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Torts -- Invasion of Privacy -- Right to Retreat from the Spotlight

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Torts—Invasion of Privacy—Right to Retreat from the Spotlight

In one respect invasion of privacy is a confused theory of tort liability.[1] The confusion occurs when a right of privacy is claimed by a person who has, at some time in the past, achieved fame or notoriety through some act or because of some unfortunate circumstance, but is no longer in the public spotlight. This results from the difficulty in balancing an individual's "right to be let alone,"[2] or to reform, with that of the public's interest in an unimpeded access to newsworthy information.[3] A different and simpler aspect of the theory is raised when there is no public interest in the published material, because then there is no public policy protecting the publisher.[4] Conversely, if the material published is of public interest, there is no right of privacy.[5]

The most famous treatment of a person's right of privacy when he has receded from the spotlight is the California case of *Melvin v. Reid*.[6] Defendant published a movie, "The Red Kimono," based on

[1] The general theory on which a cause of action for invasion of privacy is based has been stated as follows: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public . . . ." will be held liable for such interference. RESTATEMENT, TORTS, § 867 (1939).

[2] COOLEY, TORTS, 29 (2d ed. 1889).

[3] "[T]he interest of the public press in the free dissemination of the truth and unimpeded access to news is so broad, so difficult to define and so dangerous to circumscribe that courts (are) reluctant to make such factually accurate public disclosures tortious, except where the lack of any meritorious public interest in the disclosure is very clear . . . ." Jenkins v. Dell Pub. Co., 251 F.2d 447, 450 (3d Cir. 1958), *affirming* 143 F. Supp. 952 (W.D. Pa. 1956).

[4] Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945).

[5] That question is answered by the following language found in Cohen v. Marx, 94 Cal. App. 2d 704, —, 211 P.2d 320, 321 (1950): The Rights of "a person who by his accomplishments, fame or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes a part of his right of privacy." *Accord,* Estill v. Hearst Pub. Co., 186 F.2d 1017 (7th Cir. 1951); Smith v. National Broadcasting Co., 138 Cal. App. 2d 807, 292 P.2d 600 (1956); Schnabel v. Meredith, 378 Pa. 609, 107 A.2d 860 (1954). However, this is true only so long as such publications are reported accurately. See Leverton v. Curtis Pub. Co., 192 F.2d 974 (3d Cir. 1951); Bernstein v. National Broadcasting Co., 129 F. Supp. 817 (D.D.C. 1955), *aff'd,* 232 F.2d 369 (D.C. Cir. 1956); Garner v. Triangle Publications, Inc., 97 F. Supp. 546 (S.D.N.Y. 1951); Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956).

[6] 112 Cal. App. 285, 297 Pac. 91 (1931).

facts taken from the life of the plaintiff as a prostitute. Though the facts were a matter of public record, the plaintiff objected because eight years before she had changed her ways and was now married and leading a respectable life.[7] Plaintiff recovered, but liability was predicated upon a provision in the California constitution,[8] rather than recognition of a general right of privacy. However, in the course of its opinion, the court made reference to the defendant's "unnecessary and indelicate"[9] use of the plaintiff's name, and Prosser has used this language to formulate a test—"publication of matters violating the ordinary decencies"[10]—for recovery based upon invasion of the right of privacy.

In a recent case,[11] the Delaware court was asked to use the "unnecessary and indelicate" test in judging facts bearing similarity to those in *Melvin v. Reid.* Plaintiff's name was used in accurately describing the last incident of corporal punishment in Delaware.[12] These facts were a matter of public record; nine years had passed since the incident occurred; and the plaintiff was leading a normal life at the time of the publication. He argued that identifying him by name was "unnecessary" because it added nothing of informational value and that his reform made the use of his name "indelicate."

[7] A lapse of time, by itself, does not reinstate a plaintiff's right of privacy as to the publication of facts. If those facts can be found in public records and are still matters of legitimate public concern, the privilege to republish exists. Estill v. Hearst Pub. Co., 186 F.2d 1017 (7th Cir. 1951); Smith v. Doss, 251 Ala. 250, 37 So. 2d 118 (1948); Cohen v. Marx, 94 Cal. App. 2d 704, 211 P.2d 320 (1950).

[8] CALIF. CONST. art. I, § 1. "All men... [have] by nature... [the right] of pursuing and obtaining safety and happiness."

[9] Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91, 93 (1931). "The use of... [plaintiff's] true name in connection with the incidents of her former life in the plot and advertisements was unnecessary and indelicate, and a willful and wanton disregard of that charity which should actuate us in our social intercourse...." *Id.* 112 Cal. App. at —, 297 Pac. at 93.

[10] Prosser, *Privacy,* 48 CALIF. L. REV. 383 (1960). Prosser has divided the tort of invasion of privacy into four categories, the second of which is "public disclosure of embarrassing private facts about the plaintiff." *Id.* at 389.

