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Torts - Invasion of Privacy - Unauthorized Use of Photograph

Charles Simon

TORTS–INVASION OF PRIVACY–UNAUTHORIZED USE OF PHOTOGRAPH

Marie Brauer brought an action in tort, on behalf of her son Michael, for an alleged invasion of privacy. The defendant, Globe Newspaper Company, had previously published, with permission, a picture of Michael in connection with an annual Christmas series. Two years later, however, the defendant, without permission, reproduced the same picture in an article on mental retardation. Since the first publication was in no way associated with retardation, Marie Brauer contended that the second publication constituted an invasion of privacy, in that it created the inference that her son, who in fact was a normal child, was retarded. The Supreme Judicial Court of Massachusetts stated that the recognition of the photograph by neighbors, friends and family of the child "falls short of the kind of publicity upon which an action for the invasion of privacy, if acknowledged to exist, would have to be based."[1] Recovery was, therefore denied. *Brauer v. Globe Newspaper Co.*, — Mass. —, 217 N.E. 2d 736 (1966).

As yet, no case has determined that there exists in Massachusetts a legally protected right of privacy.[2] The issue has been raised but never decided, as the courts of Massachusetts have carefully preserved the question.[3] The obvious evasion, in the *Brauer* case, of the question of whether or not a right of privacy exists, lends itself to a discussion of the nature of this tort and what might result from Massachusetts' refusal to recognize the right of privacy.

One of the best and most explicit definitions of the right of privacy has been formulated by Professor Cooley,[4] who described it as the right to be let alone.[5] This phraseology was adopted and expanded by a Kentucky court in the leading case of *Brents v. Morgan*,[6] where it was held to be:

[1] Brauer v. Globe Newspaper Co., — Mass. —, 217 N.E.2d 736, 740 (1966).

[2] Thayer v. Worchester Post Publishing Co., 284 Mass. 160, 187 N.E. 292 (1933); Marek v. Zanol Products Co., 298 Mass. 1, 8 N.E.2d 393 (1937).

[3] Themo v. New England Newspaper Publishing Co., 306 Mass. 54, 27 N.E.2d 753 (1940). In Wright v. R.K.O. Radio Pictures, 55 F. Supp. 639 (D. Mass. 1944), the court considered that the state had rejected the right of privacy; but in Kelley v. Post Publishing Co., 327 Mass. 275, 98 N.E.2d 286 (1951), the question was said to be still open. See also Frick v. Boyd, 214 N.E.2d 460 (1966).

[4] 1 COOLEY, TORTS § 360 (3d ed. 1906).

[5] *Id.* at 364.

[6] 221 Ky. 765, 299 S.W. 967 (1927).

[t]he right of privacy is the right of an individual to be free from unwarranted publicity, [or] the right to live without unwarranted interference by the public about matters with which the public is not necessarily concerned.[7]

Dean Prosser, a leading authority in the law of torts, has stated that the law of privacy appears to be a complex of four distinct wrongs, each being an interference with the plaintiff's right to be let alone.[8] The first of these torts consists of intruding upon plaintiff's physical solitude or seclusion, as by invading his quarters,[9] or tapping his telephone wires.[10] A second group of cases has found a cause of action in publicity which violates the ordinary decencies given to private information, even though the information may be true and no action would lie for defamation. Thus, publication of a picture of one's deformed child,[11] or the details of a humiliating illness,[12] or the fact that he has not paid his debts,[13] may give a cause of action for invasion of privacy. The third tort, which is in question in the *Brauer* case, consists of putting the plaintiff in a false, but not necessarily defamatory, position in the public eye.[14] Cases in this category have involved signing one's name to a public telegram,[15] or letter,[16] attributing to him views which he does not hold, or using his picture, as in the *Brauer* case, to illustrate an article with which he has

[7] *Id.* at 772, 299 S.W. at 970. Similarly, a New Jersey court as said, "the right of privacy is the right of an individual to be free from unwarranted publicity, or in other words, to be protected from any wrongful intrusion into his private life which would outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities." McGovern v. Van Riper, 137 N.J. Eq. 24, 32, 43 A.2d 514, 518 (1945).

[8] Prosser, "*Privacy*," 48 CALIF. L. REV. 383, 389.

[9] Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905 (1924) (woman's bedroom on steamboat); Walker v. Whittle, 83 Ga. App. 445, 64 S.E.2d 87 (1951) (unlawful entry by officer); Welsh v. Roehm, 125 Mont. 517, 241 P.2d 816 (1952) (entry by landlord).

[10] Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931). *Accord,* McDaniels v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939) (listening to conversation with microphone).

[11] Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912); Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930). In both cases the pictures were obtained in breach of confidence.

[12] Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942).

[13] Thompson v. Adelberg & Berman, 181 Ky. 487, 205 S.W. 558 (1918). The same is true of past history, as where a motion picture revives the memory of the name and career of a reformed prostitute who was the defendant in a notorious murder trial. See Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931).

[14] PROSSER, TORTS, § 638 (2d ed. 1955).

