Tort Law—Historical Skepticism toward Emotional Distress Claims Creates a Void in Minnesota Defamation Law

Tina L. Lorleberg

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Traditional defamation law protects the interest in one's reputation and good name.¹ Modern defamation law attempts to balance First Amendment freedoms of speech and press with the legitimate interest in redressing wrongful injury.² In Richie v. Paramount Pictures Corp.,³ the Supreme Court of Minnesota recently tipped the scale against redressing wrongful injury.

In Richie, the court considered whether Minnesota allows defamation claims based on mental anguish and humiliation without proof of reputational injury.⁴ The Minnesota Supreme Court reversed the Minnesota Court of Appeals – which had held that reputational harm could be presumed for purposes of summary judgment⁵ – and reinstated the trial

3. 544 N.W.2d 21 (Minn. 1996).
4. Id. at 27.
court's decision granting the defendants' motion for summary judgment. The supreme court held that proof of reputational injury is a prerequisite to recovery for defamation, because the purpose of defamation law is to compensate individuals for harm to their reputations. Furthermore, the court chose to maintain its “historical caution regarding emotional distress claims.”

This Case Note analyzes the effect the Richie decision will have on plaintiffs seeking redress for emotional distress resulting from defamatory statements. Part II explores the history and development of common law defamation and its constitutional progeny. Part III outlines the facts in Richie v. Paramount Pictures Corp. as well as the court's holding and analysis. Finally, Part IV details Minnesota's skepticism of emotional distress claims through examination of the courts' interpretation of negligent and intentional infliction of emotional distress claims and its rejection of invasion of privacy claims. Part IV further illustrates that, although the Minnesota Supreme Court correctly perceived the purpose of defamation law, its strict adherence to "caution regarding emotional distress claims" will leave many plaintiffs without legal recourse for their injuries.

II. HISTORY

A. Defamation at Common Law

Defamation is an intentionally false written or spoken communication that injures another's reputation or good name. A defamatory communication “tends to hold the plaintiff up to hatred, contempt, or ridicule, or to cause him to be shunned or avoided.” Defamation law aims to protect an individual's reputation and good name from invasion by such false statements. Defamation is composed of the torts of libel

7. Id. at 30.
8. Id.
9. Id.
11. KEETON ET AL., supra note 1, § 111, at 773.
12. See id. § 111, at 771. Defamation law predates the Norman Conquest. See Colin Rhys Lovell, The "Reception" of Defamation By the Common Law, 15 VAND. L. REV. 1051, 1054 (1962). The earliest punishments for defamation consisted of public apology and sometimes physical punishment, such as cutting off the defamer's tongue. See id. at 1052-53. After the Norman Conquest, church courts had jurisdiction over most defamation claims, and physical punishment was no longer permitted. See KEETON ET AL., supra note 1, § 111, at 772. Instead, public penance by the “sinner” became the sole remedy. See Lovell, supra, at 1054-55. Monetary damages did not become available until the common-law courts received jurisdiction in the sixteenth century. See id. at 1061; see also infra note 16 (describing how jurisdiction came to be vested in the common-law courts).
and slander. Libel is generally written defamation, while slander is generally spoken defamation. At common law, defamation was a matter of strict liability. Liability was imposed, "regardless of fault, for un-

13. See Keeton et al., supra note 1, § 111, at 771. Libel was a common-law crime in its origins and has remained so today. See id. § 112, at 785. Slander, by itself, was never criminal. See id. Slander could become a common-law crime "only when the words amounted to some other offense, such as sedition, blasphemy, or a breach of the peace." Id. Libel was treated more seriously and courts imposed harsher penalties because the written, published word had greater potential for harm in an illiterate nation that revered the printed word. See id. The chief importance of the distinction between the two torts is that some kinds of defamatory words might create liability without proof of actual damages if written, but would require actual damages if spoken. See id. § 112, at 786.

14. See Keeton et al., supra note 1, § 111, at 771. Libel is that which is observed through the sense of sight and sometimes through the senses of touch or smell. See id. § 112, at 786. Examples of libel include pictures, photographs, signs, statutes, or conduct with defamatory connotations. See id. According to the Restatement (Second) of Torts, libel consists of the publication of defamatory matter (1) by written or printed words, (2) its embodiment in physical form, or (3) any other form of communication which has the potentially harmful qualities characteristic of written or printed words. Restatement (Second) of Torts § 568 (1977). Factors considered when determining whether the communication contains the harmful qualities and characteristics of written words are: the area of dissemination; the deliberate and premeditated character of its publication; and the persistence of the defamatory conduct. See Keeton et al., supra note 1, § 111, at 787.

15. See Keeton et al., supra note 1, § 111, at 771. Slander is perceived by the sense of hearing and generally is not actionable without proof of actual damages. See id. § 112, at 786-88. However, several categories of slander per se – which do not require proof of actual harm to reputation or other damages – developed at common law. See infra note 21 (defining four categories of slander per se). Some posit that these exceptions developed because the defamatory meaning is apparent on the face of such statements and is more likely to cause monetary damage. See, e.g., Keeton et al., supra note 1, § 112, at 788.

16. Originally, common-law courts did not have jurisdiction over defamation claims. See Keeton et al., supra note 1, § 111, at 772. Defamation claims were handled by seigniorial courts governed by local lords. See id. However, jurisdiction over defamation claims was transferred to the ecclesiastical courts when the seigniorial courts deteriorated. See id. The ecclesiastical courts regarded defamation as a sin and punished it with penance. See Lovell, supra note 12, at 1052-53. In the sixteenth century, as the ecclesiastical courts lost their power, tort actions for slander arrived in the common-law courts. See Keeton et al., supra note 1, § 111, at 772. The Court of Star Chamber took jurisdiction over the crime of political libel and later extended it to non-political libel. See id. After the Star Chamber was abolished (due to its ineffectiveness and its oppressive tactics), the common-law courts established jurisdiction over libel. See id.; Black's Law Dictionary 1406 (6th ed. 1990). The common-law courts retained the distinctions between libel and slander. See Keeton et al., supra note 1, § 111, at 772. Libel was regarded as both criminal and tortious, while slander remained a non-criminal tort. See id.

