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Melody Hsiou

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Harsh Reality: When Producers and Networks Should Be Liable for Negligence and Intentional Infliction of Emotional Distress

Melody Hsiou

INTRODUCTION 188
I. BACKGROUND 190
A. Review of Cases Addressing Tort Liability Claims against the Media 193
II. NEGLIGENCE LAW AND REALITY TELEVISION 195
A. Employer-Employee Relationship 195
B. Special Relationships Based on Control 204
III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS 210
A. Competition Format Reality Shows 212
B. Ambush Television: Talk Shows and Hidden Camera Shows 215
C. Documentary Style Reality Shows 217
IV. OBSTACLES 218
V. CONCLUSION 220

INTRODUCTION

Since its inception in the early 1990s, reality television has been linked to negative effects on participants' safety, emotional health, and welfare. In August 2011, Russell Armstrong, a cast member of Bravo network's popular television show *The Real Housewives of Beverly Hills*, committed suicide weeks before the second season was set to air.[1] After Russell Armstrong's suicide, his attorney stated that the Armstrongs' marriage had suffered damage at the hands of the television production, and Armstrong's family has stated its intention to sue Bravo for his suicide.[2] Bravo executives debated whether or not to televise the season, and ultimately decided to air it.[3] Bravo's decision, and the subsequent viewing statistics, has proven that audiences are drawn to "real-life" drama, even in the aftermath of a suicide.[4] The second season drew in 2.2 million viewers, 42% more viewers than the first season, making it the highest rated *Real Housewives* series and Bravo's most popular show.[5]

Armstrong is only one amongst at least eleven other reality television participants who have committed suicide.[6] In 1997, Sinisa Savija threw himself in front of train a month after being the first contestant eliminated from *Expedition: Robinson*, a Swedish version of the show *Survivor*.[7] His widow told the Associated Press that Savija was a stable person before he went on the show, and that it "[isn't] a game when you choose ordinary people and put them under great

1. Lana Sweeten-Shults, *Not all blame can be placed on reality TV* (Aug. 22, 2011), http://www.timesrecordnews.com/news/2011/aug/22/not-all-blame-for-off-air-drama-can-be-placed-on/.

2. *Id.*

3. *Id.*

4. Sophie A. Schillaci, *Real Housewives of Beverly Hills Season 2 Premier up 42% from Last Year* (Sept. 7, 2011), http://www.hollywoodreporter.com/live-feed/real-housewives-beverly-hills-ratings-231417.

5. *Id.*

6. *See Reality Show Suicides, Their Final Show* (Feb. 28, 2012), http://www.realityshowsuicides.com/ (Discussing the suicide deaths of reality TV participants Julien Hug, Joseph Cerniglia, Ryan Jenkins, Paula Goodspeed, James Scott Terill, Simon Foster, Nathan Clutter, Cheryl Kosewicz, Rachel Brown, Carina Stephenson, and Najal Turpin).

7. Jennifer L. Blair, *Surviving Reality TV: The Ultimate Challenge for Reality Show Contestants*, 31 LOY. L.A. ENT. L. REV. 1 (2010-2011).

pressure, constantly in front of the camera."[8] Two former chefs featured on celebrity chef Gordon Ramsay's reality shows *Kitchen Nightmares* and *Hell's Kitchen* killed themselves after being eliminated from the competitions.[9] In 2008, an *American Idol* contestant who failed to make the final audition committed suicide outside judge Paula Abdul's home.[10]

Reality television networks and producers have been sued by participants under many causes of action, including defamation, statutory and constitutional violations, publication of private facts, commercial appropriations of a name or likeness, intrusion in public places, and breach of confidence. [11] Although reality television networks and producers cannot be held responsible for the mishaps of every past and present participant, it is important to set limits as to how far reality television can push its participants. This comment argues that, depending on the types of relationships formed, the show's format, and the degree of control they have over participants, reality television networks and producers can be held liable for the emotional health, safety, and well-being of participants under the torts of negligence and intentional infliction of emotional distress. Tort suits can serve socially valuable purposes through punitive damages and prevent reality television networks from manipulating their participants.[12] More importantly, vulnerable participants should have an available remedy against increasingly great intrusions and disruptions into their private lives.[13]

Part I of this essay will explore the background of reality television and its relationship with tort liability law. Part II will discuss liability for different types of shows in the context of negligence law and explain how the existence of duty may vary depending on whether participants are considered to be

8. *Id.*
9. *Id.*
10. Schillaci, *supra* note 4.
11. Walter T. Champion, Jr., *Oh, What A Tangled Web We Weave: Reality TV Shines A False Light on* Lady Duff-Gordon, 15 SETON HALL J. OF SPORTS & ENT. L. 27 (2005).
12. Jeffrey Shulman, *The Outrageous God: Emotional Distress, Tort Liability, and the Limits of Religious Advocacy*,113 PENN. ST. L. REV. 381-415 (2008).
13. *Id.*

employees of the television company or whether other special relationships exist. Part III will explore possible claims for intentional infliction of emotional distress and argue that liability should vary amongst competition-style or makeover type shows such as *Survivor* and *Extreme Makeover*, talk shows such as *Jerry Springer* and *Jenny Jones*, and documentary style reality television shows such as the *Real Housewives* shows. Part IV will discuss obstacles to these causes of action. Finally, this paper will conclude that while it is necessary for reality television networks to recognize a greater degree of responsibility for the emotional health, well-being, and safety of its participants, the extent to which they can be held liable should be largely dependent on individual factors of the shows.

I. BACKGROUND

With the steady growth of internet media and reality television (hereafter "TV") beginning in the 1990s, the notion of easily accessible fame has lured many with the illusion of opportunity.[14] Shortly before he died, Mr. Armstrong told reporters and friends that many of his financial, marital, and person problems were aggravated, if not caused, by the show.[15] Many reality show participants, like Armstrong, lose their marriages, families, cultural capital, professional reputations, money and privacy.[16] Headlines have associated reality show participants with murder, overdoses, drug trafficking, financial ruin, custody disputes, assaults and divorce.[17] Although it is impossible to determine whether the show led to Armstrong's suicide, it is reasonable to assume that the infamy that came after his negative portrayal on the show contributed to his mental distress and despair.[18] Reality

14. See generally, KAREN STERNHEIMER, CELEBRITY CULTURE AND THE AMERICAN DREAM: STARDOM AND SOCIAL MOBILITY. (2011).

15. Virginia Heffernan, *Revamping Reality*, N.Y. TIMES (Aug. 28, 2011), http://opinionator.blogs.nytimes.com/2011/08/28/revamping-reality/.

16. *Id.*

17. ASSOCIATED PRESS, *With Murder, Suicide, Foreclosures, Assaults, Sometimes Reality TV Is All Too Real* (Aug. 20, 2011), http://losangeles.cbslocal.com/2011/08/20/with-murder-suicide-foreclosures-assaults-sometimes-reality-tv-is-all-too-real/.

