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THE RIGHT TO PRIVACY IN THE NAME, REPUTATION AND PERSONALITY OF A DECEASED RELATIVE

The twentieth century has witnessed the development of the individual's interest in privacy from a mere plea in a law review article to its present position as a well-recognized legal right, infringement of which results in tort liability. The right to privacy, or the right to be let alone, was first espoused in 1890 by Samuel D. Warren and Louis D. Brandeis.[1] In one of the first tests of the theory, the New York Court of Appeals rejected it.[2] This ruling, however, was later reversed by statute.[3] The first court to adopt the theory was the Supreme Court of Georgia in 1905.[4] Since then the tort has prospered; thirty-one jurisdictions have recognized the right.[5] Four additional states have recognized it to a limited degree by statute.[6]

The question examined in this article is whether or not any right to privacy exists in the name, reputation, and life history of a deceased which can be exercised by his legal representative or next of kin. While a person is alive he is protected against certain invasions of his private life by this right to privacy. Does the fact that he is now dead allow opportunists to commit these invasions which, but for the victim's demise, would be actionable?

In the recent case of *Maritote v. Desilu Productions, Inc.*[7] the administratrix of the estate of the late Al Capone and his wife and son sued the producers, the sponsor and the broadcasting company which telecast several programs supposedly based on the life of the deceased.[8] The estate claimed a property right in the name, likeness, and personality of the deceased,[9] while the wife and son claimed an

1 Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2 Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). A picture of the plaintiff, apparently an attractive young lady, was used without her consent by the defendant company to advertise its product.

3 N. Y. CIV. RIGHTS LAW §§ 50-52.

4 Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

5 PROSSER, LAW OF TORTS 831-32 (3d ed. 1964). Dean Prosser lists the following jurisdictions as having adopted the right to privacy: Peay v. Curtis Pub. Co., 78 F. Supp. 305, (D.D.C. 1948); Smith v. Doss, 251 Ala. 250, 37 So. 2d 118 (1948); Smith v. Suratt, 7 Alaska 416 (1928); Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945); Olan Mills of Texas v. Dodd, 234 Ark. 495, 353 S.W.2d 22 (1962); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Korn v. Rennison, 21 Conn. Sup. 400, 156 A.2d 476 (1959); Barbieri v. News-Journal Co., 189 A.2d 773 (Del. 1963); Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944); Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930); Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952); Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E.2d 306 (1949); Bremmer v. Journal-Tribune Pub. Co., 247 Iowa 817, 76 N.W.2d 762 (1956); Kunz v. Allen, 102 Kan. 883, 172 P. 532 (1918); Trammell v. Citizens News Co., 285 Ky. 529, 148 S.W.2d 708 (1941); Hamilton v. Lumbermen's Mut. Cas. Co., 82 So. 2d 61 (La. Ct. App. 1955); Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962); Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W.2d 911 (1948); Martin v. Dorton, 210 Miss. 668, 50 So. 2d 391 (1951); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); Welsh v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952); Norman v. City of Las Vegas, 64 Nev. 38, 177 P.2d 442 (1947); Frey v. Dixon, 141 N.J.Eq. 481, 58 A.2d 86 (Ch. 1948); Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956); Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438 (1941); Bennett v. Norban, 396 Pa. 94, 151 A.2d 476 (1959); Holloman v. Life Ins. Co. of Va., 192 S.C. 454, 7 S.E.2d 169 (1940); Truxes v. Kenco Enterprises, 119 N.W.2d 914 (S.D. 1963); Langford v. Vanderbilt University, 199 Tenn. 389, 287 S.W.2d 32 (1956); Roach v. Harper, 143 W.Va. 869, 105 S.E.2d 564 (1958).

6 N. Y. CIV. RIGHTS LAW §§ 50-52; OKLA. STAT. ANN. tit. 21, § 839 (1958); UTAH CODE ANN. § 76-4-8 (1953), § 76-4-9 (Supp. 1963); VA. CODE ANN. § 8-650 (1950).

