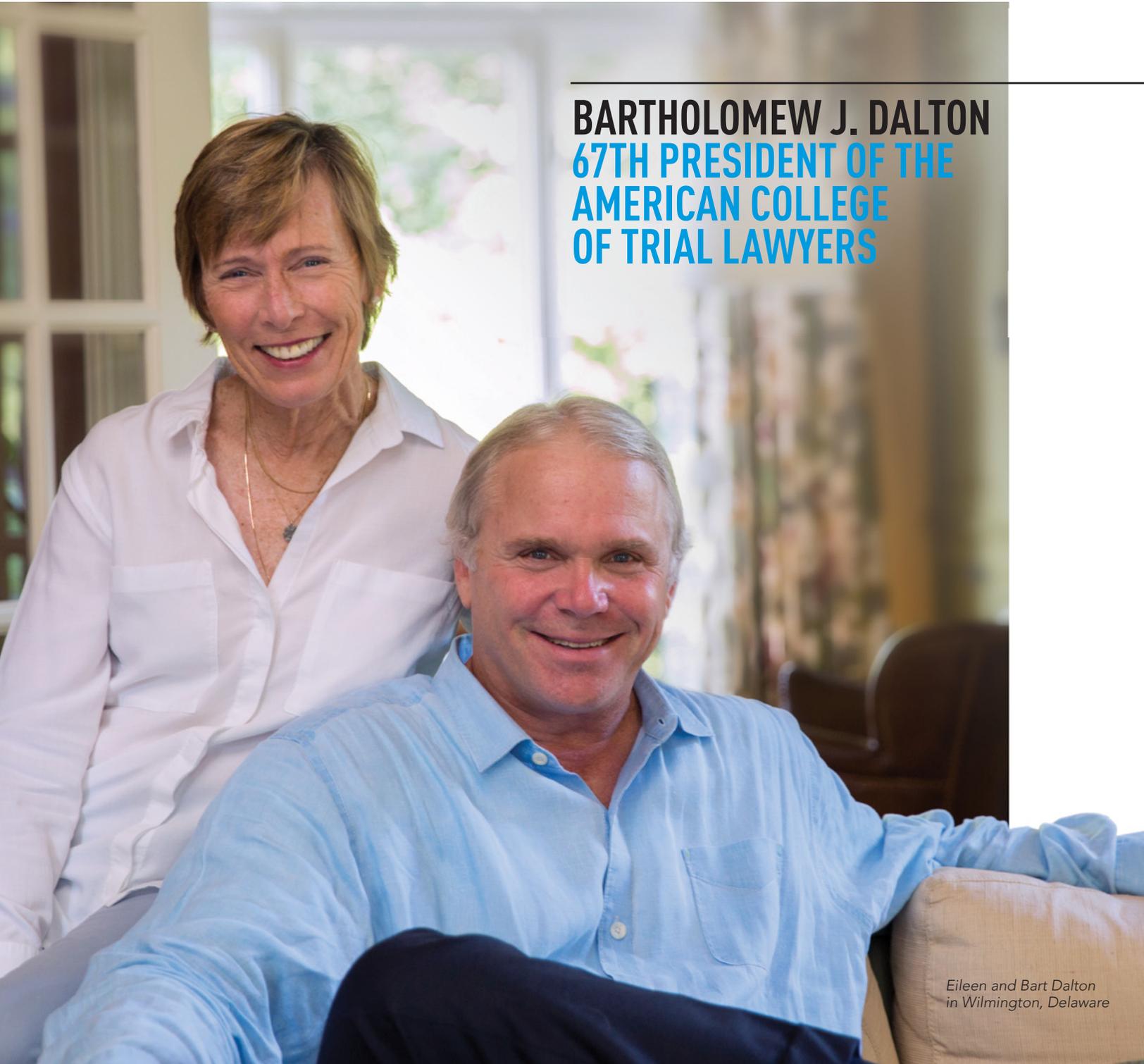


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*Eileen and Bart Dalton
in Wilmington, Delaware*

