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Photography and the Right of Privacy

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NOTES

PHOTOGRAPHY AND THE RIGHT OF PRIVACY

The right of privacy has been defined as the right of a person to be free from unwarranted publicity[1] or as the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.[2] In many instances the courts have recognized that photography may be an invasion of privacy and have permitted recovery for the publication of a photograph without consent as a part of an advertisement[3] and have granted an injunction restraining, as violating privacy, the use of a plaintiff's picture in a police rogues gallery until after a conviction.[4]

This article is concerned with whether photographing a person and publishing the resultant photograph in a newspaper or a magazine without the consent of the individual is an invasion of privacy.

1. Holoman v. Life Ins. Co. of Va., 192 S.C. 454, 7 S.E.2d 169, 127 A.L.R. 110 (1940).
2. Brents v. Morgan, 221 Ky. 765, 299 S.W. 967, 55 A.L.R. 964 (1927).
3. Pavesich v. New England Mut. L. Ins. Co., 122, Ga. 190, 50 S.E. 68, 69 L.R.A. 101, 106 Am. St. Rep. 104, 2 Ann Cas. 56 (1905); Pallas v. Crowly, Milner & Co., 322 Mich. 411, 33 N.W.2d 911 (1948); Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952).
4. Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499, 1 L.R.A. (NS) 1147, 112 Am. St. Rep. 272 (1905) (affirmed on rehearing in 117 La. 708, 42 So. 228 (1906), 116 Am. St. Rep. 215). Accord, McGovern v. Van Riper, 137 N.J. Eq. 24, 43 A.2d 514 (1945).

In considering the question the courts have used a test of "legitimate public interest" or "newsworthiness" in several instances. The publication of a picture showing the victim of a robbery,[5] the wife of a murdered man,[6] a portrait of the plaintiff's wife who had committed suicide,[7] principal in a divorce proceeding,[8] and movies of a prizefighter (shown on television)[9] were held to be in the public interest and therefore not actionable.

Assuming a newsworthy photograph it appears that there are three possible tests used by the courts: (1) the location of the picture, (2) whether the picture is offensive to the sensibilities of a normal person, (3) the tenor of the associated article or captions. As to the location of the photograph the courts in some instances have refused to allow recovery for pictures taken in public places. This theory has been based on the picture being a part of the public domain or there being no privacy in that which is already public. Utilizing this basis a principal in a divorce proceeding who was photographed in a public airport[10] and a husband and wife photographed in an affectionate pose at a public market[11] were denied recovery for the unauthorized use of their pictures. This test appears applicable only when the picture is inoffensive.

In applying the test of whether the picture is offensive the courts have arrived at varied results. A Federal District Court held that the publication of a two year old picture of a man who attempted to persuade a woman dangling from a bridge railing not to commit suicide was in the general public interest and was not derogatory or offensive to the sensibilities of a normal person.[12] In a slightly different type of case a Federal District Court held that the publication of a picture of a young girl as she lay in the street with her clothing disarranged and her face distorted by pain following an accident was humiliating to the child, had slight news value after twenty months, and was, therefore, an invasion of privacy. The Court of Appeals affirmed the judgment for the plaintiff but based its decision on different grounds, stating that publication twenty months after an accident was privileged as in the public interest, but that the picture when considered with the accompanying article headings was an invasion of privacy.[13] It has been held that the parents of a child that was born with its heart exposed could recover from a newspaper for the unauthorized

5. Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 27 N.E.2d 753 (1940).
6. Jones v. Herald Post Co., 280 Ky. 227, 18 S.W.2d 972 (1929).
7. Metter v. Los Angeles Examiner, 35 Cal. App. 304, 95 P.2d 491 (1939).
8. Berg v. Minneapolis Star Tribune Co., 79 F. Supp. 957 (D. Minn. 1948).
9. Ettore v. Philco Television Broadcasting Corp., 126 F. Supp. 143 (E.D. Penn. 1954).
10. Thayer v. Worcester Post Co., 284 Mass. 160, 187 N.E. 292 (1933).
11. Gill v. Heart Pub. Co., Inc., 40 Cal.2d 224, 253 P.2d 441 (1953). "Consistent with their voluntary assumption of this particular pose in a public place, plaintiffs' right to privacy as to this photographed incident ceased and it in effect became a part of the public domain."
12. Samuel v. Curtis Pub. Co., 122 F. Supp. 327 (N.D. Cal. 1954).
13. Leverton v. Curtis Pub. Co., 97 F. Supp. 181 (E.D. Penn. 1951), affirmed, 192 F.2d 974 (3rd Cir. 1951).

publication of a picture of the child.[14] This decision was based in part on the humiliation of the parents. In a similar instance the Massachusetts court held that the parents of a young accident victim did not have a cause of action for invasion of privacy for publication of a photograph of the disfigured body of their dead child.[15] The court refused to follow the above case and stated that the picture did not invade the privacy of the parents and that if the "right asserted here were sustained, it would be difficult to fix its boundaries."