[15] Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438 (1941). See Wigmore, *The Right Against False Attribution of Belief or Utterance,* 4 KY. L.J. 3 (1916).

[16] Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207, 127 P.2d 577 (1942). The name of an actress was signed to 1,000 letters to men which apparently suggested an assignation.

no reasonable connection.[17] These three torts are primarily concerned with the protection of a mental interest, and are only a phase of the larger problem of the protection of peace of mind against unreasonable disturbance.[18] Finally, the fourth tort consists of the appropriation of some element of the plaintiff's personality for a commercial use, such as the unauthorized use of his name or picture for advertising purposes.[19]

The refusal of the Massachusetts courts to recognize an independent right of privacy stems back to the common law concept of predicating recovery for the invasion of privacy upon the violation of some other right, such as contract, express or implied,[20] or some property right.[21] The common law courts took no cognizance of a right to be let alone.[22] There was little need to develop such a right in an English society which was loosely organized and in which news traveled very slowly. Therefore, early cases relied upon the fictions of implied contract and property rights to protect an individual's right of privacy.[23] They did not recognize that such a right existed independently.

The invasion of the right of privacy by the publication of a person's photograph, complained of in the *Brauer* case, was considered as early as 1888, in the case of *Pollard v. Photographic Company*.[24] The plaintiff, Miss Pollard, employed a photographer to take her picture. Subsequently, upon discovering that the picture was being exhibited in the photographer's shop window as a Christmas card, she brought a bill for an injunction to restrain the photographer from exhibiting or selling copies of her photograph. The defendant contended that the court had no jurisdiction to grant an injunction where there was no injury to the plaintiff's property and that a person had no property right in his own features. The court, however, granted the injunction on the grounds that there was an implied

[17] Leverton v. Curtis Pub. Co., 192 F.2d 974 (3d Cir., 1951). Peay v. Curtis Pub. Co., 78 F. Supp. 305 (D.D.C., 1948); Gill v. Curtis Pub. Co., 38 Cal. App. 2d 273, 231 P.2d 565 (1951).

[18] Harper & McNelly, *A Re-examination of the Basis for Liability for Emotional Distress*, WIS. L. REV. 426 (1938); ELDRIDGE, MODERN TORT PROBLEMS, ch. 3 (1941).

[19] Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W.2d 911 (1948).

[20] Abernathy v. Hutchinson, 3 L. J. Ch. 209; 1 H & T 28 (1825) as cited in 12 B. U. L. REV., 353, 361 (1932).

[21] Pope v. Curl, 2 Atk. 342, 26 Eng. Rep. 608 (1741) as cited in 12 B. U. L. REV., *supra* note 20.

[22] 41 ILL. BAR J. 121 (1952), noting Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952).

[23] *Supra* notes 20 and 21.

[24] 40 Ch. D 345, 58 L. J. Ch. N. S. 251, 60 L.T. N.S. 418 (1888) as cited in 12 B. U. L. REV., *supra* note 20.

contract not to use the photographs for sale or exhibition and that such a sale or exhibition amounted to a breach of confidence.[25]

It is apparent that the right of privacy is not a contrivance of modern times but a right which has been protected under one mode or another since early times.[26] A real impetus was given to the law of privacy by an article by Messrs. Warren and Brandeis.[27] Piecing together old decisions in which relief had been afforded on the basis of legal fictions,[28] the article concluded that such cases were in reality based upon a broader principle which was entitled to separate recognition.[29] This principle they called the right to privacy.[30] The authors also showed that the theories of implied contract, trust or confidence, and property right, which perhaps had rendered sufficient protection to the right of privacy up to this time, were not adequate any more, since the advances in photography had made it possible to take the picture of another on the sly, and these older theories would not apply against a stranger.[31] Nevertheless, many courts were reluctant to establish a distinct right of privacy on the theory that to do so would be to engage in judicial legislation.[32] Thus, in the case of *Roberson v. Rochester Folding Box Co.*,[33] the court denied the existence of the right of privacy and refused injunctive relief when the defendant made use of a picture of the plaintiff to advertise its flour. The court suggested that a legislative body might, "provide that no one should be permitted for his own selfish purpose to use the picture or name of another for advertising purposes without his consent."[34]

The possible consequences of not recognizing the right of privacy, as the Massachusetts court has done in the *Brauer* case, may be seen from the results of the *Roberson* case. Immediately after the New York court handed down the *Roberson* decision, there was a storm of public disapproval.[35] It was so severely criticized by the bar as well as by the press[36]

[25] *Ibid.*

[26] *Supra* notes 20 and 21.

[27] *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[28] *Supra* notes 20, 21 and 24.

[29] *Supra* note 27, at 213.

[30] *Ibid.*

[31] *Id.* at 211.

[32] Roberson v. Rochester Folding Box. Co., 171 N.Y. 538, 64 N.E. 442 (1902).

[33] *Ibid.*

[34] *Id.* at 545, 64 N.E. at 443.

