Sticks and Stones and Chips of Bones: Shock Humor and Emotional Distress in Roach and Driscol v. Stern, Infinity Broadcasting, Inc., and Hayden

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STICKS AND STONES AND CHIPS OF BONES:
SHOCK HUMOR AND EMOTIONAL DISTRESS
IN ROACH AND DRISCOL V. STERN, INFINITY
BROADCASTING, INC., AND HAYDEN

INTRODUCTION

As restrictions on the media decrease and the communications industry continues to employ sensationalist tactics to maintain ratings, both controversy and litigation abound over when the media should be held accountable for damages. Indeed, a concerted effort is being forged to hold the media liable for harmful consequences perceived as arising from its actions. For example, the Fourth Circuit recently held the publisher of an instruction manual on contract killing liable for aiding and abetting the murder of three individuals, and a Louisiana court recently held a movie production company liable for a shooting because it failed to discourage imitation of violent behavior portrayed on film.

When physical harm does not result and actions such as libel or slander do not apply, plaintiffs traditionally have faced an uphill climb in obtaining damages, and attorneys have resorted to more

3. See, e.g., Tripoli supra note 2, at 11 (“Plaintiffs’ attorneys are trying to start a Tabloid Outrage Litigation Group to discuss better, or at least more aggressive, methods to hold the media accountable.”).
innovative means to do so. One type of action on the rise is the tort of outrage, or intentional or reckless infliction of emotional distress, which recent decisions are reshaping to fit tort liability claims against media defendants. The current climate has created conflict between redress for injury and free expression, and Roach v. Stern illustrates the perplexing and plainly odd new issues such cases present.

In Roach, the New York Supreme Court, Appellate Division, held that the touching of cremated remains in a less than reverent context over a radio and cable television broadcast did not amount to interfering with the disposition of a corpse, and did not amount to mishandling or desecrating the dead. Nonetheless, the court held that the siblings of the deceased might have a valid claim for intentional infliction of emotional distress because touching cremated remains and making crude comments about the deceased in the context of an irreverent memorial broadcast may constitute outrageous conduct. This note will discuss the facts of the case, the element of "outrageousness" in intentional infliction of emotional distress claims and First Amendment protection in cases against media defendants, present the arguments of the parties, review the court's analysis, and comment on Roach's impact on emotional distress torts involving media defendants.
I. BACKGROUND

The controversy originated in a radio broadcast of the syndicated Howard Stern Show.12 Deborah Roach, known as Debbie Tay, frequently appeared as a guest on Stern’s show.13 Dubbed the “Space Lesbian” by Stern, Tay staked her claim to fame by relaying to him and his listeners her bizarre tales of her alleged sexual encounters with female aliens.14 Tay, who also worked as a topless dancer, appeared on Stern’s show with her mother, who described her as “a lot of fun.”15 Tay’s appearances on Stern’s show eventually led to her own cable access program.16

In April 1995, Tay died of a heroin overdose.17 Tay’s sister, co-plaintiff Melissa Roach Driscoll, had Tay’s body cremated and gave a portion of the remains to co-defendant Chaunce Hayden, Tay’s friend.18 In July 1995, Hayden contacted Stern and discussed on-air Tay’s death and the disposition of her remains, and Stern invited Hayden to appear on the show with the remains.19 After hearing of the conversation, Tay’s brother, co-plaintiff Jeff Roach, called the show’s producer and the station manager and objected to Stern’s invitation to Hayden, and demanded that Stern refrain from any further on-air discussion of Tay’s death.20

On July 18, 1995, Hayden appeared on Stern’s show, which was also videotaped, with a box containing Tay’s cremated remains.21 Tay’s remains had not been pulverized, so the ashes contained

12. Roach, 675 N.Y.S.2d at 133.
13. Id. at 134.
15. Id.
16. Id.
19. Id. at 134.
20. Id.
21. Id.
bone fragments, some with bloodstains. The box was shaken, rattled, and opened, and Hayden, Stern, co-host Robin Quivers, and others made lighthearted, off-color observations and comments concerning the remains. Hayden compared the bone fragments to clam shells, while Stern, wearing rubber gloves, held them up and deliberated over whether they were parts of Tay’s skull, ribs, or teeth. Stern encouraged Hayden to chew on one fragment, while someone in the background suggested that it might taste like Cracker Jacks and that a prize might be at the bottom of the container. Stern offered Hayden a plastic bag in which to place Tay’s remains and carry them around like “a big necklace.” They discussed putting the fragments together with Krazy Glue, and Stern attempted to assemble various pieces while a stagehand held up a photo of Tay. At one point, Stern exclaimed, “Wow, she [Tay] was a piece of ash.”

Despite the flippant manner in which Tay’s remains were handled, Stern recommended that Hayden have them properly buried and told him to “remember her in your mind,” not as bones. Additionally, during the broadcast, Hayden and another guest named Ralph engaged in a debate over whether Hayden had sufficiently intervened and taken adequate action to prevent Tay’s

22. Lori Tripoli, Second Billing, First Rate...How Cub Lawyer Ralph Young Stole the Show from “The King of All Media”, 12 No. 9 INSIDE LITIGATION, September 1998, at 9.
24. Id. at 134.
27. Roach, 675 N.Y.S.2d at 134. The record includes a transcript of the broadcast, in which Hayden expressed his desire to carry a portion of Tay’s ashes in a sack around his neck because he felt it was a “spiritual” gesture. Record on Appeal at 36, Roach v. Stern, 675 N.Y.S.2d 133 (N.Y. App. Div. 1998)(No. 97-01389).
29. Id. at 135.
30. Id. at 137 (Krausman, J., dissenting).
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death. The closing credits for the show, which apparently was a memorial tribute, announced that the show was “dedicated in loving memory of Debbie Tay.” The videotaped version of the show subsequently aired over cable television on the E! Entertainment Network.