The tenor of the headings or article associated with the picture has been used as a test by a California court which held that a photograph showing a husband in an affectionate pose with his wife was an invasion of privacy when the picture was used to illustrate a magazine article which was a psychological discussion of love, the inference being that the photographed couple's only interest in each other was sex.[16] The same picture when published in a different magazine without caption or associated article was held not an invasion of privacy.[17]

Justice Holtzoff of the District of Columbia bench stressed the necessity for "protecting the individual who desires seculsion" and held that the publication of a photograph showing a lady taxi driver was an invasion of her privacy.[18] This holding may be based in part upon the tenor of the associated article, which was derogatory of taxi drivers generally, but it emphasized the fact that the increase of public media such as magazines, moving pictures and television has given rise to the problem of protecting the individual from undue publicity such as the circulation of his likeness without his consent. The justice compared this invasion to that of publication of private letters and memoranda. In a similar case the publication of a picture showing a hospital patient with a rare disease with a heading of "starving glutton" was held an invasion of privacy.[19]

The plaintiff in some instances has maintained that the time between the taking of the picture and the time of publication furnishes a basis for recovery. This contention has been unsuccessful in most cases. A Federal District Court stated that publication after twenty months was of slight news value[20] but the Federal Circuit Court held that the same picture was still newsworthy.[21] A delay of two years was also held not to affect a picture's news value.[22]

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14. Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930).
15. Kelley v. Post Publishing Co., 327 Mass. 275, 98 N.E.2d 286 (1951).
16. Gill v. Curtis Pub. Co., 38 Cal.2d 273, 239 P.2d 630 (1952).
17. Gill v. Heart Pub. Co., Inc., 40 Cal.2d 224, 253 P.2d 441 (1953).
18. Peay v. Curtis Pub. Co., 78 F. Supp. 305 (D.D.C. 1948).
19. Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942). "Likewise whatever may be the right of the press, tabloids or news reel companies to take and use pictures of persons in public places, certainly any right of privacy ought to protect a person from publication of a picture taken without consent while ill or in bed for treatment and recuperation."
20. Leverton v. Curtis Pub. Co., 97 F. Supp. 181 (E.D. Penn. 1951), 192 F.2d 974 (3rd Cir. 1951).
21. *Ibid.*
22. Samuel v. Curtis Pub. Co., 122 F. Supp. 327 (N.D. Cal. 1954).

The question of the violation of privacy by photography appears to depend on whether the picture is offensive to the ordinary sensibilities, whether there is sufficient public interest in the photograph to justify its publication, and the context with which the picture is used. As to the first and second factors the balancing depends on the discretion of the particular court. In most instances the courts have favored a policy of allowing the press to "police" itself, stating that there would be no method of delineation between those photographs of great public interest and those so offensive to human sensibilities that publication would amount to a tort. This argument appears to be unsound, however, in this age of the progression of human dignities the courts could possibly establish a boundary beyond which the press could not transgress; a boundary established along the line of the mutilated body or the grief stricken parent, where photographs are clearly offensive and public interest slight. As to the context in which an inoffensive picture appears, it seems that if the photograph is used in its original context there has been no invasion of privacy, but if the photograph is lifted from its original circumstances and is used to portray or illustrate a different subject which is derogatory or offensive to the party involved there is a cause of action in the wronged party.

DONALD L. JENSEN

CONTRIBUTORY NEGLIGENCE—RELIANCE ON DUE CARE OF THE DEFENDANT

The harshness of the rule that contributory negligence is a complete defense has long been recognized by the courts, since it places upon one party the entire burden of the loss for which two are responsible.[1] In automobile accident litigation there is an increasing dissatisfaction with this defense, and courts are becoming more reluctant to rule that the plaintiff's conduct was negligent as a matter of law.[2] This dissatisfaction has led to a number of methods of dealing with cases in which there is negligence on the part of both parties. One such method is the doctrine of "last clear chance" which has been adopted to some extent in nearly all jurisdictions. Although at common law the rule of comparative negligence has been almost entirely abandoned, it survives in a few states in the form of statutes. A recognized exception to the contributory negligence rule is the rule that a plaintiff at fault may nevertheless recover in cases in which the negligence of the defendant is characterized as willful or wanton. In recent years many courts have used language and reasoning which make it seem reasonable to assert another method for avoiding the harshness of the contributory negligence doctrine. That is, the situations in which

1. Prosser, Torts, 403 (1941).
2. Nixon, Changing Rules of Liability in Automobile Accident Litigation, 3 Law & Contemp. Probs. 476 (1936).