18. Jim Moret, *Are Reality Shows Turning Deadly?*, HUFFINGTON POST (Aug. 17, 2011), http://www.huffingtonpost.com/jim-moret/are-reality-shows-

television producers, such as *Survivor's* Mark Burnett, have argued that contestants may be mentally ill prior to the shows and those personal issues, rather than reality shows, caused their suicides.[19] The growing association between reality television and suicide, however, has raised alarm about the damage that these shows may be doing to contestants' emotional health and physical safety.[20] Like Armstrong's family, critics of reality television argue that networks should be responsible for causing the mental distress or suicide of its participants. On the other hand, First Amendment advocates oppose placing liability on networks, arguing that participants willingly signed up for the experience, and warning of a chilling effect on free speech and the entertainment industry.[21]

As the reality television landscape becomes more crowded and competition to distinguish shows increases, network executives have likewise created more extreme and racier content.[22] Although these shows are much cheaper to produce than shows that hire writers and paid actors, the potential for legal conflicts is much higher than for traditional scripted shows.[23] Due to the outlandish nature of most reality shows, networks have somewhat acknowledged that they have a certain level of duty to participants with regard to imposing liability for participants' mental health and physical safety.[24] Although contestants and viewers might be willing and enthusiastic partakers, the responsibility of ensuring everybody's well-being should fall predominantly on the networks that profit off of them.[25] Producers and networks, however, rarely provide post-show counseling, and reality

turning_b_929696.html

19. Blair, *supra* note 7 at 11.

20. *Id.*

21. Keith Bradsher, *Talk Show Ordered to Pay $25 Million After Killing*, N.Y. TIMES (May 8, 1999), http://www.nytimes.com/1999/05/08/us/talk-show-ordered-to-pay-25-million-after-killing.html?ref=scottamedure

22. Joel Michael Ugolini, *So You Want to Create the Next Survivor: What Legal Issues Networks Should Consider Before Producing A Reality Television Program*, 4 VA. SPORTS & ENT. L.J. 68, 69 (2004) (discussing how network executives have become determine to create racier and more extreme show premises in order to distinguish their products, push boundaries, and create shock value).

23. *Id.*

24. *Graves v. Warner Bros.*, 656N.W.2d 195 (2002).

25. Ugolini, *supra* note 22.

television participants lack support systems such as the lobbying groups that benefit similarly vulnerable groups like child actors. [26]

The realm of reality television exists in somewhat of a "gray area" in Hollywood.[27] Unlike paid actors, reality TV participants are not supervised by unions or entertainment industry watchdogs.[28] This allows many reality shows to be produced at a large profit margin, while forcing participants to assume large risks to their safety and finances.[29] Further, because of low production budgets, most reality shows can conduct only cursory background checks on participants, and oftentimes potentially dangerous participants are not detected.[30] Pre-filming screening of Ryan Jenkins, a participant on the VH1 dating series *Megan Wants a Millionaire*, failed to discover records that he had assaulted a former girlfriend.[31] Although his past could have been easily detected by most cursory background checks, his criminal past was discovered only after he murdered his wife, fled from the police, and killed himself in a hotel room.[32]

In order to screen for potential problems, some production companies use psychological testing to predict how participants will respond to the pressures of the show and how they will react after the show.[33] For years, producers of MTV's *The Real World* have provided contestants with psychologists who help them return to life after filming.[34] While producers are aware that the most interesting characters often have psychological issues, it is difficult for psychologists to predict if and how participants will actually react to the pressures of the show.[35] Thus, there is a tension between ensuring the safety of participants and producers' desire to have characters on their shows who might be victims of abuse, depression, or other mental issues.[36] It is unknown

26. *With Murder, Suicide, Foreclosures, Assaults*, *supra* note 17.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *With Murder, Suicide, Foreclosures, Assaults*, *supra* note 17.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*

whether Bravo screens participants or offers them counseling during or after taping the *Real Housewives*.[37] As the possibility for lawsuits increases, however, Bravo executives have taken minor steps to ameliorate liability.[38] Namely, after Armstrong's death, Bravo producers threatened to fire fellow *Real Housewives* star Kim Richards if she did not enter a rehabilitation facility for treatment of her alcohol abuse and prescription drug addiction.[39]

A. Review of Cases Addressing Tort Liability Claims against the Media

Several lawsuits have demonstrated how reality television networks may be held liable for the emotional health, safety, and well-being of their participants. Two cases, *Graves v. Warner Bros* and *Williams v. ABC*, brought reality television network liability into the forefront of the media.[40] The *Graves* case arose in 1999, after Jonathan Schmitz shot and killed Scott Amedure three days after a taped episode of *The Jenny Jones Show,* during which Amedure revealed that he had a same-sex crush on Schmitz.[41] Schmitz was convicted of murder and Amedure's parents filed suit against Warner Brothers, the producer of the show, for its "ambush" of Schmitz.[42] They alleged that, because Schmitz was not informed of the subject matter of the show, the televised revelation of the crush and his resulting humiliation resulted in the shooting death of their son. [43] The case went to trial in 1999, with Jenny Jones appearing as a witness, and the jury awarded $25 million to the Amedure family.[44] After the verdict, the lead lawyer for the Amedure family stated that he hoped that the court's decision would change the way such

37. *Id.*
38. Alexis Tereszcuk, *Bravo Forced Kim Richards into Rehab*, RADAR ONLINE (Dec. 6, 2011), http://www.radaronline.com/exclusives/2011/12/bravo-kim-richards-rehab-real-housewives-beverly-hills.
39. *Id.*
40. *Graves v. Warner Bros*, 656N.W.2d 195 (2002) ; Complaint, *Williams v. ABC*, (Cal. Super. Ct. 2005) (No. BC 339581).
41. *Graves*, 656N.W.2d 195 at 198.
42. *Id.*
43. *Id.*
44. *Id.*

talk shows treat their guests.[45] After the trial, however, Warner Brothers appealed to the Michigan Court of Appeals, contending that the decision would force all media to be liable if the subjects of their interviews later behaved in destructive ways.[46] In 2003, a 2-to-1 ruling from the Michigan Court of Appeals reversed the initial jury's verdict against Warner Brothers, stating that the TV company had no legal duty to protect a guest who was killed by another guest.[47]

In another action against a television network, *Williams v. ABC*, Deleese Williams sued the popular TV show *Extreme Makeover* for one million dollars, claiming that its decision to cancel her appearance on the show contributed to her sister's suicide. [48] Williams had been due to appear on the ABC show, in which she would undergo a series of dramatic surgeries to transform her appearance.[49] She claimed that the show's producers tricked her sister, Kellie McGee, into making cruel remarks about her looks before the makeover.[50] Right before William's scheduled makeover, ABC cancelled the appearance, saying that William's jaw would not heal in time for the taping schedule, and left her sister distraught about making the remarks. [51] The legal action claimed that ABC manipulated McGee into saying unkind things about her sister's looks on camera, and that when her sister returned without her "extreme makeover", the guilt over what she had said about her sister's looks was so devastating that she killed herself.[52]

In light of these cases, reality television producers and networks should, under certain circumstances, be held liable under for the emotional health, safety and well-being of its participants. Possible causes of action include negligence and intentional infliction of emotional distress (IIED). Since different types of reality television create varying degrees of

45. *Id.*
46. *National Briefing | Midwest: Michigan: 'Jenny Jones' Verdict Reversed Published*, N.Y. TIMES (Oct. 24, 2002), http://www.nytimes.com/2002/10/24/us/national-briefing-midwest-michigan-jenny-jones-verdict-reversed.html?ref=scottamedure.
47. *Id.*
48. *TV show sued after sister's death*, BBC (Sept. 20, 2005), http://news.bbc.co.uk/2/hi/entertainment/4263428.stm.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

liability depending on the nature of relationships with their participants, liability should be analyzed accordingly.

II. NEGLIGENCE LAW AND REALITY TELEVISION

Reality show participants who assert negligence claims must prove that "the defendant owed [the participant] a duty to use reasonable care to prevent such injury, that the defendant breached that duty, that the breach factually and legally caused a foreseeable injury [to the participant], and that damages occurred as a result."[53] In the context of reality television, the viability of negligence cases may depend on the necessity and existence of duty.[54] In turn, the existence of duty may vary depending on whether there is an employer-employee relationship, which place participants in the realm of protective labor laws, or on other special relationships.[55]

A. Employer-Employee Relationship

In November 2011, Tonya Cooley, a contestant on MTV's *Real World/ Road Rules Challenge*, sued MTV and Bunim/Murray Productions for negligence and various violations of California labor laws, claiming that two cast members sexually assaulted her during filming, and that MTV producers created an environment in which "degrading and harassing behavior towards female contestants was openly tolerated and even encouraged."[56] Cases like Cooley's may turn on whether defendants are network employees.[57] Reality show participants exist in a blurred area of the law, falling somewhere between being classified as employees of TV companies and as independent contractors.[58] The lack of a

53. 2 THOMAS D. SELZ, ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 14:2 (3d ed. 2009).

