law or statutory origin, is plagued with problems of inconsistency, uncertainty, unknown potential for liability, and largely unexplored constitutional difficulties.

In light of the Act's overriding purpose of replacing existing law with a more organized framework of tort liability, Section 2-101 provides that actions in tort for injury based on or resulting from a communication must be brought under the Act, with several stated exceptions. Section 2-101 supplants existing causes of action that arise from communication including but not limited to libel, privacy, intrusion upon seclusion, fraudulent misrepresentation, product disparagement, trade libel, the right of publicity, incitement, and breach of confidentiality. The Act does not affect causes of action based on communication that are based on theories of liability other than tort such as contract.

Section 2-101 contains five exceptions to the general rule that all communicative tort liability must arise under the Act. Subsection 2-101(a) provides that additional causes of action arising from communication are not supplanted if they are created by a statute or regulation that expressly authorizes the action notwithstanding the Act. Common-law, statutory, or

regulatory liability, therefore, cannot survive the Act by default. To survive the Act, the legislature specifically must provide that the statute or regulation imposing tort liability based on communication is unaffected by the Act.

Subsection 2-101(b) provides that the Act does not supplant causes of action for professional malpractice under the laws of a state. The Act reflects the judgment that the interests served by liability for malpractice and professional misconduct are sufficiently discreet and different from those common to other forms of tort liability that they should be left unaffected.

Subsection 2-101(c) provides that conduct-based causes of action in tort, which may involve communication but in which liability is independent of communication, should not be supplanted by the Act. Many communications have potentially actionable conduct associated with them. For example, if X paints a statement on Y's house without Y's permission, X has made a communication and has damaged Y's property. X's liability for the communication depends on the availability of relief under the Act. Even if relief is not available under the Act, however, liability for the property damage would remain available if provided by the laws of a state. In such cases the Act forecloses liability for the communication but does not extinguish liability for conduct accompanying a communication if the conduct, absent the communication, is actionable under the laws of a state.

Subsection 2-101(d) provides that the Act does not affect liability pursuant to the consumer protection laws of a state. Many state consumer protection laws are designed expressly to protect the public interest rather than any individual's economic well-being. ALA. CODE § 8-19-2 (1984); W. VA. CODE § 46A-6-101 (1988); *Lightfoot v. MacDonald*, 86 Wash. 2d 331, 544 P.2d 88 (1976) (holding that purpose of Washington consumer protection law is to protect public interest). Although consumer protection laws often have the effect of protecting an individual's interests, the primary interest protected by consumer protection laws is distinct from the interests identified in the Act.

Subsection 2-101(e) provides that the Act does not affect liability pursuant to state copyright or trademark law. Although most copyright and trademark law is federal and, therefore, unaffected by the Act, the Act does not supplant the small body of state copyright or trademark law.

Article 3

Harm to Reputation

Section 3-101. Liability for Injury to Reputation.

A person who publishes, or causes to be published, a false or misleading communication that refers to another person and injures that person's reputation is subject to liability to that person either in an action for declaratory judgment pursuant to Section 9-107 or special damages pursuant to Section 9-101.

(a) In an action for declaratory judgment, injury to reputation is presumed.

(b) A person seeking special damages must prove injury to reputation by clear and convincing evidence.

Comment to Section 3-101

Article 3 provides a cause of action for protection of the interest in reputation, both individual and corporate. Section 3-101 is the exclusive basis upon which reputational interests can be vindicated in communicative tort law (although other provisions of the Act protect related interests) because the Act supplants the libel and slander torts as well as the action for false light invasion of privacy.

Article 3 is intended to provide a clearer and more finely balanced accommodation of both the plaintiff's and defendant's interests than currently exists. "Reputation" is defined as freedom from communications that are false or misleading in factual terms, that are made to a third party, that injure reputation, and that refer to the person injured.

Section 3-101 permits recovery for injurious communication that is false or misleading. In both cases false fact must be established. *See* Section 1-101(8). A misleading communication is one in which the communication on its face may be true, but the circumstances or context in which the communication is made creates a false impression of fact.

Section 3-101 maintains the distinction between fact and opinion, although the Section does not require a court to make explicitly such a distinction. Because only false communication or communication that because of its context conveys a false impression of fact is actionable, communication that is opinion is protected. The "opinion" issue, therefore, does not depend on a complex and abstract definition of opinion. The "opinion" issue, rather, depends on a practical evidentiary determination of whether the statement was *understood* as asserting fact or could not be reasonably understood notwithstanding the statement's linguistic formulation.

Current libel law does not sufficiently protect reputational interests. The required showing of fault places a nearly insurmountable burden upon injured persons who must intrude into a publisher's newsgathering procedures to prove fault. The emphasis on fault permits recovery only by injured persons who can prove fault and leaves injured persons who can prove only falsity and injury without remedy. Moreover, the emphasis placed on the status of the plaintiff in libel actions and the classification of plaintiffs as "private persons," "public figures," and "public officials," with the attendant increasing burden of proof of fault, limits the importance of reputational injury and shifts the focus of libel actions from reputational injury to the status of the plaintiff.

Section 3-101 remedies these and other existing problems of libel law and restrikes the balance between reputational interests and free speech interests. A central element of the restruck balance is the remedy available

to injured persons. A principal remedy is declaratory judgment. In an action for declaratory judgment, the injured person is required only to prove that the communication was false or misleading. Injury is presumed. A declaratory judgment will provide an expedient and inexpensive remedy by correcting a false or misleading statement, thus serving the needs of most injured persons who wish merely to clear their names.

Persons who have suffered pecuniary loss may seek special damages as an alternative to a declaratory judgment. In an action for special damages, an injured person must prove that the communication was false or misleading by a preponderance of the evidence. Injury to reputation is not presumed. An injured person specifically must plead and present evidence showing the scope and severity of the injury and must prove injury to reputation by clear and convincing evidence. The requirement that injured persons prove reputational injury will diminish the likelihood of frivolous suits and afford the press protection. Further, changing the focus of the action from the fault of the publisher to the injury suffered and requiring proof of injury before allowing compensation better comports with the legitimate reputational interests that the injured party wants vindicated.

Finally, an injured person may request a retraction pursuant to Section 9-110. If the party who made the communication publishes a sufficient retraction within 10 days of the allegedly injurious communication, the retraction constitutes a complete defense to liability. The injured party then is barred from any other relief applicable to the claim.

Article 3 also protects the defendant's interests. Because fault is not an element of either the declaratory judgment or the special damage remedy, a plaintiff is not required to intrude into the defendant's newsgathering procedures. The declaratory judgment process is faster and less expensive than the current litigation process. Plaintiffs are limited to a choice between an action for declaratory judgment and an action for special damages. Because special damages are limited to actual pecuniary loss, defendants no longer need to fear excessive jury awards that do not accurately reflect the plaintiff's reputational injury.

While Section 3-101, along with the declaratory judgment, special damage, and retraction provisions of Article 9, strikes a different balance from that reflected in current libel law, there is good reason to believe that it is constitutional and meets the United States Supreme Court's concerns expressed in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny. In *Sullivan* the Supreme Court determined that public official plaintiffs must demonstrate that the publisher knew that the defamatory communication was false or published the statement in reckless disregard of its truth or falsity. The Court's rationale for developing the actual malice requirement lay in the chilling effect that large monetary awards could have on the press and rested on a common-law libel tort that presumed falsity, contained no substantial requirement that injury be proved, and left the jury full discretion in awarding damages. *Sullivan*, 376 U.S. at 277.

Although a showing of actual malice is not required under Section 3-101, other features of the reputation tort serve to strike a constitutional

balance that meets the Court's concern in *Sullivan*. First, in an action for special damages under Section 3-101, injury to reputation is not presumed. To recover special damages, a plaintiff must plead and prove injury to reputation by clear and convincing evidence. Second, a plaintiff must prove that the statement was false or misleading by a preponderance of the evidence. Third, damages available to successful plaintiffs are limited to proven special damages. Fourth, although reputational damage is presumed in an action for declaratory judgment, the presumption of reputational damage is not absolute. Defendants may proffer evidence demonstrating that a plaintiff's reputation was not injured. Permitting the defendant to rebut the presumption of reputational injury will help to ensure that plaintiffs will not be granted declaratory judgment if the plaintiffs have sustained no reputational injury. Finally, the publisher may retract the offending statement, and thus may avoid completely a cause of action or limit damages if the retraction is issued in accordance with Section 9-110. Requiring proof of reputational injury and limiting the available remedies to declaratory judgment or special damages comports with the constitutional concerns raised by *Sullivan* and its progeny.

It also is proper for corporations or other entities to bring suit under this Section. A corporation suffers reputational injury if a false communication impugns the corporation's business practices or ethics generally, causing others to stop doing business with that corporation. If a false communication injures the corporation's commercial interest in a specific product, the corporation has an action under Section 5-102 of this Act.

Section 3-102. Exceptions to Liability.

In addition to the privileges contained in Section 8-107, a publisher is not liable under Section 3-101 if:

- **(a) the publisher is the individual's current or former employer who publishes a communication concerning the work record or performance of the individual, reasonably believing the communication to be true, and publishes the communication only:**
  - **(i) to a person requesting reference information as the individual's current employer, prospective employer, or as an educational institution to which the individual has made application;**
  - **(ii) during labor arbitration or collective bargaining negotiation for the individual's work place; or**
  - **(iii) at the request of a governmental official or agency officially charged with acting in the public interest;**
- **(b) the publisher is an educational institution that the individual has attended or is attending and the institution publishes the communication, reasonably believing the communication to be true, and publishes the communication only under circumstances provided in subsections (a)(i) and (a)(iii); or**
- **(c) the publication is a service letter pursuant to Section 3-103 and the employee has not informed the employer of any inaccuracy in the letter.**

Comment to Section 3-102

Section 3-102 defines specific circumstances in which a publisher is not liable for communications harming an individual's reputation even if the communication is false or misleading. The exception to liability is limited narrowly to the employment setting, where a dramatic increase of frequently nonmeritorious libel claims has arisen (often as a substitute theory of recovery to wrongful discharge) and where society has an interest in the free exchange of certain information even though it may contain inaccuracies. Under these circumstances, a publisher might consider even the limited damages of Section 3-101 to be a prohibitive cost when compared to the benefits of making the communication, therefore choosing not to provide the information. Section 3-102 encourages the communications by removing the threat of liability for good faith communications. The exception, or privilege, in Section 3-102 applies only as long as the publisher reasonably believes the communication's accuracy and only applies to claims of harm to reputation.

Subsection 3-102(a) protects the release of information commonly known as "references." Under the subsection employers are not liable for communicating about a current or former employee's work performance. This protection also applies to the employer's agents acting within the scope of their employment, and in this respect corresponds to the scope of the existing common-law qualified privilege. *Cashio v. Holt*, 425 So. 2d 820 (La. Ct. App. 1982). Subsection (a), however, requires the employer to establish a reasonable belief in the information. In contrast, at common law the plaintiff bore the burden of proof and had to show an abuse of privilege by proving malice. *Circus Hotels v. Witherspoon*, 99 Nev. 56, 657 P.2d 101 (1983).

Subsection 3-102(a) limits the employer's protection further by specifying only three circumstances in which liability is excluded. Subsection 3-102(a)(i) protects an employer's communication only if the employer is responding to a request for information from the individual's current employer, to someone interested in hiring the individual, or to a school to which the individual has applied for admission. The common-law privilege applied more broadly to any communication between employers having a common legitimate interest regardless of who initiated the exchange. *Fisk v. Warmack*, 486 So. 2d 203 (La. Ct. App. 1986). Protecting only communications resulting from a request for information eliminates the need to inquire into the publisher's motives for making the communication.

Subsection 3-102(a)(ii) protects an employer's statements made in the context of collective bargaining negotiations and labor disputes if the employer reasonably believes the information. This approach departs from the common-law rule, which treated labor negotiations as the equivalent of official proceedings, with the result that the employer's statements were entitled to an absolute privilege. *Sturdivant v. Seaboard Service Systems, Ltd.*, 459 A.2d 1058 (D.C. 1983). The change is intended to protect the employee who often has to depend on his union or others to represent his

rights without any ability to respond to the employer's comments. Under subsection (a)(ii) the employer may reveal information without a request from a third party in order to provide the parties access to information that is relevant to an informed resolution of the proceedings.

Subsection 3-102(a)(iii) deals with lawful requests from public agencies and officials. Society heavily regulates the work place, and subsection (a)(iii) is drawn broadly so that an employer reasonably can reply to requests from any possible governmental unit or official. The employer reasonably must believe that the requesting agency or official is acting within its authority.

Subsection 3-102(b) protects the release of information by educational institutions, but applies only to requests from current or prospective employers or governmental units. Under those circumstances the communications represent the same interest as the employer's statements covered in subsection (a).

Subsection 3-102(c) protects the employer's service statements made at the request of the employee. Under Section 3-103 an employer must make certain work record information available to the employee. The employer is not liable for harm arising out of the employee's release of the information to other persons if the employer reasonably believed the statement to be true and the employer has not been notified of any errors.

Section 3-103. Statement of Service.

A compensated employee who has worked for an employer in this State for at least ninety days shall be entitled to a statement of service from the employer when the employment ends. The employee must request the statement by registered mail within sixty days of the end of the employment. The employer or an agent authorized by the employer then shall have forty-five days to issue a letter to the employee signed by the employer or the agent that states the duration of the employment, the positions the employee held during the time, a brief description of the type and nature of work the employee performed, and the true cause of the termination of employment.

Comment to Section 3-103

Section 3-103 provides a former employer with written information that the employee may need in the future. Few states require an employer to provide employees with job records. *See* MO. ANN. STAT. § 290.140 (Vernon Supp. 1988). Section 3-103 gives the employee the right to have a statement of the employee's work record if the employee has worked for the requisite period of time and makes a timely request. Providing such a statement may limit the number of records an employer chooses to keep and provides a safe harbor for future disclosures by the employer. Section 3-103 requires the employer to state the reasons the employee left the job but does not interfere with the employer's right to discharge an employee at will. *Brown v. Southland Corp.*, 620 F. Supp. 1495 (D. Mo. 1985). The letter does not represent an opinion of the employer or prevent the employer from making

future references about an employee if the employer chooses to do so.

Article 4

Invasiveness

Section 4-101. Publication of Intimate Facts.

A person who unreasonably publishes an intimate fact about an individual is subject to liability to the individual if that individual has acted in a manner consistent with his or her intent to maintain control over the fact, unless:

- **(a) the fact is contained in a public record of a legislative proceeding or a judicial proceeding to which the government is a party;**
- **(b) the fact is contained in a public record other than that described in (a) and is newsworthy;**
- **(c) the interest in the publication of a newsworthy intimate fact substantially outweighs the interest in preserving the individual's control of the intimate fact; or**
- **(d) the publication is otherwise privileged under Section 8-107.**

Comment to Section 4-101

Protected Interests. Section 4-101 has as its major purpose protection of an individual's identity and psychological stability. *See* Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890). The fostering of self-identity and psychological stability requires that an individual have control over certain intimate facts about the individual. Unauthorized disclosure of intimate facts about an individual results in the loss of control of those facts and emotional harm to the individual. Therefore, the control of intimate facts is an essential concept of this Article.

Individuals, however, often voluntarily disclose intimate facts because disclosure to family members and friends under certain circumstances also is necessary to self-identity. Likewise, involuntary disclosures often are necessary to the functioning of a well-ordered society and may not result in complete loss of control over the facts. In order to strike a balance between individual control and the equally important need for disclosure, Section 4-101 only limits disclosure of intimate facts beyond the persons or social unit in which the disclosure is reasonable.

Changes from Previous Law. The invasiveness tort established in Section 4-101 is derived from previous privacy law, namely, the tort of public disclosure of private facts. Under the common law, attempts to strike a proper balance between an individual's right to privacy and the public's right to know proved difficult. *See* Woito and McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 197 (1979). While most jurisdictions recognized a claim for public disclosure of private facts, courts have been

reluctant to hold that a right to remain free from offensive publicity of private facts overrode the press' right to inform and the public's right to know. *See* Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291, 293 (1983).

To establish a prima facie case under the public disclosure tort, a plaintiff has to prove the publicity of private facts that were highly offensive to a reasonable person and not of legitimate concern to the public. RESTATEMENT (SECOND) OF TORTS § 652D (1977). The traditional protected interest under the public disclosure tort was reputation and freedom from emotional harm. *See* Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). Commentators also found, however, that the public disclosure tort protected the dignity and integrity of the individual. *See* Bloustein, *Privacy—An Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 978 (1964). The Act severs the reputational interest (see Article 3) from the public disclosure tort and redefines the dignity and integrity interests to include the fostering of self-identity and psychological stability through the *control* of intimate facts about oneself.

The traditional public disclosure tort required that the private fact be publicized. RESTATEMENT (SECOND) OF TORTS § 652D comment a (1977); *see Tureen v. Equifax, Inc.* 571 F.2d 411 (8th Cir. 1978). In contrast, the tort of invasiveness has no broad publicity requirement. Instead, the invasiveness tort requires only that the intimate fact be communicated to a third party. This change was made because loss of control and resulting harm to self-identity may occur even in disclosure to a single person or small group. Notwithstanding the elimination of the publicity element, however, the invasiveness tort does incorporate a form of offensiveness inquiry in the method of determination of an intimate fact. If a fact is deemed intimate under the invasiveness tort, then the disclosure of the intimate fact is by definition offensive (see subsection 1-101(5)).

