

RIGHT OF PRIVACY — RELATIVE'S INTEREST IN A DECEASED'S NAME OR LIKENESS

Bradley v. Cowles Magazines, Inc.
26 Ill. App. 2d 331, 168 N.E.2d 64 (1960)

Plaintiff brought suit to recover from the publisher of *Look* magazine for invasion of right of privacy. The basis of the action was defendant's publication of two articles relating the facts of the highly publicized kidnap-murder of plaintiff's son, a fourteen-year old Chicago youth. The articles mentioned the mother only with regard to her being notified of the kidnapping of her son. No picture or other description of the plaintiff was included. The Illinois court of appeals, in affirming the lower court, held that the complaint failed to state a cause of action. The court stated that the subject matter of the article was a matter of legitimate public news interest and that the mother could not recover when she herself was not featured or substantially publicized.

The tort of invasion of privacy is relatively new. Since the appearance of *The Right of Privacy* in 1890,¹ authored by Warren and Brandeis, the tort has received general recognition in most states.² However, there is still considerable confusion as to the nature and extent of the tort.³

The interest protected by the right of privacy is one's right "to be let alone, to be free from unwarranted publicity, and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned."⁴ However, the actual injury to plaintiff in most cases involves nothing more than mental anguish.⁵ Truth is not a defense,⁶ nor is a showing of physical harm or pecuniary loss necessary to collect damages.⁷ While the real injury in many right of privacy cases is that of mental anguish, invasion of the right of privacy constitutes a tort separate from the intentional infliction of mental distress. Although these two theories of recovery often overlap,⁸ mental distress caused by a publication

¹ Warren and Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890).

² Prosser states in a recent article that the right of privacy is now accepted in twenty-six states plus the District of Columbia, would probably be accepted in seven additional states, is accepted in a limited form in four states, and has been rejected by the courts of four states. Prosser, "Privacy," 48 Calif. L. Rev. 383, 386-88 (1960).

³ Description of the "disarray" in right of privacy will be found in Prosser, "Privacy," 48 Calif. L. Rev. 383 (1960). The entire article contains a thorough analysis of the historical development and present state of the law of right of privacy.

⁴ Syllabus 1, *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956). For another definition of the interest protected, see Restatement, Torts § 867 (1939).

⁵ Restatement, Torts § 867, comment *b* (1939).

⁶ *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (Ct. App. 1931).

⁷ *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); *Housh v. Peth*, *supra* note 4.

⁸ See Prosser, Torts § 97, at 639 (2d ed. 1955).

has generally been treated under the categories of libel, slander, or right of privacy, and not as intentional infliction of mental distress.⁹

The Illinois courts had previously recognized the right of privacy in a case involving an unauthorized commercial use of plaintiff's picture in an advertisement¹⁰ and allowed recovery for the unauthorized use of plaintiff's picture in a featured article in a magazine.¹¹ In both these cases the plaintiff was alive when the picture was used. In denying recovery in the principal case, the court seems to have rested its decision both on the fact that plaintiff herself was not featured or substantially publicized and that the subject matter of the article was privileged due to its public news value.¹²

However, since the court in denying recovery stressed the fact that the plaintiff herself was not featured or substantially publicized, this case might well be used to support the proposition that in absence of substantial publicity given a plaintiff personally, no recovery can be allowed a person for publication of offensive publicity concerning his deceased relative. There is substantial support for this view.¹³

An alternate theory—the "relational right of privacy"—was not considered by the court. Under this theory the unprivileged use of the name or likeness of a deceased relative is recognized as an invasion of the personal rights of the plaintiff, notwithstanding the fact that plaintiff's personal name or likeness is not used at all. It is assumed because of the close family relationship of plaintiff to the deceased, that plaintiff has an interest protected by law in the deceased's name or likeness.

Although many courts have denied recovery in cases concerning publicity given deceased persons, a few have allowed recovery and it seems clear that courts achieve a similar result in the analogous area relating to the mutilation of dead bodies. This area has not developed as part of the law of right of privacy. Yet the theory underlying recovery for mutilation is analogous to the theory supporting recovery for the unprivileged use of the deceased's name or likeness in that both concern activity directed against the deceased.