54. *Id.*

55. *Id.*

56. Matt Reynolds, *Cast Member Claims MTV's 'Real World' Encouraged & Filmed Her Sexual Assault*, COURTHOUSE NEWS SERVICE (Oct. 31, 2011 10:05am), http://www.courthousenews.com/2011/10/31/41048.htm; Eriq Gardner, *Can Allegedly Raped 'Real World' Star Beat MTV's Strict Cast-Member Contract?,* HOLLYWOOD REPORTER (Oct. 28, 2011), http://www.hollywoodreporter.com/thr-esq/allegedly-raped-real-world-mtv-tonya-cooley-254701.

57. *Id.*

58. Kelley L. Tiffany, *Reality Show Participants: Employees or Independent*

distinct classification or employment relationship has left reality show participants with a lack of guidance as to how they can defend themselves against studios with whom they have contracted many of their rights.[59] If reality television participants are considered to be employees of reality TV companies, negligence lawsuits against employers may be precluded by workers compensation.[60] Under the Workers' Compensation Act, all employees are automatically entitled to recover benefits for injuries arising out of and in the course of the employment.[61] Moreover, if participants are deemed to be employees, state labor laws may offer additional protection.[62] For example, as in Cooley's case, employers can be liable for the willful and unprovoked physical acts of aggression of a co-employee.[63] Reality TV show contracts, however, are typically heavily one-sided exculpatory contracts that require participants to waive many rights to sue the producers and networks, including consent to submit to "non-consensual physical contact."[64] Notably, cast members are required to consent in their contracts that "the appearance as a participant in [the show] is not a performance and is not employment."[65]

Even though *Real World* cast contracts state that participants are not to be considered performers or employees, cast members like Cooley may still be able to assert grounds that an employment relationship existed.[66] Cooley's lawsuit notably treats her as an employee of MTV and Bunim-Murray, repeatedly stating that "either the agreement she signed with MTV was an employment agreement or that her relationship with the network could be deemed an employer/employee relationship by California labor code."[67]

In order for reality show contestants to be considered "employees" of the network, they must meet three elements.

Contractors?, 32 EMP. REL. L.J. 15 (2006).

59. *Id.*

60. *See generally Privette v. Superior Court*, 21 Cal.Rptr.2d 72 (1993).

61. *Id.*

62. *See generally Torres v. Parkhouse Tire Service, Inc.*, 111 Cal. Rptr. 2d 564 (2001).

63. *Id.*

64. Gardner, *supra* note 56.

65. *Id.*

66. *Id.*

67. *Id.*

First, an individual may be considered an employee if he "acts, at least in part, to serve the interests of the employer."[68] Next, the employer must consent to the employee's services.[69] Finally, the individual must not render his services as an independent business person because the employer controls the manner and means by which the services are performed.[70]

It is relatively easy for participants to meet the first element, which states that the individual acts to serve the interests of the employer, because reality show producers generally select the contestants that they believe will result in higher ratings for their shows.[71] Although participants likely desire the fame and acknowledgement that come from being a TV figure, their main function is to serve the interests of the show's producers.[72] The second element, which states that the employer consent to the employee's service, is also likely met because producers go through several potential applicants before selecting who to have on their shows.[73] The nature of the selection process and the fact that there is a mutual contract between the producers and participants implies consent on behalf of the producers for their contestants' services.[74] Finally, the third element, which states that the employee is not an independent contractor, can be satisfied depending on factual circumstances.[75] For example, competition style shows like *Survivor* usually require contestants to live on location while the show is being filmed, making the level of control very high.[76] In these types of shows, producers have control over the design of scenarios, challenges, settings, and events to encourage particular behaviors and conflicts.[77]

This third element, whether the person is considered an independent contractor, may make the difference between

68. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 (Tentative Draft No. 2, 2009).
69. *Id.*
70. *Id.*
71. Blair, *supra* note 7, at 3.
72. *Id.*
73. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 (Tentative Draft No. 2, 2009).
74. Blair, *supra* note 7, at 3.
75. *Id.* at 4.
76. *Id.*
77. Tiffany, *supra* note 58.

whether participants are considered to be employees or not.[78] Although the determining element is usually the right of employer control, courts will consider the other factors on a case-by-case basis.[79] Courts will examine the employer's right to control the process by which the employee completes his or her work and assess whether the employer has the right to control only the results of the work, and also the means by which it is accomplished.[80] If the contracting party determines the details and means of accomplishing the sought after result independently, he will be considered an independent contractor.[81] An employer-employee relationship arises when the assumption of exercise of control is so persistent and the other party's acquiescence in that exercise of control so pronounced that it raises the inference that the parties, by implied consent, had agreed that the principal might have the right to control the details of the work.[82]

Next, even if the other requirements are satisfied, volunteers are not considered employees.[83] An individual will be considered a volunteer if he "renders uncoerced services without being offered a material inducement."[84] "Material inducement" is defined as "the promise of any type of material gain, whether in the form of monetary compensation, some special benefit . . . or an in-kind payment."[85] In accordance with this broad definition, an employer must simply make some kind of economic commitment to the employee, including in-kind benefits such as food and shelter.[86] Although reality show contestants receive little to no monetary compensation for their work, they often receive food and shelter during filming.[87] Therefore, they may be considered employees rather than volunteers because they receive benefits that qualify as material inducements.[88]

78. *Id.*
79. 19 RICHARD A. LORD, WILLISTON ON CONTRACTS § 54:2 (4th ed. 2012).
80. *Id.* at § 54:3.
81. *Id.*
82. *Id.*
83. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.02 (Tentative Draft No. 2, 2009).
84. *Id.*
85. *Id.* cmt. b.
86. *Id.*
87. Blair, *supra* note 7, at 4.
88. Blair, *supra* note 7, at 4.

If reality show contestants meet the three elements of an employer/employee relationship, and are not considered volunteers, then reality show production companies owe them certain duties as their employers.[89] As employers, reality TV networks may be found liable for injuries to their employee participants if they fail to comply with these duties.[90] Courts have to determine whether networks breached their duty to avoid harm to plaintiffs, and, if as a direct and foreseeable result of the network's actions, participants were injured.[91] "A negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm."[92] In determining whether a legal duty exists, courts examine different variables, including (1) foreseeability of the harm, (2) the existence of a relationship between the parties, (3) the degree of certainty of injury, (4) the closeness or connection between the conduct and the injury, (5) the moral blame attached to the conduct, (6) the policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and (8) the resulting liability for breach.[93]

Among the duties owed to employees is providing a safe workplace and appropriate instrumentalities to meet work duties.[94] Failure to meet these may result in employer liability to employees who are injured as a proximate result of employer neglect.[95]

TV networks may be expected to ensure the safety of their employees, which includes protecting them from being harmed by other contestants.[96] Generally, producers who witness crimes such as underage drinking or minor fights are not obligated to step out from behind the camera and intervene.[97] Reality television producers may argue that they

89. *Id.*, at 5.
90. *Id.*, at 8.
91. *Selz*, *supra* note 53.
92. *Graves*, 656 N.W.2d 195 at 200.
93. *Id.*
94. *Hess v. Bernheimer & Schwartz Brewing Co.*, 219 N.Y. 415, 416, 114 N.E. 808 (1916).
95. *Id.*
96. *Id.*
97. Jeremy W. Peters, *On reality TV, producers face moral and legal dilemmas*, Oct. 8, 2007, http://www.nytimes.com/2007/10/08/technology/08iht-

are simply documenting lives that would follow course with or without the cameras rolling.[98] In order to make a claim for negligence, plaintiffs have to prove that the show created unlikely situations that put its subjects in jeopardy.[99]