Maintaining Control over the Fact. While the disclosure of an intimate fact may be invasive, the disclosure may not be worthy of protection if the individual has not tried to keep the disclosed fact private. To maintain a cause of action under Section 4-101, an individual must have acted consistently with an intent to maintain control over the disclosed fact prior to publication. For example, silence ordinarily would demonstrate behavior that is consistent with an intent to maintain control over an intimate fact. Likewise, an individual who writes intimate facts in a diary and keeps the diary in a bedside table has acted consistently with the intent to maintain control over the intimate facts contained in the diary. On the other hand, leaving the diary in the plain view of others, intentionally or negligently, may be inconsistent with an intent to maintain control over the intimate facts in the diary. Likewise, someone engaged in an extramarital affair who flaunts that fact to the public is not acting consistently with an intent to keep the fact of the affair private.

An individual may act consistently with his or her intent to control facts even in an involuntary disclosure. An involuntary disclosure is one in which an individual is compelled to disclose certain facts about him or

herself to another person, often to a governmental entity (*e.g.*, filing a tax return). Compelled disclosure will not negate an otherwise sufficient showing of an intent to maintain control over intimate facts. Similarly, disclosure of intimate facts to family members or intimate friends does not necessarily demonstrate inconsistent behavior. An individual may still maintain a cause of action against a friend to whom the individual has disclosed intimate facts if the friend unreasonably discloses the intimate facts to a stranger or the media.

The analysis used to determine whether behavior is consistent with an intent to maintain control over intimate facts about himself or herself is analogous to the assessment of an individual's reasonable expectation of privacy in the criminal law context under the fourth amendment. What an individual seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. For example, in *Katz v. United States*, 389 U.S. 347 (1967), the United States Supreme Court held that an individual has a reasonable expectation of privacy in the words the individual utters in a public telephone booth. Although the telephone booth itself was public, the Supreme Court reasoned in *Katz* that the user still had a reasonable expectation that the conversation was private. Section 4-101 adopts this form of analysis in that an individual acts consistently with an intent to maintain control over an intimate fact if the individual has a reasonable expectation of privacy with regard to the intimate fact.

Determining Intimate Fact. For a cause of action to exist under this Section, an initial determination must be made as to whether the fact is an intimate fact as defined in subsection 1-101(5). The trier of fact is to apply a standard of reasonableness to determine whether the publication of a personal fact ordinarily is considered to lie within the control of the individual. If the trier of fact finds that a personal fact is reasonably within the control of the individual (the plaintiff), then the fact is an intimate fact as defined in this Section. The plaintiff and the defendant may offer extrinsic evidence as to whether the fact reasonably can be considered to lie within the control of the individual.

Reasonable Publication. While the manner of disclosure of the fact or any other circumstance concerning the fact is not relevant to the determination of whether the fact is intimate, the determination of whether an individual has lost a claim to control over the fact depends on the circumstances of any publication, as well as the plaintiff's conduct with respect to the fact. Section 4-101 requires that the publication be unreasonable. The unreasonable publication requirement ensures that publications of intimate facts that are necessary or beneficial are not actionable under the Section. An unreasonable publication is a publication that results in a significant loss of control over an intimate fact. The significance of an individual's loss of control is measured by the persons to whom the publication is made. The United States Supreme Court has recognized the importance of a related interest in control over information in the privacy setting. *See United States Dept. of Justice v. Reporter's Comm. for Freedom of the Press*, 109 S. Ct. 1468 (1989). Supporting the unreasonable disclosure

requirement is the recognition that disclosure among family or friends is just as necessary to developing an individual's self-identity as the need to control intimate facts in relation to broader disclosures. However, a disclosure to a person outside an individual's circle of family and friends may be unreasonable because it represents a more significant loss of control over the information. For example, if an individual disclosed private facts to a close friend and that friend in turn told a newspaper the intimate fact, then that disclosure would be unreasonable. In addition, any disclosure of that information by the newspaper also would be unreasonable, subject to any applicable privileges.

Public Records. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Supreme Court recognized that an individual's right to privacy is outweighed by the public benefit performed by the press reporting the operations of government through the use of public records. However, the *Cox* Court narrowed its holding only to public records that are maintained in connection with a public prosecution and are open to public inspection. Accordingly, Section 4-101 protects information found in two types of public records (as defined in Section 1-101). First, publication of information in the *Cox* type of public record or a record of a legislative proceeding described in subsection 4-101(a) is not actionable. Second, publication of information in any other public record described in subsection 4-101(b) is actionable to the extent that the intimate fact is not newsworthy and to the extent that other privileges found in Section 8-107 are not applicable.

First amendment interests are protected adequately by affording complete protection from liability if a fact is contained in a public record of a legislative proceeding or a judicial proceeding in which the government is a party and by balancing first amendment interests with the individual's right to control private information about him or herself in other types of public records. Even though privacy interests fade when information appears in a public record, those interests should not disappear completely, as the fact of inclusion in a public record, standing alone, does not necessarily result in the loss of control of the information because public records are not always readily accessible.

The public record exception applies to any information contained in a public record regardless of where the publisher obtained the information. For example, if a publisher obtained information from a source but later found that the information was part of a public record at the time of disclosure, then the public record defense applies. However, information that becomes part of a public record after disclosure does not affect liability for prior publication.

The fair and accurate report privilege in Section 8-107 directly affects the public record exception under Section 4-101. Under the fair and accurate report privilege, there is no liability for a communication if the communication is part of a report of a legislative or judicial proceeding and the report is fair and accurate. The fair and accurate report privilege under the Restatement (Second) of Torts requires that the publication be a report of "an official action or proceeding or of a meeting open to the public that

deals with a matter of public concern" and that the report is "accurate and complete or a fair abridgment of the occurrence reported." RESTATEMENT (SECOND) OF TORTS § 611 (1977). The fair and accurate report privilege under the Act rejects the Restatement's requirement that the proceeding deal with a matter of public concern. Instead, the Act recognizes judicial and legislative proceedings as newsworthy per se, at least to the extent that they are covered by the fair and accurate report privilege.

Because legislative proceedings and judicial proceedings to which the government is a party as well as newsworthy facts in a public record are already nonactionable under subsections 4-101(a) and (b), the fair and accurate report privilege affects most directly the case of nonnewsworthy intimate facts in a judicial proceeding to which the government is not a party (generally civil actions). In these cases, the publication of intimate facts is privileged to the extent that the publication is fair and accurate.*

Newsworthiness. At common law, newsworthiness constituted a defense to the public disclosure of private facts tort. The newsworthiness defense afforded protection to the public's right to be informed on matters of legitimate public concern. The scope of newsworthiness depended in part on the status of the plaintiff as well as the subject matter of the publication. *See* W. PROSSER AND W. KEETON, PROSSER AND KEETON ON TORTS § 117,

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* After the drafting of the Act was complete, the United States Supreme court addressed many of this Article's issues in *The Florida Star v. B.J.F.*, 109 S. Ct. 2603 (1989). In *Florida Star* the Supreme Court confronted a Florida state statute prohibiting the printing, publishing, or broadcasting by mass communication of the name of a sexual offense victim. *The Florida Star*, a city-wide newspaper, published a rape victim's name in violation of the Florida statute after the newspaper lawfully obtained the victim's name in the press room of the Sheriff's office. The Supreme Court held that imposing damages on *The Florida Star* for publishing the victim's name violated the first amendment. The Supreme Court reasoned that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish a publication of the information, absent a need to further a state interest of the highest order." *Florida Star*, 109 S. Ct. at 2609 (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979)). The Supreme Court noted further that the holding in *Florida Star* was limited. The *Florida Star* Court expressly stated that truthful publication is not automatically constitutionally protected nor was the Court holding that there is "no zone of personal privacy within which the State may protect the individual from intrusion by the press." *Florida Star*, 109 S. Ct. at 2613.

In declining to rule out the possibility of recovery in a lawsuit based on the public disclosure tort, the *Florida Star* Court observed that the state interests in that case were "highly significant." *Florida Star*, 109 S. Ct. at 2611. Nevertheless, the plaintiff's recovery was barred because the state's tort system for such cases was not "narrowly tailored." *Id.* at 2613. Article 4 of the Act proposes a newly defined cause of action that likely meets the Court's requirements. The protected interest is the fostering and preservation of self-identity and psychological stability through the control of intimate facts about oneself. The action for "invasive" publication may be considered a "narrowly tailored means of safeguarding anonymity," *id.* at 2611, in its refinement of the public disclosure tort's prima facie case, in the public domain privileges of subsections 4-101(a) and (b), and in its recalibration of available damages under subsections 4-102(a) and (b). Thus, this Article supplies an "interest of the highest order" as required by *Florida Star*. Furthermore, the express language used by the majority in *Florida Star* that the Court still is prepared to protect a "zone of personal privacy" leads to the conclusion that this Article meets the *Florida Star*'s constitutional test.

at 859 (5th ed. 1984). Comments on the lives of public officials and figures were subject to the newsworthiness defense because these individuals by virtue of their public status invited public criticism and comment. Section 4-101 rejects the public/private figure dichotomy. If the disclosed fact is intimate and the other elements of the tort are met, then private as well as public figures may recover.

The newsworthiness standard (as defined in subsection 1-101(10)) serves two purposes. First, it bars a cause of action with regard to newsworthy facts that are in a public record, described in subsection 4-101(b). Newsworthiness serves as an absolute defense in this limited category of facts, and the burden is on the defendant to prove that the subject matter or thrust of a publication is newsworthy. The newsworthiness defense is necessary because information found in a public record is generally of legitimate public concern and should be published. However, facts have different levels of news value. Section 4-101 permits recovery for some intimate and nonnewsworthy facts even though they are found in a public record. For example, disclosure of an individual's name and disclosure of an individual taking certain medication or suffering from an embarrassing disease may not be newsworthy.

Second, under Section 4-102 newsworthiness limits the availability of actual and emotional damages in cases of intimate facts that are not a part of any public record to the value of the published facts in an arm's-length transaction. Section 4-102 is intended to limit the "chilling effect" of large damage awards on the press because Section 4-102 simply requires the press to pay for information in the same manner in which the press would pay for an interview.

Newsworthiness is determined by whether the subject matter or thrust of a publication is a matter of public concern. A matter of public concern includes information necessary to keep the public well-informed on significant and legitimate issues of the day. Information that is in the public interest should be distinguished from information in which the public is interested. The latter does not necessarily constitute a matter of public concern.

A particular fact in a publication, by itself, may be a matter of public concern and thus newsworthy. However, if a fact is not by itself a matter of public concern, to be deemed newsworthy the fact must be integral to the subject matter or thrust of the publication (which itself must be newsworthy as defined in subsection 1-101(10)). The test to determine if the fact is integral is whether the omission of the fact would mislead substantially or confuse the public as to the remaining facts in the publication or the matter of public concern. If the information publicized will be substantially incomplete, inhibiting the public from becoming duly informed, the omitted fact is integral to the publication and thus is newsworthy. For example, mentioning a patient's name and identifying the patient as a victim of an unauthorized sterilization operation in an article about psychiatric hospitals is not newsworthy because omission of the patient's name would not mislead, confuse, or inhibit the public from becoming duly informed of the poor

treatment patients receive in psychiatric hospitals. However, if the subject matter of the publication was the patient, omission of the patient's name would distort the article and confuse the public. *See Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 304 (1979) (holding that publication of plaintiff's involuntary sterilization in article on patient abuse was newsworthy under common-law analysis). Similarly, if the article about the patient is published in a sidebar (a separate article but subordinate to the main story), the facts would not be newsworthy unless, standing alone, the facts are a matter of public concern or, if viewed in connection with the main story (which must be newsworthy itself), the facts are integral to the subject matter or thrust of the main story.

Balancing of Interests. Subsection 4-101(c) sets forth a balancing test that privileges publication of certain intimate facts that are "supernewsworthy". The public interest in the publication of a newsworthy intimate fact may outweigh substantially, in certain limited circumstances, the public's and the individual's interest in preserving an individual's control of intimate facts and, therefore, the publication should not be actionable under subsection 4-101. The limited circumstances contemplated under Section 4-101(c) include, for example, the publication of those intimate facts about individuals who hold public office (*e.g.*, politicians and governmental officers) that may affect that individual's fitness for office. In determining whether the public's interest substantially outweighs the individual's interest, the trier of fact should consider the nexus between behavior (the publicized intimate fact) and the individual's fitness for office.

For example, if a newspaper discovered and published that the President of the United States is an alcoholic, the newspaper would be subject to liability under Section 4-101 if the President had made every effort to conceal the intimate fact and the intimate fact was not in a public record. Absent the privilege, the fact that the President's drinking problem may be newsworthy would not preclude the President from bringing an action, but only would limit recoverable damages. In applying the subsection 4-101(c) balancing test, however, the fact that the President is an alcoholic would affect the fitness of the President to hold office and, therefore, it would be in the public interest to disclose that information. The public interest in the publication of this newsworthy intimate fact would outweigh substantially any interest in preserving the President's control over the fact that the President is an alcoholic. Therefore, the President would be precluded from bringing a cause of action under Section 4-101.

Section 4-102. Remedies for Publication of Intimate Facts.

(a) Recovery of special damages is permitted pursuant to Section 9-101 and for resulting emotional harm pursuant to Section 9-102 unless the fact is newsworthy, in which case recovery is limited to the lesser of:

(i) damages under Sections 9-101 and 9-102, or

(ii) the value of the fact in an arm's-length transaction.

(b) Recovery of punitive damages is permitted pursuant to Section 9-105 if the communication of the fact was the result of an intentional violation of the individual's reasonable expectation of privacy. Recovery of punitive damages is limited to $100,000.

(c) Injunctive relief is available pursuant to Section 9-108 only to prevent the publication of a fact that is not a part of any public record and is not newsworthy.

Comment to Section 4-102

Remedies. Special damages and damages for resulting emotional harm, pursuant to Sections 9-101 and 9-102, are generally available in invasiveness actions. If the intimate fact is newsworthy, however, damages are limited to the lesser of the sum of special and emotional damages *or* the value of the fact in an arm's-length transaction. The lesser of the two forms of damage is required in newsworthy cases because the forms of damage may vary in relation to each other depending on the particular case. For example, in the case of a prominent politician, the value of a fact in an arm's-length transaction may exceed significantly any emotional and special damages. If the transactional value exceeds the emotional and special damages, then the individual would recover only special and emotional damages. Likewise, an individual who is not in the public eye is subject to the same calculation and would be limited to the lesser of either special and emotional damages or transactional value.

Violations resulting from special circumstances. This provision deters conduct that not only violates privacy through physical trespass but also violates one's reasonable expectation of privacy through the using of more subtle methods, such as using vision or hearing enhancers. Violations of this kind coincide with the broader policy of Section 4-101 that protects an individual's control of intimate facts about him or herself, the loss of which results in emotional harm. Subsection 4-102(b) specifically recognizes publications that are the result of intentional conduct that violates a person's reasonable expectation of privacy. Invasive intrusions, such as physical trespassing and eavesdropping with electronic equipment, are examples of conduct that were actionable under the common-law tort of intrusion. W. PROSSER AND W. KEETON, PROSSER AND KEETON ON TORTS § 117, at 854 (5th ed. 1984). Behavior that would constitute an intrusion and that results in an invasive publication is accounted for in the damages calculation in Section 4-102. Recovery of punitive damages is limited under this Section in recognition of the potential "chilling effect" exorbitant damages may have on the dissemination of information.

Injunctions. Subsection 4-102(c) permits injunctive relief, which is particularly appropriate in the invasiveness context. Harm caused by disclosure of intimate facts is truly irreparable because the truth of the matter disclosed precludes correction or retraction and the individual already has suffered loss of control and emotional damage. The loss of public information as a result of an injunction is substantially less in the invasiveness tort context

than in the common-law defamation setting because the remedy generally involves purging only identifying detail or information.

Article 5

Injury to Commercial Interests

Section 5-101. Usurpation of Control of Commercial Use of an Individual's Identity.

(a) Liability for Usurpation.

(i) Any person who knowingly uses for commercial purposes an individual's name, voice, signature, photograph, or likeness, in any medium, in any manner, is subject to liability to the individual or a transferee under Section 5-101(b) in an action for injunctive relief pursuant to Section 9-108 and special damages pursuant to Section 9-101.

(ii) A person bringing an action under this Section need not allege or prove that the name, voice, signature, photograph, or likeness previously was used for commercial purposes.

(iii) Commercial purposes means the use of a name, voice, signature, photograph, or likeness with the primary purpose of selling a product or service to the public for profit, but does not include:

A. sale of the use itself; or

B. use as part of a history, textbook, film, or work of entertainment, as long as the use is clearly related to a bona fide historical, educational, or artistic purpose.

(b) Transferability of right.

(i) The right to control the commercial use of an individual's name, voice, signature, photograph, or likeness may be assigned, licensed, or transferred by will.

(ii) Any assignment or license must:

A. be in writing,

B. specify the scope and duration of the assignment or license, and

C. be signed by the transferor.

(c) Exclusivity and duration of right. The rights provided for in this Section shall be deemed exclusive to the individual, subject to transfer, for a period of twenty years after the death of the individual.

(d) Newsworthy publication of an individual's name, voice, signature, photograph, or likeness is not actionable unless the publication:

(i) captures the entirety of the individual's commercial identity, and

(ii) poses a substantial threat to the economic value of the individual's commercial identity.

(e) No individual member of a definable group may recover solely on the basis of the defendant's use of a photograph of the definable group.

