Invasion of Privacy and Infliction of Emotional Distress

Invasion of Privacy

In the United States, journalists are subject to being sued for four types of claims, which, although legally distinct, commonly are grouped under the term "invasion of privacy." They are:

- The unauthorized appropriation of a person's name or likeness for commercial purposes.
- Intrusion into a person's solitude.
- The publication of truthful but embarrassing private facts about a person.
- Portrayal of a person in a "false light."

Invasion of privacy claims can arise out of every facet of a news operation, from newsgathering to advertising to the publication of editorial cartoons. Fortunately, the N.C. Supreme Court has decided that only the first two types – appropriation and intrusion – are

recognized as part of the common law of this state; consequently, N.C. journalists are less exposed to privacy claims than their peers in other states.

It's important to remember, however, that our courts' jurisdiction ends at the state line; if you publish or disseminate information outside North Carolina about a person who is a citizen of another state you are potentially subject to invasion of privacy claims filed in less favorable jurisdictions. This concern is particularly relevant to information distributed online or via social media.

This chapter reviews the four types of invasion of privacy claims, with emphasis on the two types that are recognized by the N.C. courts. This chapter also discusses claims for the intentional or negligent infliction of emotional distress. Neither is among the claims grouped under "invasion of privacy," but they are closely related, and plaintiffs often assert emotional distress claims in conjunction with privacy claims.

What is the historical basis for invasion of privacy claims?

The concept of a legal right to privacy is a relatively recent and uniquely American invention. Privacy was not recognized as a common law right in England, Australia, New Zealand, Canada or other jurisdictions with which we share a common legal heritage.[1] The recognition of privacy rights has spread rapidly in recent years, however, as the result of influences such as the globalization of information via the Internet, the European Union's Convention on Human Rights and the United Kingdom's Human Rights Act of 1998.

Most legal commentators and scholars agree that the legal concepts underlying modern privacy rights were first articulated in an 1890 Harvard Law Review article entitled "The Right to Privacy" written by two young Boston lawyers, Samuel Warren and Louis Brandeis.[2] Because the Warren-Brandeis article had a significant impact on the recognition and development of the four "invasion of privacy" torts, it

[1] Frederick Davis, *What do We Mean By "Right To Privacy"?*, 4 S. DAK. L. REV. 1,4 (1959). *See also*, RODNEY A. SMOLLA, *SUING THE PRESS,* 123 (1986).

[2] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV.. 193 (1890).

has been called the most influential law review article in history.[3] Much of its prestige undoubtedly stems from the subsequent personal fame of Brandeis, who became a legendary justice of the Supreme Court of the United States. When "The Right to Privacy" was published, however, Brandeis was only 33 years old. Moreover, in recent years the underlying premise of the article — i.e., that the Boston newspapers of the 1880s were scandal sheets that pried incessantly into the private lives of prominent persons — has been significantly discredited by several legal and historical scholars.[4]

Despite the questions that have been raised concerning the validity of "The Right to Privacy" in recent years, its influence has been undeniable, and state after state has recognized claims for invasion of privacy since its publication.

What legal rules govern appropriation cases?

Appropriation, the first type of privacy claim to gain widespread acceptance, is the unauthorized use of a person's name or identity for trade or business purposes. Owing to its emphasis on commercial exploitation, it is frequently called "commercialization." Claims for appropriation arise most frequently in connection with advertisements that promote a product or service by associating it with a well-known person.

Although appropriation is classified as a type of invasion of privacy, most appropriation or commercialization cases actually have to do with publicity and are brought by celebrities seeking to prevent others from cashing in on their fame. For example, in 1980 Johnny Carson, the long-time host of the "Tonight" show, successfully sued a Mich. company that marketed its portable toilets under the name "Here's Johnny."[5]

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[3] Dean Prosser cites the article as "perhaps the outstanding illustration of the influence of legal periodicals upon the courts," WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 117 (4th ed. 1971), and Justice Thurgood Marshall has referred to it as "the most famous of all law review articles." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 80 (1971) (dissenting opinion). One commentator suggests that no "other law review article, before or since, has achieved greater fame or recognition." Davis, *supra* note 1.