Producers of competition-type reality shows may be more likely to be found liable for participants' injuries due to the nature of the relationship between producers and the contestants.[100] Since the contestants are usually required to shoot on location and are filmed almost 24 hours a day, they have little to no reprieve from the demands of the show.[101] On shows like *Survivor*, for instance, producers isolate contestants in an undeveloped area and prevent any interaction with the outside world by confiscating the contestants' computers, newspapers, and cell phones.[102] In addition to physical and mental isolation, producers of competition shows usually require participants to partake in vigorous challenges in exchange for prizes, a winning title, or even basic necessities such as food.[103] Essentially, the producers have complete control over the means by which the contestants accomplish these activities.[104] Contestants are told how to perform certain tasks, whom they may and may not communicate with, and when they must wake up and go to sleep each day.[105] Since producers have almost complete control of the contestants, the contestants should be considered employees to whom producers owe a duty of care.

The ongoing employer-employee relationship means that employer-producers must exercise a duty of reasonable care in hiring employees, including an obligation to conduct "a reasonable investigation into the employee's work experience, background, character, and qualifications."[106] Employer liability for harm done by one employee to another depends on

reality.1.7793893.html.

98. *Id.*

99. *Id.*

100. Blair, *supra* note 7.

101. SAM BRENTON & REUBEN COHEN, SHOOTING PEOPLE: ADVENTURES IN REALITY TV 138 (2003).

102. Edward Wyatt, *On Reality TV: Tired, Tipsy, and Pushed to Brink*, N.Y. TIMES, Aug. 2, 2009, at A1.

103. Brenton, *supra* note 101.

104. Wyatt, *supra* note 102, at A1.

105. *Id.*

106. *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907,910 (Minn. 1983).

whether the type of harm was reasonably foreseeable as a result of the employment, such as when an employer knows or should have known that an employee has a propensity towards violence.[107] Several competition reality shows require contestants to live together for the duration of filming.[108] In order to ensure the safety of the participants living in a shared space, potential contestants are usually required to pass a physical and mental screening.[109] Due to the usually limited budgets of reality shows, however, producers typically rely on questionnaires for contestants and preliminary background checks.[110] For shows in which contestants are held in a single location and are expected to have physical or sexual interaction, producers may conduct more thorough background checks, such as interviewing people who know the contestants.[111] If there is nothing on record to indicate that a potential employee has troubling characteristics such as violent tendencies, or that the employer should have been aware of such characteristics, employers are not liable.[112]

Although there is a great tension between protecting the safety of participants' and staying within a desired budget, producers of competition type reality shows should be held to a higher standard for what constitutes a "reasonable investigation." Because these shows often use psychological tactics and manipulation to elicit extreme behavior from their contestants, even people who have no record of violence or destruction may be provoked to harm others or themselves.[113] Thus, employer-producers of competition-style shows who fail to meet the duty of reasonable investigation when hiring employees may likely be found liable for harm done by their employees.

In comparison to participants in "on-set" competition format shows like *Survivor* and *Real World*, stars of documentary type series such as *Real Housewives* may be less likely to be characterized as employees of TV companies. After Russell Armstrong's suicide in August 2011, his family stated

107. *Id.* at 911.
108. Kaufman, *supra* note 71.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. Kaufman, *supra* note 71.

that they would likely sue the Bravo network. The premise of *Housewives* is that the women are simply living their daily lives, and that the cameras are documenting the drama that happens to occur. With the growing popularity of these documentary style "real" reality television shows, and the drama that comes along with them, it is likely that producers such as Bravo will be faced with an increase of negligence-based lawsuits.

In order to assess Bravo's liability, it will be useful for courts to assess factual circumstances and determine whether a special relationship exists that would give rise to employer duties. For instance, courts should ask whether the relationship between networks and these stars meets the three prongs of an employer-employee relationship mentioned. First, that the individual acts to serve the interests of the employer. Reality show producers carefully handpick "stars" that they believe will attract audiences and result in higher ratings for their shows.[114] Even before the second season of *Beverly Hills* finished airing, Bravo executives were already soliciting Sylvester Stallone's wife, Jennifer Flavin, to star in the third season because she is married to a famous actor and had "a great personality for reality TV."[115] Due to their purposeful selection process, it is reasonable to infer that the *Housewives* stars act to serve the interests of their employer, Bravo.

The nature of the selection process and the mutual contract the stars sign also satisfies the second element, which requires employer consent to the employee's service. The third element, however, which requires the participant to not act as independent contractor, is less likely to be satisfied by "real" reality shows than shows in a competition format. The existence of an independent contractor relationship is largely determined by the amount of control producers have over the manner in which the participants perform their duties.[116] While producers of shows like *Survivor* have almost

114. Kaufman, *supra* note 71.

115. Alexis Tereszcuk, *Sylvester Stallone's Wife, Jennifer Flavin Approached to be on Real Housewives of Beverly Hills*, RADAR ONLINE (Jan. 30, 2012) http://www.radaronline.com/exclusives/2012/01/sylvester-stallone-wife-jennifer-flavin-real-housewives-beverly-hills.

116. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.02 (Tentative Draft No. 2, 2009).

complete control over the manner and means that participants must complete certain tasks, Bravo producers arguably have little or no control over the lives of the housewives. Although producers do invite the women to participate in certain social events and certainly encourage drama and frequent interaction, many of the women featured in the shows had previous relationships and were chosen primarily based on the pre-existing drama of their personal lives. When questioned whether Bravo guided the Housewives' actions, Beverly Hills cast member Brandi Glanville stated "no one at Bravo ever told me what to say, there was plenty of drama, there was no need for Bravo to create any."[117]

In short, Bravo may argue that the housewives are independent contractors, and that it is simply recording the daily lives of the housewives, which include weddings, divorces, and dramatic catfights. For instance, throughout the second season, the show depicted housewife Kim Richards as an often-confused, drowsy, and delusional woman who was constantly accused of being a drug addict.[118] While media outlets reported that Bravo threatened to revoke Richards' place on the *Housewives* unless she entered rehab, it is not likely that courts will find that Bravo actually controlled Richards' actions or mandated her to go as part of an employment contract.[119] Since the nature of these "real" reality TV shows implies that producers do not dictate how the women behave and does not require them to compete for prizes or positions, the women are more likely to be deemed independent contractors who are not owed the wide range of employer-employee duties. Given that courts will most likely not find the existence of an employer-employee relationship, it is less plausible that Bravo can be held liable in a suit brought by the Armstrong family for damages in Russell's death.

117. Debbie Emery, *Not So Real Housewives*, RADAR ONLINE (Jan. 30, 2012), http://www.radaronline.com/exclusives/2012/01/lisa-vanderpump-attack-planned-brandi-glanville-real-housewives-reunion.

118. Debbie Emery, *Drama 9021. . . Oh Dear Oh Dear! Behind the Scenes at Explosive Real Housewives Reunion* RADAR ONLINE (Jan. 27, 2012), http://www.radaronline.com/exclusives/2012/01/real-housewives-beverly-hills-reunion-video.

