Emerging Legal Issues in the Collection and Dissemination of Internet-Sourced Research Data: Part I, Basic Tort Law Issues and Negligence[1]

T.A. Lipinski, J.D., LL.M., Ph.D.
University of Wisconsin—Milwaukee
PO Box 413
Milwaukee, WI 53202
tlipinsk@uwm.edu

Abstract

This article is the first in a series exploring the legal basis for liability on the part of researchers who "observe" and "collect' data from online forums such as a listserv, discussion board, blog, chat room and other sorts of web or Internet-based postings. Determining whether a data subject is "harmed" in the process requires examining existing legal concepts relating to the law of personal injury, i.e., tort law. This article establishes the groundwork for future articles by applying the law of negligence to online research settings. Concepts such as duty of care, proximate and superseding cause, assumption of risk and contributory negligence are discussed and applied to online research data collection and dissemination. While there is some legal risk, the author concludes that under most circumstances a plaintiff would be unsuccessful in pursuing a legal claim against an individual researcher. Nonetheless as online research activity increases the litigious nature of our society underscores the need for researchers to be aware of how liability can arise and the factors involved in assessing that liability, the level of legal risk and appropriate risk-avoidance strategies.

Introduction

[1] Portions of this article represent an updated and expanded version of a discussion that first appeared in the Journal of Information Ethics (Lipinski, 2006).

This article is the first instalment in a series of four articles examining the possible basis for legal liability of researchers who use the Internet in the collection of research data. Specifically, it examines the potential legal issues associated with the protocols of ethnographers who use listserv, discussion board, blog, chat room and other sorts of web or Internet-based postings as the source of their data. The author assumes that the forum for participation is legitimate, in that the list, board, blog, chat, site, etc. is not created or otherwise concocted by the researcher, but involves situations akin to off-line practices where a researcher would be listening to the conversation or watching the behaviour of subjects in a public place. The forum is "legitimate" in this sense but the researcher is either reviewing the log, transcript or other record of participation made by others or is observing ("listening in on") the online conservation as it occurs among forum participants. In the latter case the researcher might be a hidden observer or merely an obvious but silent member, that is, "logged-in" as a user but choosing instead not to participate. In this case it could be said that the researcher is somewhat of an interloper. The legal implications (potential and likely consequences) of either asynchronous review or synchronous observation (data collection) and use (dissemination) of the information collected are discussed.

The author also assumes that the host location of the listserv, discussion board, blog, chat room or other sort of web or Internet-based forum is within the jurisdictional boundaries of the United States, thus, in this discussion, U.S. law applies. While the basic legal concepts may apply across international borders, researchers unsure of which laws apply should consult additional resources or make similar analyses within their specific context. Even within the United States, some legal concepts may vary across state lines (or federal jurisdictional boundaries such as judicial districts and circuits) and again reference to the context of the particular researcher may be necessary. As a result, this article offers readers an awareness of the variety of legal issues that might arise in the general context (data collection via observation) as well concrete examples in the selected specific context (online observations subject within U.S. jurisdictions). It offers the informed and experienced opinion of the author but should not be taken as legal advice. If legal advice is needed by the journal readership, the appropriate source for that advice should be sought. The opinions offered are based on interpretation and application of the

relevant precedent, but little if any case or statutory law exists in the precise ("on point" to use the appropriate legal phrase) context of data collection from online forums by researchers in this manner. To be sure, that is a good thing, but with the ever-increasing recourse of litigation to settle perceived harms or alleged disputes the law is sure to develop in this regard. It is the goal of the author that the analysis presented in this series offers the initial legal context in which such issues would be adjudicated and more importantly resolved.

This first article in the series discusses legal aspects of harm based in claims of negligence that arise from the online practices of researchers. The second article in the series discusses the claims against researchers based in defamation, either for comments made by the researcher or by a forum participant that the researcher then disseminates in other publications such as proceedings, articles, chapters, etc. The next instalment in the series reviews the potential for harm based on several theories of privacy invasion. A fourth and final article discusses copyright and online licensing. The latter concept includes assessment of the enforceability of terms and conditions governing access to and use of listserv, discussion board, blog, chat room and other web forums to which the researcher assents by use of a click-on or similar mechanism. This article does not discuss the use of the Internet as a collection device, e.g., online surveys. Since these practices do not involve direct interview or interaction with or treatment of human subjects much of the precedent involving negligence, informed consent and related issues is not relevant, however, it is reviewed initially for guidance in suggesting the applicable legal standards of conduct. While it is concluded that the likelihood for a success of such claims is small, analyses will include steps that researchers can take to ensure that such risk remains small.

Claims Based in Tort Law: General Concepts of Harm

In the United States, tort law is the law of private injury, of civil (as opposed to criminal and public) harm. (In other countries with Roman and civil law traditions the term "delict" may be used instead.) Black's Law Dictionary (2004) defines a "tort" as a "civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on persons who stand in a

particular relation to one another." In light of this definition the following question can be posed and refined: Is there any legal liability for researchers who "observe" research subjects, parallel to ethnographers that watch or listen to participant interaction in public places and without involvement of the researcher, i.e., prodding of the subjects to act or respond? More accurately, is there a potential for liability of researchers who read the script or log of comments posted by others (the subjects) in various Internet or web-based forums, then analyze that text, and publish summarizations or excerpts of that text in reports, articles, or other scholarly communications? Can it be said that a civil wrong occurs in this process? Said in another way, what legal duty, if any, is placed upon researchers in this stead?