Comment to Section 5-101

Section 5-101 attempts to disentangle the law surrounding actions that protect an individual's control over the commercial use of his or her identity. The decision in *Haelan Laboratories, Inc. v. Topps Chewing Gum Co.*, 202 F.2d 866 (2d Cir. 1953), which established that an individual has a legally cognizable commercial interest in his or her identity, prompted much academic commentary and diverse judicial and legislative reaction. Soon after *Haelan*, two courts responded differently to the new right to control the use of one's own identity. In *Strickler v. National Broadcasting Co.*, 167 F.Supp. 68 (S.D. Cal. 1958), the court refused to "blaze the trail" to establish a right of publicity. The court in *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. 314 (Pa. Tr. Ct. 1957), however, protected the plaintiff's right to control the commercial use of his identity, indicating that "'right of publicity' is as apt a label as any other."

State legislatures developed various remedies for the individual's commercial loss arising out of the unauthorized use of identity. Virginia law protects an individual's name and likeness against commercial usurpation up to twenty years following the individual's death. VA. CODE ANN. § 8.01-40 (1987). Florida's right of publicity statute covers an individual's name, portrait, photograph or other likeness for forty years after death. FLA. STAT. § 540.08 (1988). In addition to name, photograph, and likeness, a California statute protects signature and voice—all for a period of fifty years following the individual's death. CAL. CIV. CODE §§ 990, 3344 (1988).

Section 5-101 protects an individual's interest in controlling the commercial use of his or her own identity and serves three underlying policies.

First, Section 5-101 provides an economic incentive to individuals to develop their own identity. The right to control the commercial use of one's identity encourages individuals to invest time and effort toward personal development. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977).

Second, Section 5-101 protects individual autonomy by allowing an individual to decide whether to exploit his or her image for trade purposes. Without such protection, personal identities fall within the realm of "public domain," rendering the individual powerless to control the use of the personal aspects of his or her identity. *See* Kalven, *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 989 (1964).

Third, Section 5-101 prevents unjust enrichment by any person not authorized to use another's identity. Allowing a person to benefit from the unauthorized use of an individual's identity rewards the usurper at the expense of the creative efforts of the individual. *Zacchini*, 433 U.S. at 576.

Section 5-101 states the cause of action for usurpation of control of the commercial use of an individual's identity, an action with its roots in causes of action for infringement of the right of publicity and certain species of unfair competition.

Throughout the development of the right of publicity, various courts and legislatures have protected different aspects of an individual's identity. *Martin Luther King Jr. Center v. American Heritage Products*, 250 Ga. 135, 296 S.E.2d 697, 700 (1982). *See Estate of Elvis Presley v. Russen*, 513 F. Supp. 1339, 1349 (D.N.J. 1981); *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F. Supp. 1188, 1199 (S.D.N.Y. 1983); In addition to "name, voice, signature, and photograph," subsection 5-101(a) protects an individual's "likeness." Subsection 1-101(7) defines "likeness" as any reasonably identifiable representation of an individual. Identifiability may be established by demonstrating that a significant number of persons can recognize the individual in the context of the use in question. Whether a voice impersonation constitutes a reasonably identifiable representation of an individual sufficient to comprise a "likeness" depends upon the facts and circumstances surrounding the impersonation. *Cf. Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (refusing to include voice impersonation as either "voice" or "likeness" under California right of publicity statute).

Subsection 5-101(a)(i) makes available as remedies injunctive relief or special damages. Special damages are determined by the fair market value of the usurped aspect of identity. Proof of fair market value may include but is not limited to the individual's previous remuneration in similar commercial settings or amounts received by comparable individuals in similar situations.

To obtain a preliminary injunction, the movant must show a likelihood of prevailing on the merits and that irreparable harm otherwise will result from the defendant's usurpation of control over the commercial use of the plaintiff's identity. The court may consider: (1) the effect of a preliminary injunction on any third parties, (2) the balance of hardships between the parties, and (3) the public interest. To prevent continuing infringement following a trial on the merits, the court may enjoin permanently the defendant's commercial use of the plaintiff's identity, but only if the court determines that special damages alone inadequately compensate the plaintiff.

Subsection 5-101(a)(ii) rejects the rule that an individual must commercially exploit his or her identity to establish the existence of a cognizable right. Some commentators reason that, without commercial exploitation, an individual fails to develop or demonstrate the commercial existence of his identity. Felcher & Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1591 n.78 (1979). Other authors note that a commercial exploitation requirement strikes at the "common-law preference for the survival of commercially valuable goodwill-type assets." Sims, *Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453, 476 (1981); *see also* Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1235 (1986) (characterizing lifetime exploitation as irrelevant). No jurisdiction currently requires commercial exploitation of identity as a condition precedent to an individual's establishing his or her right of control over the commercial use of his or her identity. J. McCarthy, *The Rights of Publicity and Privacy* 9-26 (1989).

A commercial exploitation requirement discriminates against noncelebrities and those individuals who choose not to use their identities commercially. Subsection 5-101(a)(ii) reflects a policy decision against usurpation of identity and in favor of individual autonomy over the use of an identity. Subsection 5-101(a)(iii) defines "commercial purposes," emphasizing that the usurper must appropriate the individual's identity for profit. Excluding nonprofit activity reflects a policy of preventing the usurper's actual unjust enrichment. Unauthorized use of an individual's identity without the primary purpose of profitmaking does not enrich the usurper at the expense of the individual. Whether usurpation reflects a "primary purpose" of profitmaking depends upon the factfinder's evaluation of the subjective intent of the usurper.

Subsection 5-101(b) states the general rule that permits an individual to transfer his right to control the commercial use of his identity. *Haelan Laboratories, Inc. v. Topps Chewing Gum Co.*, 202 F.2d 855 (2d Cir. 1953). Any subsequent holder of the right may assert or transfer the right consonant with the right's scope and duration. Subsection 5-101(b)(i) specifically mentions transfer by will, thereby eliminating intestate succession under the doctrine of *expressio unius est exclusio alterius.*

Subsection 5-101(c) provides a fixed post mortem duration for the right of control. Jurisdictions have enacted various post mortem duration periods that extend from ten to fifty years. Federal law protects copyrights for fifty years beyond the author's death. 17 U.S.C. § 302(a) (1987). The twenty year post mortem duration stated in subsection 5-101(c) reflects the understanding that, although the law should safeguard one's control over identity, this control "has less social utility than the creative values protected by copyright law." Ausness, *The Right of Publicity: A "Haystack in a Hurricane"*, 55 TEMPLE L.Q. 977, 1009-12 (1982). Regardless of who holds the right of publicity, the individual's identity enters the public domain twenty years following the individual's death. If the individual transferred the right pursuant to subsection 5-101(b), the transferee holds the right in accordance with the transfer but in no case for more than twenty years following the individual's death. If the transfer expires prior to the individual's date of death plus twenty years, then control of the right reverts as the applicable assignment, license, or will directs.

Subsection 5-101(d) reflects the holding of *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). Informative speech such as news articles, documentaries, and scholarly analyses typically receives broad first amendment protection. But, when publication captures the entirety of an individual's commercial identity and imperils the individual's livelihood, the individual's right to control the commercial value of his identity outweighs the society's interest in free speech.

To establish that the publication captures the "entirety of the individual's commercial identity," the plaintiff must demonstrate: (1) that the defendant appropriated the entire product of the plaintiff's own talents, energy, time, effort, and expense, and (2) that the defendant's appropriation precluded the plaintiff from reaping the reward of the plaintiff's endeavors.

To prove that the publication poses "a substantial threat to the economic value of the individual's commercial identity," the plaintiff must show that the defendant's appropriation: (1) severely devalued the plaintiff's commercial identity, and (2) struck at the core of the plaintiff's means of earning a living.

For the purposes of subsection 5-101(e), "definable group" means any public assemblage of individuals. Subsection (e) attempts to prevent a plaintiff's recovery based on the defendant's use of photographs of the plaintiff's appearance in crowd scenes in public places. This subsection does not protect a defendant who singles out an individual in a crowd, such as through enlargement, highlighting, emphasizing, or identifying by name.

Section 5-102. Product Disparagement.

(a) A person who publishes, or causes to be published, a false and disparaging communication that refers to and injures the commercial value of a product or service shall be subject to liability to the owner, assignee, licensee, dealer, or seller of the product or service either in an action for declaratory judgment pursuant to Section 9-107, or for special damages pursuant to Section 9-101.

(b) In an action for damages:

(i) The injured person shall bear the burden of proof of all elements by clear and convincing evidence.

(ii) Recovery of punitive damages is permitted pursuant to Section 9-105 if the injured person shows that the person who published, or caused to be published, the false communication did so with knowledge of, or reckless disregard for, the communication's falsity.

(c) In an action for declaratory judgment, injury to commercial value is presumed.

Comment to Section 5-102

Corporations have two types of interests that this Act protects. If a false communication disparages the quality of a product or a service, a corporation that provides the product or service may bring suit under Section 5-102. If a false communication attacks the character of the business by suggesting that the business engages in dishonest or misleading practices, careless or dangerous manufacturing, or other activity, the disclosure of which is detrimental to the business' reputation, the business has a cause of action under Section 3-101. Nothing in this Section precludes a business from bringing causes of action under both Sections 3-101 and 5-102 based upon one communication.

The common law imposed liability for product disparagement where a plaintiff proved that the defendant intentionally published a false and disparaging statement about the plaintiff's product and caused the plaintiff pecuniary loss. *See* RESTATEMENT (SECOND) OF TORTS § 623A (1977). A common-law disparagement action required that the plaintiff prove that the

defendant had one of the following three types of intent: (1) knowledge or reckless disregard of the statement's falsity, (2) ill will, or (3) intent to harm the plaintiff's business. RESTATEMENT (SECOND) OF TORTS § 623A comment (d) (1977).

Section 5-102 removes any intent element from a disparagement action. The gravamen of the injury under Section 5-102 is the false, disparaging statement and its resultant harm, not the knowledge or intent of the publisher of the statement. With the limitations on damages and the availability of retraction provided in the Act, a requirement of intent was not deemed necessary. Current constitutional standards, of course, require plaintiffs to show actual malice to recover punitive damages. *See Gertz v. Robert Welch, Inc.* 418 U.S. 323, 350 (1974). Subsection 5-102(b)(ii) imposes that requirement on plaintiffs seeking punitive damages.

At common law a disparaging statement was one which "is understood to cast doubt upon the quality of another's . . . chattels. . . ." RESTATEMENT (SECOND) OF TORTS § 629 (1977). For example, where a communication about a product causes consumers to stop buying a product or dissuades consumers from ever buying the product in the first place, the communication is disparaging.

Common-law disparagement actions required the plaintiff to prove injury. Section 5-102 imposes the same requirement in an action for special damages. Injury is presumed, however, when a plaintiff chooses to bring an action for declaratory judgment pursuant to Section 9-107.

Plaintiffs who bring actions for special damages under this Section must prove each of the elements of the action by clear and convincing evidence. The clear and convincing standard represents the drafters' policy that a plaintiff should prevail under Section 5-102 only if the communication at issue clearly threatens the plaintiff's commercial interests. The drafters recognize the need to protect commercial interests, but commercial interests do not warrant the same amount of protection as that afforded to reputation under Section 3-101 of this Act.

Plaintiffs may choose to bring an action for declaratory judgment pursuant to Section 9-107. The declaratory judgment remedy represents a more efficient method of redressing injury than the traditional damages action. The declaratory judgment works well in the disparagement context because, as with injury to reputation, plaintiffs often may be best served if the defendant promptly acknowledges his mistake and corrects the falsity. To encourage plaintiffs to use the declaratory judgment remedy, Section 5-102 allows for presumed injury and a lower burden of proof, preponderance of the evidence.

Section 5-103. Misrepresentation Resulting in Commercial Injury.

(a) A person who has a pecuniary interest in a transaction and makes a false communication that relates to the transaction is subject to liability to the recipient in an action for rescission if:

(i) the communication relates solely to the economic interests of the person and the recipient, and extends only to a limited audience sharing those interests;

(ii) the person specifically intends to induce the recipient to act or to refrain from acting based upon the communication; and

(iii) the recipient reasonably relies upon the communication and suffers commercial injury as a result. The recipient must prove the falsity of the communication by clear and convincing evidence.

(b) A person who makes a misrepresentation in the course of business or in the course of a transaction in which the person has a pecuniary interest is subject to liability to a recipient for special damages pursuant to Section 9-101 for rescission if:

(i) the person fails to exercise reasonable care in obtaining or communicating the information; and

(ii) the recipient reasonably relies on the misrepresentation and suffers commercial injury as a result.

Liability shall extend only to a particular recipient who the person knew would rely on the communication, or to a recipient who is a member of a limited class to whom the person knew the misrepresentation would be forwarded, for guidance regarding a commercial transaction.

(c) A person who makes a misrepresentation is subject to liability to the recipient for rescission, special damages pursuant to Section 9-101, and punitive damages pursuant to Section 9-105, if:

(i) the person makes the misrepresentation with knowledge of, or reckless disregard for, its falsity; and

(ii) the recipient reasonably relies on the misrepresentation and suffers commercial injury as a result.

Liability shall extend to all recipients whom the person intended to induce into action or inaction and to all recipients whom the person had reason to expect the communication would reach and influence.

Comment to Section 5-103

Section 5-103 contains three distinct causes of action to redress commercial injuries, replacing the common law of deceit and misrepresentation. Subsections 5-103(a) and (b) represent the modern trend away from the doctrine of caveat emptor and provide redress for injured purchasers without requiring proof of intentional deception. Subsection 5-103(c) is similar to the traditional common-law approach to fraud embodied in the English case of *Derry v. Peek*, 14 App. Cas. 337 (1889). The *Derry* court held that a misrepresentation was actionable only if the person made the misrepresentation with a fraudulent intent. Subsection (c) differs from the traditional common-law approach because the scope of liability is broader and the subsection does not distinguish explicitly between fact and opinion.

Each subsection requires a plaintiff to establish falsity, intent to induce reliance, reasonable and actual reliance by the recipient, and a commercial

injury. The type of intent to induce and the type of misrepresentation required by the particular subsections vary. The causes of action also differ in terms of the circumstances in which liability may be imposed, the measure of legal fault required to plead a cause of action, the scope of liability, and the damages recoverable.

Reliance is a common element in each of the subsections. The reasonableness of the recipient's reliance involves an objective test. Reliance is reasonable if a reasonable person would have regarded the subject matter of the misrepresentation to be an important factor in deciding whether to enter into a transaction. The recipient's reliance also is reasonable if the person making the representation knew or had reason to know that the specific recipient placed great emphasis on the subject matter of the misrepresentation, even if a reasonable person would not place great emphasis on the subject matter of the misrepresentation. *See* RESTATEMENT (SECOND) OF TORTS § 538 comment f (1977) (stating that fact may be material if person making misrepresentation knows that recipient is likely to place great emphasis on misrepresentation even though reasonable person would not rely on fact). A recipient also must rely on the communication.

The recipient must prove that the reliance resulted in a commercial injury. Section 5-103 does not provide redress for strictly personal, property, or emotional injuries. The injury, not merely the damages, must be of a pecuniary nature. Recovery for noncommercial damages resulting from a misrepresentation is addressed in Section 6-102.

Subsection 5-103(a). The first cause of action contained in Section 5-103 is a strict liability provision. A plaintiff need not prove an intent to deceive or negligence on the part of the person making the communication. Subsection 5-103(a) limits liability to cases in which the person making the false and material communication has a pecuniary interest in the transaction and the communication related to the transaction. The premise of this subsection is that a person with a pecuniary interest in a transaction should communicate accurately about matters related to the transaction.

Imposing strict liability for materially false statements on a party to a commercial transaction is not new to tort law. *See* Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415, 435 (1911) (noting that contract and tort actions most similar to tort action for deceit did not require actual intent to deceive); Green, *Deceit*, 16 VA. L. REV. 749, 757 (1930) (arguing that each jurisdiction needs both formula requiring intent and one of strict liability). *But see* Hill, *Breach of Contract as a Tort*, 74 COLUM. L. REV. 40 (1974) (arguing that other commentators have misread case law and that strict liability for misrepresentations is not widespread). The Restatement of Torts contains a strict liability provision similar to subsection 5-103(a). *See* RESTATEMENT (SECOND) OF TORTS § 552C (1977); *see also* W. PROSSER AND W. KEETON, PROSSER AND KEETON ON TORTS 748 (5th ed. 1984).

Subsection (a) is limited in scope. To be subject to liability, the person must have a pecuniary interest in the transaction that is the subject of the misrepresentation, and the person specifically must intend to induce the

particular recipient into action or inaction. A person cannot specifically intend to induce another unless the person making the false communication knows the recipient.

The limited scope of subsection (a) also is manifested by the requirement that the subsection shall apply only to commercial misrepresentations made to a "limited audience" where members of the audience share the same commercial interest as the person making the communication. Subsection (a), therefore, does not apply to one using a medium to make misrepresentations unless the medium is of very limited circulation and the person uses the medium to promote a commercial transaction to an identified and known audience interested in the transaction. *See generally Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (holding that credit report sent to only five subscribers does not involve matter of public concern so as to merit greater first amendment protection than matter of private concern). A newspaper, even a small town paper, has more than a "limited audience," and an entire newspaper audience would not share the economic interest of the advertiser in the transaction proposed in an advertisement. As a result, a newspaper advertiser would not be subject to liability for falsity in an advertisement under subsection (a). Furthermore, subsection (a) would not apply to a media defendant that publishes an advertisement because the media defendant does not have a pecuniary interest in the transaction that the advertisement encouraged. *See MacKown v. Illinois Publishing & Printing Co.*, 289 Ill. App. 59, 6 N.E.2d 526 (1937).

