

Torts - Iowa's Qualified Recognition of Right of Privacy

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The express language of the *McGuire Act* and the intent of Congress permits a manufacturer . . . to fair trade its trade-marked products by means of agreements with retailers of said products even though it is directly engaged in some retailing (by a separately incorporated subsidiary) of those products, i.e., that in passing the *McGuire Act*, Congress had not intended to withhold its benefits from a manufacturer who also sold at the retail level; and further that the manufacturer's price-fixing was entirely "vertical" because its retailing was through a separate subsidiary. . . . It is equally true that competition between the manufacturer's products and products of the same general class manufactured by competing firms remains free and open and there is no agreement between the manufacturer and other manufacturers of similar products or between retailers of these products fixing the prices at which all such products shall be sold. It is only the latter type of horizontal agreements which Congress intended to prohibit by the *McGuire Act*.²⁷

However, the majority of the court found the act to be unequivocal, looking to Congress *only* as to the limitations *expressly* set forth in the *Miller-Tydings Act* and in the *McGuire Act*, stating that the fact remained that McKesson and Robbins were wholesalers operating on the same functional level as the independent wholesalers; both selling to retailers. "Horizontal price fixing is one engaged in by those in competition with each other at the same functional level."²⁸ Since price fixing between wholesalers is *expressly* prohibited by the *Miller-Tydings Act*, and McKesson and Robbins was a wholesaler, despite the fact that it was also a manufacturer, it was in competition with and operated on the same functional level as independent wholesalers to whom their manufacturing division sold, and thus they were in violation of the *Sherman Act*, were not exempt by the *Miller-Tydings Act*, and therefore were acting illegally *per se*.

²⁷ United States v. McKesson and Robbins, Inc., 351 U.S. 305 (1956).

²⁸ Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 389 (1951).

TORTS—IOWA'S QUALIFIED RECOGNITION OF RIGHT OF PRIVACY

Defendant's newspaper published a picture of the mutilated and decomposed body of the plaintiffs' eight year old boy who had been found in a field about one month after he disappeared. Plaintiffs conceded that their son's disappearance and the subsequent discovery of his body were legitimate and privileged news, but they insisted that photographic depiction of the body went beyond those limits and thereby constituted an invasion of their right to privacy. The Iowa Supreme Court, in affirming the lower court's finding for the defendant, recognized for the first time the right of privacy as a sound doctrine. However, because a newsworthy

event was involved, the court considered the use of the photograph as being encompassed by the defendant's privilege to invade privacy when a matter of legitimate public interest arises, limited only as to indecent matter. *Brennmer v. Journal-Tribune Pub. Co.*, 76 N.W. 2d 762 (Iowa, 1956).

In 1890 Samuel D. Warren and Louis D. Brandeis wrote a well known and famous article, "*The Right to Privacy*," which appeared in the *Harvard Law Review*.¹ Throughout the years the article has furnished a stimulus for the courts to recognize a legally protected right to privacy. Now the courts of approximately twenty-two states, including Iowa, hold that such a right exists in one form or another.² Redress has generally been given for the invasion of an individual's right to be let alone or to be free from unwarranted publicity. Whatever the situation, at least two elements must be present before the courts will grant recovery: (1) plaintiff must show he suffered mental distress, and (2) that the defendant lacked or exceeded a privilege to act as he did. These two essentials become meaningful only when placed into the factual context of a decision.³

The first American decision on this subject by a state Supreme Court was *Roberson v. Rochester Folding Box Co.*,⁴ which reflected the resistance of the New York Court of Appeals to this incipient movement in the tort law. But the vigorous dissent of the *Roberson* case recognized the more complex conditions of modern society, and the dissent was later followed in the leading case of *Pavesich v. New England Life Ins. Co.*,⁵ the first American case in a state Supreme Court to affirm the independent legal existence of the right of privacy. In recognizing the plaintiff's right of privacy, the court said that the absence for a long period of time of a precedent for an asserted right is not conclusive evidence that the right does not exist. Where the case is new in principle the courts cannot give a remedy, but where the case is new only in instance, it is the duty of the

¹ 4 Harv. L. Rev. 193 (1890).