The researcher may be reviewing the log, transcript, or other record of participation made by others or may be observing ("listening in on") the online conservation as it occurs among forum participants. In the latter case the researcher might be a hidden observer or merely an obvious but silent forum member, i.e., "logged-in" as a user but choosing instead not to participate. It goes without saying that online researchers typically have no ill-intent, but also that online researchers likewise do not enter into public web spaces under false pretence or disguise. In light of these factual assumptions, the legal analysis of either subsequent review or contemporaneous observation is the same.

As long as participants can be said to interact in a public forum, one open to anyone, without promise of discrimination by the host, the author considers the forum a public one. The host will not typically make such assertion or promise of discriminating access. Even where the forum is intended to be dedicated for some subset of the public, e.g., users interested in a particular hobby or activity, meeting some particular demographic or having some other characteristic, the host will make no guarantee to that effect. It may be obvious even to the reader untrained in law, but this is done for legal reasons, as such assertion or promise would raise the expectation on the part of the participant and this, as discussed below, might raise the legal duty of care owed to the forum participant by the forum host.

Forum participants do not have any enforceable rights against the host to enforce such interest *in* parameters or even behaviour guidelines. Even if registration, sign-up, or similar permission process must occur first, forum hosts will make no guarantee to a user that other users meet the parameters of that subset. What host could guarantee that no online predator or other third party with ill-intent would ever log into a forum designed for children, or that a site devoted to Seder practices and recipes would never be visited by neo-Nazi or white-supremacists? The closest analogous case demonstrating this principle is *Noah v. America Online, Inc.*, (2003, p. 534) where the plaintiff "claimed that the ISP wrongfully refused to prevent participants in an online chat room [devoted to Muslim topics: the 'Beliefs Islam' and the 'Koran' chat rooms] from posting or submitting harassing comments that blasphemed and defamed the plaintiff's Islamic religion and his co-religionists." In dismissing the case, the federal district court observed that the terms and conditions in the service agreement regarding online comportment entitled "Community Guidelines" created no contractual duty on the part of the service provider to "police" its space or ensure that only relevant participants enter a particular room; rather the "plain language of the Member Agreement makes clear that AOL is not obligated to take any action" (*Noah v. America Online, Inc.*, 2003, p. 545). Of course the focus of this article and the others in the series is upon the legal consequences of researcher conduct, not host conduct.

For liability to exist some legal injury must occur in the act of research or its aftermath. The most common cause of action for such injury would be to claim that the researcher is somehow negligent. In other words, the lawsuit would be based on the assertion that the researcher breached a duty of care owed to the subject (see discussion below) for the injury that results from either the observation alone or from dissemination of that observation to others. Commentators have concluded that the likelihood of suit against researchers is increasing: "Although the case law on human subject research is just beginning to emerge, plaintiffs should be able to successfully establish negligence claims against researchers by establishing a duty of care based on the special relationship between researchers and subjects" (Jansson, 2003, p. 262). However, these cases involve human subjects in clinical, medical, or related studies. Even within this genre of cases, situations where no physical contact is perpetrated have not met with success. An

example would be a claim based on the "injury" that results from no longer being a part of a study group: Expulsion occurs much to the chagrin of the subject, as the subject desires to continue taking the experimental drug, receiving the experimental treatment, and the subject believes that their health is declining as a result of no longer being allowed to participate (*Spenceley v. M.D. Anderson Cancer Center*, 1996). While it is possible to craft a claim for non-contact harms, e.g., injury from either intentional or negligent "infliction of emotional distress," in those jurisdictions that recognize such claims the claim must nonetheless be "linked to a physical injury or the threat of one" (Morreim, 2003, p. 70). The question is whether any injury, other than a specific act such as a violation of privacy (discussed in a subsequent article) or defamation (discussed below) for re-publication by the researcher of a statement made by a participant, is perpetrated by merely observing or listening to another's conversation or comment when that expression is text-based and made in an open forum on the Internet, or whether any injury results from the dissemination of that conversation or comment. This "observation" does not involve an invasive act into the physical space of the participant. This is opposed to contact-based "injury," while not causing harm can nonetheless be said to "injure" a participant.

There have been cases against medical groups where the patient-participant suffers no physical harm (the operation was indeed successful) but is still considered to be injured when the medical group substitutes another surgeon for the preferred one, a so-called ghost doctor. Such circumstances can be the subject of a claim for battery (*Perna v. Pirozzi*, 1983); *Pugsley v. Privette*, 1980); *Guebard v. Jabaay*, 1983). However the injury is not the result of physical harm *per se*, of contact gone awry, but from an intentional harm, the purposeful substitution of one doctor for another: "An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other, if . . . the contact is not consented to by the other or the other's consent thereto is procured by fraud or duress" (Restatement (First) of Torts 1934, § 13).