[4] *See, e.g.,James* Barron, *Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 183: Demystifying A Landmark Citation,* 13 SUFFOLK U.S. REV. 875 (1979); DON R. PEMBER, *PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT* (1970).

[5] Carson v. Here's Johnny, 498 F. Supp. 71 (E.D. Mich. 1980).

In some states, such as New York, California and Florida, appropriation claims are based on statutes enacted by the state legislature.[6] In many other states, including North Carolina, the courts have recognized appropriation claims as part of the common law – that is, as part of the body of law that has been passed down to us through centuries of legal precedents.[7]

The plaintiff in an appropriation case must show that the defendant, without permission, used the plaintiff's "name or likeness" for his own benefit.[8]

The N.C. Supreme Court recognized appropriation claims in 1938 in *Flake v. Greensboro News Co.*[9] The *Flake* case arose when the Greensboro Daily News published an advertisement for the "Folies de Paree," a touring vaudeville show scheduled to appear at a local theater. The advertisement included a photograph of a swimsuit-clad young woman, who was described as "Sally Payne," an "exotic red-haired Venus" appearing in the show. In fact, however, the young woman pictured was Nancy Flake, a singer who had made phonograph records and appeared with orchestras throughout North Carolina. The published photo, for which Ms. Flake had posed at the request of her recording company, was inserted into the advertisement accidentally by an employee of the newspaper. When the mistake was called to its attention, the Daily News immediately stopped running the advertisement, but Ms. Flake later sued the newspaper for libel and for invasion of privacy.

Ultimately, Ms. Flake's case reached the N.C. Supreme Court, which upheld her right to sue the newspaper for appropriation of her likeness but limited the amount of damages that she could recover because she could not show any specific financial damages and because the use of her photograph was not intentional.[10] North Carolina's appellate courts have not had occasion to address the appropriation tort since 1939, when the *Flake* case was decided.

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[6] *See* N.Y. STAT. ANN. §50-51 (1990); CAL. CIV. CODE §3344 (West. Supp. 1980); FLA. STAT ANN. §540.08 (West 1972).

[7] *See, e.g.,* Pavesich v. New England Mutual Life Ins. Co., 122 Ga. 190 (1905); Flake v. Greensboro News Co., 212 N.C. 780 (1938).

[8] RESTATEMENT (SECOND) OF TORTS §652C (1977).

[9] Flake v. Greensboro News Co., 212 N.C. 780 (1938).

[10] *Id.* at 793.

Early on, courts rejected the notion that an appropriation claim could be based on the publication of a person's name or photograph in connection with news stories. As early as 1908, for example, a N.Y. man sued the New York World for publishing his picture on its front page.[11] He claimed that his picture attracted readers to the paper, resulted in the sale of more copies, and therefore constituted a "trade or commercial" use. The N.Y. courts rejected this argument, holding that claims for appropriation were not intended to prohibit a newspaper from publishing a person's name or picture as part of its coverage of newsworthy events.[12] This line of reasoning has been followed consistently by courts in many other jurisdictions. The fact that news organizations are for-profit businesses does not prevent their use of newsworthy photographs and information. Moreover, the concept of newsworthiness is usually interpreted broadly, as in a 1971 case brought against New York Magazine by a man whose photograph was taken as he marched in the St. Patrick's Day parade dressed in an Irish hat, a green bow tie and an Irish pin. New York's highest court ruled that his photo, which appeared on the magazine's cover, was newsworthy because the parade was "an event of public interest to many New Yorkers."[13]

What legal rules govern intrusion cases?

Intrusion is the only one of the four privacy torts that does not necessarily involve a publication. Instead, it is based on the idea that everyone is entitled to solitude or seclusion in some places and circumstances and that a person who wrongfully intrudes upon this "zone of privacy" may be liable for damages.

The elements of an intrusion claim are defined as follows:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[14]

The 1992 edition of this handbook forecast that it was "highly likely

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[11] Moser v. Press Publ'g Co., 109 N.Y.S. 963 (1908).

[12] *Id.*

[13] Murray v. New York Magazine, 318 N.Y.S.2d 474 (1971).