17. See Keeton et al., supra note 1, § 111, at 771. The element of publication was the only element of defamation at common law that was not subject to strict liability. See id. at 774-75.
privileged publication of a false and defamatory statements which injured the reputation of another."\textsuperscript{18} Furthermore, it was well established in common law that reputational damage was presumed from the publication of libelous statements, without requiring the plaintiff to demonstrate harm to his or her reputation.\textsuperscript{19} Slander, however, required the proof of special damages,\textsuperscript{20} or a specific showing of reputational harm, unless the slander fell within the purview of one of the four categories of slander per se.\textsuperscript{21} Thus, a common-law defamation claim requires proof of a defamatory statement\textsuperscript{22} that (1) is false;\textsuperscript{23} (2) refers to the plaintiff;\textsuperscript{24} and (3) is published to a third party.\textsuperscript{25} In some cases, special damages must be

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  \item \textsuperscript{18} Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 480-81 (Minn. 1986) (citing Matthis v. Kennedy, 243 Minn. 219, 222-23, 67 N.W.2d 413, 416 (1954)).
  \item \textsuperscript{19} See Keeton et al., supra note 1, § 112, at 795.
  \item \textsuperscript{20} See infra notes 33-35 and accompanying text (discussing special damages).
  \item \textsuperscript{21} See Keeton et al., supra note 1, § 112, at 793. Certain words, intrinsically and without innuendo, are deemed to cause injury as a natural consequence. See Black's Law Dictionary 1388 (6th ed. 1990). Such words constitute slander per se. See id. There are generally four categories of slander per se: words imputing to the plaintiff (1) a criminal offense involving moral turpitude; (2) an existing loathsome or venereal disease; (3) business incompetency; and (4) serious sexual misconduct. See Restatement (Second) of Torts §§ 571-574 (1977). In cases involving slander per se, plaintiffs need not prove special damages. See Black's Law Dictionary 1388 (6th ed. 1990).
  \item \textsuperscript{22} See Restatement (Second) of Torts § 558 (1977). Not all insults are actionable; a statement must hold the plaintiff up to hatred, contempt, or ridicule. See James A. Henderson, Jr. et al., The Torts Process 875 (4th ed. 1994). A publication may be defamatory on its face, or it may contain defamatory meaning only if extrinsic circumstances are considered. See Keeton et al., supra note 1, § 111, at 782. The extrinsic facts necessary to make the statement defamatory are called the "inducement." See Henderson et al., supra, at 881. The defamatory meaning based on the extrinsic facts is called the "innuendo." See id. Furthermore, if the statement is capable of both defamatory and non-defamatory meanings, the plaintiff must establish that the audience perceived its defamatory meaning. See id. at 880-81.
  \item \textsuperscript{23} See Restatement (Second) of Torts §§ 558-559 (1977). At common law, defamatory statements were presumed false. See Keeton et al., supra note 1, § 116, at 839. To overcome the presumption of falsity, the defendant had to prove the truth of the statement. See id.
  \item \textsuperscript{24} See Restatement (Second) of Torts §§ 558-559 (1977). The defamatory statement must clearly refer to the plaintiff, and the recipient of the statement must believe it refers to the plaintiff. See Keeton et al., supra note 1, § 112, at 784. A statement concerning a group or class of persons typically does not give rise to a defamation claim because of the difficulty in showing that it refers to a particular individual within the group. See id. Thus, it is doubtful that a derogatory statement referring to a group could be regarded as applicable to any one person within the group enough to harm that person's reputation. See id. Relevant to the analysis, however, is the size of the group, the nature and generality of the statement, and the extravagance of the communication. See id.
  \item \textsuperscript{25} See Restatement (Second) of Torts § 558 (1977). "The basis of the
B. Development of the Tort in Minnesota

A defamation claim, under Minnesota law, requires a similar showing. In Minnesota, a plaintiff is required to prove: (1) a false statement of and concerning the plaintiff; (2) publication to someone other than the plaintiff; and (3) that the statement tended to harm the plaintiff's reputation and to lower him or her in the estimation of the community. Once the plaintiff proves these elements, the defendant bears the burden of proving that the publication was true or privileged to avoid liability.

plaintiff's cause of action is the harm suffered from the reaction of others and not hurt feelings." HENDERSON ET AL., supra note 22, at 875. The defamatory statement must be published to someone other than the plaintiff. See id. The communication does not have to be spoken or written; gestures, actions, and other visual representations may be defamatory. See id. at 877.


27. A privilege may be either absolute or qualified. See HENDERSON ET AL., supra note 22, at 893. If cloaked by absolute privilege, a party may publish defamatory statements for evil motives, knowing them to be false, without being liable. See id. Absolutely privileged statements include those made with consent of the plaintiff, communications between spouses, and statements made by government officials while executing their governmental duties. See id. at 893-96. Whereas an absolute privilege may never be lost, a qualified privilege may be lost if it is abused. See id. Fair comment on matters of public concern -- such as current political issues and governmental officials -- is an example of a statement that is qualifiedly privileged. See id. at 897. However, such comments are not protected if they contain false statements of fact. See id.

28. See KEETON ET AL., supra note 1, § 116, at 839.

29. See, e.g., Rouse v. Dunkley & Bennett, P.A., 520 N.W.2d 406, 410 (Minn. 1994); Matthis v. Kennedy, 243 Minn. 219, 222-23, 67 N.W.2d 413, 416 (1954). In Minnesota, a defendant must negligently or intentionally publish the statement to a third party. See Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 491 (Minn. 1985). Compelled self-publication by the subject of the statement may also fulfill the publication requirement. See Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888 (Minn. 1986).