Relief under subsection 5-103(a) is confined to rescission of the subject transaction. By precluding money damages as a remedy, subsection (a) departs from existing case law that recognizes a cause of action in strict liability. *See* RESTATEMENT (SECOND) OF TORTS § 552C comment b (1977) (allowing damages to cover difference between value parted with and value received in transaction). Subsection (a) bears a close resemblance to a breach of warranty action. Contract actions, like those for breach of warranty, however, give protections to the defendant that subsection (a) does not. *See* Hill, *Breach of Contract as a Tort*, 74 COLUM. L. REV. 40 (1974) (arguing against position § 552C of the RESTATEMENT (SECOND) OF TORTS takes because Restatement position ignores contract law implications such as parol evidence rule and liquidated damage provisions). A plaintiff who chooses subsection (a) rather than a contract action sacrifices the ability to recover money damages in exchange for preventing the defendant from relying on contract defenses and doctrine. Proof of the intent or negligence of the defendant may involve protracted litigation. Therefore, subsection (a) may prove to be a useful alternative for a plaintiff who would be satisfied with rescission of the contract.

Subsection 5-103(a) contains an added safeguard for defendants. The recipient must prove falsity of the communication by clear and convincing evidence. Subsections 5-103(b) and (c) do not require a heightened burden of proof of the falsity of the misrepresentation, but subsections (b) and (c) require proof of legal fault. Subsection (a)'s heightened burden of proof of falsity offsets the lack of a culpability requirement.

To illustrate the operation of subsection (a), assume the following facts. A and B are negotiating over the sale of A's house. Prior to the negotiations, X Pest Company, widely respected in the pest control industry, searched A's house for signs of termite infestation. X told A that A's house "had no termite infestation." X failed adequately to check the house for termites. A subsequent inspection found that the house had termites that had caused material structural damage to the house. Consequently, X's statement was erroneous. A related X's statement to B in the course of the negotiations. B, in reliance on A's statement, purchases A's house. A is subject to liability to B regardless of X's prior statement.

Subsection 5-103(b). This subsection imposes a duty on one who makes representations in the course of that person's business or a commercial transaction. The duty requires that a person exercise reasonable care in obtaining and communicating information. *See* RESTATEMENT (SECOND) OF TORTS § 552(1) (1977) (imposing similar duty). Subsection 5-103(b) requires proof of negligence in obtaining or communicating the misrepresentation.

Negligent misrepresentation is an erosion of the "scienter" requirement of deceit. The common-law requirement of an intent to deceive is not required by subsection (b). Accordingly, the duty imposed by subsection (b) is limited in scope, and the scope of liability resulting from such misrepresentations is narrower than the scope of common-law deceit.

Subsection 5-103(b) imposes a duty to refrain from negligent misrepresentation in two situations. The first situation, when the person has a pecuniary interest in a transaction, is the same as in subsection (a). The second situation, when the person is acting in the course of the person's business, is slightly broader than the first situation. A person employed to supply information to influence a commercial transaction is held to the same standard of care as a person with an interest in that transaction, but this broadened duty is limited by the scope of the person's liability.

The liability of a person who breaches the duty of care extends only to a particular recipient or to a recipient who is a member of a limited class, of which the person making the representation is aware and intended to influence regarding a commercial transaction. A particular recipient is one known by the person. The person must intend the misrepresentation to influence that recipient regarding a commercial transaction.

A recipient who is a member of a limited class and not known specifically by the person also may recover under Section 5-103 if certain requirements are met. The recipient must be a member of a limited class, the members of which the person intended the misrepresentation to influence regarding a commercial transaction. The person must know of the limited class, though the person need not know of the particular recipient. Consequently, neither an advertiser in a widely published periodical nor the periodical's publisher is subject to liability for negligent misrepresentations. *See First Equity Corp. v. Standard & Poor's Corp.*, 869 F.2d 175 (2d Cir. 1989) (holding provider of loose leaf summaries of business operations and finances of large corporations not liable to one of its 7500 subscribers for negligent misstatement); *see also Gutter v. Dow Jones, Inc.*, 490 N.E.2d

898, 900 (Ohio 1986) (holding that subscriber of the *Wall Street Journal* is not a member of limited class of persons that negligent misstatement was intended to influence).

Subsection 5-103(b) is intended to be consistent with the reasoning of two of the leading cases. *Ultramares v. Touche Corp.*, 255 N.Y. 170, 174 N.E. 441 (1931); *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922). In *Ultramares* the Court of Appeals of New York refused to extend the liability of accountants who had made a negligent misrepresentation to an indeterminate class of recipients. *Ultramares*, 255 N.Y. at 170, 174 N.E. at 444. In *Glanzer* the same court held a bean weigher liable for negligence to the buyer for misweighing beans, although it was the seller who contracted with the weigher to have the beans weighed. *See Glanzer*, 233 N.Y. at 241, 135 N.E.at 277. *But see* Green, *The Communicative Torts*, 54 TEX. L. REV. 1, 35 (1976) (arguing that *Glanzer* involved innocent misrepresentation despite the resulting incongruence that *Glanzer* then would have extended broader liability than *Ultramares* and would have done so in a no-fault contest).

To illustrate the operation of subsection 5-103(b), assume the following facts. A placed his house for sale. A hired X Pest Control, widely respected in the pest control industry, to check A's house for termite infestation. A informed X that the information on termite infestation would be supplied to prospective purchasers of A's house. X detected no sign of termites in A's house. X, however, failed to check the baseboards of one room where termite infestation was severe. X certified to A that A's house "had no termite infestation." A then told B, a prospective purchaser of A's house, that the house was free from termites. B, in reliance on A's statement, purchased A's house. B later discovered the termite infestation. A is not subject to liability to B. X, however, is subject to liability to B. X knew that the misrepresentation would be forwarded to a limited class of recipients, and B is a member of that limited class.

Subsection 5-103(c). This subsection imposes liability on one who makes a misrepresentation intentionally or with reckless disregard of its truth. Evidence of actual subjective intent is not necessary to prove intent to deceive. Proof of intent may consist of evidence of the nonexistence of the matter asserted in the misrepresentation. Keeton, *Fraud: The Necessity of an Intent to Deceive*, 5 U.C.L.A. L. REV. 583, (1958) (citations omitted). Reckless disregard of the misrepresentation's truth may be proved by a showing that the person entertained serious doubts regarding the truth of the misrepresentation. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

The fault requirement under this subsection is greater than that required under subsection 5-103(b). Damages and scope of liability are correspondingly greater. Under subsection 5-103(c) punitive damages are available if the conduct involved in the deception is particularly egregious. Punitive damage awards are appropriate to deter the commission of intentional deceit.

The scope of liability of subsection 5-103(c) is broader than that of subsection (a) or (b) in two ways. First, a plaintiff may recover under

subsection (c) regardless of whether the defendant had a pecuniary interest in the transaction and regardless of whether the defendant made the misrepresentation in the course of business. The injury, however, still must be commercial in nature. The intent to induce and intent to deceive requirements of subsection 5-103(c) justify its broader scope. Second, the person may be liable to all recipients that the person had reason to expect the communication to reach and influence. This standard is both objective and subjective, allowing for liability to be imposed even if the person did not in fact expect the communication to reach and influence the recipient. The person, however, must have sufficient knowledge to cause a reasonable person to expect that the misrepresentation would reach and influence the recipient. *See* RESTATEMENT (SECOND) OF TORTS § 531 comment d (1977).

Constitutional protection for commercial speech should not affect the constitutionality of Section 5-103. Although the Supreme Court has recognized limited first amendment protection for commercial speech, false or deceptive commercial speech is subject to state regulation. *Posadas De Puerto Rico Association v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). Subsection 5-103(a) requires a false communication. Subsections (b) and (c) require a misrepresentation. Subsection 1-101(9) defines misrepresentation to include both a false communication and, in certain circumstances, a communication that falsely implies underlying facts. In other words, a misrepresentation may be a statement of judgment, but only if the statement falsely implies facts underlying the judgment. Because Section 5-103 regulates only false commercial speech or commercial speech that falsely implies knowledge of relevant facts, Section 5-103 falls within the area of commercial speech that the states constitutionally may regulate.

Article 6

Injury to Other Protected Interests

Section 6-101. Communication Generating Conduct that Produces Harm.

(a) A person who, specifically intending to cause imminent lawless conduct, makes a communication that advocates and is likely in the circumstances to produce imminent lawless conduct shall be subject to liability to any person injured in body or property by any conduct caused by the communication.

(b) Absent proof of conspiracy, a person associated with the communicator and on whose behalf the statement was made is not liable under this Section. Proof of conspiracy requires a showing beyond a reasonable doubt of:

(i) an agreement between two or more persons;

(ii) intent thereby to cause imminent lawless conduct by advocating conduct likely to cause harm; and

(iii) with respect to an organization's liability, agreement by an individual with authority to bind the organization.

(c) In an action brought under this Section, an injured person may recover damages pursuant to Sections 9-101, 9-103, and 9-104.

(d) The injured person shall bear the burden of proof of all elements under Section 6-101(a) by clear and convincing evidence.

Comment to Section 6-101

The purpose of Section 6-101 is to create civil liability for incitement. Section 6-101 expands the "clear and present danger" test, which the Supreme Court first articulated in *Schenck v. United States*, 249 U.S. 47 (1919), beyond criminal liability in the context of national security to include civil liability for injury resulting from the communication. Section 6-101 allows recovery for personal injury or property damage that another person caused by intentional exhortations of another to create a danger of imminent harm.

The Supreme Court has recognized certain types of speech that are not protected by the first amendment. These areas are obscenity, child pornography, fighting words, purposefully made or recklessly made false statements of fact, and incitement to imminent lawless activity. The Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), created the constitutional justification for a cause of action under Section 6-101. The *Schenck* analysis clearly permits the expansion of the clear and present danger test to the civil incitement arena in cases where the circumstances "bring about the substantive evils that congress has the right to prevent." *Schenck*, 249 U.S. at 52.

Subsection 6-101(a) requires a showing that the defendant by his communication intended to advocate imminent conduct by the recipient of the communication, that the defendant's intention was to cause lawless action, and that the circumstances were such that imminent lawless conduct by the recipient was likely. The imminent lawless conduct requirement does not require the plaintiff to prove that the defendant would have been convicted of the lawless action, but rather that the conduct alleged by the plaintiff in the pleadings is defined by the laws of the State as a felony or serious misdemeanor. A plaintiff also must allege either physical injury or property damage. Section 6-101 does not require proof of the actual occurrence of the advocated lawless conduct but does require that the plaintiff prove that the defendant specifically intended the lawless conduct to occur. Plaintiffs, therefore, may recover damages when lawless action as defined in subsection 1-101(6) was intended and advocated by the defendant and under the circumstances was likely to have occurred, even if injury was not the result of lawless action.

Subsection 6-101(b) is included to prevent an individual who does not have the legal ability to bind the organization with respect to the communication from holding the organization itself liable for the consequences of the communication unless the plaintiff makes a showing of criminal conspiracy. Concern existed that failure to shield the organization from liability would chill the most fundamental type of speech, political opinion. Liability

is imputed to an organization only if there was a pre-existing agreement that held the organization liable for the actions of the individual inciter.

Subsection 6-101(d) imposes a clear and convincing evidence standard for actions under subsection 6-101(a). Although the Supreme Court has held that incitement to imminent lawless action does not fall within the protection of the first amendment, the Constitution probably requires that this high burden of proof be imposed in establishing incitement.

Section 6-102. Noncommercial Fraud.

(a) A person who makes a false or misleading communication to an individual, either knowing its falsity or entertaining serious doubts as to its truth, and with the intent to induce the individual to act or refrain from acting in reliance on the false or misleading communication, is subject to liability to the individual for damages pursuant to Sections 9-101, 9-102, 9-103, and 9-104 if the individual reasonably relied on the communication and suffered foreseeable injury as a result.

(b) An individual seeking damages under this Section must prove by clear and convincing evidence that the communication was false or misleading, that the individual reasonably relied on it, that injury occurred as a result, and that the injury was foreseeable to the person making the communication.

(c) An individual seeking damages under this Section is precluded from seeking damages under Section 5-103.

Comment to Section 6-102

Section 6-102 is designed for situations in which, although no pecuniary interest is at stake, the fraudulent nature of the defendant's communication resulted in the plaintiff's injury. The tort of misrepresentation has been recognized in limited circumstances and no essential reason exists to prevent a deceit action from being maintained where interests other than commercial and pecuniary interests are involved. W. PROSSER AND W. KEETON, PROSSER AND KEETON ON TORTS 726 (5th ed. 1984).

Section 6-102 allows compensation for a plaintiff injured by a deliberately fraudulent misrepresentation. When a pecuniary interest is not at stake, injury for fraudulent misconduct often is emotional. *Morris v. MacNab*, 25 N.J. 271, 135 A.2d 657 (1957) (bigamy); *Work v. Campbell*, 164 Cal. 343, 128 P. 943 (1912) (inducing plaintiff to leave husband); *Burr v. Board of County Commissioners of Stark County*, 23 Ohio St. 3d 69, 491 N.E. 2d 1101 (1986) (adoption of child with serious genetic difficulties). Section 6-102 also allows a plaintiff to recover for emotional harm for mental anguish and suffering in addition to actual lost earnings, medical expenses, and damage to property.

A plaintiff, however, is barred from recovery for commercial fraud under Section 5-103 if the plaintiff brings an action under Section 6-102. The reasons for this are twofold. First, double recovery for the same injury

should not be allowed. Second, recovery under Section 6-102 centers on estoppel principles absent pecuniary interest, and the resulting damages focus on the plaintiff's reliance. In Section 5-103 the focus is on the pecuniary interest itself. The two interests are similar, but noncommercial fraud is much more difficult to prove, and although noncommercial fraud may involve pecuniary loss of some type, the major injury is more tangible. Emotional distress is not cause for recovery under Section 5-103.

[Section 6-103. Liability for Racial, Sexual, [Ethnic], or Religious Harassment.

(a) A person who intentionally engages in a course of conduct that is addressed to an individual, that is specifically intended and reasonably likely to harass or intimidate the individual because of the individual's race, sex, [ethnic origin], or religion, and that directly causes serious emotional distress, is subject to liability to the individual:

(i) for damages pursuant to Sections 9-101, 9-102, and 9-104; and

(ii) in an action for injunctive relief pursuant to Section 9-108.

(b) For purposes of this Section, "course of conduct" means a pattern of communication evincing a continuity of purpose.]

Comment to Section 6-103

Section 6-103 provides a recovery for injury to the emotional well-being of individuals who are the victims of intentional, personalized harassment based on the individual's race, sex, ethnic origin, or religion. Section 6-103 recognizes that in addition to suffering emotional distress, victims of harassment also may suffer pecuniary loss or property damage. Liability extends to such conduct as threats of harm to an individual or to the individual's property, repeated or systematic abusive or insulting communication that reasonably causes emotional injury, and the burning of crosses or placement on an individual's property of other words or symbols commonly associated with racial, sexual, religious, or ethnic harassment.

Section 6-103 reflects the policy that members of groups that traditionally have been harassed or discriminated against should be protected in tort from harassment that is based on their membership in a particular group. The Section thus provides legal protection against affronts to the interests of personal dignity, self-respect, and psychological and physical well-being. A cause of action for harassment communicates that such behavior no longer will be tolerated in our society. The legal and ethical systems of our society recognize the principle that individuals are entitled to treatment which does not ridicule their humanity by disrespect of their privacy or moral worth. *See* Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 143-44 (1982) (asserting that racial harassment is serious transgression "because it derogates by race, a characteristic central to one's self-image"). Section

6-103 offers protection that current law does not adequately provide.

In light of the first amendment, the occasions for recovery under Section 6-103 necessarily have been limited. Actionable harassment must involve a course of conduct that specifically is intended and reasonably likely to harass or intimidate an individual solely on the basis of the individual's sex, race, religion, or ethnic origin. The "course of conduct" and "intent" requirements are designed to eliminate first amendment concerns by ensuring that liability will not arise for communication with legitimate free speech value.

The free speech clause of the first amendment protects the expression of ideas, the free flow of information, and protects against the suppression of minority views by the majority. "But individuals abused on account of their race, color, [sex], or ethnicity are also entitled to protection." *See* Lasson, *Racial Defamation As Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11, 47 (1985) (discussing relationship of first amendment and racial abuse). Where there is not an expression of ideas or opinion, no reason exists why the Constitution must protect the speech itself. *Id.* at 30. Section 6-103 is drafted to require proof that the course of conduct had no other legitimate, constitutionally protected purpose. Because the statute involves speech intended solely to harass and not speech intended to communicate ideas, Section 6-103 addresses communication that falls outside the first amendment's protection.

The Supreme Court has stated recently that the capacity of speech to cause emotional disturbance is not, alone, sufficient to justify its abridgment. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). The *Falwell* Court, however, was careful to limit its holding to public officials and public figures, after noting that "at the heart of the first amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Id.* Thus, by implication, if the speech does not involve a public figure or a matter of public concern, emotional disturbance is enough to justify regulation of the speech. "When the plaintiff is a private figure and the speech does not involve any issue of public concern, the case is treated for first amendment purposes as if it were nonexpressive conduct, and no first amendment restrictions will apply, relegating the defendant's protection solely to that available under applicable [law]." Smolla, *Emotional Distress and the First Amendment: An Analysis of* Hustler v. Falwell, 20 ARIZ. ST. L.J. 423, 467 (1988). The speech that Section 6-103 proscribes always will be of nonpublic concern because the only purpose of the speech must be to harass or intimidate a specific individual, and because no exposition of ideas is involved. Moreover, although Section 6-103 covers speech that may be addressed to a "public figure," liability under Section 6-103 is based not on the individual's status as a public figure but on the individual's status as a member of a particular race, sex, religion, or ethnic group. The privileges contained in Section 8-108 should eliminate any remaining concern about liability for protected speech.