[35] An editorial in 36 AM. L. REV. 636 (1902), said "the decision under review shocks and wounds the ordinary sense of Justice of mankind. We have heard it alluded to only in terms of regret."

[36] The *New York Times* of August 23rd, 1902, wrote: "Several glaring illustrations have of late been furnished of the amazing opinion of Judge Parker of the Ct. of Appeals of this state, that the right to privacy is not a right which in the State of N.Y. anybody is bound to respect, or which the courts will lend their aid to enforce. We happen to know that that decision excited as much amazement among lawyers and jurists as among the promiscuous lay public. . . ."

that one of the concurring judges published a law review article in defense of the decision.[37] Consequently, in the next session of the New York Legislature a statute was enacted making it both a misdemeanor and a tort to make use of the name, portrait or picture of any person for advertising purposes or for the purpose of trade, without his written consent.[38] This statute, however, did not meet the popular demand for the protection of the right of privacy, because it covered only a limited aspect of the right.[39] Also, there was a great deal of confusion in interpreting the statute.[40]

The problem of interpreting the New York statute was encountered in *Wendell v. Conduit Machine Company*,[41] where a former employee who had orally consented to the use of his photograph for advertising purposes brought a bill under the statute to restrain such use. The court, however, denied an injunction on the grounds that the plaintiff had no standing in a court of equity because he terminated his employment after his employer had incurred expenses in connection with the photograph. Nevertheless, it would seem that since the statute expressly provided, that the use of a person's photograph for advertising purposes, without his written consent, was grounds for an injunction and damages, the court should have granted the plaintiff relief.[42]

Three years after the *Roberson* decision the Supreme Court of Georgia, in *Pavesich v. New England Life Insurance Company*,[43] was confronted squarely with the question of whether or not there existed a legally recognized right of privacy. In the *Pavesich* case, the defendant's advertising made use of the plaintiff's name and picture, as well as a false testimonial from him. With the example before it of the confusion in New York due to a statutory enactment to protect an individual's right of privacy, the Georgia court rejected the *Roberson* decision by stating:

> With all due respect to Chief Judge Parker and his associates who concurred with him, we think the conclusion reached by them [in the *Roberson* case] was the result of an unconscious yielding to the feeling of conservatism which naturally arises in the mind of a Judge who faces a proposition which is novel. The valuable influence upon society and upon the welfare of the public of the conservatism of the lawyer, whether at the bar or upon the bench, cannot be overestimated; but this conservatism should not go to the

[37] O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902).

[38] N.Y. Sess. Laws 1903, ch. 132, §§ 1–2. Now, as amended in N.Y. Civil Rights Law 1948, §§ 50–51. Held constitutional in Rhodes v. Sperry & Hutchinson Co., 193 N.Y. 223, 85 N.E. 1097 (1908).

[39] Kacedan, THE RIGHT OF PRIVACY, 12 B. U. L. REV. 353, 627 (1932).

[40] 74 Misc. 201, 133 N.Y.S. 758 (Sup. Ct. 1911); Almind v. Sea Beach Ry. Co., 78 Misc. 445, 139 N.Y.S. 559 (1912).

[41] *Ibid.*

[42] *Id.* at 202, 133 N.Y.S. at 759.

[43] 122 Ga. 190, 50 S.E. 68 (1905).

extent of refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writings upon the law can be called to demonstrate its nonexistence as a legal right.[44]

Since the *Pavesich* case, an overwhelming majority of American jurisdictions have rejected the *Roberson* decision and have recognized the right of privacy as a natural law, non-statutory right.[45] The *Restatement of Torts* gives recognition to the right and defines it, as follows: "A person who unreasonably . . . interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."[46]

In conclusion, it may be stated that while a majority of courts are in favor of recognizing the right of privacy as a common law right,[47] Massachusetts remains stubborn in its opposition. This might cause the people to demand legislation to protect their rights.[48] However, the experience with the New York Civil Rights Law[49] teaches us that statutory enactments to protect a person's right of privacy are inefficient and inadequate in dealing with the numerous situations which may arise in this field. While enacting a statute the legislature usually formulates a rule which is hard and fast, whereas the courts of Massachusetts can adopt the common law in its elasticity to different situations. Therefore, notwithstanding that the *Brauer* case evades the question of whether or not an independent right of privacy presently exists, the decision indicates that Massachusetts may recognize such a right when the question is presented in a proper case. This is determined from the statement made by the court that the publication of the photograph of Michael Brauer "falls short of the kind of publicity upon which an action for the invasion of privacy, if acknowledged to exist, would have to be based."[50]

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[44] *Id.* at 213, 50 S.E. at 78.

[45] *Supra notes* 6, 11, 12, 17, 43. See generally Prosser, *Privacy*, 48 CALIF. L. REV. 383, 386 (1960).

[46] RESTATEMENT, TORTS § 867 (1939).

[47] *Supra* note 45.

[48] Kacedan, *supra* note 39.

[49] *Supra* note 38.

[50] *Supra* note 1.