30. Minnesota recognizes two kinds of common-law privileges — absolute and qualified. See Utecht v. Shopko Dep't Store, 324 N.W.2d 652, 654 (Minn. 1982). Absolute privileges protect defamatory statements even if they are made intentionally or maliciously. See Matthis, 243 Minn. at 223, 67 N.W.2d at 416. For example, statements made with the plaintiff's consent and statements made in the course of government proceedings are absolutely privileged in Minnesota. See, e.g., Utecht, 324 N.W.2d at 654 (holding that statements made with the plaintiff's consent are privileged); Jensen v. Olson, 273 Minn. 390, 393, 141 N.W.2d 488, 490 (1966) (concluding that statements made in a civil service hearing are privileged); Matthis, 243 Minn. at 224, 67 N.W.2d at 417 (finding statements made in probate court proceedings to be privileged); Peterson v. Steenerson, 113 Minn. 87, 89, 129 N.W. 147, 147-48 (1910) (extending privilege to statements made in legislative proceedings).

Qualified privileges rebut the presumption of common-law malice that arises
Three types of damages may be recovered for defamation in Minnesota: special damages, punitive damages, and general damages. Special damages are recoverable upon proof of actual and special pecuniary loss, supported by clear evidence. Libel plaintiffs need not prove special damages to recover. However, slander is actionable without proof of special damages only if it is slander per se. Upon a showing of common-law malice, punitive damages are recoverable to punish the defendant. Finally, general damages are presumed in cases of defamation per se, and they are recoverable without proof of actual injury to reputation because injury to reputation is presumed.

once the plaintiff has established a prima facie case of defamation. See RESTATEMENT (SECOND) OF TORTS §§ 593-598A (1977). However, the protection afforded by a qualified privilege can be lost if the privilege is abused, such as when the publication is knowingly false, includes unprivileged information, or includes information exceeding the scope of the privilege. See id. Minnesota courts have extended qualified privilege to: (1) fair and substantially accurate reporting of official proceedings or public records, see, e.g., Nixon v. Dispatch Printing Co., 101 Minn. 309, 313, 112 N.W. 258, 259 (1908); (2) comments on the conduct of public officials, see, e.g., Diesen v. Hessburg, 455 N.W.2d 446, 450-51 (Minn. 1990); (3) statements made in the public interest, see, e.g., Burch v. Bernard, 107 Minn. 210, 211-12, 120 N.W. 33, 34 (1909); and (4) statements made by former employer about the reason for employee discharge or discipline, if made upon a proper occasion and for a proper purpose, see, e.g., Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 256-57 (Minn. 1980).

31. See Jadwin, 367 N.W.2d at 480-81; Note, Minnesota Defamation Law and the Constitution: First Amendment Limitations on the Common Law Torts of Libel and Slander, 3 WM. MITCHELL L. REV. 81, 83 (1977) [hereinafter Minnesota Defamation Law].

32. See Minnesota Defamation Law, supra note 31, at 85.

33. See, e.g., Jadwin, 367 N.W.2d at 492 (stating that “actual injury supported by competent evidence” is required to recover special damages). An example of special damages, also called actual damages, is compensation for lost employment resulting from the defamation. See Minnesota Defamation Law, supra note 31, at 85.

34. See Advanced Training Sys., Inc. v. Caswell Equip. Co., 352 N.W.2d 1, 7 (Minn. 1984).

35. See Stuempges, 297 N.W.2d at 259; see also supra note 21 (discussing four common-law categories of slander per se). Minnesota recognizes several categories of slander per se. See, e.g., Baufield v. Safelite Glass Corp., 831 F. Supp. 713, 717 (D. Minn. 1993) (imputing serious sexual misconduct to another is slander per se); Becker v. Alloy Hardfacing & Eng’g Co., 401 N.W.2d 655, 661 (Minn. 1987) (falsely accusing another of committing a crime is slander per se); Manion v. Jewel Tea Co., 135 Minn. 250, 252-53, 160 N.W. 767, 768 (1916) (imputing business incompetency to another is slander per se).


37. See Stuempges, 297 N.W.2d at 258-59. General damages—often referred to as presumed damages—are nonpecuniary in nature and compensate for things...
C. Constitutional Dimensions

Before 1964, defamatory statements were not deemed to be protected by the First Amendment of the United States Constitution. Until that time, the United State Supreme Court had held that the First Amendment guarantees of free speech and free press protected only truth and not falsehood. Eventually, the Supreme Court began to recognize that an absolute duty to publish truth inhibited First Amendment freedoms. Therefore, beginning in 1964, a series of landmark decisions brought defamatory falsehoods within the protection of the First Amendment. These decisions greatly limited a plaintiff’s ability to recover in defamation actions and had a profound effect on state defamation law by replacing the common law’s strict liability with fault standards based on the public or private status of the plaintiff. The Court first applied a constitutional interpretation to the traditional, well-established rules of common-law defamation in New York Times Co. v. Sullivan.

In New York Times, the plaintiff, an elected commissioner of public affairs of Montgomery, Alabama, brought a defamation action against The New York Times for allegedly libelous statements made about him in a political advertisement. He alleged that the advertisement falsely accused the city police of mistreating civil rights protesters. The Alabama Su-
William Mitchell, Supreme Court decided in the commissioner's favor, but the United States Supreme Court reversed. The Court held that to protect "open and robust debate," the First and the Fourteenth Amendments of the United States Constitution prohibit a public official from recovering damages for defamatory statements made about his or her official conduct, unless he or she can prove that the statement was published with actual malice. The Court reasoned that public debate and the right to criticize government and public officials are central to a democratic nation. Accordingly, the Court deemed some measure of constitutional protection to be necessary in defamation law to prevent citizens from censoring their criticism of government. Thus, New York Times initiated constitutional protection of published defamatory statements.

Three years after its decision in New York Times, the Court extended application of the actual malice standard to include public figures in Curtis Publishing Co. v. Butts. Under Curtis, public figures, like public officials, must prove the publisher's knowledge of falsity or its reckless disregard of the truth to recover damages for defamatory falsehoods. The commissioner, he claimed that it referred to him because, as commissioner, he supervised the police department. Id.