7 230 F. Supp. 721 (N.D. Ill. 1964).

8 The original telecast was a two-part drama broadcast in 1959, based on the book, "The Untouchables," by Eliot Ness (1957). Subsequently, the Desilu Company produced a series of weekly television broadcasts, called "The Untouchables" which often used the name and character of the deceased. The plaintiffs contended that the facts portrayed in these telecasts were largely fictitious.

9 The theory of this claim is discussed in Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 Nw. U. L. REV. 553 (1960). Mr. Gordon was the attorney for the plaintiffs in *Maritote*.

invasion of their right of privacy even though they were not mentioned in the telecasts. The court rejected the estate's property right theory and viewed both claims as being for an invasion of privacy. In granting the defendant's motion to dismiss, the federal court, stating that it was relying on Illinois law, held that the right of privacy is a personal right which dies with an individual and cannot be claimed by his estate. Likewise, the relatives of the deceased must prove an invasion of their own privacy before they can recover. After reaching this decision Judge Marovitz stated in the last two paragraphs of the opinion[10] that he agreed with the plaintiff that a wrong had been committed, and that there ought to be a remedy. However, as a federal judge he was bound by state law, and the arguments would be better raised in the state courts. He concluded by urging a reform of the law.

An initial distinction must be made between an invasion of privacy which takes place during life and one which takes place after death. In the case of the former, survival of the cause of action will depend upon the applicable survival statute in the jurisdiction.[11] The latter is the problem we are concerned with here: the right sought to be enforced is not a right of the deceased but rather it is actually the right of the living relatives of the deceased. It is an accepted principle that the right to privacy is a personal right which dies with an individual.[12] That is, the deceased person suffers no wrong from an act which would have been an invasion of his privacy had he been living. Thus the *relatives are enforcing their own right to privacy* which has been invaded by unwarranted publications or disclosures concerning a deceased relative. The failure of some courts to recognize this distinction has led to much of the confusion in this area.[13]

The plaintiff, who is a relative of the deceased, need only show an invasion of his own privacy. Usually there has been no publication of the facts of the relative's life, not even a mention of his name. In what sense, then, has the relative's privacy been invaded? The answer lies in the intimacy of the relation which should give the relative a protectible interest in the name, personality and reputation of the deceased. The intimacy is such that postmortem abuses of name, personality, and reputation necessarily harm surviving relatives. Dean Green[14] has strongly advocated recognition of these relational interests:

> Personalities live long after their bodies die. The relation between living and deceased relatives is no mere matter of sentiment to be brushed aside as valueless. It is as real as between living members of a family. And once it is recognized that the family relation continues after death, and that in the relation is found one of the dearest and most valued interests known to human beings, there should be no difficulty either in reaching or articulating acceptable judgments where such interests are involved.[15]

One of the early cases in the history of the right to privacy dealt with this prob-

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10 Maritote v. Desilu Productions, Inc., 230 F. Supp. 721, 726 (N.D. Ill. 1964).

11 Reed v. Real Detective Publishing Co., 63 Ariz. 294, 162 P.2d 133 (1945). The defendant died and the plaintiff sought to substitute his administratrix. The court held that the invasion was an injury to the person equal to physical injury and under the survival statute the cause of action could survive the defendant's death.

12 Judge Marovitz cited Ravallette v. Smith, 300 F.2d 854 (7th Cir. 1962), for this principle in the *Maritote* case.

13 See Starrels v. Commissioner, 304 F.2d 574 (9th Cir. 1962). This was a tax case in which the plaintiff attempted to exclude from gross income an amount of money received from Loews, Inc., for the right to do a story about the plaintiff's father. The plaintiff was relying on the theory that he would have suffered personal injuries if the story had been done without his consent, and this amount of money therefore represented a sum of money received on the settlement of a claim for damages. The Court in refusing this exclusion relied on the principle that the right to privacy is a personal right which dies with an individual. The plaintiff, therefore, would have had no cause of action which could have been pursued or settled. The Court failed to distinguish between the father's right to privacy which died with him and the son's relational right which belonged to him as a surviving relative.