Existing law indicates that harassing communication may be curtailed. For example, Title VII of the Civil Rights Act of 1964 prohibits employment

discrimination, including harassment based on an employee's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e (1964). Additionally, some states provide a private right of action under state antidiscrimination and human rights statutes. *See* CAL. CIV. CODE § 43 (West 1982) (providing for freedom from personal insult); D.C. CODE ANN. § 1-2556 (1981) (providing for private cause of action under human rights provision); ILL. STAT. ANN. ch. 68, para. 2-102(D) (Smith-Hurd 1980) (declaring that sexual harassment is civil rights violation). Other states have statutes that declare harassment to be a criminal offense. *See* ARK. STAT. ANN. § 5-71-209 (1987); CONN. GEN. STAT. ANN. § 53a-183 (West 1985); KY. REV. STAT. ANN. § 525.070 (Michie 1985). Moreover, a few states provide for civil remedies under criminal malicious harassment statutes that specifically prohibit racial, religious, or ethnic harassment. *See* IDAHO CODE § 18-7901 (1987); OKLA. STAT. tit. 21, § 850 (Supp. 1989); WASH. REV. CODE § 9A.36.080 (1988).

Several state statutes concerning harassment require that the harassment tend to lead to immediate violence or breach of the peace. *See* ALA. CODE § 13A-11-8 (1982); ALASKA STAT. § 11.61.120 (1962); COLO. REV. STAT. § 18-9-111 (1973). Words that by their very utterance inflict injury or tend to incite an immediate breach of the peace ("fighting words") are outside the protection of the Constitution. *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Section 6-103, however, does not require the course of conduct to lead to violence or an immediate breach of the peace because Section 6-103 recognizes that speech can cause serious emotional injury even if the speech does not lead to an immediate breach of the peace. Two states currently have statutes that provide civil actions for racial, religious, or ethnic harassment that do not contain a fighting words requirement. *See* R.I. GEN. LAWS § 9-1-35 (1985); VA. CODE ANN. § 8.01-42.1 (Supp. 1988); *see also Beauharnais v. Illinois*, 343 U.S. 250 (1952). *But see Brandenburg v. Ohio*, 395 U.S. 444 (1969). Although the speech at issue in *Brandenburg* included derogatory statements about Jews and Blacks, *Brandenburg* can be distinguished from a cause of action for harassment. In *Brandenburg* the speakers were the only people present when the statements were made. *Id.* at 445. Moreover, the speech was not directed at any specific individual and was clearly political speech that the first amendment protects. *Id.* 448-49. Harassing speech that Section 6-103 proscribes, on the other hand, is different in kind from the speech in *Brandenburg* because Section 6-103 proscribes speech that is directed at a particular individual with the intent to harass and thereby to cause emotional injury to the individual.

The cause of action for racial harassment under Section 6-103 essentially is a cause of action for intentional infliction of emotional distress. Numerous plaintiffs have used intentional infliction of emotional distress as a means of recovering for injuries resulting from harassment. For example, in *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 565 P.2d 1173 (1977), the Supreme Court for the State of Washington considered whether a Mexican-American's allegations that fellow employees had engaged in a campaign of racial harassment against the plaintiff were sufficient to support

a claim against the plaintiff's employer for intentional infliction of emotional distress. *Id.* at 737, 565 P.2d at 1174. After considering the extent of the racial abuse, which included accusations of theft and racist jokes, slurs, and comments, the court explained that "racial epithets which were once a part of common usage may not now be looked upon as 'mere insulting language.'" *Id.* at 741, 565 P.2d at 1177. Accordingly, the *Contreras* court held that the plaintiff had stated a cause of action for intentional infliction of emotional distress. *Id.*

The *Contreras* court correctly recognized that although the general rule states that a plaintiff cannot recover for mere insult, indignity, annoyance, or abuse without showing other aggravating circumstances, intentional harassment based on an individual's race, sex, religion, or ethnic origin is more than a mere insult and, therefore, should create liability for serious emotional distress that results from the harassment. *See id.*; *see also Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523, 527 (D.D.C. 1981) (holding that alleged sexual harassment exceeded mere insults, indignities, and petty oppression and stated cause of action for intentional infliction of emotional distress); *Agarwal v. Johnson*, 25 Cal. 3d 932, 947, 603 P.2d 58, 67, 160 Cal. Rptr. 141, 150 (1979) (holding that intentional infliction of emotional distress may include humiliation, anxiety, and mental anguish); *Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 498, 468 P.2d 216, 217 (1970) (holding that plaintiff stated cause of action for emotional distress by alleging that supervisor intended to cause mental anguish by referring to plaintiff as "nigger"); *Samms v. Eccles*, 11 Utah 2d 289, ____, 358 P.2d 344, 347 (1961) (holding that repeated sexual harassment is sufficient grounds for recovery based on intentional infliction of emotional distress).

Section 6-103 is bracketed to indicate divisions of opinion among the drafters regarding whether freedom from harassment based on an individual's race, sex, ethnic origin, or religion is an interest that the drafters wished to protect in the context of tort liability based on communication. References to "ethnic origin" also are bracketed to indicate divisions of opinion regarding whether freedom from harassment based on an individual's ethnic origin should be included in Section 6-103. Approximately one-half of the drafters felt that ethnic origin should not be included because the inclusion of ethnic origin would create too much confusion over the scope of the term. Moreover, the drafters feared that if ethnic origin were included there would be little justification for not extending the protection of Section 6-103 to harassment based on an individual's affiliation with other organizations, and that such an extension would make Section 6-103 overbroad.

Section 6-103 does not preclude other remedies available under existing law. The Section should not be construed to eliminate recovery for non-communicative forms of harassment. An individual conceivably could recover under this Section and still be able to recover under existing state or federal statutes for injuries arising out of the same harassment incident. For example, the statutes and regulations dealing with harassment in the employment context, while arguably concerned to some extent with emo-

tional well-being, are concerned more with job security and preventing unreasonable and unlawful discrimination in employment. *See, e.g., Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (viewing sexual harassment as form of disparate treatment or intentional discrimination under Title VII of the Civil Rights Act of 1964). Moreover, the existing harassment statutes provide remedies such as reinstatement and backpay that are not provided under Section 6-103. *See, e.g.*, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e-5(g) (1989).

Article 7

Breach of Confidence

Section 7-101. Liability for Breach of Confidence.

A person who possesses information is subject to liability to a person who supplied the information if:

- **(a) the possessor discloses the information, having expressly agreed to receive and hold it in confidence in the course of a nonpersonal relationship;**
- **(b) the possessor discloses the information, having received it in the course of a customarily confidential relationship;**
- **(c) the possessor discloses the information, having acquired it through improper means from another person, knowing that the person had an obligation under subsections 7-101(a) or 7-101(b) to maintain its confidentiality;**
- **(d) the possessor discloses the information, having acquired it knowing that its receipt is a direct consequence of another person's breach of confidence as defined in subsections 7-101(a), 7-101(b), or 7-101(c); or**
- **(e) the possessor negligently maintains the confidentiality of the information, having an obligation under subsections 7-101(a) or 7-101(b) to hold it in confidence, and a disclosure of the information is the proximate result of the possessor's negligence.**

Comment to Section 7-101

Article 7 establishes a statutory cause of action for breach of confidence to clarify and strengthen the existing common-law approaches to liability for breach of confidence. Traditionally, plaintiffs seeking damages for breach of confidence have had to prove that the defendant wrongfully disclosed confidential information which the plaintiff supplied to the defendant in confidence and that, as a result of the defendant's disclosure, the plaintiff suffered injury. *See Doe v. Roe*, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup. Ct. 1977) (patient claiming psychiatrist wrongfully disclosed confidential information); *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961) (bank customer claiming bank wrongfully disclosed

confidential information). Courts have struggled to identify the proper legal theory that supports the obligation of confidence. Courts have applied the traditional theories of invasion of privacy, breach of implied contract, and breach of implied statutory duty to impose civil liability for breach of confidence. *See, e.g., MacDonald v. Clinger*, 84 A.D. 482, 446 N.Y.S.2d 801 (1982) (considering several theories of liability for breach of confidence). In applying these traditional theories, however, courts have failed to establish a legal framework that adequately protects the individual and societal interests in securing confidential relationships. Drawing from the British Law Commission's draft of a statutory tort for breach of confidence and from a thoughtful student note that formulates an independent tort for breach of confidence, Article 7 establishes a legal framework for protecting confidential relationships. *See* The Law Commission, Breach of Confidence, Law. Com. No. 110 (H.M. Stat. Off. 1981) (proposing to replace common-law breach of confidence with new statutory tort) [hereinafter Law Commission's Tort]; Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982) (maintaining that traditional theories of liability do not adequately protect interests at stake in confidential relationships and proposing independent tort of breach of confidence).

A disclosure of confidential information invades two interests of the person who supplied the information during the course of a confidential relationship. Note, *supra*, at 1434. First, the disclosure invades the person's primary interest in preserving the security of the confidential relationship through which a person can reveal embarrassing or troublesome personal information to promote one's health or welfare. Second, a disclosure of confidential information invades the person's secondary interest in preventing injuries that result from the circulation of the information. These injuries could include humiliation, ridicule, emotional distress, and loss of business or professional relationships.

In addition to frustrating a person's interests in protecting the security of confidential relationships, a disclosure of confidential information invades society's interest in assuring that individuals will respect certain types of confidential relationships. Note, *supra*, at 1435. For example, because society is concerned with protecting the physical and mental health of individuals, society has an interest in encouraging individuals to feel secure in supplying all information concerning their health to doctors. Similarly, because society is concerned with the personal development of individuals, society has an interest in protecting the security of confidential discussions with counselors, therapists, teachers, and other individuals.

To protect the important individual and societal interests in preserving confidential relationships, Section 7-101 establishes five separate bases upon which a person may claim that a disclosure violates confidentiality. The protection that Section 7-101 affords extends only to persons who *supply* confidential information in the course of a relationship that carries an obligation of confidentiality. Thus, a person who is the subject of confidential information has no cause of action unless that person is also the person who supplied the confidential information. Allowing the person who

is the subject to sue would serve to protect the person's interest in maintaining control over disclosures concerning intimate facts, not the personal and societal interests in securing confidential relationships. *See* Law Commission's Tort, *supra*, at 89-90 (explaining rationale for limiting breach of confidence plaintiffs to persons who supply confidential information); *see also* MODEL COMMUNICATIVE TORTS ACT § 4-101 (establishing liability for disclosure of intimate facts). The distinction is between protecting information because the information is subject to an obligation of confidence and protecting information because of the nature of the information in question.

Subsection 7-101(a). This subsection establishes liability for disclosing information that a person expressly agrees to receive and hold in confidence in a nonpersonal relationship. The requirement that the person agree to receive and hold the information in confidence serves two important purposes. First, the requirement precludes persons from thrusting a duty of confidentiality upon persons who are unwilling to undertake the duty. Second, the requirement notifies the receiver of the information that the information is not fair game for gossip and sets aside the information from the receiver's general knowledge. In addition, the term "nonpersonal relationship" precludes liability for disclosing information that a person receives in the course of a personal relationship. Although recognizing that persons often reveal damaging information to friends and family members, subsection 7-101(a) is intended to prohibit the law of confidence from intruding into family and personal relationships. *See* Note, *supra*, at 1460 (maintaining that breach of confidence law should not intrude into personal relationships). Problems would arise if a person were allowed to sue a friend or family member for breach of confidence, including the difficult evidentiary determinations of whether a confidential relationship existed, whether the defendant learned the information outside the relationship, and whether the plaintiff consented to the disclosure. *Id.*

Subsection 7-101(b). This subsection establishes liability for disclosing information that a person receives in the course of a customarily confidential relationship. *See* Note, *supra*, at 1460 (proposing that actionable duty of confidentiality should attach to nonpersonal relationships customarily understood to carry an obligation of confidence). The term "customarily" is intended to establish a standard that is stricter than the reasonable person test for determining the existence of a confidential relationship. Under the reasonable person test, a person has a duty of confidence if, under the circumstances, a reasonable person would conclude that a confidential relationship existed. *See id.* at 1457 (discussing British common-law reasonable person test). Under the stricter standard of subsection 7-101(b), a person who receives information does not have a duty of confidence unless (1) that person and the person who supplied the information were in a preexisting nonpersonal relationship and (2) relationships of a similar kind generally are understood to carry a duty of confidentiality. *Id.* at 1461 (defining "customarily" standard). A customarily confidential relationship does not exist if only the particular facts of a particular relationship establish

an expectation of confidentiality. Accordingly, customarily confidential relationships include but are not limited to doctor-patient relationships, attorney-client relationships, priest-penitent relationships, accountant-client relationships, and bank-customer relationships. The category would not include, for example, journalist-source relationships because those relationships generally are based on express understanding.

Subsection 7-101(c). This subsection imposes liability against a person who discloses information that the person acquired through improper means from another person who had an obligation to maintain the confidentiality of the information. This subsection is based on a section of the British Law Commission's proposed statutory tort for breach of confidence. *See* Law Commission's Tort, *supra*, at 113-23 (proposing liability for disclosing confidential information improperly taken from another). A person who employs improper means to acquire information stands in the shoes of the person who had possession of the information. Thus, a person who burgles and reads confidential office files is in the same position as the person who establishes and maintains those files subject to an obligation of confidentiality. Obtaining information by improper means does not necessarily involve taking information in circumstances that would amount to criminal behavior. The essential inquiry is whether a person has acquired information without the express or implied authority of the person holding the information in confidence. Moreover, if a person exceeds any authority to handle confidential information in a particular way or for a particular purpose, the person is considered to have acted without authority. For example, a messenger who receives a confidential document for the sole purpose of hand delivering the document assumes a duty of confidentiality under this subsection if he reads the document. Finally, a person assumes a duty of confidentiality under this subsection if the person obtains information by using violence, threats, or deception against a person holding the information.

Subsection 7-101(d). Liability is imposed under this subsection on a person who discloses information knowing that she or he had acquired the information as a result of another person's breach of confidence. A person who acquires information that already is impressed with an obligation of confidence becomes subject to an obligation of confidence at the time the person (1) acquires the information and (2) learns or ought to have learned that the information is so impressed. *See, e.g., Doe v. Roe*, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup. Ct. 1977) (imposing liability against husband who published information that he knew was revealed to his wife in course of confidential physician-patient relationship).

Subsection 7-101(e). This subsection imposes liability on a person who negligently maintains information which has been received in confidence when a disclosure of that information occurs as a proximate result of the person's negligence. A person who has an obligation of confidentiality has a parallel obligation to exercise due care in assuring that other persons will not have access to that information. Even if another person employs improper means to gain access to the information, a person still is liable

under subsection 7-101(e) for subsequent disclosures if the person's negligence in maintaining the confidential information assisted in the success of the improper means. For example, a doctor who negligently leaves confidential medical records out in the open is liable under subsection 7-101(e) if one of his patients peruses the records and subsequently discloses information contained in the records.

Section 7-102. Privileges for Breach of Confidence.

In addition to the privileges contained in Section 8-107, a person is not liable for breach of confidence under Section 7-101 if:

- **(a) the disclosed information is known widely by the public;**
- **(b) the interest in the disclosure of the information outweighs the interest in preserving the confidentiality of the information; or**
- **(c) the disclosure is made with the consent of the supplier of the information in a nonpersonal confidential relationship.**

Comment to Section 7-102

Recognizing that a disclosure of confidential information may be excused or justified in certain circumstances, Section 7-102 establishes three general privileges against liability for breach of confidence. First, subsection 7-102(a) excludes a person from liability for disclosure of information that at the time of disclosure was in the public domain. This privilege is based on a provision in the British Law Commission's proposed tort of breach of confidence. *See* Law Commission's Tort, *supra* Comment to Section 7-101, at 27. Under the public domain privilege, information is in the public domain if widely known by the public. The "widely known" standard is stated in broad terms to allow courts to decide in the circumstances of each case whether the information at the time of the alleged wrongful disclosure was widely known to persons outside the confidential relationship or whether the information was, instead, relatively secret. A person who receives information in confidence should not escape liability for disclosing that information solely on the ground that the information is technically accessible to the public. The essential inquiry is not whether the information is located in a record that is accessible to the public but rather whether the information is so widely known that it has become public information that cannot be regarded as secret.

Subsection 7-102(b) provides that a person is not liable for breach of confidence if the public interest in the disclosure of the information outweighs the interest in protecting its confidentiality. The public interest privilege is stated in broad terms to encompass the various public interest-based privileges that courts previously have established and to allow courts to weigh the competing public interests on a case-by-case basis. Accordingly, Section 7-102(b) includes but is not limited to the following common-law privileges against breach of confidence: (1) the public safety privilege, which provides that a person is not liable for disclosing confidential information to protect public health and safety, *see, e.g.*, *Simonsen v. Swenson*, 104

Neb. 224, 177 N.W. 831 (1920) (holding that physician was privileged to notify hotel in which patient was staying that patient had contagious disease and that hotel should disinfect patient's sheets); (2) the fraud or crime privilege, which provides that a person is not liable for disclosing confidential information to prevent fraud or crime, *see, e.g.*, *State v. McCray*, 15 Wash. App. 810, 551 P.2d 1376 (1976) (holding that bank was privileged to disclose depositor's bad checks to police); and (3) the legal process privilege, which provides that a person is not liable for disclosing confidential information under compulsion of legal process, *see, e.g.*, *Doe v. DiGenova*, 642 F. Supp. 624, 632 (D.D.C. 1986) (holding that Veterans Administration was not liable for disclosing plaintiff's confidential record pursuant to grand jury subpoena).