46. See New York Times Co. v. Sullivan, 144 So. 2d 25, 52 (Ala. 1962). In Alabama, the common-law privilege protects fair comment only if the criticism of the public official is completely true. See New York Times, 376 U.S. at 263. In the ad that was the subject of New York Times, a few minor details were false, thus precluding the privilege of fair comment. Id. at 258-59. For example, the demonstrating students sang the national anthem and not My Country 'Tis Of Thee, as was reported in the advertisement. Id.


48. Id. at 270. The Court noted that it is realistic to expect that some error will result from "open and robust" debate. Id. at 271-72. Therefore, some falsity must be protected to encourage open debate. Id.

49. Id. at 283. Actual malice requires a showing, by clear and convincing evidence, that the statement was made with knowledge of its falsity or with reckless disregard of whether it was false. See id. at 285-86.

50. Id. at 279.

51. Id.

52. People become public figures either by occupying a position "of such persuasive power and influence that they are deemed public figures for all purposes," or by voluntarily placing "themselves to the forefront of particular public controversies in order to influence the resolution." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). To determine whether a person is a "limited public figure," one must examine the nature and extent of the person's participation in the controversy. See id.

53. 388 U.S. 130, 155 (1967). In Curtis, The Saturday Evening Post claimed that Coach Wally Butts of the University of Georgia had conspired with Coach "Bear" Bryant of the University of Alabama to fix a football game between their schools. Id. at 135. The Court held that Butts was a public figure and must prove actual malice to recover. Id.

Court reasoned that the *New York Times* actual malice standard applies to public figures because, like public officials, they have access to the media and play an influential role in shaping the events that concern society.55 Accordingly, the *Curtis* Court took constitutional protection of defamatory statements one step further.

In 1971, the Supreme Court accepted another opportunity to expand First Amendment protection in *Rosenbloom v. Metromedia, Inc.*56 The Court held that the constitutional requirement of actual malice – as developed in *New York Times* and *Curtis* – applied whenever the defamatory statements related to a matter of public concern, regardless of the plaintiff’s status as a public or a private figure.57 Therefore, under *Rosenbloom*, private individuals defamed in the discussion of public issues had no recourse for reputational injuries unless they could prove actual malice by the publisher.58

However, in *Gertz v. Robert Welch, Inc.*,59 the Supreme Court reconsidered the question of constitutional protection in a defamation action brought by private individuals, rejecting the *Rosenbloom* plurality opinion.60 The Court found that in cases involving private individuals, *Rosenbloom’s* application of the actual malice standard abridged legitimate state interests in enforcing defamation remedies and in protecting the reputations of private individuals.61 Therefore, the Court held that as long as states do not impose liability without fault,62 they may decide what standard of li-
ability should apply to those who defame private individuals. However, the Court emphasized that private individuals who do not prove actual malice may recover compensation only for actual injury, and they may not recover punitive or presumed damages. The Court did not define actual injury, but specifically stated that it is not limited to out-of-pocket costs. State courts are free to include the typical types of actual harm resulting from defamatory falsehoods, including "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." Thus, in Gertz, the Court retreated from its expansion of First Amendment protection of defamatory falsehoods and shifted its focus back toward the compensation of those whose reputations had been injured by such statements.

The Supreme Court continued this retreat two years later in Time, Inc. v. Firestone. In Firestone, the Court made clear that Gertz does not require proof of injury to reputation in a defamation case. The Court held that allowing recovery for other injuries (such as emotional distress), without proof of injury to reputation, does not violate Gertz's constitutional requirement limiting recovery to proven actual injury when actual malice is not present. Gertz requires only evidence of actual injury and no presumed damages where a private individual's claim is based on negligence rather than on actual malice. Therefore, the question of whether injury to reputation is a prerequisite to recovery for defamation is...

63. Gertz, 418 U.S. at 347. The Court stated, "The States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehoods injurious to the reputation of a private individual." Id. at 345-46. Minnesota has adopted a negligence standard. See Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 491 (Minn. 1985). In Minnesota, a private individual may recover actual damages for defamatory publication by showing that "the defendant knew or in the exercise of reasonable care should have known that the defamatory statement was false." Id. (citing RESTATEMENT (SECOND) OF TORTS § 580B cmt. g (1976)). Defamation defendants will be judged on whether their conduct was that of a reasonable person under similar circumstances. See id.

64. Gertz, 418 U.S. at 349; cf. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (holding that a private plaintiff suing over statements involving private matters need not show actual malice to recover presumed or punitive damages).

65. See Gertz, 418 U.S. at 350. The Court noted that trial courts have considerable experience in giving appropriate jury instructions in tort actions. Id.

66. Id.

67. Id.

68. 424 U.S. 448 (1976). In Time, the defendant argued that Gertz precluded recovery because the plaintiff withdrew her claim for damages to reputation before the trial. Id. at 460.

69. See id.

70. Id.

71. See id.
open for each state's determination. Until Richie v. Paramount Pictures Corp., the Supreme Court of Minnesota had never been faced with the issue and, thus, the question had remained unanswered in Minnesota.

III. RICHIE V. PARAMOUNT PICTURES CORPORATION

A. The Facts

In September 1992, Denise Richie successfully litigated a civil suit against her parents, Dennis and Lynnell Richie, arising out of sexual abuse by Dennis Richie. The jury rendered a verdict against Dennis for sexual abuse, and against Lynnell for negligently failing to prevent the abuse. After the verdict, a producer for The Maury Povich Show contacted Kathy Tatone, Denise Richie’s attorney in the civil action, regarding an appearance on the show by Denise and Tatone. Tatone negotiated the terms of the appearance.

Before the scheduled taping, the show’s producers requested photographs of Denise Richie and her parents. Denise approved the use of a photograph and suggested that Tatone look through a family photo album for a picture of Denise in her graduation gown with her parents. Tatone provided the show with a picture of Denise in her graduation gown standing between two adults. However, the adults in the photograph were not Denise’s parents; rather, they were her godparents, Karen Gerten and James Richie.