² A footnote to *Hazlitt v. Fawcett Publications*, 116 F. Supp. 538, 542, 543 (D.C. Conn., 1953) lists the decisions up to 1953; see Prosser, Torts, 635 (2d ed., 1955) for more recent decisions.

³ For an extensive collection of cases, see 138 A.L.R. 22 (1942); 168 A.L.R. 446 (1947); 14 A.L.R. 2d 750 (1950).

⁴ 171 N.Y. 538, 64 N.E. 442 (1902). The court, fearful of the lack of precedent, a possible flood of litigation, and the mental character of the injury, said: "There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give in moral law and a responsive public opinion." As a result of this decision, a great deal of public resentment arose which led to the adoption of a statute recognizing the right of privacy. Utah and Virginia have also passed similar statutes.

⁵ 122 Ga. 190, 50 S.E. 68 (1905).

courts to give relief by the application of recognized principles. This decision laid the foundation for what was later to become the rule of the majority of the courts (and the one adopted by the Iowa Supreme Court in the instant case) that there is an independent legal right called "The Right of Privacy," the invasion of which gives rise to a cause of action.⁶

Due to the fact the right is still rejected in four jurisdictions, some mention must be made of the minority view and its soundness. The decisions of Nebraska,⁷ Rhode Island,⁸ Texas,⁹ and Wisconsin,¹⁰ which constitute the minority, have rested on one of two premises: (1) that the right did not exist at early common law and that, therefore, the courts cannot create the right, and (2) if the courts were the first to recognize the right, this "... would amount to a usurpation of legislative power for it is the function of courts to perceive and discern existing rights, whereas it is exclusively within the power of the legislative to bring into existence new rights."¹¹ The courts supporting the majority viewpoint have said the inherent fallacy of the first premise is evident, for that position can only be given credence after a court of the common law era had decided and declared that no such right existed. They also point out in regard to the second premise that the right did exist at common law, but there never was any occasion to exercise it because, in most instances, news travelled by word of mouth and not by the modern media of communication such as we have today.¹²

The Privacy doctrine has been handicapped in its development by the fact that it came into being after the common law had been fairly well crystallized. Many judges who were trained merely to apply the law as they found it ignored the tradition underlying our Anglo-Saxon system of jurisprudence and failed to apply the principles behind existing rules to new situations as they arose. Consequently, the doctrine was hampered by the inability of some courts to accept the idea that it is not an interloper but a full-fledged, socially acceptable member of the legal family.¹³

Although it is dictum, the prime significance of the instant case is that it affirmatively settles the question whether or not the Iowa Supreme Court recognizes invasion of the right of privacy as a tort. However, the decision is also of special importance in relation to the privilege extended

⁶ E.g., *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P. 2d 577 (1942); *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944).

⁷ *Brunson v. Ranks Army Store*, 151 Neb. 519, 73 N.W. 2d 803 (1955).

⁸ *Henry v. Cherry & Webb*, 30 R.I. 13, 73 Atl. 97 (1909).

⁹ *Milner v. Red River Valley Pub. Co.*, 249 S.W. 2d 227 (Tex. Civ. App., 1952).

¹⁰ *Yoekel v. Samonig*, 75 N.W. 2d 925 (Wis., 1956).

¹¹ 41 Ill. B.J. 122 (Nov., 1952).

¹² *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E. 2d 742 (1952).

¹³ *Nizer, The Right of Privacy*, 39 Mich. L. Rev. 526 (1940-41).

to newspaper publishers so that they may invade an individual's privacy without liability when a matter of public interest is involved.