Understanding the Elements of Negligence

The circumstance would be rare where the online researcher could be said to intend for harm to result from the observation of listserv, discussion board, blog, chat room and other web forum participation or the dissemination of that observation through publication, i.e., in the form of a proceeding, article, book chapter, pr other publication. It is more likely the circumstance that the claimed harm occurs, to use the non-legal but no less accurate conceptualization, by accident. Nonetheless, the forum participant still cries foul believing some compensable injury occurs as a result of the observation or dissemination. In the law of tort, of injury, the general label assigned such non-intentional harms is negligence. Understanding the law of negligence and its application to the practices of online researchers identifies the legal basis on which such a claim would lie and the likely result a court would render in response to such claim. Again the reader is cautioned that the law of negligence can vary from jurisdiction to jurisdiction. This article discusses general concepts and offers example of selected cases. However, the concept of negligence does exist within all jurisdictions of the United States and in other countries so the considerations discussed here would be relevant in multiple environments.

Negligence is "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregardful of an interest of others" (Restatement (Second) of Torts, (1965, § 282). To prevail in a claim of negligence against another party the forum participant plaintiff must establish that the person who caused the harm, called the *tortfeasor*: 1) owed a duty of care of to the plaintiff, 2) there was a breach of that duty, 3) the breach was the proximate (or legal) cause of the harm, and 4) and harm (identifiable and measurable) results that is "legally compensable" (Lee, 2005, § 3:2). The lynchpin of establishing a legal duty is *foreseeability*. According to Black's Law Dictionary (2004) the resulting harm must have been "reasonably anticipatable" before the defendant would have a duty to protect against its occurrence. The concept reflects a logical response by the courts: In general it is proper to make a person responsible for the harm one causes, but where it is not reasonable to anticipate harm the legal system will conclude it is likewise not reasonable to expect that the harm can be prevented. In other words, the duty of care to protect others from harm extends to those harms which are foreseeable. Where

harm is not foreseeable one cannot be expected to exercise a duty to protect others from it. The failure of that prevention is the breach, the second element.

Duty of Care and Foreseeability

While it might be tempting to believe that all accidents are preventable and therefore foreseeable in the eyes of the law, the law does not see it that way. Foreseeability is a legal concept and a determination of whether a duty of care exists is a question of law, i.e., it is a decision for the court not the jury to make. The Restatement (Second) of Torts (1965, § 435, emphasis added) offers two considerations regarding the concept of "Foreseeability of Harm or Manner of its Occurrence": (1) If the actor's conduct is a *substantial factor* in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable. 2) The actor's conduct may be held *not* to be a *legal cause* of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm." Foreseeability is but one of several factors courts use in determining whether a legal duty exists.

Cases where the plaintiff's claim was based upon negligent dissemination of content such as entertainment media (video games) or the printed word (books, magazines, etc.) are instructive. The defendants in these cases engaged in speech that remained unprotected under the First Amendment, in that the dissemination of the content that was not defamatory or inciting. In *Sanders v. Acclaim Entertainment, Inc.* (2002, 1271), the Columbine High School shooting case in Colorado the district court weighed four factors in its duty of care analysis: "1) foreseeability of the injury or harm that occurred; 2) the social utility of Defendants' conduct; 3) the magnitude of the burden of guarding against the injury or harm; and 4) the consequences of placing the burden on the Defendants." Other articulations are possible. Consider the extended list of factors the court used in *Juarez v. Boy Scouts of America, Inc.* (2000, p. 29, citing *Rowland v. Christian*, 1968, p. 113): "These factors include: (1) the foreseeability of harm to the injured party; (2) the degree of certainty that the injured party suffered harm; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4)

the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant; and (7) the consequences to the community of imposing a duty to exercise care, with resulting potential liability." Applying these factors the court concluded that the "*Rowland* factors supports the imposition of a duty of care on the Scouts to have taken reasonable protective measures to protect Juarez from the risk of sexual abuse by adult volunteers involved in scouting programs, such as warning, training or educating him (either directly or through his parent or adult volunteers) about how to avoid such a risk. Of these factors, only the lack of moral blame is determined in favor of the Scouts. The rest are unequivocally in favor of Juarez and the existence of a duty" (*Juarez v. Boy Scouts of America, Inc.*, 2000, p. 35). Whatever set of factors are used, the duty of care concept retains one overreaching goal, to determine the legal point of responsibility between the plaintiff's lack of forbearance and the defendant's lack of caution. The factors weigh the cost and benefit of excusing the conduct of the defendant or placing responsibility upon the defendant for risk avoidance instead of with the plaintiff.

The second and third elements of the *Sanders* duty of care articulation inquires, to use the old adage, whether an ounce of prevention can result in a pound of cure or whether the opposite is true, that the burden to prevent the occasional and unanticipated injury would far outweigh the gain of an additional safe circumstance. In *James v. Meow Media*, (2002, p. 693, emphasis added), the Heath High School shooting case in Paducah, Kentucky, the court observed: "We almost appeared to say [in *Watters v. TSR, Inc.* (1990, p. 381), the *Dungeons and Dragons* suicide case] that the *costs* of acquiring such knowledge [burden on producer to identify which consumers might have a propensity for extreme dysfunctional responses] would so outweigh the *social benefits* that it would not be negligent to abstain from such an investigation. We can put the *foreseeability* point a little more precisely, however. It appears simply impossible to predict that these games, movies, and internet sites (alone, or in what combinations) would incite a young person to violence." In contrast, and in a rare case, where the risk is more likely (explicit advertisement in a national magazine) and the harm greater (contract murder), the court found a duty of care present involving the negligent publication of a "Gun-For-Hire" advertisement: "The evidence in this case fully supports the jury's determination that

defendants did not conform to the applicable standard of conduct... A risk becomes unreasonable when its magnitude outweighs the social utility of the act or omission that creates the risk" (*Braun v. Soldier of Fortune Magazine, Inc.*, 1992, pp. 1328-1329). Unlike a video game, the Soldier of Fortune advertisement if responded to by a reader and taken to a logical conclusion exhibits more than a remote possibility that severe harm will ensue, such is not the case with playing a video game. Said in another way, many lawful and non-injurious incidents can result from playing video games; shooting rampages are the exception, but unlawful and injurious incidents are far more certain to result from making a serious inquiry to a "Gun-For-Hire" advertisement in a magazine for professional soldiers *(Norwood v. Soldier of Fortune Magazine, Inc.*, 1987).