During the broadcast on November 5, 1992, the show’s producers displayed the photograph of Denise with Gerten and Richie while the acts of sexual abuse committed by Denise’s father were described. Neither Gerten nor Richie was referred to by name; Denise’s parents’ names were

72. See generally Earl L. Kellett, Annotation, Proof of Injury to Reputation as Prerequisite to Recovery of Damages in Defamation Action - Post-Gertz Cases, 36 A.L.R.4TH 807 (1985) (analyzing how, after Gertz, jurisdictions have split into “two camps” on the question of whether injury to reputation must be shown).
73. See Richie v. Paramount Pictures Corp., 544 N.W.2d 21, 27 (Minn. 1996); see also Kellett, supra note 72, at 811-13 (listing jurisdictions that impose a prerequisite of harm to reputation).
74. See Richie, 544 N.W.2d at 23.
75. Id.
76. The Maury Povich Show is a daytime television talk show on which guests appear to discuss their experiences regarding the topic or subject of the show.
77. Richie, 544 N.W.2d at 23.
78. Id.
79. Id. at 23-24.
80. Id. at 24.
81. Id.
82. Id. Gerten and Richie are Denise Richie’s maternal aunt and paternal uncle. Id. at 24 n.2.
83. Richie, 544 N.W.2d at 24.
used throughout the show. 84 A few weeks after the broadcast, the show aired a retraction at the request of Richie and Gerten. 85

Neither Karen Gerten nor James Richie saw the original broadcast airing their picture. 86 However, they eventually watched a videotape of the show after learning of it from friends and family. 87 Both Gerten and Richie testified they will never know whether people saw the broadcast or think less of them because of it. 88 Furthermore, neither Gerten nor Richie lost income or incurred special damages as a result of the broadcast. 89 However, Gerten and Richie claimed they had suffered demonstrable harm to their reputations. 90 They stated that friends and family questioned them about their involvement in the abuse, and Richie claimed he received the “cold shoulder” and raw hamburgers from a formerly friendly Hardee’s employee. 91 According to Gerten, two people who knew the photographs were a mistake contacted her about the show. 92

Richie and Gerten asserted that they suffered emotional distress after viewing the videotape. 93 Richie stated that he was “shocked,” “humiliated,” “blown away,” “just crushed,” and “very sick” about the broadcast. 94 Richie stated that he did not “take this lightly” because his sister had been abused by their father during Richie’s childhood. 95 Similarly, Gerten stated that the broadcast was “upsetting and embarrassing” and made her “sick to [her] stomach,” “emotionally upset,” and “a basket case.” 96

In May 1993, Gerten and Richie commenced this action against Paramount Pictures Corporation, Kathy Tatone, and MoPo Productions, Inc., 97 alleging defamation and false light invasion of privacy. 98 The district court granted summary judgment in favor of the defendants on both

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84. Id.
85. Id. Interestingly, in Gertz v. Robert Welch, Inc., the Supreme Court noted that a “rebuttal seldom suffices to undo [the] harm caused by defamatory falsehoods” because “the truth rarely catches up with a lie.” 418 U.S. 323, 344 n.9 (1974).
86. Richie, 544 N.W.2d at 24.
87. Id.
88. Id.
89. Id.
90. Id. at 26.
91. Id.
92. Richie, 544 N.W.2d at 26.
93. Id. at 24.
94. Id.
95. Id.
96. Id.
97. Id. at 23. MoPo Productions Inc. provided the services of the host, Maury Povich, but Povich was not aware that a photograph was being used during the interview. Id. Although it was later dismissed from the suit, Hubbard Broadcasting, which broadcast the show within Minnesota, also was named as a defendant. Id. at 23 n.1.
98. Richie, 544 N.W.2d at 23.
claims. The Minnesota Court of Appeals reversed the district court’s decision and remanded the case for trial. Richie and Gerten appealed to the supreme court.

B. The Court’s Holding and Analysis

The Supreme Court of Minnesota reversed the decision of the court of appeals, reinstating summary judgment in favor of the defendants. Following Gertz’s mandate, the supreme court stated that recovery cannot be based on presumed damages when the defamatory statements are made by the media, without proof of actual malice, and about a matter of public concern. Plaintiffs must demonstrate actual damages to recover. Furthermore, the supreme court held that the trial court did not err in finding that neither Richie nor Gerten demonstrated sufficient actual damage to their reputations to support a defamation claim.

Writing for the majority, Justice Esther M. Tomljanovich explained that despite the lack of a constitutional bar to recovery for defamation claims based solely on emotional damages, Minnesota does not allow recovery for damages based solely on emotional injury such as mental anguish or humiliation. Absent actual malice, Minnesota plaintiffs must

99. Id. The district court found that Richie and Gerten failed to show sufficient reputational harm to sustain a defamation claim. Id. at 24. According to the court, harm to reputation could not be presumed, and the emotional harm shown by Gerten and Richie could not support a defamation claim. Id. The district court also held that Tatone’s communications were privileged either by the qualified immunity protecting attorneys or by a qualified privilege for statements made on proper occasion for proper motive. Id. at 25.

100. See Richie v. Paramount Pictures Corp., 532 N.W.2d 235, 243 (Minn. Ct. App. 1995). The majority, in a split decision, found that harm to reputation could be presumed for summary judgment purposes, based on the seriousness of the false statements made on national television. Id. at 240 (“[C]ommon sense tells us that of the hundreds of thousands of possible viewers not all, as a matter of law, thought absolutely nothing ill of appellants, if only to a small degree.”). The court also found that no privilege shielded Tatone. Id. at 243; see also supra note 99 (describing the privileges that arguably applied to Tatone). The court did not consider the invasion of privacy issue on appeal because Richie and Gerten did not address the issue in their brief to the court. Id. at 237 n.1.

101. Richie, 544 N.W.2d at 23.

102. Id. at 30.

103. Kathy Tatone was considered a media defendant because her communication utilized the television medium. Id. at 26 n.5. Gertz’s prohibition against presumed damages absent actual malice applies in suits against “the press or broadcast media and those who utilize these means.” Keeton et al., supra note 1, § 112, at 796 (emphasis added).