II. PROCEDURAL FACTS

On April 4, 1996, the plaintiffs, Roach and Driscol, filed a complaint against defendants Stern, station-owner Infinity Broadcasting, Inc., and Hayden, alleging intentional or negligent infliction of emotional distress. The trial court granted defendants’ motion and dismissed the complaint for failure to state a claim. Plaintiffs appealed, and the appellate court heard oral arguments on January 9, 1998. The appellate court reversed the prior decision and reinstated the complaint, holding that a jury could find that Stern’s and Hayden’s conduct went beyond decency and rose to the requisite level of outrageousness to substantiate a claim of emotional distress. The matter is currently before the Supreme Court of New York, Kings County, on remand.

32. Id. at 49-53.
33. Roach, 675 N.Y.S.2d at 137.
34. Record on Appeal at 21, Roach (No. 97-01389).
35. Roach, 675 N.Y.S.2d at 133.
36. Id.
III. ANALYSIS

A. Intentional Infliction of Emotional Distress

1. The Restatement

The Second Restatement of Torts prescribes liability for emotional distress to "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another." To establish a prima facie case, a plaintiff must prove four elements: (1) that defendant’s conduct was intentional or reckless; (2) that defendant’s conduct was sufficiently extreme and outrageous, or defendant should have known was sufficiently extreme or outrageous, to cause emotional distress; (3) that plaintiff actually suffered severe emotional distress; and (4) that plaintiff’s emotional distress was a proximate result of defendant’s outrageous conduct. A plaintiff need not suffer physical injury; nor must he show a loss to his reputation or to his finances, as is necessary in both defamation and invasion of privacy actions. Additionally, one may be liable for inflicting emotional distress on an immediate family member who is present at the time of the outrageous conduct. This provision of the Restatement is traditionally known as the “zone of danger” provision. Many jurisdictions, including New York, have allowed recovery for emotional distress resulting from intentional or reckless mishandling of a relative’s corpse, and these cases have arisen in

39. RESTATEmENT (SECOND) OF TORTS § 46(1)(1965).
41. Tripoli, supra note 2, at 12. This note will not address libel or invasion of privacy torts because neither was at issue in Roach.
42. RESTATEmENT (SECOND) OF TORTS § 46(2)(a)(1965).
the context of interference with the final disposition of the remains.\textsuperscript{43}

2. \textit{The element of "outrageousness"}

Although intentional infliction of emotional distress requires that four elements be satisfied, the outrageousness of the conduct is key. Indeed, once a plaintiff has shown that defendant’s conduct was extreme or outrageous, he has essentially proven the tort.\textsuperscript{44} A claim for intentional infliction of emotional distress does not require any specific conduct, but rather bases liability on later assessments of behavior.\textsuperscript{45} As the New York appellate court eloquently stated, “the tort is as limitless as the human capacity for cruelty.”\textsuperscript{46} Thus, the culpability of the defendant is determinative of “outrageousness.”\textsuperscript{47}

The standard is objective, requiring that conduct be so outrageous that it goes “beyond all possible bounds of decency” and is “utterly intolerable in a civilized community.”\textsuperscript{48} The standard is also rigid: “[T]he law intervenes only where the distress inflicted is so severe that no reasonable man can be expected to endure it.”\textsuperscript{49} Courts traditionally have been conservative in recognizing damages for emotional distress because of the difficulty in proving emotional distress, the potential for fraudulent

\textsuperscript{43} See, e.g., Schmidt v. Schmidt, 267 N.Y.S.2d 645 (1966)(awarding damages for distress where deceased’s brother refused to deliver cremated remains to deceased’s wife), Gostkowski v. Roman Catholic Church of the Sacred Hearts of Jesus and Mary, 262 N.Y. 320 (1933)(awarding damages for mental suffering and anguish to a plaintiff whose wife’s body was relocated to another grave site without notice).


\textsuperscript{46} \textit{Id}. at 122.

\textsuperscript{47} Amspacher and Springer, \textit{supra} note 40, at 713.

\textsuperscript{48} \textit{RESTATEMENT (SECOND) OF TORTS} § 46, COMMENT D (1965).

\textsuperscript{49} \textit{RESTATEMENT (SECOND) OF TORTS} § 46, COMMENT J (1965).
claims, the possibility of imposing unlimited damages, and the concern over opening the proverbial floodgates of litigation.\textsuperscript{50}

3. New York Law

New York has adopted the Restatement and recognizes tort actions for both intentional and reckless infliction of emotional distress.\textsuperscript{51} New York, though far from liberal in granting emotional distress claims, has clarified and refined what constitutes a valid emotional distress claim against a media defendant in recent years, as the following cases demonstrate.