The fourth element assesses the potential fallout against the defendant and like-situated defendants in the future. In cases involving negligent speech, courts may assess the impact on future speech, to determine whether a so-called chilling effect occurs. Typically a concept associated with constitutional (state as opposed to private actions) questions of free speech relating to government regulation of citizen speech. Black's Law Dictionary (2004), indicates that the concept is also used "broadly, the result when any practice is discouraged." Thus even in civil actions where the claimed injury results from speech, courts often consider the First Amendment. For example in *Smith v. Linn* (1989, p. 127), the court concluded that the free speech rights of the publisher protected it from liability for the death of a person who followed the regimen outlined in The Last Chance Diet: "As appellant has not persuaded this Court by any existing case law that its cause of action against Lyle Stuart, Inc., can withstand judicial scrutiny, in view of the first amendment right of the publisher to publish the diet book in question, we find no error on the part of the trial court in determining there was no genuine issue of material fact necessitating trial and in accordingly entering summary judgment." The dissemination of the online observation made by researchers as part of their scholarship in the form of proceedings, articles, chapters, etc. is protected speech, e.g., is not defamatory or inciting. Imposing a duty of care for possible harm from that speech, could be said to chill the progress of such speech in the future. This would have a negative impact on the production of future scholarship. As a result the social utility of the imposition of a duty of care would be reduced instead of increased. As a result, there may be more powerful

factors motivating a court to conclude a lack of duty exits in the context of online observation and dissemination than in the production and distribution of video games. This is not to assert that video games are without social value, rather a court may view scholarly research as a more valuable social product than entertainment products such as video games, or at least, as valuable.

A rare case where a court concluded that a newspaper was responsible for negligent publication of a person's name and address involved unique circumstances, namely, the danger that might arise when the name of a crime victim is published. In *Hyde v. City of Columbia*, the victim though escaping from a first abduction by her assailant was "terrorized on seven different occasions" after the newspaper published a report on the incident along with personal information that the assailant used to identify and locate her (1982, p. 253). The *Hyde v. City of Columbia* (1982, p. 269) court concluded "that the name and address of an abduction witness who can identify an assailant still at large before arrest is a matter of such trivial public concern compared with the high probability of risk to the victim by their publication, that a news medium owes a duty in such circumstances to use reasonable care not to give likely occasion for a third party (assailant still at large) to do injury to the plaintiff by the publication." Intimidation of witnesses might also make them less forthcoming which in turn might jeopardize the progress of the criminal justice system; this results in less social utility as well. The court's comment again reflects the balancing of cost and benefit that occurs in the assessment of duty. Unlike the circumstances of *Hyde* the fourth factor may be more relevant in the case of online researchers or any researchers for that matter, as placing the burden for anticipating all possible harms upon individual researchers may have a deleterious impact on future practice and the impact would far outweigh the social benefit of protecting from harm forum participants who choose to interact in public settings. In regards to an action for negligent publication, the plaintiff is not asserting that the information is false or inaccurate, but that its truthfulness and dissemination of that "truth" leads to injury. If the basis for the claim is injury from falsity, the likely cause of action would lie in defamation (discussed below).

Proximate Cause and Foreseeability

Even if a duty of care is established, evidence of a breach of that resulting in identifiable and measurable harm a court may still rule that the conduct of the researcher is not the legal or proximate cause of the harm suffered. The concept of proximate cause often involves a policy analysis that too can focus on foreseeability, as "foreseeability along with actual causation, is an element of proximate cause in tort law" (Black's Law Dictionary, 2004). Determinations of breach and causation are questions of fact not law and thus are questions for the trier of fact, which could be the judge or could be the jury in a jury trial. (In the discussion that follows the word "court" includes jury.) However, issues of causation before a jury must still be informed by the law of causation or proximate cause. Courts contemplate the present desirability as well as impact on future alleged tortfeasors when concluding that the breach of the foreseeable harm was in fact *the* (legal) cause of the plaintiff's injury. In other words, is the chain of events close enough in terms of a logical connectedness that it should form the basis of legal responsibility, or is the harm at the finish of the event-chain too remote to contemplate? Knock the first domino down and one can clearly see how each successive tip of the block hits the next and causes the next to tip and so on, but should we hold the person who knocked the first block down by accident responsible for the fall of the last? The more intricate the chain, even if the dots can be readily connected, the less likely a remote cause will be found.

