Amending Its Anti-Paparazzi Statute: California's Latest Baby Step in Its Attempt to Curb the Aggressive Paparazzi

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Amending Its Anti-Paparazzi Statute: California's Latest Baby Step in Its Attempt to Curb the Aggressive Paparazzi

by
LISA VANCE*

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I. Introduction

A. It All Started with Princess Diana

Nearly eight-and-a-half years after the fatal accident,¹ the three paparazzi who aggressively sought photographs of Princess Diana's

last moments have been punished. A French appellate court issued “a symbolic fine of one euro” for invasion of privacy. The court also ordered the photographers to pay for the publication of announcements about their convictions in three newspapers. Just one week prior to this decision, Britney Spears commented on today’s reckless paparazzi, specifically invoking the late Princess of Wales: “I mean, Princess Diana got killed by one of these people.”

The Princess Diana tragedy triggered an international backlash against the paparazzi. On American soil, the incident resulted in a “temporary collapse in the market for paparazzi photography and the introduction of new privacy laws in California . . . .” The increasing amount of media coverage devoted to the escalating tension between the paparazzi and celebrities in the last year, however, attests to the resurgence of the market for celebrity images and the inadequacy of California’s laws to address the core of the problem.

B. Impetus Behind Revived Interest in Curbing the Paparazzi

While paparazzi “have long been a fixture in Los Angeles,” veteran stars, publicists, and entertainment lawyers believe that certain photographers “seem to have [recently] changed the rules of the game.” Actress Halle Berry commented that the paparazzi “weren’t always as invasive. There was some healthy respect about it—they kept a certain distance from you. You weren’t chased at high speeds through the streets where you endangered other lives and . . .

1. On August 31, 1997, Princess Diana died in Paris from injuries sustained when the car in which she was traveling crashed at high speed in a narrow tunnel. PETER HOWE, PAPARAZZI, 120 (2005).
3. Id. France’s highest court had previously dropped manslaughter and breach of privacy charges against ten photographers including the same three who got the slap on the wrist in this case. Id.
5. Tim Cavanaugh, The Myth of the ‘Stalkerazzi’, L.A. TIMES, Feb. 20, 2006, at B15 (quoting an interview with People for its February 27, 2006 issue after Spears was caught driving with her unsecured infant on her lap). “I was terrified that this time the physically aggressive paparazzi would put both me and my baby in danger.” Id.
7. HOWE, supra note 1 at 120.
8. Id. at 123.
9. See infra notes 28-30 and accompanying text.
innocent people . . . .

Today, described by the press and law enforcement as “overly aggressive” and “dangerous,” members of the paparazzi have begun to employ tactics such as surrounding celebrities and preventing them from moving in any direction or getting to their cars, boxing in their cars with the cars of paparazzi, and even striking a celebrity’s car after chasing her into a dead end street. The paparazzi, often in packs, engage in such conduct “in order to either capture the victim’s reaction to the assault on film or tape, or to use the threat of assault to impede the mobility of the celebrity so that an image may be taken.” Insiders say this “escalating war of wheels between A-list stars and the roving photographers who dog them” makes Los Angeles ripe for a Princess Diana tragedy.

Today, the work of the paparazzi appears in even the most mainstream publications. It is difficult to distinguish a paparazzo from his traditional photojournalist counterparts, although an excerpt from Peter Howe’s Paparazzi captures the essence of the difference: “In short, it’s taking photographs you shouldn’t take in places you shouldn’t be . . . . [T]heir true calling requires more cunning, resourcefulness, creativity, and sheer nerve than a red carpet ever demanded.”

The problem emerges when these attributes translate into aggressive tactics placing the welfare of not only the paparazzi in

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11. Id.
13. Id. at 3.
14. Id. at 4.
16. Howe, supra note 1, at 135. “Street photographers do what the paparazzi do, but they don’t take it to such extremes.” Id. at 29.
17. Italian Director Federico Fellini coined the term “paparazzo” for one of his characters in his 1960 film La Dolce Vita. Camrin L. Crisci, All the World is Not a Stage: Finding a Right to Privacy in Existing and Proposed Legislation, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 207, 207 (2002) (“Fellini’s depiction of the invasive tactics of Paparazzo . . . came to represent the photojournalists who hunt celebrities for their pictures.”).
18. Howe spent two years researching and interviewing the paparazzi as the basis for understanding the profession. Gina Piccalo, Caught in Their Sights: Savvy and Chutzpah Pay Off For Paparazzi, L.A. TIMES, June 4, 2005, at E1. He has served as Picture Editor for N.Y. Times Magazine and is a regular contributor to USA Today, American Photo, and other publications. Howe, supra note 1.
19. Id. at 17-18.
jeopardy, but also the safety of their Hollywood targets and the public at large.  

Although several celebrities have recently garnered media attention as a result of their altercations with the paparazzi, the vehicular assault committed against Lindsay Lohan in May, 2005 "signaled a turning point in the trumped-up war against 'stalkarazzi.'"21

The young actress sped away from the pursuit of the paparazzi, only to come to a dead end. When she made a U-turn in order to escape the parade of paparazzi, one their number intentionally crashed his car into hers, causing her to come to a stop. The incident was captured on film by the rest of the [paparazzi], and pictures of the incident were soon published in many different publications.  