BUBBA THE LOVE SPONGE WIPES OUT GAWKER

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You can't make this stuff up, mainly because no one, not even you, has the imagination to come up with the names, much less the scenario. Bubba the Love Sponge directs his occasional swimsuit model wife, Heather (okay, maybe you could have predicted "Heather"), to have sex with his best friend, Terry Bollea, a.k.a. Hulk Hogan, whose obviously self-written website proclaims he is the object of "legendary fan frenzy" and "Hulka-mania." Unbeknownst to Heather or Terry or even the Hulk, the Sponge secretly videotapes the act. The thirty-minute (Thirty minutes? What a Hulk! He never lasted that long in a ring . . .) video somehow ends up being sent anonymously six years later – after all marriages involving Terry, Heather, the Hulk and the Sponge at the time the video was shot have been dissolved – to Gawker, a quasi-news Internet site whose name may be its single most accurate piece of journalism – since "gawk," after all, means "to stare openly and stupidly," and Gawker openly and, as it turns out, stupidly, posts a nine-second excerpt of the video in which the Hulk is depicted, well, hulking. The posting can fairly be described as "stupid" since it leads to a lawsuit by the Hulk against Gawker for invasion of privacy, which leads to a \$140 million jury verdict, which leads to bankruptcy for Gawker. Whew! Got all of that?

But wait, there's more. It turns out that the Sponge was not the only player here with a secret. Unlike other larger-than-life comic figures who boast of funding their own campaigns, the Hulk's was secretly bankrolled by an Internet billionaire, Peter Thiel, the founder of PayPal, who has nursed a simmering grudge against Gawker for years, reputedly because Gawker outed him on his sexual preference. *The New York Times* reports that Mr. Thiel considers his financial backing of cases – yes, multiple cases, to the tune of \$10 million dollars – against Gawker to be "one of my greater philanthropic things that I've done."

To say that this case has generated a fair amount of public interest is an understatement of epic proportion. When was the last (or for that matter, other than this, the first) time you saw a court clerk put a direct link to a single case in a prominent place on his website?

So, well, all of this raises some questions, at least in my mind:

Why would Bubba the Love Sponge ask his wife to sleep with his friend? Why would she say, "Okay, honey?" Why would the Sponge secretly film it? Why . . . wait. Why would we try to make sense of anything done by

someone who is self-named (his momma sure didn't do it) Bubba the Love Sponge? Let's move on to possibly answerable questions.

While the video has long since been pulled and I haven't seen it, and of course I would never (hah!) seek to, the descriptions don't sound as though it was particularly kinky, so what made the release of nine seconds of consensual adult sex worth \$140 million to the supposedly bruised ego of a professional celebrity fake-wrestler who has a penchant for boasting about his sexual conquests?

On what planet is it philanthropic for a billionaire to bankroll private litigation to exact personal revenge against a sort-of news organization? More to the point, whether or not it was charitable, is it legal? And whether or not it's legal, is it good form?

WAS THE THIRD PARTY FUNDING OF THIS LITIGATION PROPER?

Let's start with the battle of the billionaires. Yes, it might surprise you, but not all billionaires, especially billionaires who own media companies, believe it is a good thing for billionaires to attack the media. Jeff Bezos, the founder of Amazon and owner of *The Washington Post*, weighed in after Thiel's involvement was disclosed. The verdict has made for some, if you'll pardon the pun, strange bedfellows. You would hardly think that *The Washington Post* or *The New Yorker* share editorial values with Gawker. But noting the real-world chill that a verdict of this size may have on any media company, those main-stream publications and many others have come to Gawker's defense by lamenting the very idea that a rich guy with a personal vendetta could bring down a media company.

Bezos said it simply: "I don't think a billionaire should be able to fund a lawsuit to kill Gawker."

That's right, Jeff, he shouldn't be able to do it. Champerty! Maintenance! Barratry! Humbugery! Ah, yes, in the good old days, Thiel's financing might have been a tort or even a crime. Off with his head!

Champerty, *Black's Law Dictionary* tells us, is "a bargain made by a stranger with one of the parties to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if he wins the suit, a part of the land or other subject sought to be recovered by the action." Maintenance is similar, except that the stranger has no pecuniary interest in the outcome but "intermeddles officiously." Ah, and ▶

then there is barratry—which *Black’s* informs can mean the practice of exciting groundless judicial proceedings—or in the maritime context, mutiny or other act against the owners of a vessel; or in Scottish law, the taking of a bribe by a judge.