[14] RESTATEMENT (SECOND) OF TORTS §652B (1977).

that our courts would uphold an intrusion claim grounded on appropriate facts." Indeed, in 1996 the N.C. Court of Appeals permitted a husband to sue his estranged wife for intrusion for having installed a hidden camera in his bedroom.[15] This marked the first time either of our appellate courts formally recognized a claim for intrusion.

The appeals court said intrusion "is committed when a person intentionally intrudes into the solitude or seclusion of another."[16] Such an intrusion must be highly offensive to a reasonable person to be actionable. In the *Miller* case, the court found the wife's conduct so offensive as to allow the husband to seek punitive damages on his claims.

Although intrusion cases in North Carolina have been few, intrusion cases from other jurisdictions generally fall into three categories: surreptitious surveillance, traditional trespass and cases in which consent to enter a private setting is exceeded by the defendant. Potential problems of all three types arise frequently in the newsgathering process.

Surveillance cases

People who object to having their conversations quoted in the media or to having their photographs published or broadcast often threaten to sue for invasion of privacy. The courts have held, however, that in order to carry through successfully with such a threat, one must have a reasonable expectation of privacy. The law requires people in public and semi-public places to assume that they may be photographed or recorded. Indeed, it is often said that "what the eye may see, or the ear may hear, may be recorded and reported."[17] In a typical case, a Washington state court ruled that a television crew did not "intrude" by shining lights into a pharmacy in order to film persons inside because the same persons could have been seen by any passerby who looked into the store from the street.[18]

Likewise, courts have routinely upheld the media's right to use traditional reporting techniques, such as asking questions of persons

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[15] Miller v. Brooks, 123 N.C. App. 20 (1996).

[16] *Id.* at 26.

[17] *See, e.g.,* Mark v. King Broad. Co., 618 P.2d 512 (Wash. App.1980).

[18] *Id.* at 519.

who have access to confidential information.[19] For example, a reporter who asks a college basketball coach about the SAT scores of a high school recruit does not commit an invasion of privacy, even though the coach has no legal right to disclose the information without the recruit's permission.

Surveillance cases often turn on the specific circumstances in which the alleged intrusion occurs. For example, in a 1971 case, *Dietemann v. Time, Inc.*, two Life magazine employees used false identities to gain entrance to the home of an allegedly "quack" doctor. Once inside, one of the reporters secretly photographed the "doctor"[20] while the other transmitted their conversation with him to a recorder hidden in a nearby automobile. A federal court held that the doctor's residence "was a sphere from which he could reasonably expect to exclude eavesdropping newsmen."[21] The court also rejected the magazine's claim that concealed cameras and secret recording devices are indispensable to investigative reporting and that their use is protected by the First Amendment. In a passage that has been cited frequently, the court said:

The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office.[22]

By contrast, in a Ky. case, a drug dealer told two newspaper reporters that an attorney had offered to arrange with a judge to keep her out of jail for a fee of $10,000.[23] The reporters gave the drug dealer a tape recorder, which the dealer concealed on her person during a visit to the attorney's office. During the conversation, the attorney asked the woman if she was carrying a tape recorder, but she denied it. When the attorney sued the reporters' newspaper for intrusion, the Ky. courts rejected his claim and distinguished his case

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[19] *See, e.g.,* Nicholson v. McClatchy Newspapers, 177 Cal. App. 3d 509 (1986).

[20] Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971).

[21] *Id.* at 248.

[22] *Id.* at 249.

[23] McCall v. Courier-Journal, 6 Media L. Rep. (BNA) 1112 (Ky. App. 1980), *rev'd on other grounds,* 623 S.W.2d 882 (Ky. 1981), *cert. denied,* 456 U.S. 975 (1982).

from that of the doctor in *Dietemann*.[24] The courts said that because the attorney continued to talk with the woman even after he suspected that he was being recorded, he had a lesser expectation of privacy than the doctor did.[25]

Intrusion claims often arise out of attempts to eavesdrop on telephone conversations. Moreover, "bugging," wiretapping and eavesdropping on telephone conversations are illegal under both N.C. and federal statutes.[26] The federal law, part of the Omnibus Crime Control and Safe Streets Act of 1968, makes it illegal to intercept not only traditional telephone conversations but also conversations and data transmitted via cellular telephones, electronic mail and satellites.[27]