14 Green, *Relational Interests,* 29 ILL. L. REV. 460 (1934).

15 *Id.* at 485-86.

lem. In *Schuyler v. Curtis*[16] the defendants were collecting money for the erection of a statue of the plaintiff's aunt, acclaiming her as the typical woman philanthropist. Nothing derogatory was intended by their actions for they planned to honor her as a great woman in history. The plaintiff, who was the deceased's nearest living relative, brought suit to enjoin any activities in furtherance of this plan. He alleged an invasion of privacy in that the family's consent had not been secured, and in that they were dismayed because such activities would have dismayed the deceased. In reversing the injunction issued by the lower Court, the Court held that any right of the deceased died with her and did not descend to her legal representative or next of kin. Relief could not be granted on a complaint that the proposed statue would have disturbed the deceased were she living. The Court examined the relational right to privacy in the surviving relatives and found that the facts here were not sufficient to constitute an invasion of their privacy. The Court discussed at length the merits of defendants' project, and reasoned that the plaintiff could not be caused mental distress by defendants' attempt to honor the decedent.

It is important to note that the Court did not deny that there could be a relational right in the surviving relatives. In fact it stressed the right of the living to protection from improper interference with the character or memory of a deceased relative resulting in mental distress.[17] The Court concluded by saying: "[O]ur decision furnishes, as we think, not the slightest occasion for the belief that under it the feelings of relatives or friends may be outraged, or the memory of a deceased person degraded, with impunity, by any person . . . ."[18] The Court was clearly of the opinion that relief could be granted if the relatives could show grounds sufficient to indicate a degrading of the deceased's memory, such as an improper use of the statue.

Several cases have allowed recovery to the surviving relatives of a deceased person upon a showing of an invasion of privacy. There have been two cases dealing with the photographing of deformed children. In *Douglas v. Stokes*[19] plaintiffs' Siamese twins died shortly after birth. The defendant was hired by the parents to take only twelve pictures of their bodies. Instead the defendant produced additional copies upon which he obtained a copyright. The parents sued on the grounds of humiliation and hurt feelings. Recovery was allowed for violation of the agreement. However, the Court did not limit itself to this but went on to discuss the parental affection for the children, and said that since recovery could be allowed parents for indignities done to the bodies of the children, so also would it be allowed for these incorporeal injustices. The same Kentucky Court in 1927, discussing another right to privacy case,[20] said *Douglas* could be put on no other grounds than the unwarranted invasion of privacy. *Douglas* has often been distinguished because of the violation of the agreement involved, however, this would appear to be a niggardly interpretation in view of the Kentucky Court's broader construction of its own holding.

In *Basemore v. Savannah Hospital*[21] a hospital allowed a photographer to take pictures of the dead body of a deformed child and the parents were allowed to recover for an invasion of their privacy. The Court also analogized from the dead body cases and held that the right here was one belonging to the parents and not surviving to them from the deceased child. This case is thought to be weak authority because it involved a violation of a confidential relationship.[22] Nevertheless, the

16 147 N.Y. 434, 42 N.E. 22 (1895). Based on the findings in the case the dissenting judge felt there was an unauthorized invasion of the plaintiff's right to the preservation of the name and memory of the deceased.

17 *Id* at 25.

18 *Id.* at 27.

19 149 Ky. 506, 149 S.W. 849 (1912).

20 Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

21 171 Ga. 257, 155 S.E. 194 (1930). The dissenting judge felt that the right belonged to the child, not to the parents, and died with him.

22 Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939).

case stands for the principle that there can be an invasion of privacy though the actionable transgression is visited upon the person or body of a decedent.

In both of these cases the Courts rely on the relational interest that the parents have in the bodies and memories of their children. Their interest in preserving this memory was protected from the unnecessary notoriety and humiliation which would follow the publication of these pictures. It was their right to privacy that was protected, not the right of the decedent.