\textit{a. Howell v. New York Post Co., Inc.}\textsuperscript{52}

In \textit{Howell}, a New York Post photographer trespassed onto the grounds of a private mental hospital and took pictures of Hedda Nussbaum, adoptive mother of a child whose death from abuse a year prior stirred public interest.\textsuperscript{53} A photo of Nussbaum with the plaintiff, whose face was clearly discernable, was published in an article about Nussbaum.\textsuperscript{54} Plaintiff sued for, among other causes, intentional infliction of emotional distress.\textsuperscript{55} The court denied the claim, holding that in publishing a newsworthy photo without further action toward the plaintiff, the defendant did no more than exercise a legal right in a permissible way, and therefore the defendants' conduct could not properly be deemed so "outrageous" that it went beyond decency.\textsuperscript{56}

\begin{itemize}
\item \textsuperscript{50} Randy J. Cox and Cynthia H. Shott, \textit{Boldly into the Fog: Limiting Rights of Recovery for Infliction of Emotional Distress}, 53 Mont. L. Rev. 197 at 198 (Summer 1992).
\item \textsuperscript{52} 81 N.Y.2d 115 (1993).
\item \textsuperscript{53} \textit{Howell}, 81 N.Y.2d at 118.
\item \textsuperscript{54} \textit{Id.} at 119.
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.} at 125-6.
\end{itemize}
b. Esposito-Hilder v. SFX Broadcasting, Inc.\(^{57}\)

In *Esposito-Hilder*, the plaintiff sued a radio station for an independent claim of intentional infliction of emotional distress over a broadcast.\(^{58}\) A bridal photograph of the plaintiff, an employee of a competing radio station, was published in a local newspaper.\(^{59}\) Defendant radio station broadcast a regular program that featured a routine called the "Ugliest Bride Contest," in which the hosts made derogatory comments about the brides published in the paper.\(^{60}\) In selecting the plaintiff's photograph, the hosts deviated from the normal routine and revealed her name, place of employment, and position, and identified her supervisors.\(^{61}\) Defendants moved for dismissal for plaintiff's failure to state a claim, contending that the plaintiff should have pled defamation, and even then her case failed because the statements in the broadcast constituted expression of opinion.\(^{62}\)

Although the court agreed that a defamation claim would fail, the court nonetheless held that the plaintiff stated a prima facie case of intentional infliction of emotional distress.\(^{63}\) The court held that the plaintiff's status as a private individual and not a public figure entitled her to a higher standard of protection.\(^{64}\) Further, the nature of the defendants' broadcast involved a matter serving no public interest and sought to inflict harm specifically because the plaintiff was an employee of a competing radio station, which was evident in its expansion of its "contest" routine to disclose the identity of the "winner."\(^{65}\) In short, the defendants targeted the plaintiff because she worked for a competing radio station, and used their access to the media to hurt her; thus, their conduct rose to a level of outrageousness utterly intolerable in civilized society.

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58. Id. at 699.
59. Id.
61. Id.
62. Id.
63. Id. at 699-701.
64. Id. at 700.
65. Id.
The court additionally held that broadcasting, although protected by the First Amendment, enjoys the most limited protection because of its easy accessibility,\(^6\) and defendants’ conduct was not comedic expression but rather an attempt to injure disguised as humor.\(^7\)

**B. First Amendment Protection**

The Supreme Court has acknowledged that “[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern,”\(^6\) and that “speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values.’”\(^7\) Thus, the purpose of the First Amendment is to safeguard the discussion of public issues.\(^7\) As such, courts are hesitant to impose liability on media defendants where issues of free expression are concerned. Indeed, as one commentator has noted, past Supreme Court decisions clearly demonstrate that the individual interest in peace of mind is not as weighty as society’s interest in discussing public issues.\(^7\) In deciding tort cases against media defendants, courts balance the plaintiff’s right to redress for harm against the media the defendant’s right to free expression and information dissemination, and the “chilling effect” that damage awards might impose on such expression.\(^7\) In virtually all claims

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66. See FCC v. Pacifica Foundation, 438 U.S. 726, 748-49 (1978)(holding that broadcasting receives more limited First Amendment protection than other modes of communication because material aired over radio and television reaches the listener in the privacy of his home, and because broadcasting is uniquely accessible to children).


against them, media defendants resort to the First Amendment for protection of their actions, and they usually win because of the level of protection afforded to free expression by the press. Protection of speech rests on a number of factors, and the newsworthiness and the level of value accorded the type of expression are of particular significance in weighing the degree of First Amendment protection.

1. Newsworthiness

The doctrine of “newsworthiness” developed from the tort of public disclosure of private facts; but the newsworthiness of allegedly offensive speech similarly has become a factor in the context of intentional infliction of emotional distress claims against media defendants. Which matters constitute “public interest and concern,” and therefore warrant First Amendment protection, never has been clearly delineated, and courts have shied away from defining “news.” However, courts clearly have demonstrated that items deemed “newsworthy” are afforded high First Amendment protection.

73. Id. at 702.
protection, thus making defenses on grounds of newsworthiness almost impossible to defeat.\textsuperscript{78}

Though no court has gone so far as to fix the precise limits of “newsworthiness,” courts have interpreted the doctrine to include commentary on both public figures and on items of legitimate public interest.\textsuperscript{79} Newsworthiness embodies speech pertaining to political matters as well as “low gossip mongering aimed at only the public’s morbid curiosity.”\textsuperscript{80} A Georgia court, for example, recently held that the proceedings of a lawsuit against a newspaper over an advertisement featuring a photo of the plaintiff’s pierced breast was a matter of public interest appropriate for publication.\textsuperscript{81} The California Supreme Court recently held that an automobile accident and rescue of one of the survivors, who was left a paraplegic from the crash, was newsworthy.\textsuperscript{82} The court found a legitimate public interest in the incident because (1) travel by car is commonplace, (2) an emergency rescue is a vital service that many members of the public may one day require, (3) the incident depicted the daily challenges that emergency workers face in handling serious accidents, and (4) the plaintiff’s statement “I want to die” and her conversation with the rescue crew added a “dramatic and interesting” dimension to the story.\textsuperscript{83} Because it found a legitimate public interest, the court found the incident newsworthy.\textsuperscript{84} As for the broadcast, the court found no “morbid or sensationalist prying [into private facts] for its own sake,” no “lurid and sensational tone,” nor any “intensely personal” content.\textsuperscript{85} Even a New York court recently determined the parameters of newsworthiness.