It is important to note that although state and federal law prohibit the interception, surveillance or recording of telephone conversations by **third parties**, neither N.C. law nor federal law prohibits your recording a telephone conversation in which you are a **participant** unless the recording is made "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state."[28] Also, the Federal Communications Commission requires broadcasters to give advance warning if a recorded telephone message is intended for broadcast.[29]

This means that print reporters may lawfully record a telephone interview with or without the knowledge or consent of the other party. Broadcast reporters must seek consent if the recording is to be aired.

Although it is illegal for someone who is not a participant to intercept or record a telephone conversation, journalists sometimes come into possession of tapes or transcripts made by eavesdroppers. One such incident occurred in the 1992 N.C. gubernatorial campaign, when a supporter of one candidate used a police scanner to intercept a conversation between two supporters of the opposing candidate, one of whom was using a

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[24] *Id.*

[25] *Id.*

[26] *See* Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 (1970 & 1991 Supp.); N.C. GEN. STAT. §14-155 (1986).

[27] *Id.*

[28] 18 U.S.C. §2511(2)(d) (1970 & 1991 Supp.). *See* Annot., 67 A.L.R. Fed. 429 (1984 & 1991 Supp.).

[29] 47 C.F.R. § 73.1206.

wireless phone. When the taped conversation was given to reporters, the news media had to decide whether they could legally disclose the contents of the conversation. It was not broadcast.

In 2001, the U.S. Supreme Court ruled in *Bartnicki v. Vopper*[30] that a journalist's disclosure of such a tape was protected by the First Amendment because the contents related to a matter of public concern and were lawfully obtained. Although this ruling is helpful to journalists, reporters who acquire recordings of telephone conversations should consult with an attorney knowledgeable about First Amendment issues before publishing or broadcasting them.

Trespass cases

Trespass is a tort that involves going onto private property or causing another to do so without the consent of the person who owns or is lawfully in possession of the property.[31] Intrusion cases involving trespass usually arise out of newsgathering activities in which media representatives go onto private premises or in which the media obtain documents or other private property as the result of a trespasser's efforts.

Intrusion problems frequently arise when reporters and photographers follow or accompany police, fire fighters and other officials into homes, offices and other private premises where crimes, arrests, accidents or natural disasters have occurred.[32] The court decisions in such cases are not consistent, and the outcomes often appear to depend upon the specific facts.[33]

For many years reporters and photographers followed the custom of obtaining and relying on permission from law enforcement officers to enter onto private property that was the scene of a crime, fire or natural disaster. In 1999, however, the U. S. Supreme Court ruled that such permission is legally ineffective; accordingly, media representatives should not enter onto private premises in the face of

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[30] Bartnicki v. Vopper, 532 U.S. 514 (2001).

[31] RESTATEMENT (SECOND) OF TORTS §158 (1965).

[32] *See, e.g.,* Florida Publ'g Co. v. Fletcher, 340 So.2d 914 (Fla. 1976), *cert. denied,* 431 U.S. 930 (1977).

[33] *See* Green Valley School, Inc. v. Cowles Florida Broad., Inc., 327 So. 2d 810 (Fla. App. 1976); Prahl v. Brosomle, 295 N.W.2d 768 (Wis. App. 1980); Anderson v. WROC-TV, 441 N.Y.S.2d 220 (Sup. Ct. 1981).

an objection from the owner or other person having authority over the premises. Likewise, a journalist should not enter private property if a "No Trespassing" sign is posted. If no sign is posted and no occupant or other person with apparent authority to give consent is present, a journalist should proceed no further than the areas where a salesman or delivery person would be expected to go, such as a driveway, porch or lawn.