Fitzsimmons v. Olinger Mortuary Ass'n[23] involved an undertaker who used in his advertisements pictures taken of a particular funeral. The advertisement was intended to stress the extra service provided by the mortuary in transporting the decedent by plane from the place of death to the place of burial. The widow who had asked for no undue notoriety concerning the funeral, sued for mental distress upon the publication of the advertisements and recovered damages. Here again the case is attacked as being based on the violation of an implied condition in an oral contract. This criticism misses the significance of the developing law. To be sure, the court will seek other grounds for liability in order to buttress the case for consequential damages to relatives. Still no one can really believe that a tenuous breach of a nonexistent contractual condition supplies the justification for generous money damages. Rather the law in its time-honored fashion is using old bottles to market the new wine of the right to privacy. This is evident when one considers that the foreseeability test of damages applied in these so-called contract cases is really the tort test of foreseeability. Thus recovery is allowed to those within the foreseeable risk of harm and is not limited to the expectable contract breaches.

Two principles afford a defense to an action for invasion of privacy, and where these defenses are present, no cause of action would exist even if the deceased himself were alive to bring it. First, where an event is of newsworthy interest, the press is privileged to report it under the freedom of press guaranteed by the first amendment. Second, when a person becomes a public figure, he relinquishes a certain amount of his right to privacy.

Unfortunately, many of the cases dealing with the relative's right to privacy also involve these principles. Where a publication is in the public interest in that it is a newsworthy item or because it involves a public figure, the courts must deny relief just as if the case were brought by the deceased. Many of these cases have been brought by the parents of children whose violent deaths were subsequently reported in newspapers and magazines.[24] Decisions for the defendant are a sad comment on a society whose sadistic nature deems these articles noteworthy.[25] Also where the deceased has by his own actions made himself a public figure, relief will be denied because he has thereby surrendered a portion of his right to privacy, and the public has an interest in knowing the facts.[26]

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23 91 Colo. 544, 17 P.2d 535 (1932).

24 *E.g.,* Mahoffey v. Official Detective Stories, Inc., 210 F.Supp. 251 (W.D. La. 1962) (magazine article on murder of plaintiff's son); Abernathy v. Thornton, 263 Ala. 496, 83 So. 2d 235 (1955) (picture of deceased son with bullet protruding from his head); Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344 (1956) (publication and sale of pictures of plaintiff's murdered daughter when her body was dragged from a river); Bradley v. Cowles Magazine Co., 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960) (magazine article on murder of the plaintiff's son); Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 76 N.W.2d 762 (1956) (pictures of murdered son's body when found); Kelly v. Post Publishing Co., 327 Mass. 275, 98 N.E.2d 286 (1951) (picture of daughter killed in automobile accident published in newspaper). However, in Sellers v. Henry, 329 S.W.2d 214 (Ky. 1959), the Court reversed a summary judgment for defendant where there had not been an affirmative showing that the exhibition was in the public interest.

25 See Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 76 N.W.2d 762 (1956).

26 Smith v. Doss, 251 Ala. 250, 37 So. 2d 118 (1948). The "deceased" had disappeared years before and another man had been tried for his murder. "Deceased" later appeared in California. The Court held that by this he had made himself a public figure, and the public had an interest in hearing about him. Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (Dist. Ct. App. 1939). The Court felt that the deceased by jumping off a building had made herself a public figure.

In each of these public interest cases (as distinguished from the relational suit where no newsworthy event has occurred) the determinative feature has been the legitimate interest of the community in the facts of a public incident, even though attention must be focused on an otherwise obscure individual, and a sense of humiliation and mental distress brought to bear upon the surviving relatives of such an individual. *Metter v. Los Angeles Examiner*[27] presented this problem. The defendant newspaper published a story and picture concerning a woman's suicide leap from a building. The deceased's husband sued for an invasion of his "relational right" of privacy. Recovery was denied on this ground because the deceased's suicide was a matter of public record not subject to any rights of privacy. The Court here was motivated by the public nature of the act and did not otherwise rule on the existence or nonexistence of "relational rights."