[11] Barbieri v. News-Journal Co., 189 A.2d 773 (Del. 1963).

[12] RESTATEMENT, TORTS, § 867, comment *c* (1939) states that "a public official, an actor, an author.... or one who unwillingly comes into the public eye because of his own fault... are the objects of legitimate public interest during a period of time after their conduct or misfortune has brought them to the public attention; until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains, and victims."

Therefore, he argued, his situation was similar in all important respects to *Melvin v. Reid* which established that liability should be imposed for the "publication of matters violating the ordinary decencies."[13]

The Delaware court flatly rejected this argument and said:

> Such a rule would in reality subject the public press to a standard of good taste—a standard too elusive to serve as a workable rule of law.... There must be something more than the mere publication of facts of record relating to a matter of public interest. In the Melvin case, in our opinion, there was the fact of exploitation of plaintiff's private life for commercial profit in a medium—the motion picture—almost inevitably entailing a certain amount of distortion to capture the attention of the public.[14]

Though this statement is a flat rejection of the "unnecessary and indelicate" interpretation of *Melvin,* it is also a recognition that liability was properly imposed in that case, for reasons which were not present in *Barbieri.* According to the court, these reasons would be: use of a "medium... entailing... distortion to capture the attention of the public"[15] and "commercial exploitation" of plaintiff's name.[15a]

Many jurisdictions recognize that the right of privacy is invaded when the defendant exploits the plaintiff's name or private life for profit;[16] however, such exploitation of a person's private life for commercial profit has been a factor only where the name[17] or picture[18] of a person is used in advertising without his permission. Therefore, Delaware's application of this concept to a situation not involving advertising is a departure from the norm.[19]

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[13] In Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (N.D. Calif. 1939), the court allowed the plaintiff to recover basing its decision on *Melvin v. Reid.* However, it made no mention of the "unnecessary and indelicate use of a name" for the basis of its decision.

[14] Barbieri v. News-Journal Co., 189 A.2d 773, 776 (Del. 1963).

[15] *Id.* at 776-77.

[15a] *Ibid.*

[16] *E.g.,* Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938).

[17] Birmingham Broadcasting Co. v. Bell, 266 Ala. 266, 96 So. 2d 263 (1957); Fairfield v. American Photocopy Equipment Co., 138 Cal. App. 2d 82, 291 P.2d 194 (1955); Kerby v. Hal Roach Studios, Inc., 53 Cal. App. 2d 207, 127 P.2d 577 (1942).

[18] Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); 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).

[19] However, Ettore v. Philco Television Broadcasting Corp., 220 F.2d 481 (3d Cir. 1956) classified the following group of cases as involving

When an advertisement is the method of publication, it is easy to see the applicability of the concept of "commercial appropriation" as the basis for imposing liability because the sole motive of the defendant is financial gain without regard to the public's acquisition of information. It is possible to say that the same is true when the publication is not an advertisement, because no matter what the form of publication,[20] the basic wrongful act of the defendant is the commercial appropriation of a person's name or personality without permission. Even advertisements inform the public; but the small amount of informational value or benefit contained therein is not enough to offset the invasion of an individual's right of privacy. It is certainly conceivable that the same situation might be present when another form of publication is used.[21]

However, it is necessary that there be some standard which clearly defines the applicability of this concept to other forms of publication,[22] and the difficulty of defining such a standard has

"strictly commercial exploitation of some aspect of an individual's personality": Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (N.D. Cal. 1939); Gill v. Curtis Pub. Co., 38 Cal. 2d 273, 239 P.2d 630 (1952); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944); and Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938). *Id.* at 486, n.9.

[20] That entertainment is a legitimate goal and in most instances privileged and that publications giving out facts of legitimate public concern are privileged is not questioned here; however, just as the privilege to publish news can be abused by fictitious additions to a story or publication of non-newsworthy items; entertainment mediums can also use a person's name or picture for a commercial motive. Of course courts will permit limited scrutiny of the private lives of public figures. See Garner v. Triangle Publications, Inc., 97 F. Supp. 546 (S.D.N.Y. 1951). But when this is carried to the point of appropriation should the courts not find this as objectionable as using a name in advertising?

[21] In Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944), the defendant wrote a book about the section of Florida in which the plaintiff lived containing a vivid description of the plaintiff's masculine characteristics and her constant use of profanity. The court allowed recovery for this use of the elements of her personality without her consent even though it recognized that the book had legitimate entertainment and informational value.