119. Tereszcuk, *supra* note 38.

B. Special Relationships Based on Control

Even if reality show participants are not deemed employees of TV companies, certain special relationships may arise under which participants may recover for negligence.[120] In *Graves*, plaintiffs contended that Warner Brothers had a duty to protect Scott Amedure from the criminal acts of a third party, Jonathan Schmitz.[121] Plaintiffs claimed that Warner Brothers "ambushed" Schmitz with the revelation of Amedure's "same-sex crush" while he was a guest on the *Jenny Jones* show, and stated Warner Brothers knew or should have known that (1) their actions would incite violence, (2) the only purpose of the show was to increase ratings, and (3) Warner Brothers had the affirmative duty to prevent or refrain from placing Amedure in a position that would unreasonably and unnecessarily expose him to risk of harm, including the criminal conduct of a third party.[122] Plaintiffs claimed that Warner Brothers breached its duty and foreseeably subjected Amedure to an unreasonable risk of harm.[123] As in all negligence cases, the cornerstone of *Graves* was whether Warner Brothers owed a duty to Amedure, which would include the duty to protect him from harm caused by the criminal acts of a third party.[124]

In general, there is no legal duty that obligates one person to aid or protect another. [125] Moreover, there is no duty to protect others from the criminal act of a third party.[126] For example, a merchant does not have a general duty to anticipate and prevent criminal activity, even where there have been prior incidents and the site of the injury is a business premises.[127] Rather, a merchant's duty is limited to reasonably responding to situations that occur on the premises and pose a risk of imminent and foreseeable harm to identifiable invitees.[128] A reasonable response would include calling the police. The rule is justified by the theory that, in

120. Krass v. Tri-County Security, Inc., 593 N.W.2d 578 (1999).
121. *Graves*, 656 N.W.2d at 199.
122. *Id.* at 198-99.
123. *Id.* at 199.
124. *Id.*
125. *Krass*, 593 N.W.2d at 578.
126. *Id.* at 582.
127. *Graves*, 656 N.W.2d at 201.
128. *Id.*

the absence of reason to expect otherwise, people may reasonably proceed on the assumption that others will obey criminal law and not engage in deviant and unforeseeable criminal activity.[129] Reality television networks and producers may argue that, like merchants, they have no duty to anticipate and prevent criminal activity.

However, under specific circumstances, special relationships may exist between the defendant and the plaintiff, or the defendant and the third party, which give rise to a duty to protect others.[130] When setting standards for reasonable conduct, courts have drawn a distinction between misfeasance and nonfeaseance. Misfeance refers to active misconduct that causes personal injury, while nonfeasance refers to passive inaction.[131] Although courts are reluctant to recognize liability for nonfeasance, social policy has carved out an exception in cases where special relationships exist.[132] Namely, courts have imposed the duty to protect a third party in situations where "one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself."[133] These types of special relationships must be sufficiently strong to require the defendant to take action to benefit the injured party.[134] Even if a special relationship is found to exist, the duty of reasonable care is owed only to parties who are reasonably identifiable as being foreseeably endangered.[135]

In order to determine whether a duty existed, the court had to determine if there was a special relationship between Warner Brothers and Amedure that would justify the imposition of a legal obligation on one party for the benefit of another.[136] In *Graves*, plaintiffs contended that because talk shows such as *Jenny Jones* profit from sensationalism and exploitation of participants, a special relationship existed between Warner Brothers and Amedure that gave rise to a duty to protect Amedure from the criminal acts of third

129. *Id.*
130. *Id.* at 668-669.
131. *Krass*, 593 N.W.2d at 582.
132. *Graves*, 656 N.W.2d at 201.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*

parties.[137] Plaintiffs further maintained that Warner Brothers breached its duty to protect Amedure and foreseeably subjected him to an unreasonable risk of harm, resulting in his death.[138] In overturning the initial verdict against Warner Brothers, the appellate court stated that Warner Brothers did not owe a duty to Amedure to protect him from harm caused by the criminal acts of Schmitz.[139] The majority reasoned that the relationship among Schmitz, Amedure, and Warner Brothers was akin to that of a business invitor to invitee. The court noted that an invitor-merchant's duty to protect is limited to taking reasonable measures in response to an ongoing situation that is taking place on the premises.[140] Furthermore, the court noted that no specific acts occurred on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee, thereby triggering a merchant's duty.[141] Thus, the majority stated that Warner Brothers had no duty to anticipate and prevent Amedure's murder.[142] The court reasoned that even the minimum relationship between invitor-invitee failed to exist at the time of Amedure's murder, because any duty ended when Schmitz and Amedure left the studio.[143] The court stated that there was no ongoing relationship at the time of the murder three days after taping, and therefore Warner Brothers had no duty to protect Amedure from Schmitz' violent attack.[144]

The dissent disagreed with the majority's conclusion, contending that Warner Brothers' offense was active misfeasance, in which case the special relationship doctrine need not be applied.[145] The dissent referenced *Ross v. Glaser*, in which the personal representative for a decedent's estate brought a suit against the father of an adult son after the son, who had a history of mental illness, shot the decedent with a

137. *Id.* at 200.
138. *Graves*, 656 N.W.2d at 200.
139. *Id.* at 201.
140. *Id.*
141. *Id.*
142. *Id.* at 202.
143. *Id.* at 203.
144. *Graves*, 656 N.W.2d at 203.
145. *Id.* at 207 (Murphy, J., dissenting).

gun provided by the father.[146] The *Ross* court stated that since the father's act of handing a loaded gun to his son was an active misfeasance, the case turned on whether the defendant had a duty to refrain from handing his son a loaded weapon in the context of the likelihood of injury.[147] In concluding that handing the gun to his son was a misfeasance, the court highlighted the fact that the likelihood of injury was high because the father knew of the son's mental illness, and still handed him a loaded gun while the son was in an agitated state and in conflict with antagonists.[148] The dissent argued that Warner Brothers' actions constituted similar misfeasance when it caused the revelation of Amedure's homosexual crush and lurid sexual fantasy to Schmitz, even after he warned defendants that he did not want the crush to be from another man.[149] The dissent contends that Warner Brothers' use of deceit, sensationalism, and outrageous behavior, in combination with Schmitz' personal history of mental illness, alcohol and drug abuse, suicide attempts, anger management problems, and sexual identity concerns, could have made it reasonably foreseeable that their conduct created a risk of harm to Amedure.[150]

If liability for reality TV producers turns on whether the at-issue actions are deemed nonfeasance or misfeasance, it is certainly arguable that ambushing a mentally agitated man such as Schmitz could be considered misfeasance.[151] The majority reasoned that to find misfeasance in the circumstances of *Graves*, would expand the concept of the duty to limitless proportions.[152] However, as talk shows become increasingly outrageous, it may be of social value to expand the concept of duty in the context of reality shows that create volatile emotional situations for commercial value. If active misconduct creates a risk of foreseeable harm, then a duty arises and producers and networks should be held liable.[153] Moreover, where the defendant, through his or her

146. *Ross v. Glaser*, 559 N.W.2d 331 (1996).
147. *Graves v. Warner Bros.*, 656 N.W.2d 195, 207 (Murphy, J., dissenting).
148. *Id.*
149. *Id.* at 208.
150. *Id.*
151. *Id.*
152. *Id.* at 204.
153. *Graves*, 656 N.W.2d at 207 (Murphy, J., dissenting).

own misfeasance, places the plaintiff in a worse position, and has created a foreseeable risk or harm from the third party, liability may arise.[154]

Even in the event that only nonfeasance is found, courts should carefully analyze the totality of circumstances in order to determine the existence of a special relationship that would give rise to a duty to protect. Although the *Graves* court argued that no special relationship existed between Warner Brothers and Amedure, courts should consider the fact that Warner Brothers created a new relationship between Schmitz and Amedure that probably would not have existed but for the taped episode.[155] When Schmitz revealed to Warner Brothers that he did not want his admirer to be a man, Warner Brothers should have been put on notice of the potential of inciting a new relationship, yet it proceeded for the sake of profit and sensationalism.[156]

