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Torts--Right of Privacy

Durward W. Caudill
University of Kentucky

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TORTS—RIGHT OF PRIVACY.—Plaintiff's fifteen-year-old daughter was killed in an automobile accident. Defendant police officer, while officially investigating the accident, photographed her mutilated body, and later showed the photograph to her classmates to demonstrate a safety lesson. Defendant was awarded summary judgment on the ground that he had the right to "take and publish" the photograph. *Held*: Reversed. There existed two material issues of fact: (1) whether the photograph was identified when published; and (2) the nature and purpose of the publication. *Sellers v. Henry*, 329 S.W.2d 214 (Ky. 1959).

The right of privacy was developed for the protection of the interest of the individual in "not having his affairs known to others, or having his likeness exhibited to the public."¹ It is not the purpose of this comment to re-examine the development of the right of privacy,² but rather to consider three issues raised by the *Sellers* case: (1) who may bring an action; (2) the extent of the right; and (3) identification of the photograph as a requirement for recovery.

Who May Bring Action

The *Sellers* case is based on the theory that publication of the child's photograph is an invasion of the parents' right of privacy, and not that the parents should be able to recover on behalf of the child for an invasion of *her* right.

Kentucky became the second jurisdiction³ to recognize the invasion of the right of privacy as a tort in *Brents v. Morgan*.⁴ The definition of the right of privacy given in the *Brents* case is "the right to be let alone, that is, the right of a person to be free from unwarranted publicity, or the right to live without unwarranted interference by the public about matters with which the public is not necessarily concerned."⁵ This definition, like the *Restatement* definition above,⁶ describes the right of privacy as a personal right. However, it will permit recovery in a case such as *Sellers v. Henry*, while the *Restatement* would confine recovery to cases where the *plaintiff's likeness was published*.⁷

¹ Restatement, Torts § 867 (1939).

² See Note, 38 Ky. L.J. 487 (1950).

³ Georgia was the first jurisdiction to recognize the right of privacy. See *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

⁴ 221 Ky. 765, 299 S.W. 967 (1927).

⁵ *Id.* at 770, 299 S.W. at 970.

⁶ See note 1 *supra*.

⁷ For an extreme example, see *Friedman v. Cincinnati Local Joint Executive Bd.*, 20 Ohio Op. 473 (1941), cited in Annot., 138 A.L.R. 22, 51 (1942). An injunction was issued to restrain labor pickets from making motion pictures of plaintiff's business patrons on grounds that this was an invasion of the plaintiff's right of privacy.

In view of *Douglas v. Stokes*,⁸ it is not surprising that the Kentucky court in the principal case refused to uphold a summary judgment granted to a defendant who had published a photograph of the mutilated body of the plaintiff's child. In the *Douglas* case, a father had employed a photographer to take pictures of the dead body of his deformed child and to deliver to him a certain number of prints. The court upheld a judgment for the parents who had brought suit against the photographer for having the photograph copyrighted. This case was cited in *Brents v. Morgan*⁹ as having granted recovery for invasion of the right of privacy. Although some believe that the decision in the *Douglas* case was actually based on breach of contract, the court indicated that it would grant recovery for an invasion of the right of privacy when it said:

A man may recover for any injury or indignity done to the body, and it would be a reproach to the law if physical injuries might be recovered for and not those incorporeal injuries which would cause much greater suffering and humiliation.¹⁰

The typical situation involving the right of privacy is where an individual's name, signature, or photograph is used for some commercial purpose, such as the advertising of a product. The writer of the *Kentucky Law Journal* note referred to above¹¹ suggested that there existed an excellent possibility that the Kentucky court would grant recovery for the non-commercial use of a photograph. The *Sellers* case goes beyond that prediction since the court used words which indicate that it will grant recovery for the non-commercial use of a photograph, even if the photograph is that of the mutilated body of the plaintiff's child, provided that (1) the publication was not in the public interest; and (2) there was some identification of the photograph at the time of publication.

The Extent of the Right

In the *Sellers* case, the court held:

While the question of whether the publication of such a photograph as is here involved is in the public interest is one of law, it is a type of legal question the answer to which is peculiarly dependent upon factual details.¹²

The trial court, in awarding summary judgment for the defendant, considered only the complaint and an affidavit of the defendant which stated that he was required to investigate the accident and it was in

⁸ 149 Ky. 506, 149 S.W. 849 (1912).

⁹ 221 Ky. 765, 299 S.W. 967 (1927).

¹⁰ 149 Ky. at 509, 149 S.W. at 850.

¹¹ Note, 38 Ky. L.J. 487 (1950).

¹² 329 S.W.2d at 216.

the public interest that the pictures should be taken and published. The Court of Appeals held that the trial court must consider the nature of the publication, and if, upon further proceedings, it develops that there is no genuine issue about these facts, a summary judgment will be proper; the decision is to whether the publication was in the public interest is one of law, dependent upon the factual details of the publication.