While these incidents may give rise to criminal charges "due to the egregious nature of the assault, many go unpunished due to the difficulty of proving criminal assault."22 Although the paparazzo who assaulted Lindsay Lohan was arrested for suspicion of felony stalking and assault with a deadly weapon, no criminal charges were brought against him.24 The Los Angeles District Attorney's office concluded that there was insufficient evidence that the paparazzo intentionally struck her car: "it appears that, although the suspect was most likely

20. A celebrity pursuit involving the actress Scarlet Johansson serves as an example of how easily and incidentally bystanders can get swept up in a celebrity-paparazzi conflict. In August, 2005, paparazzi in four vehicles pursued Johansson into a parking lot at Disneyland. In an attempt to evade the paparazzi, she clipped another car carrying a woman and her children. The four vehicles "then surrounded hers, with the photographers jumping out of the cars, cameras ready." Pamela McClintock, Governor Snaps Back at Paparazzi, DAILY VARIETY, Oct. 3, 2005, at 1. Fortunately, this time, neither the woman nor her children were injured. Id.

For the purposes of this note, the distinction between paparazzi and other photojournalists is irrelevant. All photographers engaging in overly aggressive conduct pose the same dangers and should be subject to the same liability since it is the process by which the pictures are captured, not the content of the pictures themselves, at issue. However, for the purpose of clarity, and in light of current events and the California legislature's specific aim to curb inappropriate paparazzi conduct, this note will focus on the "paparazzi" as such, since the hyper-aggressive, dangerous pursuits posing a public safety risk are most commonly associated with this subset of photographers.

21. Cavanaugh, supra note 5.

22. Civil Assault: Liability: Hearing on AB 381 Before the Assemb. Comm. on Judiciary, supra note 12, at 4 (crediting Lohan's accident as the incident that prompted the California legislature to take action).

23. Id. However, the Ninth Circuit has held that "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering." Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971).

driving carelessly when he collided with the victim’s car, it was not an intentional assault.\textsuperscript{25}

The financial rewards of capturing the perfect celebrity photo serve as an incentive for the paparazzi to continue to push this trend.\textsuperscript{26} Janice Min, editor of \textit{US Weekly}, acknowledged that “the market for photos of stars’ unguarded moments might have eroded Los Angeles’s status as a safe haven.”\textsuperscript{27} The reality is that in today’s pop-driven culture, “[i]n a seller’s market, the price tag on an exclusive shot of an A-list personality seems almost without limit.”\textsuperscript{28} A single shot may sell from $6,000 to $100,000.\textsuperscript{29} Such price tags play a large part in setting the industry standards as to acceptable conduct; as one reporter writes, “independent paparazzi can earn $1 million a year because of their unparalleled tenacity and, many would say, untethered moral code.”\textsuperscript{30} Competition among paparazzi to capture the perfect shot and reap the financial rewards further aggravates the problem. “[T]he circle of paparazzi working in [Los Angeles] has increased in 10 years from a handful of photographers to scores of them. There are dozens of paparazzo agencies . . . vying for images of about 50 A-listers, [making] it difficult . . . to land the high-value exclusive photos.”\textsuperscript{31}

C. California’s Most Recent Attempt to Rein in the Paparazzi: A Baby Step in the Right Direction

Aware of these changes, alarmed by the increasing trend of the use of assault-and-intimidation-style tactics by the paparazzi,\textsuperscript{32} and with the perennial war between celebrities and the paparazzi showing no sign of ceasefire, the California legislature stepped in and armed Hollywood with a weapon to fight back by amending its existing anti-
Effective January 1, 2006, the amendment allows victims of paparazzi assaults to file lawsuits seeking up to three times the damages suffered, in addition to punitive damages and court orders requiring the photographers to disgorge any proceeds earned from the pictures involved. Unfortunately, however, it is unlikely that this weapon will be as powerful as the legislature anticipated.

With the rise of reckless and aggressive tactics, high-speed pursuits jeopardizing public safety, and other extreme measures to capture the perfect celebrity snapshot, the California legislature, for good cause, determined that its existing anti-paparazzi statutory remedies fell short. While the statute greatly enhanced the penalties from those under the traditional common law remedies for invasion of privacy, the narrow language of the physical and constructive trespass provisions of the anti-paparazzi statute critically limits the effectiveness of the law. Further, even if these remedies were effective and utilized, they do not reach the recent paparazzi pursuits of their celebrity prey.