⁹ See Prosser, *op. cit. supra* note 8, at §§ 11, 97.

¹⁰ *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952).

¹¹ *Annerino v. Dell Publishing Co.*, 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958).

¹² Since the subject matter of the article was an already well publicized murder involving racial tension, the entire article might well be privileged due to its dealing with matters of legitimate public news interest. The privilege to print that in which the public has a legitimate news interest is well established in the law. *Elmhurst v. Pearson*, 153 F.2d 467 (D.C. Cir. 1946); *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (Ct. App. 1939); *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W.2d 972 (1929). In *Abernathy v. Thornton*, 263 Ala. 496, 83 So. 2d 235 (1955) and *Smith v. Doss*, 251 Ala. 250, 37 So. 2d 118 (1948), the name or likeness of plaintiffs' deceased was published, although the names or likenesses of plaintiffs themselves were not published at all. The courts denied recovery entirely on the basis that the subject matter was privileged due to its public news value.

¹³ *James v. Screen Gems, Inc.*, 174 Cal. App. 2d 650, 344 P.2d 799 (Ct. App. 1959); *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 325 P.2d 659 (Ct. App. 1958); *Kelley v. Post Publishing Co.*, 327 Mass. 275, 98 N.E.2d 286 (1951); *Atkinson v. Doherty & Co.*, 121 Mich. 372, 80 N.W. 285 (1899); *Schuyler v. Curtis*, 147 N.Y. 434, 42 N.E. 22 (1895).

Courts recognize a property right of a surviving spouse or next of kin in the dead body and allow recovery for mutilation (including unauthorized autopsies).¹⁴ Damages may be based entirely on mental anguish suffered by the plaintiff, no showing of physical harm or pecuniary damage to the plaintiff being necessary.¹⁵ The relative thus actually recovers for mental anguish caused by physical acts done to the deceased after death. Perhaps a better statement of the real basis of allowing plaintiff to recover in mutilation cases was stated by Judge Pound: "An indignity to the dead is an offense to the living."¹⁶ The relational right of privacy theory discussed herein would extend recovery beyond the physical mutilation of the body of deceased to the more intangible use of deceased's name or likeness.

Four states have statutes making the unauthorized use of one's name or likeness for advertising purposes a misdemeanor and providing for the recovery of damages in a civil action.¹⁷ Three of these states allow recovery by the heirs or next of kin for the unauthorized use for advertising purposes of a person's name or likeness after his death.¹⁸

The unfortunate result of denying recovery for relatives when offensive publicity is given the deceased is that if the court does not recognize a relational right of privacy, there is no one who can bring a civil action in absence of a statute. Defendant thereby is completely exonerated from civil liability simply because the person featured in the offensive publicity is dead. No survival of action theory can be used satisfactorily because the tort occurs after deceased's death.

No attempt is made here to describe either the acts which will invade plaintiff's interest or the circumstances in which such acts will be privileged.

¹⁴ *Streipe v. Liberty Mut. Life Ins. Co.*, 243 Ky. 15, 47 S.W.2d 1004 (1932); *Blanchard v. Brawley*, 75 So. 2d 891 (La. Ct. App. 1954); *Burney v. Children's Hosp.*, 169 Mass. 57, 47 N.E. 401 (1897); *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891); *Beller v. City of New York*, 269 App. Div. 642, 58 N.Y.S.2d 112 (1945).

¹⁵ *Supra* note 14; Restatement, Torts § 868, comment *b* (1939).

¹⁶ *Finley v. Atlantic Transport Co.*, 220 N.Y. 249, 259, 115 N.E. 715, 718 (1917).

¹⁷ N.Y. Civ. Rights Law, §§ 50-51; Okla. Stat. Ann. tit. 21, §§ 839-40 (1958); Utah Code Ann. §§ 76-4-8 and 76-4-9 (1953); Va. Code Ann. § 8-650 (1957).