\textsuperscript{78} See Loquai, supra note 74, at 448.
\textsuperscript{79} Scott, supra note 77, at 699-700.
\textsuperscript{80} Kirkpatrick, supra note 7, at 1020 (citing the Restatement’s definition of “authorized publicity” as items of popular appeal, including reports of crimes, suicides, marriages, divorces, and drug overdoses, among other items).
\textsuperscript{82} Schulman v. Group W Prods., 955 P.2d 469, 486-87 (Cal. 1998).
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
In *Messenger v. Gruner*, the defendant, publisher of *YM* magazine, used a photograph of an underage model to illustrate a letter submitted to an advice column. The letter, signed "Mortified," was from a young girl who got drunk and had sex with three boys at a party. The court denied, among other claims, the plaintiff's claim for intentional infliction of emotional distress. The court found that although plaintiff neither authored the letter nor authorized her photo for use in a sexual context, defendant's use of the photo related to teen sex, teen pregnancy, and alcohol abuse, all of which the court found to be matters of public concern. Thus, even if fictionalized, the defendant's use of the plaintiff's photo was done so in a newsworthy context, and precluded the plaintiff's claims. The court noted that newsworthiness includes "not only descriptions of actual events, but also articles on political happenings, social trends, and things not considered 'hard news.'" As the cases clearly demonstrate, the threshold for newsworthiness is not particularly high, and practically any event can be deemed newsworthy as long as it garners some amount of public interest. As long as an event is newsworthy, media speech related to it is protected.

2. Level of Value

First Amendment protection is strong, but it is not absolute. Indeed, certain types of speech are afforded higher or lower degrees of protection than others because of their so-called "social
value." Generally, the "high-low" value determination categorizes speech according to how much it furthers the "historical, political, and philosophical purposes that underlie the First Amendment." In other words, speech that promotes the transmission of ideas and the dissemination of truth is far more important than speech that does not. Speech that causes serious harm or that is "of de minimus value to society" is usually afforded lower protection than speech that contains political commentary or cultural value. Examples of low value speech are "hate speech" in a leaflet that proclaims, "If . . . the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions, . . . rapes, robberies, knives, guns, and marijuana of the negro surely will," and "commercial speech" in the form of an unsolicited communication from an attorney concerning a possible personal injury action.

In determining the weight of a particular speech, courts assume that the First Amendment protects all expression, and only after they find that a particular category of speech fails to further the principles of the First Amendment do they deem it to be of lower value, and therefore less protected. Generally, this includes words that incite lawless action ("fighting words"), obscenity, child pornography, profanity, libel, and commercial speech, all of

95. Shaman, supra note 70, at 298-99.
97. Christopher M. Schultz, Content-Based Restrictions on Free Expression: Reevaluating the High Versus Low Value Speech Distinction, 41 ARIZ. L. REV. 573 (Summer 1999).
98. Shaman, supra note 70 at 298-99.
99. Id. at 300.
100. Schultz, supra note 97.
101. Beauharains v. Illinois, 343 U.S. 250, 252 (1952)(holding that the state had a compelling interest in curbing defamation of racial and religious groups).
102. See Florida Bar v. Went For It, 515 U.S. 618 (1995)(affirming the Florida Bar Association's rule banning attorney solicitations to those who had been in an accident until after thirty days).
103. Schultz, supra note 97. (quoting Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).
which are accorded lower First Amendment protection because of their low or lack of social value.\textsuperscript{104} Where humor is involved, courts have consistently allowed media defendants considerable latitude despite the content of the speech.\textsuperscript{105} Perhaps this is because of the history of satire and parody in commentary on American politics.\textsuperscript{106} However, protection for humorous speech clearly extends beyond political satire and commentary, and includes non-political speech that is "so extremely nonsensical and silly that [no one] could take [it] seriously,"\textsuperscript{107} and exists solely to entertain.

3. \textit{Hustler Magazine v. Falwell}\textsuperscript{108} and "actual malice"

\textit{Hustler} is the seminal intentional infliction of emotional distress claim against a media defendant. In \textit{Hustler}, the plaintiff Jerry Falwell, a "televangelist," sued the publisher of \textit{Hustler Magazine} for, among other causes, intentional infliction of emotional distress due to an ad parody insinuating that his first sexual encounter was a drunken romp with his mother in an outhouse.\textsuperscript{109} Despite the fact that the parody contained disclaimers,\textsuperscript{110} the plaintiff nonetheless contended that the defendant was liable for his emotional

\begin{itemize}
\item 104. Shaman, \textit{supra} note 70, at 298-319.
\item 105. Amspacher and Springer, \textit{supra} note 40, at 702 (specifically, satire, parody, and other forms of humor).
\item 106. \textit{See Hustler Magazine, Inc. v. Falwell}, 485 U.S. 46, 54-55 (1988)(noting that without satirical political cartoons, "our political discourse would have been poorer without them").
\item 108. 485 U.S. 46 (1988).
\item 109. \textit{Id.} at 48-49. The ad parody was modeled after advertisements for Campari Liquor, which featured celebrities discussing their "first time" drinking Campari. The ads played on the sexual entendre of the term "first time."
\item 110. \textit{Id.} at 48-49. In fine print at the bottom of the page was the statement "ad parody – not to be taken seriously," and in the table of contents the ad was listed as "Fiction, ad and personal parody."
\end{itemize}
Plaintiff argued that the defendant's intention, namely to harm him, precluded any First Amendment protection regardless of the statement's veracity because free expression does not permit one to inflict injury solely for injury's sake. The Supreme Court disagreed in a unanimous decision. The Court applied the New York Times "actual malice" standard to plaintiff's claim for intentional infliction of emotional distress and reversed an award for damages. The New York Times actual malice standard is a higher standard of fault reserved for public figure plaintiffs. Originally applied in actions for defamation, it requires that a media defendant act either with knowledge that a statement is false or with reckless disregard for its truth in order for a plaintiff to recover. In other words, a statement must be false and a media defendant must act culpably before the defendant will incur liability for what it says; otherwise, the plaintiff has no cause of action.