Since assault protects against the apprehension of immediate physical contact, the legislature seems to be at least moving toward the core problem with its 2005 amendment to California Civil Code section 1708.8. Celebrities certainly have a right to live in society without being put in fear of physical harm. Assault protects this right of personal security, but the difficulty of proving the requisite intent makes the amendment little more than a legislative censure of paparazzi conduct. With the "lottery-like payoffs a single image can produce," it is clear that the paparazzi are going to need more than a slap on the wrist for their misconduct. In order to accomplish this, the legislature needs to counteract the increasingly aggressive and extreme tactics of the paparazzi with a more innovative solution. An analysis of assault followed by a brief overview of recovery available for intentional and negligent infliction of emotional distress suggests that, in order to deter paparazzi and redress celebrities, California must discard the intent requirement and relax or abandon the imminence requirement of assault. California should fashion a new remedy in which the paparazzi can be held liable for negligently causing apprehension of contact.

34. Id.
35. RESTATEMENT (SECOND) OF TORTS § 21 (1965).
36. Piccalo, supra note 18, at E1.
II. Background

A. Recovering for Invasion of Privacy under the Common Law: Intrusion into Seclusion

California began developing a common law privacy tort in 1931.\(^{37}\) Of the four traditional common law remedies for invasion of privacy, intrusion into seclusion is most relevant to the issue at hand.\(^{38}\) California has adopted the Restatement definition of the intrusion into seclusion privacy tort: "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."\(^{39}\)

In *Shulman v. Group W Productions*, the California Supreme Court held that the intrusion cause of action has two elements: "(1) intrusion into a private place, conversation or matter (2) in a manner highly offensive to a reasonable person."\(^{40}\) When the plaintiff has merely been observed, or even photographed or recorded, in a public place, the first element is not satisfied.\(^{41}\) Rather, "the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude . . . ."\(^{42}\) Further, "[i]f the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law."\(^{43}\)

Even if a celebrity were to try to pigeonhole the type of reckless paparazzi behavior at issue (taking place in locations in which he or she could not reasonably hold an expectation of privacy) into a common law intrusion tort cause of action, these claims would be

\(^{37}\) Dietemann v. Time Inc., 449 F.2d 245, 248 (9th Cir. 1971) (citing Melvin v. Reid, 297 P. 91)).

\(^{38}\) Under the common law, the right of privacy is also invaded by appropriation of a plaintiff’s picture or name for defendant’s commercial advantage, publication of facts placing a plaintiff in a false light, and public disclosure of private facts. See *Restatement (Second) of Torts* § 652A (1977).


\(^{41}\) *Id.*

\(^{42}\) *Shulman*, 955 P.2d at 490.

unlikely to survive a summary judgment motion. In *Deteresa v. American Broadcasting Co.*, the Ninth Circuit found an “insubstantial impact on privacy interests” based on the undisputed facts that the plaintiff was videotaped in public view by a cameraperson in a public place.\(^4\) The California Court of Appeal addressed a similar situation in *Aisenson v. American Broadcasting Co.*:

Respondents’ camera crew ... videotaped appellant from their car, which was parked across the street from his home. They maintain that appellant was in full public view from the street at the time he was videotaped. Appellant claims he could not be seen from the photographer’s location unless an enhanced lens was being used. He does not, however, claim that his car and the driveway where he was filmed were outside of public view. Nor has he shown that his home address or his car license plate number were disclosed. At most, the evidence shows that any invasion of privacy which took place was extremely de minimus because the camera crew did not encroach on appellant’s property.\(^5\)

Thus, in the context of the aggressive paparazzi type conduct at issue, it is likely that courts would determine the intrusion of privacy, if any, to be de minimus and thereby insufficient to state a common law intrusion into seclusion privacy claim. The common law tort remedies are not broad enough to provide relief in these circumstances.

In *Sanders v. American Broadcasting Co.*, however, the California Supreme Court reiterated that it has never “stated that an expectation of privacy, in order to be reasonable for purposes of the intrusion tort, must be of absolute or complete privacy.”\(^46\) “[P]rivacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic.”\(^47\) Although the tort is often defined in terms of “seclusion,”\(^48\) “the concept of ‘seclusion’ is relative. The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone.”\(^49\) In *Sanders*, the court stated that the facts of *Dietemann*\(^50\)

\(^{44}\) *Deteresa v. Amer. Broad. Co.*, 121 F.3d 460, 466 (9th Cir. 1997).
\(^{45}\) *Id.* at 466 (citing *Aisenson v. Amer. Broad. Co.*, 220 Cal. App. 3d 146, 162-163 (1990)).
\(^{47}\) *Sanders*, 978 P.2d at 72.
\(^{48}\) *See*, e.g., *Restatement (Second) of Torts § 652B* (1977); *Shulman*, 955 P.2d at 490.
\(^{49}\) *Sanders*, 978 P.2d at 72 (citing 1 *MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5.10* (1998)).
\(^{50}\) In *Dietemann*, reporters for a news magazine deceitfully gained access to a doctor’s home office, where they secretly photographed and recorded his examination of one of them. *Dietemann*, 449 F.2d at 246.
exemplified the idea of a "legitimate expectation of limited privacy." Taking pictures of a person in a public place, or on a public street while he or she is driving or immediately after having been in a scuffle with the pursuing paparazzi, does not fit within this notion of a legitimate expectation of limited privacy. For liability to attach, the defendant must intrude into something within the plaintiff's own private domain. When the California legislature enacted the anti-paparazzi statute in 1998, it was justified in concluding that the traditional common law remedies for invasion of privacy were inadequate to redress celebrities who were aggressively and relentlessly pursued by the paparazzi.