[22] Informational value could, of course, vary with the type of book, radio program, television program, or motion picture, and one could find extremes in each of these mediums that would range from absolute documentary presentations to utter fantasy. Therefore, each case should be strictly determined on its facts and not by the category in which it might fall. This segregation of mediums is meant to be only a rough indication of the amount of informational value one might expect generally from a particular medium. In order to provide a working standard, Gill v. Curtis Pub. Co., 38 Cal. 2d 273, 239 P.2d 630 (1952) set out the following factors for consideration: (1) the medium of publication; (2) the extent of the use; (3) the public

caused some courts to refuse to recognize an individual's right in this situation at all.[23] Still other courts, when faced with flagrant intrusions on an individual's rights, have imposed liability for such reasons as "unnecessary and indelicate" use of a person's name[24] or the presence of distortion without more.[24a] The Delaware court refused to follow either of these alternatives. Instead it would examine the published material to see if there was a legitimate public interest in the specific statements complained of. If it did not find such an interest, it would then impose liability if it found that the publisher's intent was other than serving the public's right of access to newsworthy information.[25] In other words, if the court had found that use of the plaintiff's name was currently newsworthy, it would have gone no further. But, finding this interest lacking, it examined the publisher's intent and found that the intention was to satisfy the public's interest in the merits of corporal punishment, even though the use of the name did not accomplish the purpose.

Such a test protects a publisher from liability when he makes a mistake, and it keeps the emphasis where it belongs—on the public's right—but it has, to some degree, the same flaw as the "unnecessary and indelicate" test because it is hard to apply. In this respect the court thought the medium of publication important, and in many situations this would be a good test. In *Melvin,* for instance, the medium was a motion picture, and motion pictures are generally published to entertain, not to inform. On the other hand because certain forms of publication may involve mixtures of informational and entertainment value, this test, like the "unnecessary and indelicate" test will be difficult to apply. However, this is not necessarily so in every instance as the intent or motive of a publisher producing distorted fictional dramatizations can readily be distinguished from that present when a publication performs the service of satisfying the

interest served by the publication; and (4) the seriousness of the interference with the person's privacy. See also, RESTATEMENT, TORTS, § 867, comment *d* (1939), which states, "In determining liability, the knowledge and motives of the defendant, the sex, station in life, previous habits of the plaintiff with reference to publicity, and other similar matters are considered."

[23] Generally courts will not distinguish between news for information and news for entertainment. Chaplin v. National Broadcasting Co., 15 F.R.D. 134, 138-39 (S.D.N.Y. 1953).

[24] Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931).

[24a] Leverton v. Curtis Pub. Co., 192 F.2d 974 (3d Cir. 1951).

[25] Barbieri v. News-Journal Co., 189 A.2d at 776-77.

more important interest of the public in unimpeded access to newsworthy information. In the latter there should not be recovery; but it is objectionable that in the former this public interest is said to protect a publisher when such an interest is not present at all, simply because it might have been. It is submitted that upon finding a lack of legitimate public interest in the specific statements complained of, a court should base its decision on a further investigation of whether the defendant's intent was to commercially exploit plaintiff's private life.

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Trusts—Deviation from Investment Restrictions

In 1924 James B. Duke established the Duke Endowment when he transferred to trustees a large amount of securities, the income of which was to be used for educational, religious and other charitable purposes.[1] The trust indenture provided that the trustees could invest the funds of the trust in either government bonds or Duke Power Company securities, other investments being prohibited. In 1962 over 80% of the trust was invested in common stock of Duke Power, and over 95% of the remaining common stock was invested in two aluminum companies.[2] The trustees brought an action for modification of the trust instrument to permit them to invest in stocks and bonds of corporations other than Duke Power. Basing their opinion on New Jersey law because of the terms of the trust instrument,[3] the North Carolina Supreme Court said that a court

[1] 20% of net income is to be set aside until an additional $40,000,000 has been added to the trust. The remaining income is payable 32% to Duke University, 32% to such nonprofit hospitals in North and South Carolina as the trustees select, 5% to Davidson College, 5% to Furman University, 4% to Johnson C. Smith University, 10% to nonprofit organizations in North and South Carolina selected by the trustees which are engaged in caring for orphans, 2% for care of needy retired Methodist preachers, or widows and orphans of deceased Methodist preachers in North Carolina, 6% to be used in erecting rural Methodist churches in North Carolina, and 4% for maintenance and supervision of such churches. Cocke v. Duke Univ., 260 N.C. 1, 5-6, 131 S.E.2d 909, 911 (1963).

[2] Stocks in companies other than Duke Power were received from either Mr. Duke or his estate. In 1962 the number of shares and the values of aluminum company stocks held by the trust were as follows: 791,040 shares of Aluminum Ltd., of Canada, valued at $17,402,880; 639,644 shares of Alcoa common, valued at $35,180,420; 59,300 shares of Alcoa preferred, worth $5,040,500. *Id.* at 13, 131 S.E.2d at 916.

[3] The trust by its express language is "executed by a resident of the State