104. Richie, 544 N.W.2d at 26.

105. Id.

106. Id. at 30.

107. Id. at 27-28. However, once defamation is established, “general” damages
demonstrate actual damage to their reputations to recover against media defendants.\textsuperscript{108} The court found that none of the cases relied upon by Richie and Gerten allowed emotional harm, unaccompanied by harm to reputation, to sustain a defamation claim.\textsuperscript{109} Rather, the court consistently has acknowledged that the primary purpose of a defamation action is to "compensat[e] private individuals for wrongful injury to reputation,"\textsuperscript{110} and it has "exercised historical caution regarding emotional distress claims" due to their highly subjective nature the the ease with which false claims can be made.\textsuperscript{111}\textsuperscript{112}

In contrast to defamation's focus on injury to reputation, the court noted that the torts of invasion of privacy compensate for mental distress resulting from public exposure.\textsuperscript{112} Minnesota, however, has never recognized a cause of action for invasion of privacy.\textsuperscript{113} To allow recovery for a defamation claim based exclusively on emotional harm, the court reasoned, would be the equivalent of allowing recovery for invasion of privacy and would be inconsistent with the court's previous rejection of such claims.\textsuperscript{114}

\textsuperscript{108} Id. at 27 (citing KEETON ET AL., supra note 1, § 112, at 794-95). Once defamation is proven, emotional distress damages are recoverable as "parasitic" damages. \textit{Id.}
\textsuperscript{109} Id. at 28.
\textsuperscript{110} Richie, 544 N.W.2d at 28 (citing Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 480 (Minn. 1985)).
\textsuperscript{111} Id. (citing K.A.C. v. Benson, 527 N.W.2d 553, 559 (Minn. 1995)).
\textsuperscript{112} Id. at 28; \textit{see also infra} text accompanying note 141 (discussing the four distinct types of invasion of privacy).
\textsuperscript{113} \textit{See} Richie, 544 N.W.2d at 28. Minnesota courts strictly adhere to a general rule of nonrecognition. \textit{See}, e.g., Hendry v. Connor, 303 Minn. 317, 319, 226 N.W.2d 921, 923 (1975) ("Minnesota has never recognized, either by legislative or court action, a cause of action for invasion of privacy, even though many other states have done so."); Stubbs v. North Mem'l Med. Ctr., 448 N.W.2d 78, 81 (Minn. Ct. App. 1989) (stating that a "long established rule in Minnesota is that invasion of privacy is not a recognized cause of action"); Bohdan v. Alltool Mfg. Co., 411 N.W.2d 902, 906 (Minn. Ct. App. 1987) ("Minnesota has not recognized a cause of action for invasion of privacy."); House v. Sports Films & Talents, Inc., 351 N.W.2d 684, 685 (Minn. Ct. App. 1984) ("Clearly there is no action for invasion of privacy in Minnesota."). However, when discussing the tort, the Minnesota courts have referred to Prosser's four-tort classification scheme. \textit{See}, e.g., Stubbs, 448 N.W.2d at 80; \textit{see also infra} note 141 and accompanying text.
\textsuperscript{114} Richie, 544 N.W.2d at 28.
IV. ANALYSIS OF THE RICHIE DECISION

In Richie, the Minnesota Supreme Court correctly interpreted defamation law by holding that injury to reputation is a prerequisite to recovering damages. However, in light of the court's historical skepticism toward emotional distress claims, many plaintiffs now will be unable to obtain legal redress for injurious false statements. The court's caution has left other tort theories—such as intentional infliction of emotional distress, negligent infliction of emotional distress, and invasion of privacy—unlikely alternatives for relief. Thus, unless Minnesota recognizes invasion of privacy or relaxes its standards with regard to emotional distress claims, the Richie court's holding will create a void whereby many plaintiffs will be left without compensation for their emotional injuries.

This analysis of the Richie decision begins with a discussion of the underlying purposes of defamation law. A detailed analysis of the likelihood of recovery under alternative tort theories will follow to illustrate Minnesota's historical caution toward emotional distress claims.

As noted previously, the Richie court correctly perceived the purpose of defamation law in holding that proof of reputational injury is a prerequisite to recovery. Damage to reputation is the "essence and gravamen"

115. See id.

116. Intentional infliction of emotional distress was first recognized as a cause of action in Minnesota in 1983. See Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 438 (Minn. 1983) ("[T]he problems inherent in allowing recoveries for mental and emotional disturbances can be more clearly and adequately addressed if intentional infliction of emotional distress is recognized as a separate and independent tort."). The Hubbard court adopted the tort as it is set forth in the Restatement (Second) of Torts: "[O]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Id. at 438-39 (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)). However, the court has specifically labeled intentional infliction of emotional distress as a disfavored tort. See Hubbard, 330 N.W.2d at 439 (stating that its interpretation of this tort would be limited in scope and would not significantly expand the scope of conduct that is actionable); see also Eklund v. Vincent Brass & Aluminum Co., 351 N.W.2d 371, 378-79 (Minn. Ct. App. 1984) (recognizing that Minnesota disfavors claims seeking damages for intentional infliction of emotional distress) ("The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it."). Furthermore, the Hubbard court limited application of the tort to only those cases involving particularly egregious facts. Hubbard, 330 N.W.2d at 439 (indicating that particularly egregious facts are required in order to prevent fictitious claims).

117. See Langeland v. Farmers State Bank, 319 N.W.2d 26 (Minn. 1982) (recognizing negligent infliction of emotional distress).

118. See supra note 113 and accompanying text.

119. See Richie v. Paramount Pictures Corp., 544 N.W.2d 21, 28 (Minn. 1996).
of a defamation action.\textsuperscript{120} "Defamation is not concerned with the plaintiff's own humiliation, wrath or sorrow, except as an element of 'parasitic' damages attached to an independent cause of action."\textsuperscript{121} Consequently, plaintiffs in a defamation action should be required to prove actual harm to reputation before recovering for emotional distress. Alternative emotional distress theories, however, would not require similar proof of reputational harm.