B. California's Original Anti-Paparazzi Statute: Invasion of Privacy by Trespass

California enacted its anti-paparazzi statute in 1998, setting forth the remedies afforded victims of physical and constructive trespass committed with the intent to take photographs or recordings. The law authorizes recovery of treble and punitive damages. Additionally, if invasion of privacy occurs for a "commercial purpose," the statute provides for disgorgement of any profits earned from the sale of the photographs or recordings. Finally, the statute allows for equitable relief, including injunctions. The statute also provides that a person who "directs, solicits, actually induces, or actually causes" another person to commit an assault or other invasion of privacy with the intent to capture a physical impression is liable for specified damages, regardless of the existence of an employee-employer relationship. Finally, the statute

51. Sanders, 978 P.2d at 72.
52. See § 1708.8(a).
53. See § 1708.8(b). Liability under the constructive invasion of privacy subsection requires the "the use of a visual or auditory enhancing device" and involves "circumstances in which the plaintiff had a reasonable expectation of privacy." Id.
54. § 1708.8.
55. § 1708.8(d). Pursuant to Civil Code section 3294, "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff . . . may recover damages for the sake of example and by way of punishing the defendant." CAL. CIV. CODE § 3294 (2006).
56. "Commercial purpose" is defined here as the "expectation of a sale, financial gain, or other consideration." § 1708.8(k).
57. § 1708.8(h).
58. § 1708.8(e). While holding the publishers as well as the individual photographers accountable prevents publication of the pictures in the United States, it cannot prevent them from being printed in foreign magazines. Howe, supra note 1, at 100. A June 2004 Ruling by the European Court of Human Rights, however, may be rapidly closing these
specifically forecloses the defendant from making a “defense . . . that no image, recording or physical impression was captured or sold.”

The legislature drafted the statute regarding physical and constructive trespass narrowly so as to ensure that legitimate photojournalists would not be held liable under its provisions, but in doing so, seems to have inadvertently foreclosed any path for celebrities to seek redress against the paparazzi under the statute. The statute imposes liability for trespass committed for the narrowly defined purpose of capturing an image or recording of the defendant “engaging in a personal or familial activity.” The legislature construed “personal or familial activity” to include “intimate details of the plaintiff’s personal life, interactions with the plaintiff’s family or significant others, or other aspects of plaintiff’s private affairs or concerns.” An additional requirement for the constructive trespass provision invokes the same “reasonable expectation of privacy” language discussed in relation to the common law intrusion tort, thereby raising the same doubts as to its effectiveness in addressing the numerous celebrity encounters with the paparazzi that occur on main streets and other crowded public spaces. Finally, in order to be held liable under this statute, the defendant must commit the invasion of privacy “in a manner that is offensive to a reasonable person,” an element of the statute that represents a retreat from the “highly offensive” requirement under the common law.

III. Analysis

A. The 2005 Amendment: Adding Assault to the Anti-Paparazzi Statute

Faced with a flood of media headlines, high-speed pursuits, and clashes between paparazzi and celebrities, the California legislature markets for photos taken under such circumstances. Photos printed purely for entertainment purposes rather than to advance public debate violate Article 8 of the European Convention of Human Rights, which pertains to respect for private and family life. Id.

59. § 1708.8(j).
60. § 1708.8.
61. “Personal and familial activity does not include illegal or otherwise criminal activity as delineated in subsection (f),” but does include the activities of victims of crime in circumstances where either the subdivisions regarding constructive or physical invasion of privacy apply, § 1708.8(f).
62. § 1708.8(b) (“under circumstances in which the plaintiff had a reasonable expectation of privacy”).
63. §§ 1708.8(a)-(b).
64. See Shulman, 18 Cal. 4th at 231.
acknowledged the fact that its statute failed to deter paparazzi and provide effective redress for celebrities by its 2005 amendment, adding assault to the list of activities that constitute invasion of privacy. The law now imposes civil liability for "assault committed with the intent to capture any type of visual image, sound recording, or other physical impression . . . ." The legislature intended to extend the current rights and remedies for victims of assault committed by paparazzi in their attempt to capture images or sound recordings for financial gain.

While the amendment was being debated by the Assembly Committee on the Judiciary, opponents voiced their concerns that the implications of this law extend beyond the paparazzi and could have a chilling effect on the reporting of newsworthy events and subject the press to frivolous litigation. From the outset, it is important to note that similar arguments were made back in 1998 in opposition to the original anti-paparazzi statute. However, these fears seem to be largely unfounded since, to date, there are no reported cases based on this statute.