Two California cases[28] dealing with the question of whether or not a relational right to privacy might exist in the relatives of a deceased held that there was no such right. Neither case involved the element of legitimate public interest in the newsworthiness of a story. One case was a suit brought by a widow for the wrongful portrayal of her husband (a son of Jesse James, famed bad-man of the Old West) in a movie.[29] The other case involved a publication of allegedly untrue statements concerning the death of Jack Thompson, a one-time prizefighter, in a magazine article on boxers.[30] The action was brought by his sisters. Recovery was denied in both cases. The courts refused to extend the right to privacy to third parties because to do so would open it up to all of a deceased's relatives. Both cases relied on the California case of *Coverstone v. Davies*,[31] which in turn cited the previously discussed *Metter*[32] case for its authority. In *Coverstone* the parents of a boy sued for an invasion of their privacy based on the publicity attendant upon the arrest and trial of their son. This was clearly a public interest case, just as *Metter* was. *Coverstone* was factually distinguishable from the succeeding two cases on the element of public interest in a matter of public record. The *Coverstone* court said that no cases had been shown wherein this relational right had been recognized. Moreover, reason and authority did not support an extension of the right because this would open it to all relations of the deceased.[33] Dean Green has criticized this kind of reasoning[34] and one suspects that the fears of the California Court are exaggerated.

Conclusion

No strong case has been made for or against the recognition of this relational right. The cases which have denied a remedy have usually involved other elements which would have defeated the recovery anyway. Likewise, the cases cited in favor of a right of action have also involved other elements upon which to allow recovery. At least it can be said that the reforms suggested by Dean Green and Judge Marovitz have not been rejected by the courts thus far after consideration of the precise question. The wrongful exploitation of a person's name, reputation and personality

27 35 Cal. App. 2d 304, 95 P.2d 491 (1939).

28 James v. Screen Gems, Inc., 174 Cal. App. 2d 650, 344 P.2d 799 (Dist. Ct. App. 1959); Kelly v. Johnson Publishing Co., 160 Cal. App. 2d 718, 325 P.2d 659 (Dist. Ct. App. 1958).

29 James v. Screen Gems, Inc., *supra* note 28.

30 Kelly v. Johnson Publishing Co., 160 Cal. App. 2d 718, 325 P.2d 659 (Dist. Ct. App. 1958).

31 38 Cal. App. 2d 315, 239 P.2d 876 (1952).

32 Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939); see text accompanying note 27 *supra*.

33 Another rather interesting case was that of Schumann v. Loews, Inc., 135 N.Y.S.2d 361 Sup. Ct. 1954) in which the plaintiff brought allegations of invasion of privacy in over 60 jurisdictions including the United States and several foreign countries. The defendant had produced a movie which depicted the plaintiff's great-grandfather as being insane. The Court, finding no precedent for recovery either in New York or in a sister state, refused the relief sought. The cases cited by plaintiffs either did not involve dead persons or great-grandchildren.

34 Green, *supra* note 14.

should not be permitted just because that person is dead. To do so might often result in real injury to the deceased's surviving relatives, injury from which the law could protect them. Denial of this protection because the law cannot protect against all injuries seems an inffectual, indeed a timid, response to the commercial profiteering at the expense of helpless relatives.

If these relational rights are to be recognized, certain restrictions and limitations would have to be placed upon them. The right should be permitted only when the relative is deceased, for during his lifetime he himself can protect his privacy. Moreover, the relatives to whom this right should be extended would also have to be restricted. Limiting it to the immediate family relationships of parents, spouse, children and brothers and sisters does not seem too broad an extension.

Recognition of this relational right would protect against crass invasions of privacy which are becoming frequent in these days when radio, television, motion pictures, newspapers and magazines intrude so much into our lives. Whether the right is to be recognized deserves full and fair consideration on its own merits viewed as a separate cause of action sounding in tort and not ancillary to any other remedy.

Robert P. Kennedy