Interceding in this legal backtrack of events is the concept of superseding cause or the acts of the plaintiff or third party that contribute to the harm which can also operate to frustrate the plaintiff's claim. According to the Restatement (Second) of Torts (1965, § 440, emphasis added), "Superseding Cause Defined": A superseding cause is an act of a third person or other force which by its *intervention* prevents the actor from being liable for harm to another which his *antecedent negligence is a substantial factorSanders* case (*Sanders v. Acclaim Entertainment, Inc.*, 2002, p. 1276), the court identified the elements of a superseding cause: "A superseding cause exists when: 1) an extraordinary and unforeseeable act intervenes between a defendant's original tortious act and the injury or harm sustained by plaintiffs and inflicted by a third party; and 2) the original tortious act is itself capable of bringing about the injury." in bringing about… A superseding cause relieves the actor from liability, irrespective of whether his antecedent negligence was or

was not a substantial factor in bringing about the harm. Therefore, if in looking back from the harm and tracing the sequence of events by which it was produced, it is found that a superseding cause has operated, there is no need of determining whether the actor's antecedent conduct was or was not a substantial factor in bringing about the harm."

Did the intervening criminal acts of the Dylan Klebold and Eric Harris supersede any fault on the part of the video game manufacturers? Foreseeability, superseding cause, and proximate cause concepts are present and interrelated in the third element of negligence. In other words, does the video game manufacturer have a responsibility to take into account the fact that some individual somewhere might engage in criminal activity reminiscent of a scene or play in the video game? No. "Just as *foreseeability* is central to finding that a *duty* is owed, it is also 'the touchstone of *proximate cause*' and of the superseding cause doctrine. Moreover, a superseding cause relieves the original actor of liability when 'the harm is *intentionally caused* by a third person and is *not within the scope of the risk* created by the actor's conduct'" (*Sanders v. Acclaim Entertainment, Inc.*, 2002, p. 1276, emphasis added, quoting *Webb v. Desert Seed Co.* (1986, pp. 1062-1063), quoting Restatement (Second) of Torts (1965, § 442B). Likewise the court in *James* concluded that an intentional criminal act breaks the chain of causation, such that no further dominos fall: "Even if this court were to find that the defendants owed a *duty* to protect James, Steger, and Hadley from Carneal's violent actions, the plaintiffs likely have not alleged sufficient facts to establish the third element of a *prima facie* tort case: proximate causation. The defendants argue that even if they were negligent, Carneal's *intentional, violent actions constitute a* superseding cause of the plaintiffs' damages and sever the defendants liability for the deaths of Carneal's victims. Generally, a third party's criminal action that directly causes all of the damages will break the chain of causation" (*Sanders v. Acclaim Entertainment, Inc.*, 2002, p. 699, emphasis added). Criminal acts as well as other intentional acts are too remote to contemplate and courts will not conclude that a person at the start of a chain of events is responsible for such end harm.

Assessment of Negligence for Researchers in Online Settings

Consider the following facts. A researcher who studies adolescent sexuality collects data (postings) from an online forum dedicated to some subset of teenagers, i.e., those with a particular interest or characteristic. From analysis of the comments, the researcher concludes that a number of the participants are either likely to engage in early sexual promiscuity or prone to sexual exploitation by others. The researcher disseminates the findings in a scholarly journal. A sexual predator comes across the journal article online, in which the sources of the data (the forums) are listed in the methodology section of the paper. The predator later visits the sites, engages in numerous chat sessions and convinces several of the female teenage participants to meet him for an amorous rendezvous. He later sexually assaults several of them. The predator is arrested and prosecuted. During investigation and trial it comes out that the predator selected his victims based on the vulnerability profiled by the researcher and from the same chat rooms cited by the researcher in the article. The families of several of the victims sue the researcher and publisher of the journal. Is the researcher in anyway legally responsible for the harm that befell the forum participants?

Applying the concepts of negligence to the scenarios of researchers who observe subjects in online forums and disseminate some aspect of that observation in the context of scholarship suggests that a claim of negligence is unlikely to be successful. In clinical or other human subject research, establishing a duty to inform or protect the subject from undue risk is somewhat obvious, but what duty of care do researchers merely "listening in" on online public forum conversations have when snippets of the "conversations" are repeated to others in the context of scholarly publications? What additional risk is there that the subject by choosing to participate in the forum did not already assume in the first instance? These questions raise concepts that are embedded in the tort law.

Assumption of Risk and Contributory Negligence for Dangerous Behaviour

Forum participants may be said to "assume a risk" of harm for the consequences of posting identifying information or images, expressing personal opinion, willingness to agree to off-line contact, et cetera. Assumption of risk is a legal concept and can operate to absolve the defendant of liability in cases where a defendant acted in negligence. The

Restatement (Second) of Torts (1965, § 496A) "Assumption of Risk" "General Principle" states that "a plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm." In the predator chat-room scenario, it can be said that the female forum participants assumed the risk of the subsequent assault by engaging in continued contact with the predator and agreeing to meet with the stranger with an understanding that a tryst was intended. Do not, however, confuse this tort law concept with criminal law concepts of culpability. As far as the criminal law is concerned, the victims are not responsible for their assault. In addition, if any of the teenagers were minors, legal issues of consent may also be involved. Under the criminal law of some states a minor or a minor under a certain age cannot legally consent to sexual relations.