The Court placed a premium on the right to speak freely on matters of public interest, particularly the right to criticize. The Court found Falwell to be a public figure and held that criticism, therefore, even when as sharp as the speech at issue and even when

111. Id.
113. Justice White filed a concurring opinion, and Justice Kennedy did not take part in the decision.
115. Hustler, 485 U.S. at 57.
119. Hustler, 485 U.S. at 52.
121. Id. at 57.
false, was protected by the First Amendment.122 Because both falsehoods and caustic criticism are inevitable in free debate on public matters, strict liability for either would result in a "chilling effect" on discourse regarding public figures that has no constitutional value.123 The Court found that the ad parody was just that—parody, and that the defendant had a protected right to resort to parody to comment on Falwell.124 Because it was parody (replete with a disclaimer), Hustler's "ad" was not a false statement made culpably, and thus was not actionable.125 The Court noted that in public discussion of public figures, "many things done with motives that are less than admirable are protected by the First Amendment."126 The Court further noted that the "outrageousness" standard, though supposedly objective, is in actuality too subjective a check on discussion of political and social matters because it allows a factfinder to "impose liability on the basis of [its own] tastes or views," thus conflicting with established policy of rejecting damage awards for the emotional impact speech may have on an audience.127 The result of Hustler is clear: public figures cannot recover damages for emotional distress over true statements of fact, regardless of the intent of the speaker.128

122. Id. at 51-52 ("[C]riticism [of public figures], inevitably, will not always be reasoned or moderate; public figures as well as public officials will sometimes be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks'") (quoting New York Times v. Sullivan, 376 U.S. 254, 270).
123. Id.
124. Id.
125. Id. at 56.
126. Hustler, 485 U.S. at 53.
127. Id. at 55.
128. Rodney A. Smolla, Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell, 20 ARIZ. ST. L.J. 423, 438-40 (Summer 1988). See also, Farnam, supra note 118 at 877 (quoting Hustler publisher Larry Flynt describing his motive behind the ad parody as "to assassinate [Falwell's character].")
C. Plaintiffs' Arguments in Roach

Plaintiffs argued that the trial court erred in dismissing their claim for intentional infliction of emotional distress. Because the plaintiffs' arguments for both mishandling a corpse and intentional infliction of emotional distress are intertwined, this section will address only the arguments for mishandling a corpse that overlap with the arguments for the outrageousness of the defendants' conduct.

1. Defendants' conduct was outrageous because it involved handling human remains.

Contending that Tay's remains qualified for protection as a corpse, the plaintiffs argued that until Roach, no New York court had even suggested that a material distinction existed between cremated and uncremated remains in determining the appropriateness of emotional damages.129 Plaintiffs relied on Sorrentino v. New York130 in asserting that the legal definition of human remains requires only that some identifiable portion of the body remain intact.131 Stern's and Hayden's touching Tay's bone fragments and commenting on them over a national broadcast made the plaintiffs helpless witnesses to the desecration of their sister's final resting place, plaintiffs argued, constituting sufficiently outrageous conduct to state a claim for intentional infliction of emotional distress because it was objectively patently outrageous.132

131. Brief of Plaintiffs-Appellants at 5-6, Roach (No. 97-01389).
132. Id. at 16-7.
2. **Plaintiffs satisfied all four elements of intentional infliction of emotional distress.**

In addition to stating a claim for emotional distress arising from defendants' handling the plaintiffs' sister's remains, the plaintiffs further argued that they satisfied all four elements.\(^{133}\) Plaintiffs argued that (1) Stern’s and Hayden’s handling of Tay’s remains on national radio and television after plaintiff Roach specifically warned defendants that such action would cause the family distress, demonstrated intentional or at least reckless conduct;\(^{134}\) (2) defendants’ conduct was outrageous because the handling of cremated remains on national radio and television was itself extreme and outrageous behavior;\(^{135}\) (3) the plaintiffs alleged severe emotional distress beyond mere embarrassment;\(^{136}\) and (4) the plaintiffs’ established a causal link between their emotional distress and the defendants’ actions.\(^{137}\) This, the plaintiffs asserted, established a viable claim for intentional infliction of emotional distress.\(^{138}\)

**D. Defendants’ Arguments in Roach**

Defendants argued that the trial court correctly dismissed the plaintiffs’ action because the plaintiffs failed to state a claim for intentional infliction of emotional distress. The arguments addressed in this section pertain only to plaintiffs’ claim for intentional infliction of emotional distress.

1. **“Outrageousness”**

First, the defendants maintained that their conduct was not outrageous within the stringent definition of intentional infliction

\(^{133}\) Reply Brief of Plaintiffs-Appellants at 14-6, *Roach* (No. 97-01389).

\(^{134}\) Reply Brief of Plaintiffs-Appellants at 15-6, *Roach* (No. 97-01389).