The legislature explicitly acknowledges that its statutory remedies are not meant to displace any avenues for recovery that may otherwise be available: "[t]he rights and remedies provided in this section are cumulative and in addition to any other rights and remedies provided by law." By doing so, it raises the question of what, if any, relief the statute, and more specifically, the assault provision really affords celebrities. True, it seems that with the increasingly aggressive tactics employed by the paparazzi, assault comes closer to addressing the core problem than either traditional common law privacy torts or section 1708.8 as originally enacted. A closer look at the elements of assault as an intentional tort and the difficulty of proving the requisite intent, however, suggest that the

65. § 1708.8(c).
67. Id. at 5.
70. § 1708.8(i).
amendment is nothing more than a statement of legislative disapproval and censure of paparazzi conduct, rather than a workable solution to the problem.

B. Why the Amendment is Doomed to Fail: Assault as an Intentional Tort

The law imposing civil liability for assault committed with the intent to capture a physical impression does not on its face restrict the cause of action to victims of paparazzi assault, as opposed to the greater news industry. Legislative history, however, undoubtedly suggests this is the case: the author of the amendment, California Assemblywoman Cindy Montanez, emphasized the role of the intent requirement in ensuring that liability extend only to the legislature’s intended targets (the paparazzi and, more specifically, those engaging in overly aggressive and dangerous conduct).

Assault is an intentional tort and the actor must have intended to inflict harmful or offensive contact upon the other person. In California, a court instructs the jury to find the requisite intent in either of two situations: 1) when the defendant intentionally does an act that made the plaintiff “reasonably believe” that he or she was about to be touched in a harmful or offensive manner; or 2) when the defendant threatens to touch the plaintiff in a harmful or offensive manner, and it “reasonably appeared” to the plaintiff that the defendant “was about to carry out the threat.”

Assault requires intentional conduct. The defendant must act with the purpose to cause apprehension of a contact or “with knowledge that, to a substantial certainty, such apprehension will result.” Absent such intent, the actor is not liable for an assault even if his conduct “creates an unreasonable risk of causing such an apprehension to another” and even if his conduct does, in fact, cause such apprehension. According to the Restatement (Second) of Torts, assault protects “only against acts intended to inflict a bodily contact or to cause an apprehension of such contact, and not against

71. See § 1708.8(c).
73. Id.; see also RESTATEMENT (SECOND) OF TORTS § 21 (1965).
75. RESTATEMENT (SECOND) OF TORTS § 21 cmt. d (1965). Thus, the defendant may not avoid liability by claiming that he did not mean to place the plaintiff in fear of an unwanted touching, if he knew to a substantial certainty that fear of a touching would result.
76. Id. at § 21 cmt. f.
conduct which creates such a risk of it that, had the risk threatened bodily harm, it would constitute negligence." Thus, regardless of the fact that a photographer may clearly be negligent and act in such a manner that creates a risk of his celebrity prey apprehending bodily contact, if he lacks the requisite intent, he will not be liable for assault.

Many situations in which persons are placed in fear of a touching are not intentional as that term is used in intentional tort law. While a celebrity may clearly be traumatized by a pack of paparazzi carelessly pursuing her down the street at high speed, she would be unlikely to succeed in an action for assault. Assault addresses only one narrow form of emotional distress: apprehension of a contact with the person of the plaintiff. In all but the most extreme cases, this is not what a paparazzo threatens to do. He does not intend to physically touch the celebrity, nor does the celebrity actually fear that he will. Since assault only protects against threatened contacts with the plaintiff herself, these interactions are not assaults.

Further, there is a crucial difference between a person apprehending an imminent injury and realizing, after the fact, that he or she has narrowly escaped one. To succeed in a cause of action for assault, a plaintiff must be placed in fear of an imminent contact. A celebrity’s post hoc awareness of contact may be equally disturbing, but it does not qualify as assault.

Yet, the overly aggressive tactics employed by paparazzi surely are inappropriate and celebrities ought to have a remedy for such conduct, even if it can’t be shoehorned into the elements of assault. If it isn’t assault, it must be something, or else maybe the law ought to make it something and give it a name to deter such conduct and provide celebrities with a civil remedy. The assault cause of action is to arthritic too be stretched this far, as a traditional civil remedy, and even more so with the new statutory requirement that the photographer commit assault in order to capture images or sound recordings for financial gain. As articulated by paparazzo Frank Griffin, a leading Los Angeles photographer at celebrity photo

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77. Id.
78. This problem is exemplified by the inability to find the requisite intent to prosecute the paparazzo for assault in the Lindsay Lohan incident. See supra notes 22, 24-25 and accompanying text.
79. RESTATEMENT (SECOND) OF TORTS § 21 (1965).
80. See id. at § 29 cmt. b (Imminent “does not mean immediate, in the sense of instantaneous contact . . . [but] that there will be no significant delay.”).
81. CAL. CIV. CODE § 1708.8(c) (2006).
agency Bauer-Griffin, “[t]o actually break this law, we would have to put our cameras down, punch a celebrity in the face and then take pictures of them afterwards. That is ridiculous. No one would do that and no one would want pictures of it.”

Despite the probable ineffectiveness of California’s amended anti-paparazzi statute in curbing aggressive celebrity hunters, California’s attempt does show it is moving closer toward the core problem by beginning to address not only privacy rights, but physical harm and public safety concerns as well.