But I digress. Sorry Jeff, but none of these concepts have much relevance in the modern world.

Third party litigation funding is the new black. *Miller UK Ltd. v. Caterpillar, Inc.* (2014) cites extensively to the literature and sums it up:

[T]he costs inherent in major litigation can be crippling, and a plaintiff, lacking the resources to sustain a long fight, may be forced to abandon the case or settle on distinctly disadvantageous terms. Creative businessmen, ever alert to new opportunities for profit, perceived in this economic inequality a chance to make money and devised what has come to be known as third party litigation funding, where money is advanced to a plaintiff, and the funder takes an agreed upon cut of the winnings. If the plaintiff loses the case, the funder may get nothing. Third party litigation funding is a relatively new phenomenon in the United States. The business model has generated a good deal of commentary about and controversy over its intrinsic value to society (or lack thereof depending on one’s perspective).

But the controversy over the value to society of the practice has not led to any real controversy over the legality of the practice. If you have ever sent a dollar to the ACLU or the NRA or the NAACP or the Law Enforcement Legal Defense Fund or any of a zillion others, you have participated in low-tech crowd-funding; and you have probably committed maintenance or barratry – since your financial contribution was likely (or maybe even expressly) used to fund litigation to which you are a stranger and have no pecuniary interest in the outcome. But you have a constitutional right to do it. Half a century ago, in *NAACP v. Button*, (1963), the Supreme Court struck down Virginia’s champerty and maintenance laws as violating the First Amendment, because litigation – and the sponsorship of it – is a vehicle for expressing viewpoints.

In *Miller*, supra at 727, the Court observed that “over the centuries, maintenance and champerty have been narrowed to a filament.” Indeed, the Court cited a case handed down more than 125 years ago, *Dunne v. Herrick*, (1890) for the proposition that champerty and maintenance “have been so pruned away and ex-



ceptions so grafted upon them, that there is nothing of substance left.”

So it isn’t illegal to fund litigation, and if a guy with \$1 to spend has a right to be heard, I can’t think of a legitimate reason to think that a guy with \$10 million to spend does not. So it seems that Thiel has a perfect right to finance litigation against Gawker.

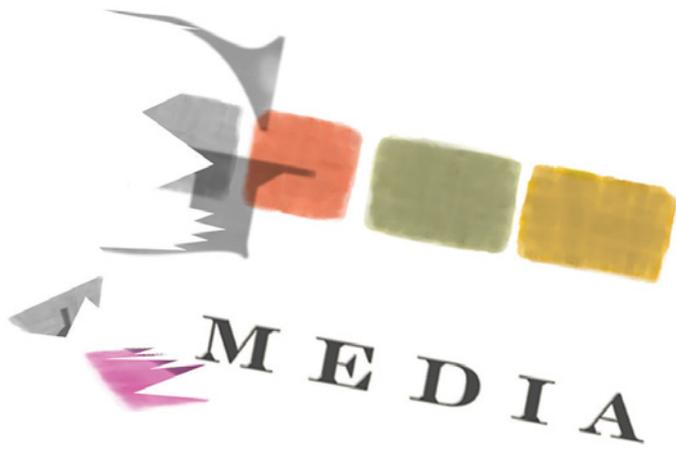
And he has a right, I suppose, to call that philanthropic, just as I have the right to say, “Huh?”

Let’s get out our dictionaries again. Philanthropic means “seeking to promote the welfare of others, especially by donating money to good causes; synonyms include: generous, benevolent, charitable, humanitarian, public-spirited, altruistic, magnanimous, munificent, openhanded, bountiful, liberal, generous to a fault, beneficent, caring, compassionate, unselfish, kind, kind-hearted, big-hearted.”

“Good causes?” Take this simple test: which is a good cause, cancer research or Hulk Hogan’s bruised psyche? “Openhanded?” As a rule, Thiel is open about his philanthropy. See, for example, <http://www.insidephilanthropy.com/guide-to-individual-donors/peter-thiel.html>, which describes his good works in support of science and technology, freedom and humanitarian efforts, and LGBT rights – but is silent on ridding the world of Gawker. There was nothing philanthropic about a secret campaign to destroy an entity, even a possibly unlikeable entity like Gawker.