\(^{135}\) *Id.*

\(^{136}\) *Id.* at 16.

\(^{137}\) *Id.*

of emotional distress. Defendants pointed to the long line of dismissed claims arising from repugnant and mean-spirited conduct, which they distinguished from the "admittedly offbeat humor and affection" contained in Stern's tribute to Tay. As such, the defendants contended that the plaintiffs' claim was not actionable. Defendants further argued that "outrageousness" must be appraised within the context of the allegedly offensive conduct. Here, Tay rose to fame on Stern's show precisely because of her eccentricities, and without inflicting emotional distress upon her family. Defendants argued that Tay's history with Stern, known for his raucousness, apparently did not distress her family while she was alive and therefore precluded a claim for emotional distress the plaintiffs may allege against defendants.

2. Conduct was within single broadcast, not a campaign of harassment.

Defendants next maintained that their conduct within the context of a single broadcast aimed at the general public, rather than a campaign of harassment targeted solely at the plaintiffs, supported dismissal on three grounds. First, the defendants' conduct

140. Id. at 12, Roach, (No. 97-01389). Stern cited a number of cases from various jurisdictions, all of which involve conduct, from sexually derisive statements, See Shea v. Cornell Univ., 596 N.Y.S.2d 503, 504 (N.Y. App. Div. 1993) (3d Dept.), to suits filed for the sole purpose of maligning, harassing, and intimidating, See Andrews v. Bruk, 631 N.Y.S.2d 771 (N.Y. App. Div. 1995) (2d Dept.), that could be considered reprehensible but were dismissed nonetheless because the conduct was not sufficiently "outrageous."
141. Id.
142. Id. at 13.
143. Id. For this proposition, Stern relied on Eddy v. Brown, 715 P.2d 74 (Okla. 1986). Eddy involved an emotional distress claim from workplace mistreatment.
144. Brief of Defendants-Appellees at 13, Roach (No. 97-01389).
145. Id.
146. Id. at 13, Roach (No. 97-01389).
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occurred in the course of its regular business of broadcasting. Further, the defendants’ regular business of broadcasting newsworthy items of interest was a legitimate and constitutionally protected purpose, and the First Amendment precluded liability on defendants simply because such broadcast might incidentally cause severe emotional distress to the plaintiffs. If liability could be imposed, defendants argued, the media could not exist. Second, a cause for intentional infliction of emotional distress must arise from activity directed at the plaintiffs calculated to harm them. Plaintiffs here had no cause of action because Stern and Hayden’s conduct was not calculated to harm them. Defendants further argued that the plaintiffs were not entitled to damages because they were not even present at the time of the defendants’ conduct. Third, more than a single broadcast is required to state a claim for intentional infliction of emotional distress since an action requires repeated broadcasts amounting to a campaign of harassment. Here was an isolated incident: a single show broadcast over radio and later cable television. Defendants argued that the plaintiffs stated no actionable claim.

3. Severity of emotional distress

Finally, the defendants maintained that the plaintiffs’ alleged emotional distress was insufficiently severe to state a claim. Arguing that although the plaintiffs complained of distress, it was

148. Id. at 14-15.
149. Brief of Defendants-Appellees at 13, Roach (No. 97-01389)(quoting Lamonaco v. CBS, Inc., 22 Med. L. Rptr. 1831, 1832 (3d Cir. 1994)).
151. Id. at 17.
152. Id. at 17-18 (The Restatement’s “zone of danger” provision requires presence at the time of the allegedly outrageous conduct in order for liability to ensue).
154. Id. at 19.
155. Id. at 19-20.
hardly so severe that "no reasonable person could be expected to endure it." Defendants maintained that the plaintiffs' claim therefore fell short of adequate.

E. Court's Analysis

The appellate court, in a relatively brief opinion, upheld part of the lower court dismissal, but reversed and remanded the case for trial before a jury on the issue of intentional infliction of emotional distress. One justice dissented, holding that he would have affirmed the prior order in whole and dismissed the claim in its entirety.

1. Mishandling of a Corpse

The court wasted no time in, nor did it devote much space to, agreeing with the trial court that the plaintiffs failed to state a claim for interference with the disposition and mishandling of a corpse. The court stated that "[i]n general, such a cause of action requires a showing of interference with the right of the next-of-kin to dispose of the body." The court concluded that the defendants did not interfere with the plaintiff's decision to cremate Tay's body and give part of the remains to Hayden, and therefore the plaintiffs stated no claim. The court drew the line of disposition at the family's decision to apportion the remains and give them to others.

156. Id. at 19. Stern argued that plaintiffs' allegations of inability to enjoy the company of friends and fear of speaking with old friends and neighbors paled in comparison to a dismissed claim involving recurring nightmares and sleeplessness, See Khan v. American Airlines, 639 N.E.2d 210 (Ill. App. 1994). Stern further maintained that plaintiffs' alleged suffering here was not "truly devastating," as required by Pemberton v. Bethlehem Steel Corp., 502 A.2d 1101 (Md. App. 1986).