In applying these traditional public interest privileges and in balancing the competing public interests on a case-by-case basis, a court should review all the circumstances, including the need for the information to vindicate a public interest, the manner in which the disclosing person acquired the information, and the extent and use of the disclosure. In reviewing the extent and use of the disclosure, a court may consider whether the disclosure was confined to those persons who were appropriate to receive the information. For example, because the public has an interest in encouraging citizens to help police apprehend criminals, a court may conclude that it was proper to disclose a crime to the police but improper and unjustified to disclose a crime to a newspaper reporter. Finally, in applying the public interest privilege, courts should refrain from equating the term "public interest" with the term "public curiosity." *Cf. Doe v. Roe*, 93 Misc. 2d 201, 400 N.Y.S.2d 668, 677 (Sup. Ct. 1977) (noting that in no case has curiosity or education of medical profession superseded physician's duty of confidentiality). The essential inquiry is whether the disclosure of the confidential information was in the public interest and not merely of public interest.

Subsection 7-102(c) provides that a person is privileged to disclose confidential information if the supplier of the information consents to the disclosure. A person who consents to disclosure of information supplied in confidence terminates any duty of confidentiality with respect to that information. A person impliedly may consent to disclosure of information if the person acts inconsistently with his interest in preserving the confidentiality of the information. For example, a public official who reveals confidential information to a doctor impliedly may consent to the doctor's subsequent disclosure if the public official revealed the same information to a newspaper that questioned the official's ability to hold office. In applying the consent privilege, a court should analyze carefully the scope of the consent and determine whether the disclosure was within the scope of consent.

A person's consent to a disclosure of confidential information does not preclude liability for disclosing invasive, intimate facts under Section 4-101 of this Act or for injury to reputation under Section 3-101. For example, if X tells his psychiatrist Y an invasive intimate fact about his wife W, X

can shield Y from liability under Section 7-101 by consenting to the disclosure of the fact. X's consent, however, does not shield Y from W's potential suit under Section 4-101 for disclosing an invasive, intimate fact.

In addition to the privileges contained in Section 7-102, Section 8-108 of this Act contains privileges that universally preclude liability for certain types of communications. First, subsection 8-108(b) establishes a privilege for communications that are made in the course of a person's testimony under oath in a judicial or legislative proceeding. Thus, a person is not liable for a breach of confidence if the breach occurs while the person is under oath. The drafters decided that the public interest in preserving the efficiency of the judicial and legislative process outweighed any benefits a supplier of confidential information may receive by excepting breaches of confidence from subsection 8-108(b). Subsection 8-108(b), however, does not *compel* disclosure; nor would a disclosure privileged under Article 8 absolve the disclosing party from liability or sanctions arising under other law or under professional codes of responsibility.

In addition, subsection 8-108(d) establishes a privilege for communications that a person makes as a fair and accurate report of a judicial or legislative proceeding. Thus, if a person acquires confidential information by witnessing a judicial or legislative proceeding, the person is not liable for a breach of confidence if the person discloses the information in a fair and accurate report of the proceeding. The fair and accurate report privilege applies regardless of whether the person knows that he obtained the information as a direct result of another person's breach of confidence. The drafters agreed that the public interest in receiving fair and accurate reports of judicial and legislative proceedings outweighed the interest in preserving the confidentiality of information.

Section 7-103. Remedies for Breach of Confidence.

Recovery for breach of confidence may include:

(a) special damages pursuant to Section 9-101;
(b) damages resulting from emotional harm pursuant to Section 9-102;
(c) punitive damages pursuant to Section 9-105; and
(d) injunctive relief pursuant to Section 9-108.

Section 7-104. Codes of Professional Conduct.

This Article shall not affect liability under any Code of Professional Conduct.

Comment to Section 7-104

Section 7-104 provides that in establishing liability for breach of confidence the provisions of Article 7 do not affect a person's liability under any Code of Professional Conduct. Various professions have codes of conduct that discipline members who disclose confidential information that those members learn in the course of their profession. *See, e.g.*, A.M.A. Principles of Medical Ethics § 9 (1975); Model Code of Professional

Responsibility Canon 4, EC 4-1, 4-4, 4-6, DR 4-401 (1980). Civil liability for breach of confidence, as established in Section 7-101, does not preclude additional liability for violating these or other professional codes of conduct. Accordingly, a lawyer who makes an unprivileged disclosure of information that his client revealed in confidence may be held liable under Section 7-101 and professionally disciplined pursuant to the Model Code of Professional Responsibility.

Article 8

Republication; Miscellaneous Provisions

Section 8-101. Liability Premised on Republication.

(a) Liability for Republication.

(i) Unless privileged under subsection (b), a person who publishes information derived from a previous publication is subject to liability as if the person originally published the information, if publishing the information would create liability under Sections 3-101, 4-101, or 5-102 of this [Act].

(ii) A person who has published information is subject to liability for injury caused by the natural and probable republication of that information by any person other than the injured person, if publishing the information would create liability under Sections 3-101, 4-101, or 5-102 of this [Act].

(b) Privilege to Republish.

(i) Except as provided in subsection (b)(ii), a person who republishes information derived from another person's previous publication is not liable for republishing the information, if:

A. the republisher does not know or have reason to know that the information would cause injury; and

B. the republisher names the source from which it derived the information in close proximity to the information.

(ii) The privilege in subsection (b)(i) does not protect a republisher from liability if a person in the position of the republisher could not reasonably rely on the information's source and on the accuracy of the information from which the republication was derived.

(c) Limitations on Liability for Third Party Republication. A person who has published information is not liable for injury caused by a third party republication if:

(i) the third party republication occurred after the person made a sufficient retraction pursuant to subsection 9-111(b) or a publication satisfying subsection 9-107(a)(i) of this [Act]; or

(ii) the person notifies the third party that publishing the information may cause injury and the third party receives notification before publishing the information.

Comment to Section 8-101

The three subsections of Section 8-101 are structured to establish and circumscribe liability for republication. Subsection 8-101(a) sets forth two bases of republication liability. Under subsection 8-101(a)(i) a person is liable for publishing information that the person obtained from an earlier communication. Under subsection 8-101(a)(ii), a person is liable for harm caused by subsequent third party communications derived from the person's communication. Subsections 8-101(b) and 8-101(c) provide for publishers and republishers to take curative action and limit their liability for republication under subsection 8-101(a).

Section 8-101 modifies common-law rules of liability for republication in several ways. First, subsection 8-101(a) applies the rule of liability for republication to actions for product disparagement and communication of intimate facts as well as actions for harm to reputation. Second, subsection 8-101(b) provides a privilege for republishing information, together with the name of the source of the information, not provided in the common law. Third, subsection 8-101(c) permits a publisher to limit its liability for third party republication by making a sufficient retraction or publication pursuant to a declaratory judgment under Section 9-107. Fourth, a republisher who does not wish to make a retraction may avoid liability for republication by specific third parties by informing the third parties that the published information may cause injury. An additional limitation to liability is contained in Section 8-103, which precludes any person from bringing an action against a person for a third party republication that occurs ten years or later after the person's publication.

In establishing republication liability subsection 8-101(a) adopts three policies. First, the rule that a republisher is subject to liability as an original publisher encourages care on the part of the republisher in making communications that might harm another person. Second, imposing the liability of an original publisher upon a republisher also acknowledges that republication is as likely to cause harm as the original publication. Third, by imposing liability on a previous publisher for foreseeable third party republications, subsection 8-101(b) recognizes that an original communication may cause harm beyond the initial publication as third parties repeat and republish the substance of the original communication.

These policies apply as much to the harm caused by republication of intimate facts or information disparaging a commercial product as to information harming reputation. The rules of liability in Section 8-101, therefore, have been extended to apply to the causes of action for communication of intimate facts and product disparagement as well as for harm to reputation. By imposing liability for republication of intimate facts, Section 8-101 also preserves a plaintiff's remedies under the structure of

the Model Communicative Torts Act. Under the Act emotional harm is not compensable in an action for harm to reputation. By extending the rule of republication liability to actions for communication of intimate facts, Section 8-101 preserves an injured person's ability to recover for emotional harm that republication of intimate facts causes.

Subsection 8-101(a)(i) adopts the principle expressed in Section 578 of the Restatement of Torts (Second) that a republisher adopts a statement as his own statement. The privilege that subsection 8-101(b) provides for a republisher who attributes information to a source, however, substantially limits the application of the principle.

Subsection 8-101(a)(ii) adopts with modifications the principles embodied in Section 576 of the Restatement of Torts (Second). Subsection 8-101(a)(ii) abandons the three-part structure of Section 576 of the Restatement of Torts (Second) in favor of a rule of liability based on reasonable foreseeability of republication. Section 576(c) of the Restatement (Second) essentially expresses such a rule in recognizing liability for "a third person('s) . . . repetition . . . reasonably to be expected." The scope of "natural and probable consequence" under subsection 8-101(a)(ii) is slightly broader than the language of section 576(c) of the Restatement (Second). By abandoning the reference to "repetition" in Section 576(c) of the Restatement, subsection 8-101(a)(ii) applies to conduct as well as statements. Subsection 8-101(a)(ii) is sufficiently broad to include liability for republication that the publisher authorized or intended. Subsection 8-101(a)(ii), therefore, includes a similar liability standard that the Restatement (Second) recognized in Section 576(b) by referring to "repetition authorized or intended by the original defamer" without excluding liability for republication by conduct and republication of conduct.

Subsection 8-101(a)(ii) abandons the rule in Section 576(a) of the Restatement (Second) that a publisher is liable for republication merely because a third party republisher has a privilege to repeat injurious information. Under subsection 8-101(a)(ii) the issue of whether a third party republication is privileged is irrelevant to determining whether a previous publisher is subject to liability. The rule of the Restatement (Second) rested on a policy that the injured person should have a party against whom to bring an action to vindicate his reputation. RESTATEMENT (SECOND) OF TORTS, § 576 comment b (1977). Subsection 8-101(a)(ii) rejects this policy. An injured person has ample opportunity to vindicate his reputation without resorting to the rule set forth in Section 576(a) of the Restatement (Second). The injured person may vindicate his reputation in an action for the previous publication, provided that he brings the action before the statute of limitations has run. *See* § 8-103 of this Act (setting forth statute of limitations). If a republication is a natural and probable consequence of a previous publication, the injured person may bring an action against the previous publisher even though the republication is privileged.

To demonstrate under Section 8-101 that republication has occurred, a plaintiff must show that the alleged republication derived from the previous publication. *See Windsor-Lake, Inc. v. WROK*, 94 Ill. App. 2d 403, 236

N.E.2d 913, 915 (1968). Evidence that the alleged republisher and the previous publisher both published matter concerning the same event should not be insufficient to establish republication. *See Davis v. National Broadcasting Co.*, 320 F. Supp. 1070, 1073 (E.D. La. 1970). To recover against an initial publisher for foreseeable third party republication, a plaintiff must demonstrate that the republisher selected the information in the republication from information contained in the previous publication.

Subsection 8-101(b)(i) provides an absolute privilege to republish information if the republisher has no reason to know the information might cause injury and attributes the information to its source. This exception is a marked departure from the rule expressed in the Restatement (Second) of Torts that a person may not avoid liability by attributing a communication to its source. *See* RESTATEMENT (SECOND) OF TORTS § 578 comment b (1977) (newspaper is subject to liability for statement even though newspaper named first newspaper in which statement appeared). Subsection 8-101(b)(i) is intended to impose liability for injury resulting from communication on the source of information.

The scope of the privilege, however, extends only to the republisher's liability for his own publication. The privilege does not foreclose the republisher's liability under subsection 8-101(a)(ii) for natural and probable republications derived from the republisher's publication. Hence, a newspaper that attributes a quoted or paraphrased statement to its source is protected by subsection 8-101(b)(i) for the publication but, nevertheless, is subject to liability for injury caused when a radio broadcaster later reads the newspaper's statement over the air. To avoid liability for third party republication, the newspaper must take corrective action pursuant to subsection 8-101(c).

Subsection 8-101(b) limits the scope of the republisher's privilege in two ways. Subsection 8-101(b)(i)(A) provides that republication is not privileged if the republisher knew or had reason to know that the republished matter might cause injury. Subsection 8-101(b)(ii) limits the application of the privilege regarding the responsibility of republishers that occupy special positions in communications media.

Under subsection 8-101(b)(i)(A) "reason to know" refers to a republisher's possession of information that would cause a person of reasonable intelligence to infer that a republication may cause injury. *See* RESTATEMENT (SECOND) OF TORTS § 12 (1977). The word "injury" in subsection 8-101(b)(i)(A) means harm for which a person may recover damages under Sections 3-101, 4-101, or 5-102 of the Act. A person seeking recovery against a republisher must demonstrate by a preponderance of evidence that the republisher had reason to know that republication would cause injury.

If a previous publisher notified the republisher before republication occurred that republishing information would cause injury, the republisher would have reason to know that injury would occur and republication is not privileged. In this way, subsection 8-101(b)(i)(A) operates with the limitation on liability under subsection 8-101(c)(i) to permit a publisher to shift the risk of liability for third-party republication to the third party by

notifying the third party that the information may cause injury. The interaction of the two subsections is intended to encourage the flow of accurate information from prior publishers to third parties and prevent increase of injury by unnecessary republication.

Subsection 8-101(b)(ii) provides a flexible rule for limiting the scope of the privilege to republish information. The flexibility of subsection 8-101(b)(ii) expands the privilege that Section 581 of the Restatement (Second) of Torts provided for persons who transmit or deliver defamatory material. Under Section 581 of the Restatement (Second) of Torts, a person who sells, rents, gives, transfers, or circulates defamatory matter is not liable unless the person knew or had reason to know that the matter was defamatory. Section 581 of the Restatement (Second) of Torts applies to news dealers, bookstores, libraries, messengers, and telegraph companies. By creating a flexible rule for limiting the scope of the privilege, subsection 8-101(b)(ii) eliminates the need to list and define the persons who may claim the protection of the privilege.

The flexibility of subsection 8-101(b)(ii) rests on the reference to a "person in the position of the republisher." Reasonable reliance under subsection 8-101(b)(ii) will vary according to the position of the republisher. Some republishers, such as publishers of books and producers of plays, movies, or television programs, are able to create great injury through widespread republication. These republishers have ample opportunity before republishing to review the material to determine the potentially injurious content. Republishers who have a practical opportunity to control the information that they republish should bear responsibility for reviewing material before republishing it. *See* RESTATEMENT (SECOND) OF TORTS, § 581 comment c (1977) (comparing persons who put information into market to persons who distribute information in market).

If a review of the material to be published would reveal information that could cause injury compensable under Sections 3-101, 4-101, or 5-102 of the Act, the republisher also may have a duty to inquire into the accuracy of the information and the reliability of the source of the information. In determining whether to impose a duty on the republisher to inquire into the accuracy of information, a court should consider whether an inquiry is practical. Time constraints may limit the ability of a republisher to inquire into the accuracy of material that third parties have prepared. For instance, it would be impractical for a newspaper to undertake a thorough investigation into the subject matter of a story that broke shortly before going to press. If a court-imposed duty of inquiry results, as a practical matter, in a republisher's self-censorship of material that a third party has prepared, the policy of encouraging editorial supervision should yield to the policy of encouraging the free exchange of ideas and information.

Subsection 8-101(b)(ii), therefore, requires a two-step determination of reasonable reliance. In the first step, a court should determine whether the republisher is capable of causing great injury through widespread publication and has the opportunity to exercise editorial supervision over the republished material. Unless the republisher satisfies both prongs of the first step of

the test, the republisher should be subject only to the "reason to know" standard set forth in subsection 8-101(b)(i)(A). If the republisher satisfies both prongs of the first step of the test, however, subsection 8-101(b)(ii) requires that the republisher at least review the material before republishing it.

Section 8-101(c) permits a publisher to limit liability for third party republication by taking corrective action. Under subsection 8-101(c)(i), a person who makes a sufficient retraction or publication pursuant to an action for declaratory judgment is not subject to liability for any third party republication that occurs after the retraction. Subsection 8-101(c)(ii) provides that a publisher can avoid liability for third party republication by giving third parties actual notice that republishing the information may cause harm. No publisher is subject to liability for a republication that occurs ten years or later after the person's publication.

Subsection 8-101(c)(ii) provides a means for a person to limit liability for natural and probable republications by targeting corrective action to third parties that the person knows have received potentially injurious information. Subsection 8-101(c)(ii), however, provides immunity from liability for republication only to a person who has effectively notified third parties that republication of information may cause injury. Subsection 8-101(c)(ii), therefore, provides the most protection to a person who knows the identity of third parties who have received information from the person.

Section 8-102 Single Publication Rule.

(a) Except as provided in subsections (b) and (c), each communication to a third party is a separate publication.

(b) A communication simultaneously received by more than one third party is a single publication.

(c) Any edition of a book or newspaper, radio or television broadcast, exhibition of a motion picture, or other aggregate communication is a single publication.

(d) As to any single publication:

(i) damages in all jurisdictions can be recovered in any cause of action under this [Act];

(ii) a judgment for or against the plaintiff on the merits of any cause of action brought under this [Act] bars any collateral adjudication of that cause of action between the same parties in all jurisdictions.

Section 8-103. Limitations on Actions.