The right of individual privacy is by no means absolute. Where it is recognized, it has been agreed from the beginning that it is subject to a number of limitations.¹⁴ The most important of these limitations is the privilege granted the press to invade an individual's privacy when a newsworthy event is involved. Decision after decision has said, the right of privacy is subordinate to the right of the general public to the dissemination of news and information.¹⁵ The courts have repeatedly relied on this privilege to defeat recovery. The majority of the court in the instant case adopted the view that has been followed down through the years that the individual's right to privacy does not extend to matters of public or general interest, since the benefit to the public in these matters outweighs the individual irksomeness of any particular item. In the Warren and Brandeis' article it was said:

Besides, it is only the more flagrant breaches of decency and propriety that could in practice be reached, and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn.¹⁶

It should be noted that this court and others have always attempted to balance conflicting interests, the interest of the individual in privacy on the one hand against the interest of the public in news on the other. It was stated in *Douglas v. Stokes*: "... the most tender affections of the human heart cluster about the body of one's dead child."¹⁷ The court in the instant case was confronted with identical affections and they had to balance these against the right of the public to the news which prevailed. In *Jones v. Herald Post*, the court, after recognizing and defining the right of privacy, said: "There are times, however, when one becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of the occurrence."¹⁸ The photographic depiction of the boy's body in the instant case was of legitimate interest to the public as was his disappearance and subsequent discovery. Even as innocent bystanders in so many cases become reluctant public characters and "until they have reverted to the lawful and unexciting life

¹⁴ 4 Harv.L. Rev. 193, 214-220 (1890).

¹⁵ *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E. 2d 344 (1956); *Hazlitt v. Fawcett Publications, Inc.*, 116 F. Supp. 538 (1953); *Casin v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1944); *Levertov v. Curtis Pub. Co.*, 192 F. 2d 974 (C.A. 3d, 1951).

¹⁶ 4 Harv. L. Rev. 193, 216 (1890).

¹⁷ 149 Ky. 506, 149 S.W. 849 (1912).

¹⁸ 230 Ky. 227, 18 S.W. 2d 972 (1929).

led by the great bulk of the community, they are subject to the privileged which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims."¹⁹

Again, the privilege is not unlimited and may be exceeded when a photograph is discovered to be indecent.²⁰ As was noted by the dissenting opinion, the majority of the court refused to examine the photograph in question for unknown reasons. In order for any court to determine whether or not a particular act violates common decencies and, therefore, exceed the privilege, an act must be such that a reasonable man *can see* that it might and probably would cause mental distress and injury to one possessed of ordinary feelings and intelligence, situated in like circumstances of the plaintiff.²¹ In two decisions cited by the majority to support its position, the courts very carefully examined the photographs in an attempt to discover if they were indecent before dismissing the cause.²² It is submitted that the instant case would be of greater value to this growing body of law had the court examined the photograph.

Thus, once the right is recognized by a court, it must then be determined if the privilege granted the press to invade an individual's right to privacy is applicable. If it is, then the facts must be thoroughly examined to ascertain whether or not any one of them violates common decencies. The press should not be allowed under the guise of "news interest" to invade an individual's right to privacy indiscriminately. However, because of the practical difficulty confronting newspaper editors in determining borderline cases at the risk of liability, the courts will undoubtedly continue to deal liberally with newspaper publications and therefore repeatedly rely on the "privilege" to defeat recovery.

¹⁹ Restatement of Torts, § 867, Comment C.

²⁰ It was said in: *Gill v. Curtis Pub. Co.*, 38 Cal. 2d 273, 231 P. 2d 565 (1951); *Barber v. Time*, 348 Mo. 1199, 159 S.W. 2d 291 (1942); *Nelvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931) that the privilege to disseminate news should not be abused so as to violate common decencies.

²¹ *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P. 2d 133 (1945).

²² *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E. 2d 344, 348 (1956). That court said: "We might point out in this connection that from an observation of the pictures attached to the record, it appears that a person viewing them could not identify the deceased"; *Abernathy v. Thornton*, 263 Ala. 496, 83 So. 2d 235, 236 (1956). The court stated, "No mention was made of the plaintiff in the news story and nothing therein or on the accompanying photograph showed any relationship between the plaintiff and the deceased."

TORTS—NON-PROFIT HOSPITAL LIABLE TO PAYING PATIENT FOR NEGLIGENCE

Plaintiff, a paying patient, brought an action against the defendant, a non-profit hospital, for damages resulting from personal injuries sustained