157. Id. at 20.


159. Roach, 675 N.Y.S.2d at 136-7 (Krausman, J., dissenting).


161. Id.

162. Id.
Thus, the court impliedly held that the defendants did not disturb Tay’s grave or desecrate her remains.

2. Intentional Infliction of Emotional Distress

The court differed, however, in its treatment of the plaintiffs’ claim for intentional infliction of emotional distress. The court acknowledged the requisite “outrageousness” in the defendants’ conduct in order to impose liability on them. Quoting Murphy v. American Home Products, the court recognized that the defendants’ conduct must have been “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” The court further recognized that the element of “outrageous conduct” is purposely “rigorous and difficult to satisfy” in order to eliminate trivial complaints and ensure the authenticity of emotional distress claims. Nonetheless, the court concluded that, despite the fact that the defendants did not interfere with the plaintiffs’ disposition of Tay’s body, the element of outrageousness was not necessarily lacking as a matter of law. Discounting the defendants’ contention that their conduct was not shocking, the court held that a jury might reasonably conclude that “the manner in which Tay’s remains were handled, for entertainment purposes and against the express wishes of her family, went beyond the bounds of decent behavior.” The appellate court thus reversed the lower court’s order, reinstated the complaint, and remanded the case for trial on the issue of whether Stern and Hayden’s conduct amounted to intentional infliction of emotional distress.

165. Roach, 675 N.Y.S.2d at 135.
166. Id. at 135 (quoting Howell v. New York Post Co., Inc, 81 N.Y.2d 115 (1993)).
168. Id.
3. The Dissent

Justice Krausman, the sole dissenter, disagreed with the majority opinion, stating that he concurred with the prior order in toto. Justice Krausman conceded that defendants Stern and Hayden’s conduct might have been inappropriate, tasteless, and insensitive in the eyes of some members of society. However, he disagreed that the defendants’ conduct gave rise to a right for plaintiffs to recover emotional distress damages. Citing the common law notion that emotional distress claims are easily feigned, he stressed the requirement of “extreme and outrageous conduct” in modern tort actions. Quoting Howell, he noted that every one of the emotional distress claims that the court considered had failed “because the alleged conduct was not sufficiently outrageous.”

Justice Krausman proposed a more flexible balancing test to consider all the facts at issue, contending that “[t]he issue of whether decedent’s brother and sister may recover tort damages cannot be considered in a vacuum, with total disregard for who Debbie Tay was.” He implied that the validity of the plaintiffs’ claim was buttressed by their sister’s personality, her benefit from associating with Stern, and her inferred reaction to the use of her remains. He also considered the fact that Driscol voluntarily gave her sister’s remains to Hayden, who then brought them onto the show for a tribute to Tay, to be critical in tipping the balance in the defendants’ favor.

171. Id.
172. Id.
173. Id.
174. Roach, 675 N.Y.S.2d at 136 (Krausman, J., dissenting). Justice Krausman did not mention the finding in Esposito-Hilder, possibly because the decision was from another department.
175. Roach, 675 N.Y.S.2d at 136 (Krausman, J., dissenting).
176. Roach, 675 N.Y.S.2d at 136 (citing that Tay had appeared on Stern’s show with her mother, and even launched her own career from her appearances on Stern’s show).
177. Id. at 137.
As for the memorial broadcast itself, Justice Krausman found its context significant. Hayden claimed to have brought Tay's remains on air because "the only happiness Debbie had was the Howard Stern Show," and opened them up because, having enjoyed and participated in Stern's crude humor during her lifetime, believed Tay "would love this." Justice Krausman also pointed to the fact that Stern recommended Hayden have Tay's remains buried, and that the show's closing credits dedicated the show "in loving memory of Debbie Tay." Although the show's producer ignored Roach's request to stop discussing Tay's remains, Justice Krausman found nothing to implicate Stern, Hayden, or Infinity as acting to cause the plaintiffs harm.

IV. IMPACT

A. Roach Makes Emotional Distress Claims Easier to Proceed Because It Lessens the Necessary Level of "Outrageousness."

The Roach decision effectively lowers the bar for emotional distress claims, at least in New York. Although the court in Roach did not determine that Stern and Hayden's conduct was outrageous as a matter of law, it left the question to a jury to decide. Courts are entitled to defer to a jury in cases where "reasonable men may differ" as to whether conduct is outrageous. However, when expression is concerned, as in Roach, passing the question of "outrageousness" to the discretion of a jury is a dubious move. The Supreme Court in Hustler recognized the "inherent subjectiveness" of the "outrageous" standard, and specifically cautioned against its application to political and social discourse because of the threat it poses to free expression. The Court opposed jury determination of "outrageousness" in cases involving expression because of the potential inability of individual jurors to
objectively weigh First Amendment concerns, and instead impose liability "on the basis of their dislike of a particular expression."\textsuperscript{183} The Court required a rigid standard of "outrageousness" to impute liability for expression in order to provide ample "breathing room" for expression.\textsuperscript{184} The court in \textit{Roach} does just what \textit{Hustler} admonishes. By letting the question reach a jury, the court in \textit{Roach} allows individual notions of taste to infect emotional distress torts, thereby watering down the legal definition of "outrageous." As a result, \textit{Roach} controverts both the common law and modern law embodied in the Restatement because it considerably lessens the rigidity of the "outrageousness" standard to the detriment of free expression.

The \textit{Roach} decision is troubling because the court did not explain how the defendants’ conduct was extreme, especially after it declined to hold that cremated remains possess the same status as a corpse and thereby implied that cremated remains are mere objects once the decedent’s family has dispensed with them. Touching and discussing objects, even cremated human remains, is not extremely shocking. Hayden legally obtained the remains, and he legally brought them onto the show. Stern, Hayden, and others discussed Tay and commented on the remains. The fact that those discussing Tay and her remains all knew her personally is even less shocking; surely, we are free to discuss the people and events that enter, and in this case exit, our life.