IV. Proposal

From the common law privacy torts to its recently amended “anti-paparazzi” statutory remedies, California admittedly seems to be moving closer toward the core problem. As the paparazzi turn to more extreme and more aggressive tactics, however, California must itself counter with more innovative and aggressive solutions to the problem. The courts and the legislature should establish from the first test case that the doors to recovery under any remedy will be closed to all circumstances except that overly aggressive conduct by the paparazzi that endangers the public safety in addition to the paparazzi and their prey. It is extremely important, for constitutional reasons, to restrict the scope of liability solely to this subset of photojournalists.

The intent requirement of assault itself should, in theory, serve to insulate the majority of journalists, and even legitimate paparazzi,

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84. See supra note 13 and accompanying text.

85. Although the constitutionality of California’s anti-paparazzi statute has not been challenged, several scholars and critics have opined that the free speech implications of the law are ominous. The California Newspaper Publisher’s Association opposed the amendment, in part, because it regarded it as “an attempt to amend and expand a constitutionally suspect law that makes those engaged in First Amendment protected activities susceptible to special penalties for which the rest of society is exempt.” Physical Invasion of Privacy: Liability: Hearing on AB 381 Before the Senate Judiciary Comm., supra note 68, at 5; see also David A Browde, Warning: Wearing Eyeglasses May Subject You To Additional Liability and Other Foibles of Post-Diana Newsgathering – An Analysis of California’s Civil Code Section 1708.8, 10 FORDHAM INT’L J. COMM & INFO L. 697 (2000); Richard J. Curry, Jr., Diana’s Law, Celebrity and the Paparazzi: The Continuing Search for A Solution, 18 J. MARSHALL J. COMPUTER & INFO L. 945 (2000). But see also Sharon A. Madere, Paparazzi Legislation: Policy Arguments and Legal Analysis in Support of Their Constitutionality, 46 UCLA L. REV. 1633 (1999).
from liability under this statute. The law should not make those persons engaged in non-aggressive, lawful photography and reporting, whatever the subject matter, susceptible to its penalties. However, as shown above, the strict intent requirement of assault makes the statute problematic in terms of holding anyone, even the intended targets of the statute, liable under its terms.

A. A Brief Overview of Intentional and Negligent Infliction of Emotional Distress: Suggests Negligence Must Be the Standard

Concurrently with the development of privacy law, California decided a series of cases awarding plaintiffs relief from “unreasonable penetrations of their mental tranquility based upon the tort of intentional infliction of emotional distress.” According to the Ninth Circuit, this precedent is indicative of the trend of California law to protect interests analogous to those protected by common law privacy torts. Trying to manipulate aggressive paparazzi conduct into the rubric of preexisting California tort law aimed at protecting emotional distress will be as ineffective as California’s past attempts, but a brief analysis of intentional and negligent infliction of emotional distress suggests that while the legislature can draw from existing tort law, it must ultimately create a cause of action specifically tailored to these photographers engaging in this particular conduct.

Intentional infliction of emotional distress (IIED) allows recovery for acts that cause severe distress, regardless of whether a physical threat was made. While liability is generally confined to defendants exhibiting “extreme and outrageous conduct,” in the cases of overly aggressive and dangerous paparazzi conduct with which the legislature seemed particularly concerned, few people could dispute the fact that this conduct transcends all bounds of decency tolerated by our society. A court may find the requisite intent element in one of two ways: 1) intent on the part of the defendant to cause the plaintiff to suffer severe emotional distress, or 2) recklessness as to the effect of defendant’s conduct. A defendant will be held liable not only for intentional conduct, but also for

86. See Civil Assault: Liability: Hearing on AB 381 Before the Assemb. Comm. on Judiciary, supra note 12. See also supra notes 74-77 and accompanying text.
87. Dietemann, 449 F.2d at 248 (citations omitted).
88. Id. at 248-249.
89. See RESTATEMENT (SECOND) OF TORTS § 870 (1965) (supporting liability for intentional infliction of harm that does not fit the elements of traditional intentional torts).
91. Id.
reckless conduct. With IIED, however, a celebrity plaintiff will encounter the same difficulty proving the requisite intent as she would with assault. Further, in all but the most extreme cases, a plaintiff will be unable to show that the paparazzo’s conduct rises to the level of recklessness, as opposed to mere negligence. In order to redress celebrities, California will have to hold the paparazzi liable without requiring intentional conduct and by lowering the standard necessary for the imposition of liability.

While negligence may be the appropriate standard, California’s negligent infliction of emotional distress (NIED) tort is blurry, at best, and not designed to protect plaintiffs in the majority of paparazzi encounters. In order to recover for NIED in California, the plaintiff must either have been in the “zone of physical danger” and suffered at least some physical injury as a result of the emotional trauma or qualify as a bystander under the guidelines articulated in Dillon v. Legg. In many circumstances, this does not encompass situations in which the plaintiff is the primary person against whom the defendant’s conduct is directly targeted. For example, if a paparazzo pursues a celebrity in a high speed car chase in order to capture the perfect shot, but manages to stay a fair distance away as to keep the plaintiff outside the zone of physical danger, even though the paparazzo might be found negligent (or even reckless), the celebrity would be unlikely to muster an actionable claim of NIED.