¹⁸ Oklahoma, Utah, and Virginia, *supra* note 17. A Utah case decided under one of these statutes confirms the fact that such statutes give a cause of action to the heirs or next of kin even though the unauthorized use occurs after the death of deceased. *Donahue v. Warner Bros. Corp.*, 2 Utah 2d 256, 272 P.2d 177 (1954). These three statutes have been referred to as providing for survival of a cause of action for an invasion of the right of privacy. Concurring opinion in *Donahue v. Warner Bros. Pictures*, 194 F.2d 6, at 15 (10th Cir. 1952); Note, 38 Va. L. Rev. 117, 125 (1952). However, it would seem that these three statutes really recognize a property interest in the name or likeness of deceased, which is held by the heirs or next of kin. These statutes do not provide for "survival" in the usual sense because the deceased is dead at the time of the tort. This is particularly apparent from the facts of *Donahue v. Warner Bros. Pictures*, 194 F.2d 6 (10th Cir. 1952), in which suit was brought by the heirs of Jack Donahue for use of his name and personality. Jack Donahue died October 1, 1930; the act which was the basis of the complaint was the showing of a certain motion picture, which depicted Donahue as a character, for the six months preceding filing of the complaint. 194 F.2d at 15, 16.

The effort here is solely to urge that a legally protected interest should be accorded to surviving relatives of deceased persons for mental anguish caused by offensive publicity given the deceased.

In at least two right of privacy cases this interest of the surviving relatives for the offensive use of the deceased's picture has been recognized. Although neither court used the phrase "relational right of privacy," this seems to be an appropriate description of the theory of the cases. Both involved publication of pictures of plaintiff's deformed babies. The babies died shortly after birth, and defendants published pictures of the deformed babies after they were dead. In both cases the parents recovered for mental anguish suffered due to the publication of the pictures.¹⁹

Although Ohio has recognized the right of privacy,²⁰ no Ohio court has dealt with the relational right of privacy theory expressly or with a factual situation involving undue publicity or use of a deceased's name or likeness.²¹ It is desirable that in an appropriate situation Ohio adopt the relational right of privacy.

¹⁹ In *Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930), a child was born with its heart outside its body. The child was taken to a hospital where it died shortly thereafter. After the child's death, the hospital allowed a newspaper to take and publish pictures of the child. The parents, alleging that they had suffered mental anguish, loss of personal reputation, and physical illness, brought suit against the newspaper and the hospital for an injunction and substantial damages. The court granted the relief sought on the basis of invasion of right of privacy.

Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912), an earlier Kentucky case, involved a similar situation. While it was decided on a theory of a property right in the photograph, a later Kentucky court stated that it was a case of invasion of right of privacy. *Brents v. Morgan*, *supra* note 7, at 773, 288 S.W. at 971. Deformed children, twins with bodies physically joined, were born to plaintiff. The babies died, and after they were dead plaintiff employed defendant, a photographer, to photograph the corpses. Defendant did so, but made more copies than plaintiff requested, and obtained a copyright for himself on the picture by use of one of the copies. The court allowed substantial damages, even though plaintiff personally was not identifiable from the pictures in any way and the only item of damages was mental anguish of plaintiff. The extent to which the court analogized the case to one involving physical mutilation and applied a theory similar to a relational right of privacy is apparent from the following statement of the court: "The most tender affections of the human heart cluster about the body of one's dead child. A man may recover for any injury or indignity done the body, and it would be a reproach to the law if physical injuries might be recovered for, and not those incorporeal injuries which would cause much greater suffering and humiliation." 149 Ky. at 509, 149 S.W. at 850.

²⁰ *Housh v. Peth*, *supra* note 4.

²¹ The entire case law of Ohio concerning right of privacy consists of the following cases in addition to *Housh v. Peth*, *supra* note 4: *Schmukler v. Ohio Bell Tel. Co.*, 66 Ohio L. Abs. 213, 116 N.E.2d 819 (C.P. 1953); *Friedman v. Cincinnati Hotel Employees*, 6 Ohio Supp. 276, 20 Ohio Op. 473 (C.P. 1941), *rev'd on other grounds*, 86 Ohio App. 189, 90 N.E.2d 447; *Johnson v. Scripps Publishing Co.*, 32 Ohio L. Abs. 423, 18 Ohio Op. 372 (C.P. 1940); *Martin v. F.I.V. Theatre Co.*, 26 Ohio L. Abs. 67, 10 Ohio Op. 338 (C.P. 1938).