In the 1999 case, *Wilson v. Layne*, the Court held that police who invite media representatives to accompany them during the execution of search warrants may violate the Fourth Amendment rights of the individuals whose homes are the subject of the warrant.[34] The case arose when U.S. marshals invited a photographer and a reporter from The Washington Post to accompany them while they executed a search warrant. At least five plainclothes officers with guns drawn entered a home at 6:45 a.m. in search of a man wanted for probation violations. When they entered the home with the reporter and photographer in tow, the marshals were confronted by the father of the man sought in the warrant. Cursing and wearing only briefs, the father was quickly subdued after demanding that the marshals state their business. His wife appeared wearing only a nightgown and witnessed her husband being restrained by the officers. The subject of the warrant was not found in the home.

The Post never published the photographs of the incident. Despite finding that the marshals violated the couple's Fourth Amendment rights, the Supreme Court found the marshals immune from liability, saying that the law in this area had not been previously established so as to give notice to law enforcement engaged in the practice. There is no indication that the Post was ever sued. However, the opinion clearly gives warning to police and the media that similar conduct after the opinion may be actionable.

In *Hanlon v. Berger*, a companion case to *Wilson v. Layne*, agents of the federal Fish and Wildlife Service obtained a warrant to search a 75,000-acre ranch in Montana for evidence of violations of federal wildlife laws. CNN accompanied the multiple-vehicle caravan when the search of the ranch was carried out.[35] Relying on *Wilson v. Lane*,

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[34] *See* Wilson v. Layne, 526 U.S. 603 (1999).

[35] Hanlon v. Berger, 526 U.S. 808 (1999).

the Supreme Court held that "police violate the Fourth Amendment rights of homeowners when they allow members of the media to accompany them during the execution of a warrant in their home."[36] Consistent with its decision in *Wilson*, the *Hanlon* Court also held that the police had a defense of qualified immunity for permitting CNN's access as the state of the law was not clear until its decisions. The opinion makes no mention of that qualified immunity extending to CNN.

After the U.S. Supreme Court decision returned the case to the Ninth Circuit Court of Appeals, the appeals court decided during further proceedings that because CNN had worked so closely with the Fish and Wildlife Service agents in the execution of the search warrant CNN staffers could be considered "joint actors" with the government and thus subject to claims for violation of the Bergers' Fourth Amendment rights. The circuit court declined to extend to CNN the qualified immunity defense recognized by the U.S. Supreme Court as being available to the federal agents involved.[37] The federal government and CNN settled the case in May 2001.[38]

Potential trespass situations require reporters and photographers to exercise common sense and good judgment, usually on the spur of the moment. It is often difficult to tell whether a particular place is private property, and media representatives often receive conflicting instructions or advice from law enforcement officers and others at the scene of a crime or accident. It is almost always best to comply with orders from police and fire officials, even if you think they are incorrect. If you think they are wrong, notify your employer and check with an attorney who is knowledgeable about this area of the law. If you find that the authorities overstepped their authority, you and your employer should seek a conference with the authorities and attempt to reach understandings to prevent further problems.

The leading case involving the media's receipt and publication of stolen property is *Pearson v. Dodd*, a 1969 case in which members of U.S. Sen. Thomas Dodd's staff made photocopies of private

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[36] *Id.* at 810.

[37] Berger v. Hanlon, 188 F.3d 1155, 1157 (1999).

[38] *See* "CNN settles privacy suit over involvement in search of ranch." http://www.rcfp.org/browse-media-law-resources/news/cnn-settles-privacy-suit-over-involvement-search-ranch

documents from his office and gave them to Drew Pearson, a nationally syndicated columnist.[39] A federal circuit court held that Pearson was not liable for intrusion because he had neither participated in nor encouraged the removal of the documents from the senator's files.[40]

Bilney v. Evening Star is a similar case in which intrusion claims were dismissed against a newspaper that published the confidential academic records of University of Maryland basketball players.[41] The court reasoned that even though the newspaper knew that the information was unlawfully obtained, its employees did not participate in the trespass.[42]

Media representatives who obtain documents or copies of documents that may have been taken unlawfully should immediately contact an attorney who is knowledgeable about First Amendment and media law. Not only is there a risk of a trespass suit, individuals or companies whose documents fall into the hands of reporters may sue for conversion and/or threaten to prosecute the media representatives criminally for receiving stolen property. In practice, such prosecutions seldom occur because they require the cooperation of the district attorney, who usually has more important things to worry about. Moreover, the facts seldom support a criminal charge. Nevertheless, no use of such documents should be made without first consulting with a lawyer.