Plaintiffs whose reputations have been harmed may attempt to recover under the related causes of causes of action for negligent or intentional infliction of emotional distress or invasion of privacy, in addition to their defamation claims.\textsuperscript{122} However, the Minnesota Supreme Court's restrictive attitude\textsuperscript{123} regarding these torts likely will prevent plaintiffs with failed defamation claims from recovering for their emotional distress under these alternative theories.

First, plaintiffs with a failed defamation claim cannot recover by asserting a claim for negligent infliction of emotional distress. Minnesota case law establishes that failure of the defamation claim precludes recovery for negligent infliction of emotional distress.\textsuperscript{124} A separate claim for negligent infliction of emotional distress requires a showing by plaintiffs that they were in the "zone of danger" of physical impact,\textsuperscript{125} feared for

\textsuperscript{120} Richie v. Paramount Pictures Corp., 532 N.W.2d 235, 244 (Minn. Ct. App. 1995) (Davies, J., dissenting) (citing Gobin v. Globe Publ'g Co., 649 P.2d 1239, 1243 (Kan. 1982)).
\textsuperscript{121} Keeton et al., supra note 1, § 111, at 771.
\textsuperscript{123} The supreme court has adopted a cautious stance because "[e]motionally distress is highly subjective, often transient, and easily alleged." \textit{Richie}, 544 N.W.2d at 28 (citing Garvis v. Employers Mut. Cas. Co., 497 N.W.2d 254, 257 n.3 (Minn. 1993)). Given its highly subjective nature, it may lead to fictitious claims. See Steenson, supra note 122, at 96.
\textsuperscript{124} See, e.g., O'Brien v. A.B.P. Midwest, Inc., 814 F. Supp. 766, 774 n.10 (D. Minn. 1992) (explaining that emotional distress damages may be recovered if a plaintiff prevails on a defamation claim); State Farm Mut. Auto. Ins. Co. v. Village of Isle, 265 Minn. 360, 367, 122 N.W.2d 36, 41 (1963) (stating the well-established rule that mental distress damages cannot be sustained when there is no accompanying physical injury, unless there has been other misconduct constituting a direct invasion of a plaintiff's rights); Covey v. Detroit Lakes Printing Co., 490 N.W.2d 138, 143 (Minn. Ct. App. 1992) (stating that where a defamation claim is unsuccessful, the negligent infliction of emotional distress claim must also fail); Lee v. Metropolitan Airport Comm'n, 428 N.W.2d 815, 824 (Minn. Ct. App. 1988) (stating where appellant's defamation claim cannot withstand summary judgment, the negligent infliction of emotional distress claim also fails); Bohdan v. Alltool Mfg. Co., 411 N.W.2d 902, 907 (Minn. Ct. App. 1987) (stating that a negligent infliction of emotional distress claim based on the same facts as a failed defamation claim cannot survive); see also Steenson, supra note 122, at 84.
\textsuperscript{125} Minnesota first applied the "zone of danger" rule to negligent infliction of emotional distress claims in Purcell v. Saint Paul City Railway Co. 48 Minn. 134,
their safety,\textsuperscript{126} and suffered contemporaneous physical injuries or manifestations.\textsuperscript{127} Because the essence of a defamation claim is damage to reputation, defamatory statements are unlikely to place plaintiffs in a "zone of danger" of physical impact or to cause them to fear for their safety. Plaintiffs who can establish a separate tortious act or direct invasion of their rights – such as defamation, malicious prosecution, or other willful or malicious conduct – can avoid the "zone of danger" requirements and still recover under the theory of negligent infliction of emotional distress.\textsuperscript{128} Under this exception, however, the success of the claim for negligent infliction of emotional distress depends upon the success of the defamation claim.\textsuperscript{129} Hence, recovery is impossible if the defamation claim fails and the plaintiff is unable to prove successfully the elements of any other tort.\textsuperscript{130}

Second, plaintiffs often assert an intentional infliction of emotional distress claim along with a defamation claim. Intentional infliction of emotional distress is characterized by conduct which is extreme and outrageous, is committed intentionally or recklessly, and causes severe emotional distress.\textsuperscript{131} The Minnesota Supreme Court defines "extreme and outrageous conduct" as conduct "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community."

\textsuperscript{128} See, e.g., Leaon v. Washington County, 379 N.W.2d 867, 875 (Minn. 1986) (holding claim for negligent infliction of emotional distress must be premised on physical manifestations of distress); Langeland v. Farmers State Bank, 319 N.W.2d 26, 31 (Minn. 1982) (holding there can be no recovery absent some accompanying physical injury); Covey, 490 N.W.2d at 144 (finding embarrassment, nervousness, and compulsive scratching, without physical injury, insufficient to support claim); Hempel v. Fairview Hosp. & Healthcare Servs., Inc., 504 N.W.2d 487, 492 (Minn. Ct. App. 1992) (requiring physical symptoms for recovery); Strauss v. Thorne, 490 N.W.2d 908, 913 (Minn. Ct. App. 1992) (holding that general embarrassment, nervousness, and depression do not constitute sufficient physical injury).


\textsuperscript{130} See Steenson, \textit{supra} note 122, at 86; \textit{supra} note 124 and accompanying text.

\textsuperscript{132} See Steenson, \textit{supra} note 122, at 86; \textit{supra} note 124 and accompanying text.
Furthermore, the resulting emotional distress must be "so severe that no reasonable [person] could be expected to endure it." To prove their claims, Minnesota plaintiffs must show they suffered physical manifestations of the emotional distress that required psychological or medical treatment.

Unlike negligent infliction of emotional distress, however, the success of an intentional infliction of emotional distress claim does not depend on the establishment of another tort, such as defamation. A plaintiff's failed defamation claim does not preclude recovery under the theory of intentional infliction of emotional distress. However, the plaintiff must meet the rigid standards of pleading and proof that the supreme court has mandated to limit recovery.