Unlike in \textit{Esposito-Hilder}, Stern did not use his show to target Tay or her family; in fact, neither of Tay’s siblings was even mentioned by name.\textsuperscript{185} Every comment was either a true statement

\textsuperscript{183} \textit{Id.}


\textsuperscript{185} Brief of Defendants-Appellees at 9, Roach v. Stem, 675 N.Y.2d App. Div. 1998)(No. 97-01389). A review of the transcript of the broadcast contained in the record shows that Driscoll was mentioned or referred to approximately ten times as "Debbie’s sister," "the sister," and "she." Roach was referred to one time as "her [Tay’s] brother." Tay had another sister who likewise was mentioned in the same anonymous manner. See Record on Appeal at 34-67, Roach v. Stern, 675 N.Y.2d 133 (N.Y. App. Div. 1998)(No. 97-01389).
or an opinion; although some of the comments may have been calculated to be humorous, none can fairly be classified as calculated to harm. At worst, the defendants' comments were juvenile.

Additionally, Tay’s remains were not mutilated. Only Stern touched Tay’s remains, and he did so momentarily before placing them back in their container and returning them to Hayden. Had Stern thrown Tay’s ashes onto the floor or extinguished cigarettes on them, or had Hayden stolen Tay’s remains, perhaps the plaintiffs’ claim for emotional distress might make sense. The events that occurred, however, simply do not surpass all decency of civilized community. Though unconventional, the memorial clearly exhibited affection for Tay. Further, the record suggests that plaintiff Roach was estranged from his sister; if true, it seems patently absurd, not to mention outrageous itself, to award Roach damages for emotional distress because of a discussion about his estranged sister. By holding that the expression in the broadcast here might surpass all bounds of decency, the court opens the door to a number of potential trivial claims for emotional distress arising out of handling other objects that arguably occupy the same status as cremated remains, such as religious or sentimental objects such as heirlooms or mementos. Thus, Roach defeats the purposes of the "outrageousness" standard, which is to limit actionable emotional distress claims to cases that are extreme and to avoid trivial claims. Emotional distress claims should not proceed simply because of the emotional impact that the expression may have on an audience.

186. Indeed, Stern's suggestion that Hayden have Tay’s ashes pulverized and buried, Ralph’s debate with Hayden over preventing Tay’s overdose, the footage of Tay on the cable television broadcast, and the dedication of the show “in loving memory of Debbie Tay” negate any contention that the broadcast was done with culpability.

187. Record on Appeal at 65, Roach, (No. 97-01389)(During the course of the broadcast, Hayden told Stern that Tay had two sisters and a brother, adding “...I think her brother, she’s estranged from.”).

188. Hustler, 485 U.S. at 55.
B. Roach Circumvents First Amendment Analysis and Infringes On Protected Expression.

The court in Roach should not have concluded that Stern and Hayden’s expression might rise to a level of “outrageousness” without considering actual malice. Hustler requires a level of culpability before a media defendant can be held liable for emotional distress arising from its expression concerning public figures. The court in Roach, however, overlooked this crucial factor. Clearly, Tay was a public figure: through her repeated appearances on Stern’s show and her own cable access program, she placed herself in the public eye. Although Tay’s siblings were not public figures, the expression at issue focused not on them but on Tay. The actual malice standard therefore should have been applied in Roach. Because no false statements about either Tay or her family were made, and because no one on the show acted culpably, Roach presents absence of actual malice and therefore the expression within the broadcast was protected.

Further, the court should have examined the newsworthiness of Tay’s death in assessing the broadcast. Had the court considered newsworthiness, it would have found two bases upon which Tay’s death was newsworthy. First, Tay was a public figure; the death of a public figure, however minor, surely garners public interest and thus is newsworthy. Second, Tay’s death resulted from a drug overdose. Drug abuse is a topic just as newsworthy as teen pregnancy, alcohol abuse, and mental health recovery. The debate over the prevention of Tay’s death is exactly the kind of discussion on public issues that the First Amendment protects. A public figure’s drug overdose is as newsworthy as an unknown person’s car accident or pierced breast. Indeed, New York itself has held items of lesser importance as newsworthy. The threshold for newsworthiness is not high; clearly it was met in Roach.

189. Hustler, 485 U.S. at 55.
V. Conclusion

Perhaps Roach is a fluke decision. As Messenger demonstrates, New York courts are still willing to balance First Amendment protection of expression against individual protection from harm arising out of expression. As the Restatement suggests and case law establishes, a media defendant cannot be liable for emotional distress claims when it has not acted culpably. Stern and Hayden did not act culpably, and thus liability for plaintiffs' emotional distress should not even be at issue. Roach is not a question of whether the media can say anything it wants: Roach is not about desecrating the dead or damaging others with expression. The real issue in Roach is taste, and taste is too subjective a matter for a court or a jury to judge. If the defendants are guilty of anything, it is poor taste. Poor taste is not sufficiently extreme to support a claim of emotional distress. Holding otherwise is unfair.

We live in a democratic society. Clearly, one of our most cherished values is freedom of expression. We recognize that the marketplace of ideas, self-government, and the search for truth all require the free flow of expression. Ideas clash, and necessarily there will be friction from differences of opinion; this is the price for our freedom. Although it cannot run unchecked, the media is the best way to promote ideas by providing a vehicle for their expression. The approach in Hustler appropriately balances free expression and redress for injury. Roach chips away at our valued First Amendment rights, and the court should have taken more into consideration than it did.

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1984)(holding that developments in the fashion world are of consumer interest and are therefore newsworthy topics deserving of First Amendment protection), Messenger v. Gruner, 2000 N.Y. Lexis 75 (Feb. 17, 2000)(holding that teen sex, teen pregnancy, and alcohol abuse are newsworthy topics deserving of First Amendment protection).