A forum participant can also "contribute" to the negligent environment. In general, when the plaintiff is more negligent than the defendant, the plaintiff cannot recover for the injury. Where the plaintiff is somewhat negligent but not more than the defendant, most jurisdictions will reduce the plaintiff's recovery by an amount representing, in percentage points, the contributing negligence of the plaintiff. "The same conduct on the part of the plaintiff may thus amount to both assumption of risk and contributory negligence, and may subject him to both defenses… assumption of risk rests upon the voluntary consent of the plaintiff to encounter the risk and take his chances, while contributory negligence rests upon his failure to exercise the care of a reasonable man for his own protection… A subjective standard is applied to assumption of risk, in determining whether the plaintiff knows, understands, and appreciates the risk. An objective standard is applied to contributory negligence" (Restatement (Second) of Torts (1965, §496A, comment d).

The age of the plaintiff can affect the ability to appreciate and therefore assume the risk. "If by reason of age, or lack of information, experience, intelligence, or judgment, the plaintiff does not understand the risk involved in a known situation, he will not be taken to assume the risk, although it may still be found that his conduct is contributory negligence because it does not conform to the community standard of the reasonable man" (Restatement (Second) of Torts (1965, § 496D, comment c, "Knowledge And Appreciation Of Risk"). In the hypothetical predator chat room

scenario, the teenage victims would likely be deemed mature enough to understand and assume, in terms of the civil tort law, the risk of ignoring the charge drummed into children from an early age to "never talk to strangers" and "never get into a car with a stranger" and its modern incarnation against entering into relationships with chat room participants, especially where chat of sexual activity is involved. Short of assuming the risk of such trysts, the teenagers in terms of the civil tort law contributed to their harm.

Both concepts of assumption of risk and contributory negligence may operate to insulate researchers from any risk of liability from observation and dissemination of information others voluntarily submit to online forums. Before these concepts come into play, however, a court would first need to determine that the researcher was in some way negligent. Is this a realistic possibility?

Making the Claim of Negligence, Elements Applied to the Circumstances

For such claim to be successful it would be as if the plaintiff (the research subject) charges that because you (the researcher) do not know me or did not ask my consent you should not be listening to my conversation or watching my actions and recounting what transpires, even if those occur in a public place. While we were all taught that it is rude to listen to others' personal conversation and that it is not polite to stare, the law would hardly find a remedy for such an imagined harm. So what legal duty of care does a researcher have? Can it be said that there is a duty not to listen to or observe the participation of others in a public place or, in this instance a virtual space, an online forum open to all comers? Is there a duty to cease observation when the opportunity arises to do so, to avert your online eyes or shun your online ears so to speak or to refrain from telling others what you observed through subsequent dissemination? Ridiculous! In fact, it could be argued that such forums are more open than traditional public spaces in the real world, as the physical casual observer or passer-by might by accident overhear part of a conversation or cast a distracting glance, the observer might need to take obvious and affirmative acts to maintain proximity in order to continue listening to or maintain visual contact of a particular subject. Yet, in the online world, the purpose and expectation of such forums is to allow all comers to read one's thoughts or opinions, or view one's art work, or cell-phone self portrait, or myspace.com video autobiography,

with full understanding of the likelihood that others will in return make a similar response, comment, critique, etc.

A court would not likely conclude that there is a duty of care to refrain from observing or recording the communication of participants on a listserv, discussion board, blog, chat room and other sort of web or Internet-based posting. Dissemination of the communication would fall under a similar rule. This assumes that the researcher does not disseminate identity information but follows an anonymity protocol, thus avoiding the circumstances of *Hyde v. City of Columbia*. Recall that the dissemination of identity information in that case was that of a crime victim in the context of a still at-large assailant. Also recall also the facts of the hypothetical and the concept of foreseeability. Is it possible that online sexual predators will use the Internet to identify, seek out, and pursue victims on various online forums? Is it also possible that predators may be alerted to the Internet whereabouts of these potential forums by third parties, e.g., advertisements on and off line promoting new chat rooms dedicated to teenage topics, an article in a local newspaper about the proliferation of online dating services or a researcher who studies online communities and publishes on the topic? Yes, but should the law place the legal burden of foreseeability for the clandestine activities of predators on those third parties, holding those third parties to a legal duty of care to ensure that such harm does not occur from the dissemination? It is unlikely that a court would hold a third party speaker or publisher to this standard.

If identity information is further disseminated from the initial posting but without the immediacy of a recent and known injury such as the first assault on the victim in *Hyde*, a court may still conclude that foreseeability is absent. Where the dissemination includes identity information the case could fall under the *Braun v. Soldier of Fortune Magazine, Inc.* holding. However, the unique circumstances of that case, i.e., Gun-For-Hire advertisements involving the solicitation of dangerous criminal activity, limit its application to the unusual scenario. As discussed above, the concept of duty of care includes various shifting scales of evaluation. Foreseeability may be present in situations where the severity of potential harm is increased and is coupled with a parallel increase in the likelihood that harm the will occur, especially where the dissemination poses a direct and unique link to the harm. This analysis would by logic apply to the dissemination of

threats of serious physical harm, hate, or otherwise harassing speech. In the case of *Braun v. Soldier of Fortune Magazine, Inc.* it was the publication of contact information in the context of the advertisement that evidenced a foreseeable outcome. The original advertisement that appeared in the June 1985 through March 1986 issues of *Soldier of Fortune* included the phone and address information of the Gun-For-Hire solicitor. In the case of a researcher, the foreseeable risk for a researcher could be avoided by applying an anonymity protocol that would excise the identity information.