In Hubbard v. United Press International, Inc., the Minnesota Supreme Court instructed trial courts to limit recovery for emotional distress claims. In response, Minnesota courts consistently have denied recovery as a matter of law for intentional infliction of emotional distress claims. Such claims are generally denied because the conduct was not sufficiently "extreme and outrageous" or because the emotional distress was not sufficiently severe. Therefore, an unsuccessful defamation plaintiff seems

134. Compare Hubbard, 330 N.W.2d at 440 (holding that the plaintiff's testimony regarding depression, stomach disorders, skin rash, and high blood pressure, absent corroborating medical testimony, does not sustain a claim), and Strauss v. Thorne, 490 N.W.2d 908, 913 (Minn. Ct. App. 1992) (stating general embarrassment, nervousness, and depression are not sufficient to sustain the claim), and Born v. Medico Life Ins. Co., 428 N.W.2d 585, 590 (Minn. Ct. App. 1988) (stating that plaintiffs failed to meet their burden of proof, because they did not present medical testimony to substantiate the alleged physical manifestations of their distress), with Venes v. Professional Serv. Bureau, Inc., 353 N.W.2d 671, 673 (Minn. Ct. App. 1984) (stating that evidence of anger, migraines, ulcers, and spastic bowel syndrome is sufficient to sustain an intentional infliction of emotional distress claim).
135. See Steenson, supra note 122, at 87.
136. See supra note 116.
137. 330 N.W.2d 428, 440 (Minn. 1983) (restating the need for trial courts carefully to scrutinize evidence regarding the cause and the severity of the emotional distress).
138. See, e.g., Conroy v. Kilzer, 789 F. Supp. 1457, 1467 (D. Minn. 1992) (recognizing that plaintiffs in Minnesota must clear high thresholds of severity and egregiousness before emotional distress claims may be submitted to a jury); see also Steenson, supra note 122, at 36-37.
139. See, e.g., O'Brien v. A.B.P. Midwest, Inc., 814 F. Supp. 766, 777 (D. Minn. 1992) (holding that depression, headaches, loss of sleep, upset stomach, and yeast infections do not manifest sufficiently severe distress and that intentional harassment is not extreme and outrageous behavior); Conroy, 789 F. Supp. at 1467-68 (holding that statements accusing fire chief of aiding arsonists were not extreme
unlikely to meet the stringent thresholds and the level of severity required for recovery under the theory of intentional infliction of emotional distress.

Finally, a claim of invasion of privacy is a likely companion to a defamation claim. The common-law right of privacy, which originated during the nineteenth century, has been separated into four distinct types of invasion of privacy: (1) appropriation of another's name or likeness; (2) unreasonable intrusion upon the seclusion of another; (3) public disclosure of private facts; and (4) false light in the public eye. The purpose of the invasion of privacy torts is to compensate for emotional distress resulting from public exposure and to protect one's interest in peace of mind and tranquillity. Unsuccessful defamation plaintiffs in Minnesota, however, may not obtain recovery for emotional distress under an invasion of privacy theory.

Despite widespread recognition of the invasion of privacy torts, the Minnesota Supreme Court has never recognized a cause of action for invasion of privacy. Furthermore, the court has failed to explain whether

and outrageous); Hubbard, 330 N.W.2d at 440 (stating that symptoms of depression, stomach disorders, skin rash, and high blood pressure are not severe enough absent corroborating medical testimony); Strauss, 490 N.W.2d at 913 (holding that general embarrassment, nervousness, and depression are not severe enough to sustain a claim); Lund v. Chicago & N.W. Transp. Co., 467 N.W.2d 366, 370 (Minn. Ct. App. 1991) (holding that posting of office memo – which resulted in harassment and ridicule by co-workers and caused a co-worker to lace the plaintiff's coffee with a pepper derivative – was not sufficiently outrageous conduct); Lee v. Metropolitan Airport Comm'n, 428 N.W.2d 815, 823 (Minn. Ct. App. 1988) (finding that spreading damaging office gossip is not atrocious behavior); cf. Venes, 355 N.W.2d at 673 (holding unfair debt collection practices, consisting of verbal abuse and physical threats, was sufficiently egregious, and the resulting anger, migraine headaches, ulcers, and aggravation of spastic bowel syndrome were sufficiently severe manifestations of emotional distress).

140. See generally Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). Warren and Brandeis criticized the press for overstepping the "obvious bounds of propriety and decency." Id. at 196. They wrote:

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Id.

141. See Keeton et al., supra note 1, § 117, at 851-66.
144. See supra note 113 and accompanying text.
145. See supra note 113. See generally Russell G. Donaldson, Annotation, False
it will consider the tort under more egregious circumstances. Thus, plaintiffs in Minnesota apparently cannot seek redress for emotional distress resulting from public exposure.

As a result of the supreme court’s continuing skepticism toward emotional distress claims and its failure to recognize invasion of privacy as an actionable claim, many unsuccessful defamation plaintiffs will be deprived of redress for their emotional injuries. Absent adoption of an invasion of privacy tort or the relaxation of standards for intentional and negligent infliction of emotional distress claims, many emotional injuries will remain uncompensated under Minnesota law.

V. CONCLUSION

The United States Supreme Court radically altered common law defamation claims in an attempt to balance First Amendment freedoms and protection of reputational interests. The Supreme Court has deferred to the states to decide for themselves whether emotional distress, without proof of reputational harm, can sustain a defamation claim. The Minnesota Supreme Court’s decision in Richie to disallow such claims correctly interpreted the purpose of defamation law. Its decision, however, creates a void that will leave many plaintiffs uncompensated for wrongful emotional injury due to the court’s consistently cautious attitude toward emotional distress claims. Therefore, unless the court eases its standards for emotional distress claims or adopts the invasion of privacy torts, many plaintiffs will lack alternatives to recover for their emotional damages.

Tina L. Lorleberg


146. See Richie v. Paramount Pictures Corp., 544 N.W.2d 21, 28 (Minn. 1996).