And here’s the real problem with Thiel’s support. When ten million people each donate a dollar to the cause they believe in, the cause can use that money to support the cause, but none of the contributors has the ability to control the details of the litigation. But when there is only one contributor, he is likely to have a voice – a voice that might even drown out the real cause.

The Hulk’s goal was to recover damages, right? Thiel’s goal was different. Thiel’s agenda was to destroy Gawker.



It was widely reported that the Hulk's lawsuit could have included claims that would have triggered Gawker's substantial insurance coverage – but those claims were expressly not made. A plaintiff who wants to recover wants the insurance to be there so he can collect his judgment; but a silent backer who wants to destroy the defendant wants the defendant to be uninsured and naked. So who made that call?

So is Thiel's involvement troubling? You bet. Is it illegal? Not in the slightest. Is it distasteful? Well, that's a matter of taste, and your palate may be stronger than mine.

SO HOW DID THIS VERDICT HAPPEN?

\$140 million.

Let's start with the fact that there were no sympathetic figures in that courtroom. Scott Adams, the creator of the comic strip *Dilbert*, describes Gawker this way: "How awful is Gawker? Imagine if revenge porn and cancer decided to get married and have an ugly baby with fangs. That would be Gawker. Pure evil." When it learned of Adam's comment, Gawker fired back that Adams is "a run-of-the-mill white nerd racist misogynist. He called us 'pure evil' and 'completely lazy.' Hey—we are only partly evil. But you are completely loathsome. Dork." If that doesn't display journalistic maturity, what does? Adams writes a cartoon, while Gawker wants to be regarded as a news organization, but gleefully admits that it is at least partly evil. I'm guessing that the jury saw evil.

And it couldn't have helped that Gawker's witnesses shot themselves in the head, not the foot, but the head.

Gawker editor A.J. Daulerio testified that "the Internet has made it easier for all of us to be shameless voyeurs and deviants, we love to watch famous people have sex." And then he was asked if there was any celebrity sex tape he would not publish. He responded that he would not publish, perhaps, if the celebrity were a child. "How

old?" a child, he was asked. "Four." Really? Gawker would without hesitation publish a sex tape involving a five-year-old child? It was reported that the jury gasped. Of course they did.

HOW COULD YOU NOT HATE GAWKER?

But then, how could you love the Hulk? When rumors of his sex tape surfaced, Hogan was quoted as saying that he had no idea who his sex partner on the tape might be because he had "banged so many chicks" during a four-month alcohol-fueled screwing bender between the time when he left his ex-wife and met his current wife that the woman could be one of many possible conquests. He went on the Howard Stern Show and other media to cluck about his sexual prowess.

I'm just guessing, but I'm betting that the jury wasn't all that fond of either side. But just like this year's presidential election, the fact that you may not be excited about the choices doesn't necessarily mean you won't vote.

As is now known the jury voted that the Hulk receive \$140 million. Wow. Thompson Reuters' Jury Verdict Research analyzed seven years of wrongful death verdicts from 2006-2012 and found the average award was about \$1.1 million. Sure, that makes sense. The pain of having nine seconds of consensual adult adultery made public is worth 140 lives.

The term runaway verdict comes to mind. But Florida, where the Hulk had his day, and boy, did he ever have his day, doesn't think that caps on noneconomic damage awards, at least in the medical malpractice arena, are constitutional, see *McCall v. United States*, (2014), so it is not clear that the courts will find the jury ran excessively. Gawker's motion for new trial or remittitur has been made and denied. Gawker has appealed, but faced with the reported \$50 million cost of an appeal bond, it has also filed for bankruptcy protection.

Florida Appellate Courts review a trial court's order denying a motion for remittitur for abuse of discretion, *City of Hollywood v. Hogan* (2008). And Florida law requires that "awards of damages be subject to close scrutiny by the courts and that all such awards be adequate and not excessive" (2010).

So stay tuned. That's all Bobba The Amorous Moistette has for now . . .

Robert L. Byman
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