Liability should especially be imposed in a situation where producers are made aware of someone violent or displaying suicidal tendencies.[157] Reality television networks may argue that it is nearly impossible to ascertain the mental health of all participants through even thorough background checks.[158] However, reality TV producers that exploit their participants should assume the risk of the participants' pre-existing characteristics and behaviors.[159] For purposes of a foreseeability analysis, public policy suggests that producers should bear some of the risk when a guest is psychologically unstable or criminally dangerous, but the producers included them in spite of having this information.[160] The *Graves* majority reasoned that Schmitz gave every appearance of being a normal, well-adjusted adult who consented to being surprised on the show by a secret admirer.[161] While this may have been true, producers should be responsible for more complete mental health evaluations of people they exploit for entertainment value. If courts allow lack of knowledge about

154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 212.
158. *Id.*
159. *Richman v. City of Berkley* 269 N.W.2d 555 (1978).
160. *Graves v. Warner Bros.*, 656 N.W.2d. 203, 212 (Murphy, J., dissenting).
161. *Id.*

personal history as a defense to block civil actions, they would allow television, radio, or other media outlets to undertake similar potentially harmful actions without limitation.[162]

When considering reality stars in the vein of the *Real Housewives*, however, plaintiffs will be hard pressed to show that a sufficient special relationship existed that would justify placing a burden on one party for the benefit of another. It is unlikely that courts will find that the *Housewives* stars, by participating on the shows, entrust themselves to the control and protection of Bravo, with a consequent loss of control to protect themselves, and that Bravo should take action to benefit injured parties.[163] On the contrary, many *Housewives* participants have profited immensely from their relationships with Bravo. Bethenny Frankel, who was originally on the *Real Housewives of New York City*, capitalized on her *Housewives* fame to build a massive commercial empire.[164] She recently sold her "Skinnygirl Margarita" drink company for $120 million and expanded her brand into lingerie, skin care, and self-help books.[165] Almost every step of her rise to fame, including her wedding and the birth of her child, was documented by the *Real Housewives of New York City* and her two solo spin-off shows on Bravo.[166] Other housewives, such as Ramona Singer, who launched a successful wine business, and NeNe Leakes, who was recently featured as a "celebrity" on Donald Trump's reality show *Celebrity Apprentice*, have arguably built their entire careers on the brand that Bravo helped them establish.[167]

Furthermore, even if a special relationship is found to exist, the duty of reasonable care is owed only to parties who are reasonably identifiable as being foreseeably endangered. Although Russell Armstrong might have been unhappy with the way he was edited on the show, it is not likely that Bravo could have reasonably foreseen that he would commit suicide. Notably, Armstrong was not personally under contract with

162. *Id.*
163. *Id.* at 201.
164. Lizzie Skurnick, *Self Sells: Bethenny Frankel's Triumph*, TIME (May 9, 2011), http://www.time.com/time/arts/article/0,8599,2070126,00.html.
165. *Id.*
166. *Id.*
167. *Id.*

Bravo and could have left the show after the first season.[168] Moreover, since *Beverly Hills* was not the first installment of the *Housewives* franchise, Bravo may contend that after so many seasons have aired, potential participants should know what they are signing up for and abide by the "buyer beware" doctrine.[169] Finally, unlike in *Graves*, there have been no allegations of deception and deliberate manipulation of events that could support a misfeasance action.[170] In consideration of all of these factors, it is unlikely that a special relationship will be found, and the producers of reality shows such as the *Real Housewives* series will probably not be held liable in a negligence action.

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

As reality television networks and producers must increasingly distinguish their product from the myriad of existing shows, they have become more determined to push the boundaries of outrageous show premises.[171] In an effort to create lasting shock value in a media-saturated climate, television executives often impose emotionally traumatizing situations upon show participants.[172] In fact, words such as "extreme" and "outrageous" have become widely used in the television advertising lexicon.[173] In addition to suing for negligence, plaintiffs have sued reality TV networks and producers for intentional infliction of emotional distress (IIED).[174] The tort of IIED aims to protect emotional well-being by allowing recovery for plaintiffs who satisfy four

168. Drew Grant, *Did "Real Housewives" kill Russell Armstrong?*, SALON (Aug. 17, 2011), http://letters.salon.com/ent/tv/feature/2011/08/17/real_housewives_russell_armstrong/view/.

169. Alexandra Pichette, *Real Liability for the Real Housewives*, Sept. 1, 2011, http://www.jetlaw.org/?p=7777; *Stambovsky v. Ackley*, 572 N.Y.S.2d 672 (N.Y. App. 1991) (explaining the property law concept of caveat emptor, or the "buyer beware" doctrine that states that a buyer cannot recover for defects on the property unless the seller actively concealed latent defects or otherwise made material misrepresentations amounting to fraud).

170. Pichette, *supra* note 169.

171. Ugolini, *supra* note 7.

172. *Id.*

173. *Id.* (discussing shows like *Extreme Makeover* and *Castaway*).

174. Blair, *supra* note 7.

necessary elements.[175] First, plaintiffs must show that the producers engaged in extreme and outrageous conduct. Second, plaintiffs must show that the producers either intentionally or recklessly caused the plaintiff to endure severe emotional distress. Third, plaintiffs must show that he or she "actually suffered severe emotional distress." Finally, plaintiffs must show that the producer's actions caused the contestants severe emotional distress.[176] In general, courts are wary of IIED claims because it is difficult to ascertain whether claims are genuine.[177] As a result, plaintiffs claiming IIED have a higher bar to pass, and claims are often difficult to prove successfully.[178]

In the media context, IIED claims have usually been attached to a defamation or invasion of privacy claim, and courts have set a high standard for recovery.[179] However, the tort has been successfully used against media defendants.[180] "Successful IIED actions tend to involve vulnerable, non-public plaintiffs and/or non-newsworthy conduct."[181] In the media context, newsworthiness "would presumably be a defense to an intentional infliction of emotional distress claim."[182] In the past, IIED claims against reality shows have failed due to an inability to establish the first element, which requires contestants to show extreme and outrageous conduct.[183] Liability is generally only found where the conduct has been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[184]

In January 2012, perhaps in a strategic move to avoid an IIED lawsuit, NBC decided not to air a controversial new episode of its show *Fear Factor* that would have featured a segment in which contestants were required to drink glasses

175. SELZ, *supra* note 53.
176. *Id.*
177. *Id.*
178. *Id.*
179. Robin Famoso, *Ambush TV: Holding Talk Shows Liable for the Public Disclosure of Private Facts*, 29 RUTGERS L.J. 579 (1998).
180. *Id.*
181. *Id.* at 599.
182. *Id.*
183. SELZ, *supra* note 53. § 14:17.
184. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

of donkey urine and semen in exchange for a cash prize.[185] Although situations like these would seem extreme and outrageous in almost any context, courts have set a high standard for what constitutes extreme and outrageous conduct in IIED lawsuits.[186] In *Stepien v. Franklin*, the court refused to award damages to a former owner of a professional basketball team after a radio talk show host called him "a liar, irrational, scum, and suicidal."[187] In its ruling, the court noted that it was important to consider the context of the conduct when evaluating the outrageousness of IIED claims.[188] In *Stepien*, the context was sports, which the court considered a "traditional haven for cajoling."[189] In contrast, the court in *S&W Seafoods Co. v. Jacor Broadcasting* determined that the defendant was culpable of outrageous actions because the on-air statements he made that encouraged listeners to go to plaintiff's restaurant and spit on him.[190] Next, conduct may be more likely to be deemed outrageous if the defendant possesses knowledge that the plaintiff is peculiarly susceptible to emotional distress but nevertheless proceeds.[191] Once a plaintiff has established that the defendant's conduct was extreme and outrageous and caused the plaintiff emotional distress, he or she must then prove that the distress is severe.[192] The severity of the resulting distress should be considered on a case by case basis.[193] The success of IIED claims will likely vary according to the format of the shows.