Media representatives who receive original documents that appear to belong to another should be especially careful. They and their attorneys may wish to contact the apparent owner and offer to return the documents if the owner will sign a receipt for them. This procedure not only will result in the return of the documents to their rightful owner, it also will serve to authenticate any copies that the reporter makes.

Exceeding the scope of consent or invitation

Courts have upheld invasion of privacy claims in some cases in which media representatives have exceeded the scope of express or

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[39] Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969), *cert. denied,* 395 U.S. 947 (1969).

[40] *Id.at 704*

[41] Bilney v. Evening Star, 43 Md. App. 560, 406 A.2d 652 (1979).

[42] *Id.* at 568.

implied consent granted by the plaintiff. In one of the best known of these cases, an intrusion claim was upheld against a television station whose camera crew burst into a restaurant with cameras rolling and television lights ablaze, disrupting the patrons' meals and causing several of them to flee.[43] The court held that although the television station had a legitimate right to report about the restaurant's inclusion on a list of establishments that violated the New York City sanitation code, the camera crew was unnecessarily intrusive because it entered without any intention of purchasing food and had unreasonably disrupted the restaurant's customers.[44]

In another well-known case, the Fourth Circuit Court of Appeals upheld nominal verdicts for trespass and breach of duty of loyalty claims against two ABC News producers who carried out a "hidden camera" investigation of a North Carolina-based supermarket chain.[45] In *Food Lion v. Capital Cities/ABC*, the producers falsified their work histories to obtain jobs in three Food Lion stores. The reporters secretly videotaped what appeared to be questionable food-handling practices, and the tapes later were aired on the news magazine "PrimeTime Live."

Food Lion did not sue ABC for libel but instead for violation of the Racketeer Influenced and Corrupt Organizations Act, ownership of ABC's copyright in the broadcast, fraud, breach of the duty of loyalty, trespass and unfair and deceptive trade practices. Early on, the trial court dismissed the RICO and copyright claims but ultimately allowed Food Lion's other claims to be decided by a jury. After a three-stage trial, the jury awarded Food Lion $1,400 in compensatory damages on the fraud claim, $1 each on the duty of loyalty and trespass claims and $5,545,750 in punitive damages. The trial court reduced the punitive damage award related to fraud to $315,000.

Upon appeal by both Food Lion and ABC, the Fourth Circuit overturned the jury's damages award on fraud, saying Food Lion had not proved all of the elements necessary to maintain the verdict. The Fourth Circuit did, however, uphold the breach of the duty of loyalty award of $1 in a narrow holding. The court indicated that the reporters' pursuit of two jobs (one for Food Lion and one for ABC)

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[43] Le Mistral, Inc. v. CBS, 402 N.Y.S.2d 815 (App. Div. 1978).

[44] *Id.* at 816-17.

[45] Food Lion v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir.1999).

that were diametrically opposed in purpose breached their common law duty of loyalty to Food Lion. The court also upheld the jury's verdict of $1 for trespass, not because the reporters misrepresented their experience to gain access to non-public areas of Food Lion's stores but because the reporters exceeded the scope of their permission and duty of loyalty by filming in non-public areas.

What legal rules govern false light cases?

Of the four invasion of privacy torts, claims arising out of the media's presentation of the plaintiff in a "false light" are the most difficult to explain and categorize. False light, a sort of "double first cousin" of defamation, is so closely related to libel as to be virtually indistinguishable in many cases. In theory, the difference between the two is that a false light claim may rest on a publication that is false but is not defamatory.

Fortunately for the N.C. media, the N.C. Supreme Court decided in 1984 that false light claims should not be "recognized," or included, as part of the common law of this state.[46] The court's decision, which was issued in *Renwick v. News and Observer Publishing Co.*, was based primarily on two factors. First, the court pointed out that the "false light" tort often duplicated or overlapped claims for libel, making the law unnecessarily complicated; thus the tort was rejected in the interest of "judicial efficiency."[47] Second, the court noted that recognition of false light claims would add to the inherent "tension" between freedom of the press, as guaranteed by the state and federal constitutions, and the law of torts, which permits recovery of damages against the press.[48]

What legal rules govern private facts cases?