The court in the principal case indicated that "a regular newspaper account of an occurrence of public and general interest does not constitute an actionable invasion of the right of privacy."¹³ It would appear, therefore, that the newspapers have gained an unqualified right to publish photographs concerning current news events, regardless of how gruesome the photographs are. This concept was recognized in *Jones v. Herald Post Co.*,¹⁴ where the court said,

There are times, however, when one, whether willingly or not, 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 such occurrence.¹⁵

In the *Herald Post* case, an action was brought for damages for the publication of a photograph of the plaintiff with a narrative of the incident in which she had helped defend her husband against robbers. The photograph was not one showing her in the act described, but a regular portrait of her, which was taken sometime before. The spirit of this doctrine appears to be that the public has a right to an account of newsworthy items in the community, with photographs of the person involved, but not the right to view all of the gruesome details of the incident.

The courts gave recognition to the right of privacy largely because of the unauthorized use of names and photographs of individuals in advertising products, and other similar commercial publications. At the present time, it appears that newspapers have a right to publish any photograph, as long as it pertains to a current event. The writer believes that sensationalism has crept into journalism under the guise of public interest to such an extent that the courts should begin to exercise the same control over published news photographs as they exercise over those published commercially.

The case of *Waters v. Fleetwood*,¹⁶ illustrates the unfortunate consequences of the public interest, or *current events* test. In that

¹³ *Ibid.*

¹⁴ 230 Ky. 227, 18 S.W.2d 972 (1929).

¹⁵ *Id.* at 229, 18 S.W.2d at 973.

¹⁶ 212 Ga. 161, 91 S.E.2d 344 (1956).

case the plaintiff's daughter had been the victim of an atrocious crime; her body had been wrapped in chains and thrown into a river. Upon recovery the body was photographed, a copy of the photograph was published in the defendant's newspaper, and later, the defendant sold copies of the photograph to the general public. The court upheld the sustaining of a general demurrer to the complaint, saying that the same rule would apply to the sale of the photograph as applied to the newspaper account—they were both in the public interest. It is difficult to see how a sale of such a photograph to the public is in the public interest; furthermore, it is equally difficult to see how the publication of the photograph in a newspaper could be little more than catering to a sense of morbid curiosity. A narrative description along with a photograph of the little girl while she was still alive would have sufficed to inform the public of the incident; this would not violate the public interest concept as presented in the *Herald Post* case,¹⁷ and it would protect the right of the parents not to have the grotesque details of the incident revealed to the public.

There are indications that some courts are not entirely satisfied with the absolute right of newspapers to publish photographs in reporting news events regardless of how shocking they are. In *Meetze v. Associated Press*,¹⁸ the North Carolina court held that a newspaper article reporting the fact that a twelve-year-old girl had given birth to a normal, healthy son was not actionable, because it was not offensive. However, the court said, "[N]ewsworthiness is not necessarily the test. . . . Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notion of decency."¹⁹ This view was also presented in a vigorous dissent in an Iowa decision, where the dissenting judge said that the court should recognize invasion where there is "extreme catering to the morbid and sensational."²⁰

Removing the unqualified right to public photographs of news events would not involve censorship so as to invade freedom of the press, but it would force the press to publish sensational photographs at its own risk. The writer advocates that the right to publish photographs of news events be qualified by requiring that the publication not offend the sensitivities of an ordinary person.

¹⁷ *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W.2d 972 (1929).

¹⁸ 230 S.C. 330, 95 S.E.2d 606 (1956).

¹⁹ *Id.* at , 95 S.E.2d at 609, quoting from *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 809 (2d Cir. 1940).

²⁰ *Bremmer v. Journal-Tribune Publishing Co.*, 247 Iowa 817, 76 N.W.2d 762, 769 (1956).

The *Sellers* case demonstrates that the public interest concept can be extended to situations other than publication of photographs in newspapers. This type of publication should be governed by the same test as the one proposed for newspaper publications above. Thus the factual consideration should include the nature of the publication *and* whether the publication would offend a person of ordinary sensitivities. These are clearly questions of fact which should be considered by the jury, since there could be differences of opinion among reasonable men concerning them.

Identification as a Requirement for Recovery

One of the requirements for recovery is that there have been some identification of the photograph at the time it was published. This is a question of fact for the jury. It is not startling to impose such a requirement as a prerequisite to recovery; an individual could hardly contend that his privacy had been invaded unless he had been identified. In the *Sellers* case, identification of the child from the photograph was questionable. The court seemingly indicated that it would allow recovery if there was some identification of the photograph by the girl's classmates, regardless of whether it was explicit at the time of publication.

Conclusion

The court will grant recovery for invasion of the right of privacy of parents where a photograph of the mutilated body of their child has been shown to her classmates to demonstrate a safety lesson, provided that the publication was not in the public interest, and that there was identification of the photograph at the time of publication. The trial court will decide as a matter of law, on retrial, whether publication was in the public interest. If it was not, the jury will decide whether there was identification of the deceased at the time of publication. The writer advocates submitting to the jury the question of whether the photograph is so gruesome as to offend the sensitivities of an ordinary person, as a test of whether the publication is in the public interest, rather than basing the decision on a *current events* test and deciding the question as a matter of law.

Durward W. Caudill