A. Competition Format Reality Shows

Competition format reality shows are likely to be found liable for IIED claims if courts find that the behavior of

185. *Too vile for TV? NBC pulls Fear Factor episode where contestants are served glasses of donkey semen off schedule*, DAILY MAIL REP., Jan. 30, 2012, http://www.dailymail.co.uk/tvshowbiz/article-2093685/NBC-pull-Fear-Factor-episode-contestants-served-glasses-donkey-semen-schedule.html.
186. Famoso, *supra* note 180.
187. Stepien v. Franklin, 528 N.E.2d 1324 (Ohio Ct. App. 1988).
188. *Id.*
189. *Id.* at 1329.
190. S&W Seafood Co. v. Jacor Broadcasting, 390 S.E.2d 228, 232 (Ga. 1990).
191. RESTATEMENT (SECOND) OF TORTS § 46, cmt. f. (1965)).
192. *Id.*
193. Famoso, *supra* note 180.

networks and producers was extreme or outrageous. TV executives considering creating competition type shows must recognize the legal risks involved and factor them into the costs of conducting business.[194] After *Expedition Robinson* contestant Sinisa Savija committed suicide upon being eliminated from the show, producer Mark Burnett was careful to consult psychologists to help prevent such outcomes on his similar show, *Survivor*.[195] Gene Ondrusek, the psychologist for *Survivor*, claims that producers told him that the show would put contestants through potentially demeaning, degrading, stressful, humiliating experiences, and that the producers did not want psychologically vulnerable or fragile people to be damaged by the show. [196] On competition format shows, cast members are pushed mentally and physically 24 hours a day. Forced isolation, in addition to sleep deprivation and exposure to the elements, causes contestants to experience large amounts of stress.[197] Other tactics producers employ to elicit dramatic or extreme behavior from the contestants include supplying contestants with alcohol,-fostering environments of distrust and paranoia, creating the illusion of imminent harm, placing emphasis on apparent irrelevancies, distortion of time, and the building up and dashing of hope.[198]

To a reasonable fact finder, such psychological tactics may border on mental cruelty and constitute sufficiently extreme and outrageous conduct to support an IIED claim.[199] If the conduct is found to be sufficiently extreme and outrageous, plaintiffs must then show that the producers' conduct was intentional or reckless.[200] It is likely that the mere design of competition-type shows will suffice to show that the actions were deliberate or calculated and not accidental or random.[201] By creating artificial scenarios that push contestants to their mental limits, producers deliberately provoke the dramatic

194. *See* Ugolini, *supra* note 22, at 76-78.
195. *Id.*
196. Andy Dehnart, *The Curse of Reality TV*, PLAYBOY MAGAZINE (Aug. 26, 2011), http://www.playboy.com/playground/view/the-curse-of-reality-tv.
197. *Id.*
198. Blair, *supra* note 7, at 6.
199. *Id.* at 7.
200. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).
201. Blair, *supra* note 7, at 8.

and extreme behavior needed to entertain viewers.[202] Such entertainment usually comes at the expense of the emotional distress of the contestants and constitutes the third element of an IIED claim. The fourth element of an IIED claim requires that the distress be severe.[203] Cases may be found to be sufficiently severe in cases such as Sinisa Savija's, in which the mental and emotional harm from the show may be so serious that participants have difficulty recovering once leaving the show.[204]

In *Williams v. ABC*, the plaintiff alleged that ABC was liable under a claim of IIED due to the nature of the relationship between plaintiff and ABC as the network knew that the plaintiff was particularly fragile and susceptible to extreme emotional distress due to the peculiarity of her appearance.[205] In the complaint, Williams claimed that ABC profited by exploiting people like her who had been subjected to ridicule and who were unusually susceptible to emotional distress, and that ABC's actions were deliberately carried out to increase, heighten and maximize her emotional distress for entertainment value.[206] In fact, Williams claimed, ABC producers believed that there was a direct correlation between plaintiff's emotional distress and the show's ratings.[207] Furthermore, although ABC knew the filming would be "extreme," "unnatural," "unusual," and would cause "emotional distress and strains," ABC nonetheless put Williams into such a situation in wanton and reckless disregard of the consequences to her.[208] Williams claimed she suffered humiliation, mental anguish, and severely extreme emotional and physical distress as a result of the actions alleged.[209] Although the *Williams* case was settled for an undisclosed amount, producers should be cognizant of the potential consequences of the highly volatile situations they

202. *Id.*
203. *See supra* note 7 (discussing Sinisa Savija's participation in *Expedition Robinson* and subsequent suicide).
204. Brenton & Cohen, *supra* note 101, at 2-3.
205. Williams, at 24.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*

create.[210]

Reality TV executives may argue that the fact that the show's title had the word "extreme" in it should have provided some indication of a desire to provoke high emotional stress in participants. However, reasonable people may believe that putting Williams through the process of interviewing her about her painful past, hearing her friends and family discuss how "ugly" they thought she was, building up her expectations for a full life transformation, and then suddenly taking that chance away from her would cause great emotional trauma and be considered outrageous conduct.

B. Ambush Television: Talk Shows and Hidden Camera Shows

In addition to competition-type shows, increasingly controversial manifestations of reality television are "ambush television shows," such as talk shows and hidden camera shows. These shows typically involve the revelation of "shocking" secrets or play out extreme pranks on unsuspecting victims.[211] Television shows have a long history of entertaining audiences at the expense of practical jokes on others, but the pranks are rapidly becoming more extreme as audiences are becoming more jaded.[212] Ultimately, "victims" of these pranks usually overcome their initial shock and may even embrace the prank. Emotionally unstable "victims," however, may not be as amenable and, in extreme cases, may have legal justification to assert an IIED claim as a result of being "ambushed."[213] The success of claims against "ambush" type shows may depend on whether the conduct is found to be reckless and intentional. [214]

Talk show participants, such as those in *Graves*, may also bring IIED claims against TV networks. Notably, if a

210. *TV show sued after sister's death*, BBC (Sept. 20, 2005, 11:46 AM) http://news.bbc.co.uk/2/hi/entertainment/4263428.stm.

211. *See Victims Seek Last Laugh on TV Pranksters*, *available at* http://abcnews.go.com/2020/story?id=123692&page=1#.UF810Y2PUs8 (last visited Dec. 3, 2011).

212. The original Candid Camera premiered in 1948.

213. *See 'Joe Schmo' Duped in New Reality Show,* CNN (Aug. 29, 2003, 1:32 PM) http://www.cnn.com/2003/SHOWBIZ/TV/08/29/television.joe.schmo.reut/

214. *See* Famoso, *supra* note 180 at 581.

defendant network, such as Warner Brothers, possesses knowledge that the plaintiff is peculiarly susceptible to emotional distress, but nevertheless proceeds in the face of such knowledge, the conduct may be deemed outrageous when it would not have been so if the defendant had no such knowledge.[215] Since talk shows such as *Jenny Jones* usually know the guest's background and the show's topic beforehand, the show would likely be aware of emotional or mental problems that would make the guest particularly susceptible to emotional distress.[216]

The plaintiff must show that the defendant acted intentionally or recklessly to establish the second element of an IIED claim.[217] Courts may find it difficult to accept that talk show hosts and producers intended to cause their guests emotional distress rather than simply intending to create entertaining emotional drama. When talk shows present their guests with potentially disturbing and embarrassing information, such as unexpected paternity results or the revelation of same-sex crush, they are acting with a purposeful disregard for the high probability that emotional distress will follow.[218] Considering the deeply emotional nature of the topics, the manner in which contestants are confronted, and the possibility that networks are aware of the potential of negative reactions to follow, the ambush tactics used by the shows could be considered reckless.[219]