B. Back to the Drawing Board: Negligently Causing Apprehension of Contact

If California is serious about curbing aggressive and irresponsible paparazzi, it will inevitably need to return to the drawing board and once again amend its legislation. Instead of looking to existing

92. Acting in reckless disregard of a high probability that emotional distress will result. See generally RESTATEMENT (SECOND) OF TORTS § 500 (1965) (“The actor’s conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.”).

93. “The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.” Id. at § 500 cmt. g.

94. Thing, 771 P.2d at 818.

95. See Dillon v. Legg, 441 P.2d 912 (Cal. 1968) (allowing recovery to a mother who suffered emotional trauma and physical injury from witnessing the infliction of death to her child resulting from the defendant’s negligence).
common law and statutory tort remedies that, as the current state of affairs demonstrates, have proven inadequate, California must fashion a remedy from scratch, specifically targeted at photographers associated with this unacceptable conduct. By narrowing the scope of liability in this way, instead of merely coupling the traditional assault tort with the accompanying language “with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff,” the legislature can simultaneously circumvent the under-inclusive nature of the statute it faced in its 2005 amendment, while ensuring that journalists—paparazzi or otherwise—are not liable as long as they are pursuing their profession in a legitimate manner.

The legislature should use the assault tort as a baseline for the new cause of action, but discard the intent requirement and replace it with a negligence standard. Thus, a photographer would be liable for negligently causing apprehension of contact. Further, the legislature should either relax or abandon the imminence requirement in order to accommodate the conduct at issue. Under this new cause of action, had Lindsay Lohan opted to bring civil charges against the paparazzo who struck her car, she could have successfully recovered for her damages despite the fact that, according to the Los Angeles District Attorney’s office, “although the suspect was most likely driving carelessly when he collided with the victim’s car, it was not an intentional assault.” Surely, the paparazzo’s conduct would satisfy a negligence standard and Lohan would have been in apprehension of contact at some future point.

This new remedy would address the overly aggressive and utterly careless conduct undertaken by the paparazzi that does not quite rise to the level of recklessness, but surely poses an unacceptable risk to both celebrities and society at large. By incorporating assault into its statutory framework, the legislature acknowledged the right of celebrities to be free from both mental and physical harm. The California Supreme Court has stated that “[a]ssault is a tort which . . . recognizes the right of the individual to peace of mind, to live without fear of personal harm.” Allowing recovery to victims when paparazzi negligently cause apprehension of contact serves both of these goals.

Equally, if not more importantly, damages awarded would provide the same financial deterrent effect as damages under an

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96. CAL. CIV. CODE § 1708.8(c) (2006).
97. Van Gelder, supra note 25.
assault or invasion of privacy cause of action, without having to manipulate the paparazzi conduct in order to fit it into the elements of other pre-existing torts. In Los Angeles, where paparazzi travel in flocks and are in constant pursuit of their A-lister prey, there is always another paparazzo waiting to capture the perfect shot in exchange for a hefty reward. Hitting the paparazzi with only nominal or minimal general damages would amount to nothing more than a slap on the wrist by the courts. With a single shot selling for anywhere from $6,000 to $100,000, the California legislature was correct to assume that the paparazzi need something more than judicial disapproval of their conduct to provide a deterrent.

The redeeming feature of California’s anti-paparazzi statute is the enhanced penalties it provides for what are little more than traditional common law torts in the context of capturing an image or recording. Specifically, “[b]ecause paparazzi are paid handsomely for their efforts and stand to profit regardless of civil liability, they may be willing to risk civil litigation.” By allowing for profit recapture, California’s anti-paparazzi statute may effectively deter paparazzi by depriving them of the fruits of their aggressive and intrusive conduct.

While the paparazzi risk getting hit with treble and punitive damages, in addition to the disgorgement of profits earned from their photographs, the costs and burdens on California’s judicial system from allowing for celebrities to recover should be minimal. As with any new law, the first time a frivolous lawsuit is filed in this context, the court can set precedent and thereby dissuade others from using this as a tool to bring false claims, while limiting the confines of the plaintiff class to embody the same general intent of the legislature as spelled out in the history of section 1708.8. Peter Howe believes

99. California Assemblywoman Cindy Montanez expressed that the amendment was concerned more with public safety than with crafting special protections for celebrities: “[w]hen paparazzi engage in reckless behavior on the streets and sidewalks of L.A.—or anywhere—it puts everyone in harm’s way: the movie star and the movie-goer alike.” Schwarzenegger Signs Law Limiting Paparazzi Pursuits, CITY NEWS SERVICE, Sept. 30, 2005.


101. Crisci, supra note 17, at 235.

102. See § 1708.8(d).

103. Crisci, supra note 17, at 235-236.

104. See § 1708.8(d).

"[i]t is unlikely that celebrity magazines will put up much of a fight if courts . . . issue adverse rulings." Barry Levine, assistant executive editor of The National Enquirer, stated that the tabloid will be as competitive and aggressive as any other publication in the pursuit of celebrity coverage, but not to the point where it risks having its reporters sued or jailed: "[a]t the end of the day, we’re talking about celebrity coverage, we’re not talking about a cure for cancer."