(a) All claims under this [Act] shall be barred unless the action is commenced in a court of competent jurisdiction within one year of the plaintiff's knowledge of the subject communication, but in no case may an action be commenced more than five years after the subject communication.

(b) All claims based on a republication under Section 8-101(a)(ii) shall be barred unless the action is commenced in a court of competent jurisdiction within ten years of the publication of the information from which the republication was derived.

(c) The limitations period is tolled during the period provided in Section 9-109 for a request for retraction.

Comment to Section 8-103

Section 8-103 contains two provisions addressing limitations on actions. First, Section 8-103 balances the interests of both parties to a suit under the Act by adopting a rule based on plaintiff's discovery of the communication, but strictly limiting the period for filing suit once discovery is made and precluding all suits filed more than five years after the making of the communication. Second, Section 8-103 provides a ten-year limitation period for suits based on republication.

Subsection 8-103(a) provides that a plaintiff must commence a suit under the Act within one year of the plaintiff's actual knowledge of the communication. Although most states provide a one-year statute of limitations on libel actions, states vary as to when they begin the limitations period. Some states provide that a libel cause of action accrues when the publication is made, *see* N.Y. CIV. PRAC. L. & R. § 215 (McKinney 1971); ILL. ANN. STAT. ch. 110, para. 13-201 (Smith-Hurd 1934), while other states provide that a libel cause of action does not accrue until the plaintiff learns of the communication. *See* CAL. CIV. PROC. CODE § 340(3) (West 1982). Basing the statute of limitations upon the making of the communication has the advantage of providing a definite limitation on a communicator's liability. The Act departs from this approach in recognition of the fact that a person can be injured by a communication of which the victim is unaware.

Subsection 8-103(a) also provides that a communicator's potential liability is terminated after the passage of five years following the making of the communication. The five-year limitation on liability represents a balance struck between fairness to plaintiffs and fairness to defendants. The Act protects unaware plaintiffs, but only for five years. Accordingly, a communicator will not have to defend a communicative tort suit initiated more than five years after the alleged tortious communication. The only exception to this rule applies if a communication is republished. Republication is addressed in subsection 8-103(b).

Subsection 8-103(b) rejects the common-law principle that republication indefinitely can extend into the future a person's liability for publishing injurious information. This provision ultimately protects publishers from the distant repercussive effects of injurious publications. Together with the privilege provided in subsection 8-101(b)(i) for republishers who attribute information to a source, subsection 8-103(b) potentially can foreclose all liability for republication of injurious information ten years or more after publication. Although foreclosing liability after ten years may work a hardship on injured persons, subsection 8-103(b) adopts a policy of protecting publishers from claims based on past actions and encourages rapid resolution of claims.

Subsection 8-103(c) provides for the tolling of the statute of limitations while a plaintiff awaits a defendant's reply to a request for retraction made

pursuant to Section 9-109. The policy behind subsection 8-103(c) is that plaintiffs should not be discouraged from requesting retractions out of concern that the limitations period is nearly at an end. Although Sections 9-109 and 9-111 require a defendant to respond to a request for a retraction within twenty-five days, if the request comes within twenty-five days of the running of the statute of limitations, a defendant should not be able to delay answering to cause the statute to run. Although a plaintiff could file a suit before he requests a retraction, subsection 8-103(c) allows a plaintiff to avoid incurring the legal fees attendant on filing suit.

Section 8-104. Jurisdiction over Nondomiciliaries.

In an action arising under this [Act], a court may exercise personal jurisdiction over any nondomiciliary or over an executor or administrator, if the defendant possesses sufficient minimum contacts with the State and substantial injury occurred within the State.

Comment to Section 8-104

Section 8-104 provides that the enacting State's courts will exercise personal jurisdiction over out-of-state defendants only when the forum state has a significant interest in the outcome of the litigation. To that extent, Section 8-104 blends the purposes of a long-arm statute with those of a choice of law provision.

States are not required to provide long-arm jurisdiction. At least one state specifically exempts libel defendants from long-arm jurisdiction. *See* N.Y. CIV. PRAC. L. & R. § 302 (McKinney 1972). With the growth of national communication systems, however, there is an increased likelihood that a communicative tort action will involve parties from different states, thus requiring long-arm jurisdiction. Some state long-arm statutes allow state courts to exercise jurisdiction over out-of-state defendants to the extent the United States Constitution permits. E.F. SCOLES & P. HAY, CONFLICT OF LAWS 315 (1982). Current constitutional law requires only that an out-of-state defendant possess "certain minimum contacts [with the forum jurisdiction] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Although the sufficient minimum contacts test insures that defendants are not denied due process, the test allows parties with little or no relation to a state to use state courts to settle disputes. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (allowing jurisdiction even though defendant's contacts with forum state constituted less than one percent of its business and plaintiff's contacts with forum state practically were nonexistent). Because of the likelihood of multistate communications, however, more than minimum contacts is required.

Section 8-104 provides that a court may exercise jurisdiction over a case only if the defendant possesses minimum contacts with, and substantial injury occurred within, the enacting state. Whether a defendant possesses

minimum contacts will be determined under the test enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Whether substantial injury occurred within the state is a factual question properly determined by consideration of all the circumstances. For example, if five percent of the injury occurred within the state, but no more than five percent of the injury occurred in any other state, the court may consider five percent to be substantial injury. This substantial injury prong is analogous to the significant relationship test used in the choice of law area. *See* RESTATEMENT (SECOND) OF CONFLICTS § 145 (1971). The Act simply limits the factors a court must consider in determining whether a significant relationship exists to the amount of injury within the state.

Section 8-105. Pleadings.

(a) In an action under this [Act], a plaintiff shall set forth in the complaint the communication, specific challenged portions thereof, and any relevant surrounding circumstances that give rise to the cause of action.

(b) If the plaintiff demonstrates that the defendant continuously made the communication and is reasonably likely to continue to make the communication, the court may, upon the plaintiff's motion, shorten the time for defendant to answer to not less than ten days after service of the complaint upon the defendant.

(i) Continuous communication means three or more publications within fifteen days.

(ii) If a court grants a plaintiff's motion to shorten the time period for the defendant's answer, the court shall give precedence in setting the case for trial and may not grant a continuance in excess of ten days without the consent of the adverse party.

Comment to Section 8-105

Section 8-105 provides that a plaintiff filing a complaint under the Act must describe the subject communication in sufficient detail to inform adequately the defendant of the subject of the suit. This Section imposes special requirements in communicative tort actions that extend beyond the requirements generally imposed for all pleadings under state laws. Although some states require particularity of pleading in libel actions, *see* N.Y. CIV. PRAC. L. & R. § 3016(a) (McKinney 1974), current law largely remains silent on how particularly a cause of action for a communicative tort must be pled. Consequently, in some states a plaintiff may append a copy of a book or lengthy article to the complaint, forcing the defendant to deduce what part of the publication the plaintiff finds objectionable. Particularity of pleading makes the defendant immediately aware of the subject of the suit, thus promoting efficiency and facilitating early steps to retract the communication or to settle the suit.

Subsection 8-105(a) requires that a plaintiff set out in a complaint the exact offending words or conduct. A plaintiff may not give a general description of the communication limited by terms such as "to the effect" or "substantially." Furthermore, if only a portion of a communication is actionable, the plaintiff must specify in the complaint the actionable portion.

If the ordinary meaning of the subject communication does not give rise to a cause of action under this Act, but the circumstances surrounding the communication imply a meaning to the communication other than the ordinary meaning, the plaintiff must plead the specific circumstances. In a case involving innuendo, sarcasm, or a statement accompanied by conduct, the plaintiff must state the alleged implicit meaning.

Subsection 8-105(b) provides that a plaintiff who alleges continuous injury from a communication that continuously is being made may have the proceeding expedited. At least one state currently provides for expedited proceedings. CAL. CIV. PROC. CODE § 460.5 (West 1973). Inclusion of subsection 8-105(b) reflects a policy decision that plaintiffs who are not eligible for injunctions pursuant to Section 9-108, but who nonetheless are being injured by a continuously made communication, should have an opportunity to obtain relief earlier than normal litigation procedures provide.

Section 8-106. Reporter's Source Privilege.

(a) A court may not compel the disclosure of an unidentified source of information obtained by a reporter during the course of the reporter's employment. However, in an action in which a reporter or news medium is a party defendant, a party can petition the court to limit or prohibit the defendant's reliance on the unidentified source.

(b) In a motion to limit or prohibit a media defendant's reliance on an unidentified source, the moving party must demonstrate that:

(i) the information to be obtained from the unidentified source is relevant to the cause of action;

(ii) the information cannot be obtained through alternative means; and

(iii) the party has a compelling interest in obtaining the information.

(c) If a court grants a motion to limit or prohibit a defendant's reliance on an unidentified source and the defendant chooses not to reveal the identity of the source, the court in its discretion may preclude the defendant's introduction of evidence of the existence of the source or instruct the jury that the defendant's failure to produce the source creates a rebuttable presumption that the source does not exist.

Comment to Section 8-106

Section 8-106 strikes a balance between a reporter's need to protect the identity of confidential sources and a plaintiff's need to discover the source

of the information. Forcing reporters to disclose the identity of confidential sources might deter informants from providing necessary information to the press, except anonymously. *See Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980). The press might not publish any of the information because of the inherent unreliability of anonymous tips. *Id.* However, the press should not be allowed to hide behind a confidential source to another party's detriment.

Subsection 8-106(a) provides that a court may not compel a reporter or a reporter's employer to reveal the identity of a confidential source. This "shield" is consistent with many state laws preventing courts from imposing contempt sanctions upon reporters. *See* M. FRANKLIN, MASS MEDIA LAW 581 (3d ed. 1987). Subsection 8-106(a)'s shield, however, does not provide media defendants with an absolute privilege. Upon the requisite showing, a court may impose sanctions upon the media defendant's reliance on the source.

Subsection 8-106(b) adopts the three-part test set out in *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980). A party seeking a court-ordered limitation or prohibition of a media defendant's reliance on an unidentified source essentially must demonstrate that the party's case would be untenable without the identity of the source and that the information is otherwise unavailable. Thus, in recognition of the importance to the media of unidentified sources, subsection 8-106(b) erects a difficult obstacle for moving parties. Accordingly, only in extreme cases will a media defendant have to suffer any hardship for maintaining the confidentiality of a source.

Subsection 8-106(c) gives courts discretion in crafting remedies for moving parties. Although a court cannot force a reporter to disclose the identity of the source, the court can limit a media defendant's reliance on the source. Subsection 8-106(c) permits a court to consider the circumstances of each case in determining the extent to which the court should limit a media defendant's reliance on a source.

Section 8-107. Other Privileged Communications.

An action under this [Act] may not be maintained against any defendant for a communication that is privileged. A privileged communication is one made:

- **(a) with the consent of the subject of a communication, other than a confidential communication under Section 7-101;**
- **(b) in the course of a person's testimony under oath in a judicial or legislative proceeding;**
- **(c) to prevent potential harm to third persons or to preserve the public safety; or**
- **(d) as a fair and accurate report of a judicial or legislative proceeding.**

Comment to Section 8-107

Section 8-107 contains privileges that generally are applicable under the

Act. At common law some communications were privileged because the speaker's status or position required the free exchange of information or because on some occasions the freedom to speak in protection of certain interests was more important than any potential harm to reputation. R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 267 (1980). Section 8-107, combined with other privileges specific to certain Articles in the Act, supplants the common-law privileges.

Subsection 8-107(a) provides that if the subject of a communication consents to the communication before the communication is made, the communication is privileged. Subsection (a) does not constitute a change in existing law. RESTATEMENT (SECOND) OF TORTS § 583 (1977). Consistent with the Restatement (Second), the requisite consent cannot be obtained through duress or fraud or from a person who lacks the capacity to consent. RESTATEMENT (SECOND) OF TORTS § 583 comment b (1977). A person also may limit the scope of the consent.

A person impliedly may consent to the communication. Whether a person impliedly consented is to be determined in light of the circumstances surrounding the alleged consent. Implied consent exists when a person's words or conduct reasonably could be interpreted as an expression of consent to the publication. *See* RESTATEMENT (SECOND) OF TORTS § 583 comment c (1977).

Subsection 8-107(b) privileges all communications made while the communicator is testifying under oath in a judicial or legislative proceeding. The function of witnesses is of fundamental importance to the administration of justice and to the governing of our society. The final judgment of tribunals or decisions by legislatures must be based on facts that witnesses provided. To promote full disclosure, witnesses must not fear private suits based on these communications. RESTATEMENT (SECOND) OF TORTS § 588 comment a (1977).

The testimonial privilege is not a license to communicate injurious information. Subsection 8-107(b) only privileges statements pertinent to the proceeding. To be pertinent, a statement must appear to have enough connection with the proceeding so that a reasonable person might think it relevant. R. SACK, *supra*, at 269. Any doubts regarding the pertinence of a statement should be resolved in the speaker's favor.

A judicial proceeding includes proceedings before any court or agency of a court. Judicial proceedings also should include proceedings that are judicial in character although held before another tribunal, such as an extradition hearing before the governor of a state or an impeachment proceeding before a legislative body. *See* RESTATEMENT (SECOND) OF TORTS § 611 comment d (1977) (describing judicial proceedings in context of fair and accurate report privilege). A legislative proceeding includes any proceeding before Congress, state legislatures, or municipal councils. RESTATEMENT (SECOND) OF TORTS § 590 comment c (1977).

Subsection 8-107(c) privileges all communications made either to prevent potential harm to third persons or to preserve the public safety. Subsection (c) reflects the public policy that it is desirable that true information be

given whenever it is reasonably necessary to prevent harm to another person or to the public in general. Existing law privileges communications that are made to protect a third party's interest or certain interests of the public. *See* RESTATEMENT (SECOND) OF TORTS § 595 (1977). The drafters decided that a third party's interest or the public interest was not a sufficiently limiting standard. Therefore, the Act departs from existing law by privileging only communications made to prevent harm to third parties or to preserve the public safety.

Subsection 8-107(d) allows a person to report information obtained at an open judicial or legislative proceeding. The rationale for this privilege is that information about the content of official proceedings should be made available to the public. RESTATEMENT (SECOND) OF TORTS § 611 comment a (1977). To promote the public interest, subsection 8-107(d) permits a person to report on an open judicial or legislative proceeding as long as the report is fair and true.

For the privilege in subsection 8-107(d) to apply, the proceeding must be open to the public. Therefore, the privilege is designed to permit the press to be the public's proxy at proceedings that the public could attend. Accordingly, if the public could not attend a proceeding, the subsection (d) privilege will not protect a report of the closed proceeding. Furthermore, subsection (d) does not privilege the communication of material contained in records of closed proceedings.

To be a true report, the report must be a substantially correct account of the proceeding. Minor inaccuracies in the report should not preclude the communicator from asserting the subsection (d) privilege. To be a fair report, the communication must not be misleading. To qualify for the privilege, the report need not be a verbatim account of a proceeding. However, nothing in the report must "be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it." RESTATEMENT (SECOND) OF TORTS § 611 comment f (1977).

Section 8-108. Severability.

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

Section 8-109. Burden of Proof.

Unless otherwise provided in this [Act], the burden of proof shall be by a preponderance of the evidence.

Article 9

Remedies

Section 9-101. Special Damages.

In any action arising under this [Act] in which a party may recover special damages, recovery shall be limited to reasonable compensation based on proof of lost earnings, diminished earning capacity, lost profits, loss of commercial value, or any other pecuniary loss that proximately results from the injury.

Comment to Section 9-101

Section 9-101 provides the measure of special damages recoverable under the Act but limits the recovery to certain types of provable economic injury. The requirement of proof of actual injury and the limitation of damages to those that are pecuniary will reduce the chilling effect on free speech that results from presumed damages. *See New York Times v. Sullivan*, 376 U.S. 254, 278 (1964) (linking damages to "pall of fear and timidity" on part of press); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (limiting damages to compensation for actual injury in private plaintiff cases where actual malice is not required to prove liability). Additionally, an across-the-board special damages rule reduces the complexity in communicative torts by eliminating distinctions between classes of plaintiffs and defendants. Emotional harm is not included in special damages because injury to personal feelings should not be compensated in many classes of communicative torts. *Cf. Gertz*, *supra* (including emotional harm in actual injury).

The requirement of proof of actual injury places recovery for communicative torts on an equal footing with recovery in other tort cases. *See* Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747 (1984). Compensation, therefore, is limited to proven injury rather than the open-ended general and presumed injury for which damages could be recovered at common law. For example, a party recovering for injury to reputation may recover only for the economic damage caused by harm to reputation.

Excluding emotional harm from actual injury departs from current law. This exclusion will prevent plaintiffs from recovering for emotional harm when they cannot prove injury to reputation. *Cf. Time, Inc. v. Firestone*, 424 U.S. 448, 461 (1976) (allowing recovery for emotional harm even though plaintiff failed to prove reputational harm). The policy justification for this change is that a plaintiff whose reputation is injured will be able to show some form of economic injury. *See* Anderson, *supra* (arguing that truly injured plaintiff can show harm to reputation).

The requirement of proof of actual injury will provide reviewing courts with a record against which to assess damage awards. Under the Act courts reviewing awards that compensate for actual injury will be able to determine

when the evidence supports the award. Previously, courts reviewing presumed damage awards had little or no check on the size of the award because the plaintiff did not have to offer any evidence of injury.

Section 9-101 also is intended to permit a plaintiff to recover for future injury. If the injury to the protected interest will continue, the damage award may compensate for proven future loss and not merely for damages that exist at the time of the action.

Section 9-102. Emotional Harm.