Where circumstances of error are involved, if the researcher possesses any duty of care it is to follow the protocol (standards) for such noninvasive, non-interactive research, for example, to accurately and within its relevant context present the conversation or other activity or content so observed and recorded. Even if this duty could be established it would be judged by a standard of reasonableness, not under a no-fault or strict liability rule. Researchers have a scholarly duty to "get it right" but this does not necessarily equate to a standard of infallibility. Quantitative research recognizes the concept of error and deviation. Similar standards may apply in the context of such research when plaintiffs seek to claim that such deviation forms the basis of a compensable harm. Was deviation from perfection in the observation and collection of such a character so as to establish a duty and breach of that duty? A plaintiff would need to establish through the expert testimony of other researchers that the deviation was unreasonable. The public policy in favor of the progress of science may also work to prevent a court from assigning a duty of care in cases where the researcher acted within the parameters of the protocol where acceptable levels of error are allowed.

Public policy arguments may also drive the analysis where short of the obvious danger of the Gun-For-Hire scenario, the suspicious nature of the content included by the researcher is no less apparent. In Eimann v. Soldier of Fortune Magazine, Inc., the federal appellate court concluded that the following advertisement, unlike the "Gun-For-Hire" advertisements in Braun and Norwood, did not pose a foreseeable risk: "EX-MARINES-67-69 'Nam Vets, Ex-DI, weapons specialist-jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas" (Eimann v. Soldier of Fortune Magazine, Inc., 1989, p. 832). The court discussed the social utility of the advertisement and the negative impact imposition of a duty of care would produce: "Given the pervasiveness of advertising in

our society and the important role it plays, we decline to impose on publishers the obligation to reject all ambiguous advertisements for products or services that might pose a threat of harm… The burden on a publisher to avoid liability from suits of this type is too great: he must reject all such advertisements. The range of foreseeable misuses of advertised products and services is as limitless as the forms and functions of the products themselves. Without a more specific indication of illegal intent than Hearn's ad or its context provided, we conclude that SOF [Soldier of Fortune] did not violate the required standard of conduct by publishing an ad that later played a role in criminal activity" (Eimann v. Soldier of Fortune Magazine, Inc., 1989, p. 838, emphasis original). It is logical to conclude that a court would see as much if not more value in the progress of science that the dissemination of proceeding paper, journal article, book chapter, publication represents. Concluding that researchers possess a foreseeable risk would garner a similar undesirable result: researchers would avoid including any suspicious, controversial, or otherwise unusual forum content in their findings, or forego inquiry into entire subject matters or genres of online speech. Such result is not in the public interest.

Assuming the rare instance where a duty is present, was the duty nonetheless breeched? If breach occurs, with what result does it occur? Is the breech the legal cause of the harm and what is the compensable harm? Short of defamation or invasions of privacy discussed or the clear and volatile circumstances of the crime victim or Gun-For-Hire cases in subsequent articles, what is the harm in being misquoted, for a researcher to claim that X's favorite movie is *Brokeback Mountain* not *Broken Arrow*, or *Mystic PizzaMystic River*, or subject Y's favorite sexual position or preferred frequency is confused with X's, or is different than the one reported by the researcher? Errors do occur, but did the researcher follow the proper error protocol while transcribing her notes or while subjecting the downloaded forum snippets to software based content analysis? Even if protocol was not followed, can the plaintiff forensically reconstruct the process to prove unreasonable deviation from the protocol? Moreover, the plaintiff subject would need to demonstrate a compensable injury occurred. (If an error occurs in the presence of negligence a false light claim is be possible. False light is a subset of the invasion of privacy tort and is discussed in a subsequent article.) The dollar value (compensable

harm) placed on these errors is likely small, or certainly smaller in relation to what it would take to retain counsel to litigate such disputes.

The reality of this factor in risk assessment cannot be overlooked as it is typical for personal injury lawyers to operate on a fixed percentage fee, where compensation is owed only if the claim is successful. Thus personal injury lawyers limit their personal docket to those cases that have a likelihood of success. Success equates to dollars, not just a winning verdict. The potential for recovery must be expected to exceed the outlay, the attorney's cost in time of pretrial, trial and post trail preparation and execution. The attorney's fee is typically between thirty to forty percent of the total award. Other costs must come from the plaintiff's share of recovery as well, that is, the cost of retaining expert witnesses to testify as to the duty of care (acceptable level of behaviour) and breach of that duty (deviation from the protocol by the researcher), costs of recording and transcribing a deposition, and so on. There must be a reasonable opportunity to recover all of these costs or the attorney is unlikely to undertake representation. As a result, the practical logistics of litigation serves to further minimize the risk of a legal proceeding even in the rare instance where some risk exists.

Finally, if damages are extant and determinable, a court would have to conclude that the breach of protocol was in fact the legal or proximate cause of the harm. This is a significant "if" as courts especially appellate courts often consider public policy impact that the imposition of liability would have against similarly situated plaintiffs and defendants in the future. In other words, if researchers could be sued for errors in phrasing or reporting mischaracterization (short of defamation, invasion of privacy, etc., see discussion below and in a future article, respectively), would it encourage the filing of unsound or frivolous claims by subjects or otherwise have a negative effect on the progress of research, that is, by chilling the desire of like-minded researchers fearing like result who then forego similar research projects in the future?