Contrary to premature concerns regarding baseless lawsuits, a greater problem might be getting the celebrities themselves to initiate civil lawsuits following their altercations with the paparazzi. While criminal prosecution is still a viable alternative in appropriate situations, the legislature’s specific desire to deter the paparazzi through the threat of large general and punitive damages can only be accomplished in a civil context. One prominent entertainment lawyer believes “most celebrities shrink from filing suit because litigation allows defense lawyers to put stars’ private lives on display.”

Further, some paparazzi disguise themselves with hats and sunglasses and cover or remove their cars’ license plates, “tactics that can prevent a positive identification.” Finally, even if identification is possible, some celebrities may view the process of hauling a paparazzo into court as futile, since the photographer may or may not actually appear in court to defend himself. Nevertheless, if and when California does choose to provide the stars with an effective vehicle to recover, this will certainly boost any incentive they may have to expend the energy, costs, and time associated with litigation.

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106. HOWE, supra note 1, at 100.
107. Barry Levine also serves as the publication’s New York bureau chief and has served in various roles at the Star, A Current Affair, and Extra! HOWE, supra note 1, at 12.
108. HOWE, supra note 1, at 100.
110. Id.
111. It is important to note that the difficulty of compelling paparazzi to appear in court is not eliminated in the criminal context. For example, although the paparazzo who was arrested stemming from his efforts to photograph actress Reese Witherspoon and her children at Disney’s California Adventure theme park was charged with child endangerment and battery, the paparazzo failed to appear in court to face the charges. Richard Winton, Paparazzo Fails to Come to Court, L.A. TIMES, Jan. 5, 2006, at B3. He held both U.S. and British Honduras passports and had used a dozen aliases over the years.
V. Conclusion

In light of the escalating use of aggressive intimidation-style tactics by the paparazzi, and due to the fact that few cases of paparazzi harassment rise to the level of criminal activity, the state certainly has a legitimate interest in providing celebrities with a civil remedy in order to curtail this conduct. The extreme measures undertaken to reap the financial benefits of capturing the perfect image pose a public safety hazard, endangering the celebrities or innocent third parties who could be seriously injured or even killed in such situations. The new legislation represents California’s attempt to curb the overly aggressive tactics employed by the paparazzi in their zealous pursuit to feed the public’s seemingly insatiable interest in Hollywood’s elite—at any price.

As for the ultimate effectiveness of any current or future legislative action at accomplishing its intended purpose of curbing the overly aggressive tactics of the paparazzi, only time will tell. As long as tabloids are willing to shell out hundreds of thousands of dollars for the “perfect” shot, it is possible the legislature will never be capable of reining in the paparazzi. Yet perhaps the threat of enhanced penalties and disgorgement of profits may provide a financial incentive of its own. The drafter of California’s 2005 amendment stressed that the virtue of the law is that it “hits the paparazzi where it hurts—the wallet. Money is their motivation. So taking away their money will be the solution.” While admittedly this attempts to reduce a complex problem into a simple formulaic solution, the underlying logic of Assemblywoman Cindy Montanez’s argument seems undeniable. California was on the right track in terms of the remedies it was willing to afford wronged celebrities; it simply took a detour in terms of finding a successful mode for a celebrity to effectuate those remedies. Discarding the intent requirement of assault and replacing it with a negligence standard in which the apprehension of contact need not be imminent might prove to be what California has been searching for in order to accomplish its dual purpose of deterrence and providing recovery in appropriate circumstances.

Princess Diana’s death remains a “cautionary tale about photographers gone wild.” While the three paparazzi who took pictures of her as she lay dying were recently found liable for invading

113. Cavanaugh, supra note 5.
her privacy,\textsuperscript{114} the millions of pounds spent pursuing them through the courts to recover one euro seems an empty victory for public figures and celebrities in their perennial battle against the paparazzi.\textsuperscript{115} Driven by the universal dollar sign, the paparazzi are unlikely to take notice of such a ruling, let alone be persuaded to change their conduct as a result of it.

Back on American soil, while a spokesperson for the California Newspaper Publishers Association criticized California's new law as "attempt[ing] to stop paparazzi conduct with a very broad brush,"\textsuperscript{116} closer scrutiny of the history of the common law privacy torts and the anti-paparazzi statute suggests that the legislature, while admittedly moving closer to the core problem, has only dipped the tip of its brush and needs to approach the canvas from a different angle. Otherwise, with the rise of dangerous and overly aggressive tactics employed by the paparazzi in their persistent, price-tag driven pursuit of the perfect shot, it may only be a matter of time before California witnesses its own Princess Diana tragedy.

\textsuperscript{114} This marks "the first time anyone has ever been successfully prosecuted in France for taking an unpublished picture." Ellis, supra note 2.

\textsuperscript{115} Id.

\textsuperscript{116} Harris, supra note 82.