In any action arising under this [Act] in which a party may recover damages resulting from emotional harm, recovery shall be limited to:

(a) reasonable compensation for emotional harm, based on proof of mental anguish and suffering, personal humiliation, or emotional distress; and

(b) reasonable compensation based on proof of physical pain and suffering proximately resulting from the emotional harm.

Comment to Section 9-102

Section 9-102 recognizes that certain limited classes of communicative torts result in emotional injury. Emotional injury includes personal humiliation and mental anguish and suffering. Section 9-102 also recognizes that an emotional injury may manifest itself in the form of physical pain and suffering. The Act allows recovery for both types of injury.

In many cases a party may be able to offer evidence in addition to the party's testimony that will prove the existence of emotional injury. This Section, however, does not require that a party present any "independent" evidence of the injury. For example, a plaintiff who offers his own testimony, which the jury finds credible, that he or she suffered emotional harm may recover under Section 9-102.

Recovery for emotional injury is not allowed for persons who are not the subject of a communication even though they also may suffer emotional harm as the result of a communication. This prohibition eliminates a source of large potential liability to unforeseen plaintiffs and limits a publisher's liability to those who are the subject of a communication. An owner, officer, or employee of a business entity that is the subject of a communicative tort may not recover for emotional injuries.

Section 9-103. Physical Injuries.

In any action arising under this [Act] in which a party may recover damages resulting from physical injury, recovery may include, in addition to special damages under Section 9-101, reasonable compensation for pain and suffering proximately resulting from the physical injury.

Comment to Section 9-103

Section 9-103 governs recovery for physical injuries. While damages for

physical injuries can be recovered under Section 9-101, Section 9-103 provides for additional recovery by permitting recovery for pain and suffering proximately resulting from physical injury. Thus, a party who may recover for physical injuries may recover the types of economic damages available under Section 9-101 and damages for pain and suffering under Section 9-103. A party claiming pain and suffering bears the burden of proving that the pain and suffering proximately resulted from a physical injury.

Section 9-104. Property Damage.

In any action arising under this [Act] in which a party may recover for damages to real or personal property, recovery shall be limited to the difference between the fair market value of the property prior to the occurrence giving rise to liability and the fair market value of the property immediately after the occurrence.

Comment to Section 9-104

Section 9-104 governs recovery for damage to real and personal property, limiting recovery to the difference between the fair market value of the property before and after the injury. "Fair market value" refers to the selling price of similar property established by expert testimony and generally accepted valuation techniques. Economic damage flowing from the property damage, such as lost profits due to damaged equipment, is not recoverable under this Section. However, economic damages of this type are available under Section 9-101.

Section 9-105. Punitive Damages.

Punitive damages shall be allowed only as explicitly authorized by this [Act], and shall be available only to a party who has proven damages under Sections 9-101, 9-102, 9-103, or 9-104.

Comment to Section 9-105

Section 9-105 governs punitive damages that are available in limited cases under the Act. The policy rationale for the punitive damages limitation is that punitive damages have a severe chilling effect on free speech. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Additionally, as a practical matter juries already may add a punitive element in awarding compensatory damages. *See* Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747 (1984).

The Act eliminates punitive damages for communicative torts except in specified classes of cases, such as intentional misrepresentation, noncommercial fraud, and breach of confidentiality. In all instances, punitive damages are available only if the plaintiff establishes a specified level of fault and successfully recovers some other form of damages as a precondition.

A plaintiff cannot recover punitive damages unless the plaintiff has suffered some harm as a result of the communicative tort. The requirement that a party recover some other damage award before recovering punitive damages prevents a jury from awarding nominal damages and using the nominal damages as a basis for awarding punitive damages. This requirement is a change from common-law libel. *See Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976) (awarding punitive damages because defendant knowingly published false facts even though plaintiff did not prove actual damages). This requirement will prevent a plaintiff who has not been injured from recovering a large award that could chill free speech. For a plaintiff interested only in nominal damages, the declaratory judgment provisions of the Act should suffice.

Section 9-106. Attorneys' Fees.

(a) Except as provided in subsection (b) or in Sections 9-107 and 9-109, a party shall not recover attorneys' fees.

(b) If in any action under this [Act], the court determines that a party vexatiously prolonged the litigation or maintained frivolous claims, the court may award the opposing party reasonable attorneys' fees and court costs.

Comment to Section 9-106

Section 9-106 adopts the American rule that a party bears his or her own attorneys' fees. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). Three exceptions serve to encourage the rapid disposition of communicative tort cases. The first, provided in subsection 9-107(b)(ii), encourages plaintiffs to seek a nondamage remedy when a nondamage remedy will protect their interests by awarding attorneys' fees and costs to a prevailing plaintiff. The second, provided in subsection 9-109(c)(ii), encourages plaintiffs to seek a retraction or opportunity to reply by rewarding such an effort with attorneys' fees when the effort is unsuccessful and the plaintiff ultimately prevails in an action arising under this Act. This exception also encourages defendants to retract or allow a reply by penalizing a failure to do so if the defendant ultimately loses on the merits.

The third exception to the general rule is found in subsection 9-106(b), which authorizes an award of attorneys' fees against a party who maintains vexatious or frivolous actions. This exception discourages tactics that unfairly prolong litigation and add to the expense of the opposing party. *Cf.* 28 U.S.C. § 1927 (1982) (providing for sanctions of attorneys' fees when an attorney unreasonably and vexatiously prolongs litigation); FED. R. CIV. P. 11. In appropriate cases courts may apply this sanction to a party's attorney in addition to or instead of sanctioning the party. *See* Note, *When Is An Attorney Unreasonable and Vexatious?*, 45 WASH. & LEE L. REV. 249 (1988) (discussing appropriateness of sanctioning attorneys).

Section 9-107. Declaratory Judgment.

A party bringing an action under Sections 3-101 or 5-102 of this [Act] may elect to seek a declaratory judgment that a communication contained injurious or disparaging false or misleading statements.

(a) If in an action seeking a declaratory judgment the trier of fact determines that a communication contained false or misleading statements:

(i) the court shall order that the party who made the communication publish or cause to be published in a manner and medium reasonably calculated to reach the same audience as the false or misleading communication, the contents of the declaratory judgment or a correction satisfactory to the plaintiff; and

(ii) the party obtaining the declaratory judgment shall recover reasonable attorneys' fees and reasonable costs of bringing the action.

(b) Actions for declaratory judgments shall be granted docket priority and, absent consent of the parties, shall be adjudicated in a court or in a court-annexed proceeding not more than 120 days after the filing of the complaint, unless the court makes a finding on the record that such an expedited trial is impracticable under the circumstances.

(c) Damages shall not be recoverable in a declaratory judgment action.

Comment to Section 9-107

Section 9-107 permits a plaintiff to require that an action be tried as a declaratory judgment action with no damages permitted. The declaratory judgment alternative provides plaintiffs with an expedited and less costly alternative by which to vindicate the interests harmed by a communicative tort. *See* LIBEL REFORM PROJECT OF THE ANNENBERG WASHINGTON PROGRAM, PROPOSAL FOR THE REFORM OF LIBEL LAW 16 (1988) (discussing advantages of declaratory judgment action); BEZANSON, SOLOSKI AND CRANBERG, LIBEL LAW AND THE PRESS, 172-77 (1987). Both plaintiffs and defendants will benefit from the reduced costs incident to a declaratory judgment action as opposed to the costs associated with an action for damages. Additionally, a declaratory judgment eliminates the possibility of large damage awards that may chill free speech. The speed and efficiency of a declaratory judgment action and the award of attorneys' fees and costs offset the plaintiff's loss of an opportunity to recover money damages. The requirement of an expedited trial also benefits defendants because the possible award of attorneys' fees and costs will be less. Because discovery is limited to the issue of whether the statements were false or misleading, both plaintiffs and defendants will incur lower costs than in an action for damages unless the defendant chooses to rebut the presumption of injury.

The issues to be litigated in a declaratory judgment action are whether the communication was false or misleading and caused the relevant injury. A court should disallow discovery into or presentation of evidence concerning matters relevant only to fault. Attempted discovery into these matters

could lead to a sanction of attorneys' fees under Section 9-106 if the party attempting such discovery does so to prolong the litigation or harass the opposing party.

Under subsection 9-107(a)(i) a court will not make the choice between requiring publication of the contents of the declaratory judgment or a correction satisfactory to the plaintiff. If the plaintiff agrees to the defendant's proposed correction, the defendant simply will publish the correction. If the plaintiff does not agree to the proposed correction, the defendant must publish the contents of the declaratory judgment. This prevents plaintiffs from requiring publication of a correction that the defendant does not think should be published. The defendant can refuse to offer a correction and publish the contents of the declaratory judgment.

A court may order that the declaratory judgment action be heard by a court-annexed adjudicatory body such as a magistrate, referee, or master. This is designed to allow a declaratory judgment action to be heard quickly, even in jurisdictions that have a backlog of civil actions. A court that orders a court-annexed adjudication should incorporate the decision of the adjudicator into an order of the court. The adjudicator's decision is subject to *de novo* review by that court.

Once a party has filed an action for declaratory judgment, the party may not file an action for damages based on the same claim. This requirement, however, will not prevent a party from bringing an action based on republication of a tortious communication. *See* ACT § 8-101.

Section 9-108. Injunctive Relief.

(a) A party may seek injunctive relief only as explicitly authorized by this [Act].

(b) A court may grant injunctive relief preventing the making of all or a part of a communication only if after an adversary hearing the court finds that:

(i) the party seeking the injunction has shown that irreparable harm will result to the party in the absence of the injunctive relief and that the injunction will prevent the harm; and

(ii) the injunctive relief is narrowly tailored and is the least restrictive means of preventing the irreparable harm.

(c) A court may grant a temporary restraining order or preliminary injunction only if the party seeking the injunction has instituted an action seeking permanent injunctive relief and is likely to succeed at trial.

(d) In any action in which temporary or preliminary injunctive relief has been granted, the court may require the posting of a bond and shall try the action within 60 days after the issuance of the temporary or preliminary injunctive relief.

Comment to Section 9-108

Section 9-108 governs actions under Sections 3-101, 4-102, 5-101, or 7-

103 for injunctive relief to prevent irreparable injury or to prevent the repetition of a communication that a court has determined to be tortious. The rationale for allowing injunctive relief is that damages may not adequately compensate a party after publication has occurred. Historically, courts disfavor prior restraints. *Near v. Minnesota*, 283 U.S. 697, 716 (1931). Courts, however, have allowed injunctions restraining publication to protect specific business and commercial interests such as trademark or copyright infringement. *See, e.g., Dallas Cowboy Cheerleaders v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979); *Reddy Communications, Inc. v. Environmental Action Fund*, 477 F. Supp. 936 (D.D.C. 1977); *Karamchandani v. Ground Technology, Inc.*, 678 S.W.2d 580 (Tex. Ct. App. 1984). Additionally, a narrowly tailored prior restraint may withstand constitutional scrutiny if the interest protected by the injunction "outweighs" the first amendment interest in protecting free speech. *Near*, 283 U.S. at 716. Rather than adopting a blanket prohibition against "prior restraints," Section 9-108 recognizes that an "adjudication" of a violation of this Act may precede publication and, therefore, allows the issuance of injunctions in appropriate cases.

Section 9-108 specifies the constitutional procedural safeguards required before a court may issue an injunction restraining publication: (a) the party seeking the injunction has the burden of instituting judicial proceedings that will result in a final judicial determination of whether the communication violates this Act; (b) a court may issue an injunction only after an adversary hearing; and (c) a prompt final judicial determination must be assured. *See* Abrams, *Prior Restraint*, 1986 COMMUNICATIONS LAW 395, 462-68.

Within this procedural framework, injunctions are permitted only in very limited situations. Preliminary injunctive relief is an extraordinary remedy that will be inappropriate in most cases. Permanent injunctive relief will be an appropriate remedy in cases where a party has proven that the communication was wrongful and continuous use or publication of the communication will cause continued injury. An injunction in these cases, however, must be tailored narrowly to protect the party.

The findings that Section 9-108 requires courts to make before issuing an injunction must follow an adversary hearing where the opposing parties have a chance to present the merits of their respective cases. *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968). The requirement of irreparable harm adopts the traditional standard applied to the issuance of injunctive relief. The court must find that any other remedy provided under this Act will not adequately compensate the party for the injury that allegedly will result from the communication.

The requirement that a party seeking temporary injunctive relief show a likelihood of success on the merits requires not only that the party make out a prima facie case, but that the party be able to carry the appropriate burden of proof at trial. Additionally, the party seeking the injunction must overcome the defendant's prima facie case showing that the defendant has a defense permitted under this Act.

Section 9-109. Retraction.

Subject to subsection (c), a party may elect to forego any other remedy provided under this [Act] and request that the person making a communication publish a retraction or provide an opportunity to reply.

(a) The request for a retraction or reply must be made in writing and signed by the party or by the party's authorized agent. The request must specify the statements claimed to be false or misleading and the basis for that claim.

(b) (i) If the party who made the communication timely publishes a sufficient retraction or reply, the party requesting the retraction or reply shall be forever barred from obtaining any other relief applicable to the claim.

(ii) A timely and sufficient retraction fulfills the requirements of this Section in all cases. An opportunity to reply does not fulfill the requirements of this Section if a retraction is specifically requested.

(c) If the person making the communication refuses to publish a retraction or reply:

(i) the party requesting the retraction or reply shall be entitled to pursue any remedy provided under the other provisions of this [Act];

(ii) the party requesting the retraction or reply, if awarded any damages under this [Act], shall recover reasonable attorneys' fees; and

(iii) in determining whether the statute of limitations has expired, the time between the date on which a party receives a request for retraction or an opportunity to reply and the expiration of the time provided under Section 9-111 for the publication of a retraction or a reply shall not be considered.

Comment to Section 9-109

The retraction Sections (9-109 through 9-111) should be read as a whole. These Sections represent a careful balancing of the interests of plaintiffs and defendants and are designed to encourage the prompt, informal settlement of tort claims arising out of communication.

Section 9-109 permits a party suing under Articles 3 or 5 of the Act to seek a retraction or an opportunity to reply rather than damages or a declaratory judgment. A retraction or reply is a simple and efficient remedy. Additionally, a retraction or reply serves to limit or eliminate the damages caused by a communication. Unlike many current retraction statutes, Section 9-109 does not require a party to seek a retraction or opportunity to reply before filing an action for damages or a declaratory judgment. *Cf.* N.C. GEN. STAT. § 99-1 (1985); WIS. STAT. ANN. § 895.05 (West 1983). The rationale for this change is that a retraction may not effectively make the party whole and, therefore, the party should not be required to seek a retraction or reply. A party may seek a retraction or opportunity to reply

at any time prior to the expiration of the statute of limitations provided for actions arising under this Act.

Section 9-109 is designed to encourage parties to grant a request for retraction or reply by providing that the requesting party may seek no additional remedy in the event of the publication of a retraction or reply. Additionally, by refusing the request, a party is subject to a possible award of attorneys' fees if the requesting party thereafter prevails in an action for damages.

Under Section 9-109 the requesting party may choose between a retraction or an opportunity to reply. The opposing party, however, may not fulfill the requirements of this Section by offering to publish a reply when the requesting party has requested a retraction. A retraction, however, always will fulfill the requirements of this Section.

Section 9-110. Publisher's Offer of Retraction.

(a) If within 10 days of a communication, the person who makes the communication publishes or causes to be published a sufficient retraction, the person may assert the retraction as a complete defense to liability under Sections 3-101 and 5-102.

(b) If a person who makes a communication that is the subject of an action under Sections 3-101 or 5-102 publishes or causes to be published a sufficient retraction at any time prior to the beginning of trial, the person shall be liable only for those damages occurring prior to the publication of the retraction.

Comment to Section 9-110

Under Section 9-110 a publisher may retract unilaterally within ten days of a communication and avoid *any* liability. Section 9-110 is an important and unique provision of this Act. Section 9-110 is designed to encourage publishers to correct mistakes quickly and thereby avoid much of the harm that may flow from publication. Subsection 9-110(b) also allows a publisher voluntarily to retract at a later point and thereby cut off any future liability, except in the case where a republication precedes the retraction. At a trial of an action in which the defendant has published a retraction in accordance with subsection 9-110(b), the plaintiff will bear the burden of proving damages that occurred prior to the publication.

Section 9-111. Timely and Sufficient Retraction or Opportunity to Reply.

(a) To be timely, a retraction or reply must be published within 25 days of receipt of the request.

(b) To be sufficient:

(i) the retraction or reply must be published in a manner and medium reasonably calculated to reach the same audience as the false or misleading communication; and

(ii) in the case of a retraction, must set forth the errors or misleading statements contained in the original communication and must contain a correction and repudiation of the false or misleading statements.

Comment to Section 9-111

Section 9-111 sets out the requirements for a timely and sufficient retraction or opportunity for reply. A "timely" retraction must be published within 25 days of a request for retraction. A "sufficient" retraction or reply must be published in substantially the same manner and medium as the original communication unless publication in some other manner and medium reasonably is calculated to reach the same audience as the original communication.

A "sufficient" retraction also must withdraw and repudiate the original communication. An equivocal retraction will not satisfy the requirements of this Section. If the party requesting a retraction claims that the alleged communicative tort was the result of an implication contained in a communication, a sufficient retraction need contain only a statement that the party making the communication did not intend the implication and that the party rejects the implication. This will allow the publisher to disavow the alleged implication and yet stand behind the "facts" of the story.

In the case of a reply, the party publishing the reply reasonably may require that the reply not exceed the space or length of the original communication unless to do so would not permit the replying party to address adequately the dispute.