The third element of an IIED claim, requiring the plaintiff to show that the defendant's conduct was the proximate cause of their emotional distress, may be satisfied if the guests' emotional distress is caused by the show's public broadcast of personal and humiliating private facts.[220] In assessing the fourth element of an IIED claim, the severity of the resulting distress, courts should weigh factors on a case by case basis.[221] The context of the conduct in question is very important in determining if the conduct is outrageous.[222] For example,

215. RESTATEMENT (SECOND) OF TORTS § 46, cmt. f. (1965).
216. *See generally* Famoso, *supra* note 180.
217. *Id.* at § 46(1).
218. Rekha Basu, *TV Must Share Blame*, DES MOINES REG., Nov. 8, 1996, at 1.
219. Famoso, *supra* note 180, at 602.
220. *Id.*
221. *Id*. at 603.
222. *Id.* at 600 n.136.

conduct that may be considered trivial between private parties may become extreme and outrageous if published to the community at large via ambush style shows.[223]

C. Documentary Style Reality Shows

It may be significantly more difficult for participants of the documentary style *Real Housewives* reality television shows to prevail on IIED claims. Although these plaintiffs may assert that their experiences on the shows have included extreme or outrageous behavior, they will probably fail to show that the producers' themselves perpetrated activities that were sufficiently extreme or outrageous. After Russell Armstrong's death, his attorney stated that the show proximately caused distress by fostering constant competition among the cast members to appear wealthy and "outdo each other," and that Russell himself had once stated that the show had "literally pushed [him] to [his] limit."[224] Bravo widely advertises and even glamorizes extreme behavior such as table flipping and explosive catfights.[225] Episodes often feature grown women hurling insults at each other in public and then "tweeting" or otherwise publicizing cruel comments that are readily available to the public via social media websites.[226] Although these actions may be attributed to the situations that producers put the cast members in, and the situations may be sufficiently extreme, networks will likely prevail on the argument that participants, including Armstrong, knew the possible consequences of being on the shows, and that pre-existing mental health conditions would have taken their toll even without the shows filming.[227] Furthermore, cast members of shows such as *Housewives* will not be considered particularly vulnerable because they are free to live their own lives while filming, making it more

223. *Id.*
224. Alessandra Stanley, *The Housewives Regroup, Now With One Widow*, N.Y. TIMES (Sept. 6, 2011), http://www.nytimes.com/2011/09/07/arts/television/beverly-hills-housewives-goes-on-after-a-suicide.html.
225. Nicole Evatt, *Reality TV Causes Bullying? 'Real Housewives' Star Says Yes*, HUFFINGTON POST (Nov. 2, 2011, 8:33 AM), http://www.huffingtonpost.com/2011/11/02/real-housewives-star-bullying_n_1071482.html.
226. *Id.*
227. Grant, *supra* note 169.

difficult to succeed on IIED claims. Although Bravo may be considered morally insensitive for documenting and profiting from the life of a man who was clearly experiencing severe financial and marital troubles, Bravo will most likely not be responsible for the surrounding circumstances that resulted in his suicide.[228] Thus, cast members of documentary style reality television shows are not likely to prevail on IIED claims.

IV. OBSTACLES

Networks and producers of reality TV shows may present many reasons why they should not be liable for participants' emotional health and safety. Although networks should not be required to completely abstain from putting participants through risky mental and physical challenges, they should be held liable when their ratings come at the expense of the contestants' well-being.[229] Perhaps the biggest obstacle to negligence and IIED claims brought by participants is the fact that participants usually sign lengthy contracts that explicitly limit the networks' liability.[230]

Potential *Survivor* cast members are required to sign a 32-page contract and nine-page rule book, acknowledging that they agree to be confronted with severe mental stress, and promising not to defame, disparage or cast in an unfavorable light on the network, or to otherwise speak publicly about their experience.[231] A typical contract also states that the shows may reveal things "of a personal, private, intimate, surprising, defamatory, disparaging, embarrassing or unfavorable nature that may be factual and/or fictional" and that may expose them to "public ridicule, humiliation or condemnation."[232] However, even if participants do sign these extensive contracts, courts may invalidate contracts by evaluating whether the supposed assumption of risk for things such as "non-consensual physical contact," as required

228. Grant, *supra* note 169.
229. Blair, *supra* note 7, at 9-10.
230. Gardner, *supra* note 56.
231. *Id.*
232. Camille Dodero, Real World *Contracts Stipulate That You Could Die And MTV's Not To Blame*, VILLAGE VOICE (Aug. 1, 2011, 7:45 PM) http://blogs.villagevoice.com/runninscared/2011/08/mtv_real_world_contract.php?page

in *Real World* contracts, are deemed unconscionable contract terms.[233] Courts should also examine the relationship between the participant and producer to determine whether an employer/employee relationship exists, which would bring the case under the umbrella of employment law protection.[234]

To guard against IIED claims, networks might require participants to sign contracts that disclose the true topic of the show, thereby blocking any claims of "ambush" or treatment to which they have not consented.[235] Next, networks might argue that the First Amendment allows them to present any topic, in any manner, without the risk of liability, and that the regulation of shows would have a "chilling effect on free speech."[236] However, it may be difficult for the media to bring a constitutional challenge in response to contract claims because the claim "arises from situations in which the media has agreed to limitations in exchange for information."[237] Furthermore, courts are not likely to uphold contracts if the terms were ambiguous or lacked consideration.[238]

Finally, contracts will not protect producers from litigation if producers subject participants to injuries caused by abnormally dangerous activities, as public policy does not allow individuals to waive their right to sue for such harms.[239] Broad and encompassing contracts will also not preclude liability for intentionally tortuous or illegal conduct.[240] Thus, producers must carefully balance the safety of challenges and the need to protect themselves against lawsuits, while potentially suffering lower ratings, with the desire to put participants through abnormally dangerous challenges and potentially having to compensate contestants for their injuries.

233. *Id.*
234. Blair, *supra* note 7, at 3.
235. Famoso, *supra* note 179, at 601.
236. Ron French, *Jenny Jones Lawsuit Sends Chill Through the World of TV Talk Shows*, DETROIT NEWS, Feb. 26, 1996, at A1.
237. Famoso, *supra* note 179, at 603.
238. Id. at 604.
239. Blair, *supra* note 7, at 10.
240. *See* Dieu v. McGraw, No. B223117, 2011 WL 38031 at *1 (Cal. Ct. App. Jan. 6, 2011) (In which participants recruited to participate in a Dr. Phil reality show sue for negligence and intentional tort claims; waiver and release agreements signed by the participants do not preclude liability for the claims beyond negligence.)

V. CONCLUSION

Over the past decade, reality shows have become increasingly popular and this trend shows no signs of slowing down. With the growing popularity of reality shows and the greater variety of such shows being created, the desire for increasingly shocking material to captivate viewers has exposed participants to potential harm. Participants have brought lawsuits against reality networks for several causes of action, including negligence and intentional infliction of emotional distress. While it is crucial for networks to have some responsibility for the emotional health, safety, and well-being of its participants, the likelihood of liability rests on many factors. These factors, such as the existence of an employment relationship or other special relationship, vary among the different formats of reality shows. When analyzing the existence of liability, courts should recognize the significant differences between competition type shows such as *Survivor*, talk shows such as *Jenny Jones*, and documentary style reality shows such as the *Real Housewives* series. Networks that exploit or feature their participants on a public platform should take their responsibilities to participants seriously and commit themselves to promoting the mental health and welfare of their participants even after the shows have finished filming. Reality shows can create situations that pose extremely real threats to its participants. The suicides of Russell Armstrong and at least eleven other people associated with reality TV indicates that producers should recognize potential liability and protect the people who allow them to profit from their lives.