In other cases of measurable physical harm such as the online predator scenario, public policy considerations may also lead a court to conclude that the dissemination of postings by forum participants was not the proximate cause of harm that did result. Assessment of foreseeability is part of the proximate cause analysis as well. Moreover,

the concept of superseding cause may break the link of event and excuse the researcher for any liability for the harm resulting from the criminal act of another, in this example the criminal conduct of the predator.

So too, the case law of negligent publication demonstrates that liability is rare except where circumstances increase the magnitude and likelihood of harm, i.e., the criminal defendant became aware of otherwise unknown name of crime victim or Gun-For-Hire advertisements. In other cases of measurable physical harm such as the predator scenario described above, the public policy considerations may also lead a court to conclude that the dissemination of postings by forum participants was not the proximate cause of harm that did result. The link in terms of the law is too tenuous. Moreover, the concept of superseding cause may break the link of event and excuse the researcher for any liability for the harm resulting from the criminal act of another, in this example the criminal conduct of the predator.

The more likely remedy for "negligence" in the academy is some sort of censure by colleagues for the less than acceptable deviation from proper research protocol. Censure would take two forms, informally by fellow researchers through the peer review process or formally by disciplinary or other action for the violation of a policy regarding research integrity, Institutional Review Board practices, and/or responsible conduct of research. A court might likewise view either process as a more efficient method of regulation-response than pursuit of remedy through the courts.

Conclusion

In assessing the likelihood of success for harm based upon negligence, it is unlikely that a court would conclude that the duty of care owed by researchers to either the research subject or to third parties is complete accuracy. Attention to protocol regarding reporting errors would also eliminate risk where the defendant is defamed or otherwise harmed (negligence). A researcher would need to deviate in a demonstrable way from the standard protocol in reporting and that deviation must be proved to have caused measurable harm. Likewise a court would not conclude that the duty of care placed upon researchers applies to the range of all possible harms, however remote. Again the issue of damages would need to be proved. Moreover, the amount of the damages would need to

be of an amount that would make legal process worthwhile for an aggrieved plaintiff and his or her attorney. Finally, a court may refuse as a matter of law or public policy to hold that a researcher is responsible for harm that might result from the dissemination of forum content. The negative impact of turning all possible harms into foreseeable ones is obvious. Without this protection the risk-averse researcher would be reluctant to include such content resulting in a decrease in the rigor or robustness of inquiry.

The following guidelines can be used to assist the researcher in avoiding the possibility of claims made on the basis of negligent content. Follow standard methodology for error reduction to ensure that the duty of care is not breached; and, where danger of physical harm is possible but remote, avoid use of identifying information to ensure that a legal nexus does not exist between the breach of a legal duty and the resulting harm.

References

Black's Law Dictionary (8th ed. 2004). St. Paul, Minnesota: West Publishing Co.

Jansson, R. L. (2003). Researcher Liability for Negligence in Human Subject research: Informed

Consent and Researcher Malpractice Actions. *Washington Law Review*, 79:229-263.

Lee, B. L., *Modern Tort Law: Liability and Litigation* (2d ed. 2005). St. Paul, Minnesota: West Publishing Co.

Lipinski, T.A. (2006). Emerging Tort Issues in the Collection and Dissemination of Internet-Based Research Data, *Journal of Information Ethics*, Fall: 55-81.

Morreim, E. H. (2003). Medical Research Litigation and Malpractice Tort Doctrines: Courts on a Learning Curve. *Houston Journal of Health Law & Policy*, 4: 1-86.

Restatement (First) of Torts. (1934). St Paul, Minnesota: American Law Institute.

Restatement (Second) of Torts (1965). Philadelphia, Pennsylvania: American Law Institute.

Cases

Braun v. Soldier of Fortune Magazine, Inc., 757 F.Supp. 1325, aff'd 968 F.2d 1110 (11th Cir.1992), cert. denied 506 U.S. 1071 (1993).

Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830 (5th Cir., 1989), cert. denied 493 U.S.1024 (1990).

Guebard v. Jabaay, 42 N.E.2d 751 (Ill. App. Ct. 1983).

Hyde v. City of Columbia, 637 S.W.2d 251 69 (Mo. App., 1982), cert. denied 459 U.S. 1226 (1983).

James v. Meow Media, 300 F.3d 683 (6th Cir. 2002), cert. denied 123 S. Ct. 967 (2003).

Juarez v. Boy Scouts of America, Inc., 97 Cal. Rptr. 2d 12 (Cal. App. 2000).

Noah v. America Online, Inc., 261 F.Supp.2d 532 (E.D. Va. 2003), affirmed sub. nom. *Noah v. AOL-Time Warner, Inc.*, 2004 WL 602711 (4th Cir. Mar 24, 2004) (unpublished).

Norwood v. Soldier of Fortune Magazine, Inc., 651 F.Supp. 1397 (W.D.Ark., 1987).

Perna v. Pirozzi, 457 A.2d 431 (N.J. 1983).

Pugsley v. Privette, 263 S.E.2d 69 (Va. 1980).

Rowland v. Christian, 69 Cal.2d 108 (1968).

Sanders v. Acclaim Entertainment, Inc., 188 F.Supp. 2d 1264 (D. Colo. 2002).

Smith v. Linn, 563 A.2d 123 (Penn. Super. 1989).

Spenceley v. M.D. Anderson Cancer Center, 938 F. Supp. 398 (S.D. Tex. 1996).

Webb v. Desert Seed Co., 718 P.2d 1057 (Colo. 1986).