Privacy claims that arise out of the publication of truthful, embarrassing private facts reflect most faithfully "the right to be let alone" on which Warren and Brandeis based their concept of privacy.

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[46] Renwick v. News and Observer Publ'g Co., 310 N.C. 312 (1984), *cert. denied,* 469 U.S. 858 (1984).

[47] *Id.* at 323.

[48] *Id. See also*, Burgess v. Busby, 142 N.C. App. 393, 405 (March 20, 2001) ("North Carolina does not recognize a cause of action for the. . . invasion of privacy by placing a plaintiff in false light before the public.")

This tort implicitly acknowledges and reflects sympathy for the fact that most of us are aware of facts about ourselves that we would prefer not to share with the world at large. At the same time, it is a tort that, as the Oregon Supreme Court has observed, singles out the press for punishment that is not applied "to gossip-mongers in neighborhood taverns or card parties, to letter writers or telephone tattlers."[49]

The elements of a private facts claim are defined as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of a legitimate concern to the public. [50]

This definition is subject to considerable interpretation. What, for example, is "a matter concerning the private life of another"? The Restatement of Torts, a legal treatise that attempts to explain the elements and characteristics of the various kinds of tort claims, cites sexual relations, family quarrels, humiliating illnesses and some details of a person's past "that he would rather forget." [51]

Because the tort protects only against the publication of matters that are not "of legitimate concern to the public," the media cannot be held liable for publishing information that is newsworthy, even if it is so intimate and personal that its publication would otherwise be "highly offensive." However, newsworthiness is an amorphous concept, which, like obscenity, varies from one locality to another.

One of the best-known private facts cases, and one that illustrates vividly some of the obstacles facing anyone who files an invasion of privacy claim of this type, is *Sipple v. Chronicle Publishing Co.* [52] The case arose when a woman named Sara Jane Moore attempted to assassinate President Gerald Ford in San Francisco in 1975. Oliver Sipple was standing next to Ms. Moore and grabbed her arm just as she was about to shoot the president. Herb Caen, a well-known columnist for the San Francisco Chronicle, wrote about

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[49] Anderson v. Fisher Broad. Co., Inc., 712 P.2d 803,809 (Ore. 1986).

[50] RESTATEMENT (SECOND) OF TORTS §652D (1977).

[51] *Id.* at §652B.

[52] Sipple v. Chronicle Publ'g Co., 154 Cal. App. 3d 1040 (1984).

the reaction to Sipple's heroism within San Francisco's gay community, of which Sipple was a prominent member. After Caen's column appeared, other newspaper articles mentioned Sipple's involvement in San Francisco's gay community. Some of these articles apparently were read by Sipple's family members, who lived elsewhere in the United States and were not previously aware of his homosexuality. On these facts, the California courts threw out Sipple's suit against the newspaper for publishing truthful but embarrassing private facts about him. The courts reasoned that because Sipple's sexual orientation was widely known in San Francisco, where he lived, he could not claim that his homosexuality was a private matter elsewhere. [53]

Because private facts claims are almost always directed against the press and because such claims can result in the recovery of damages for **truthful** publications, private facts suits raise serious First Amendment issues. In 1988, this "tension" between such claims and freedom of the press was one of the factors that caused the N.C. Supreme Court to refuse to recognize private facts claims in *Hall v. Post*. [54]

Hall v. Post arose after The Salisbury Post published a human-interest story in 1984 under the headline "Ex-Carny Seeks Baby Abandoned 17 Years Ago." The story recounted the search by a Wisconsin couple, Lee and Aledith Gottschalk, for a daughter Mrs. Gottschalk and her former husband had abandoned in Salisbury in 1967. The article described Mrs. Gottschalk's previous marriage to a carnival barker named Clarence Maxson, the birth of their daughter in 1967, their abandonment of the child at the age of four months, various events in Mrs. Gottschalk's life during the ensuing 17 years and her return to Rowan County to look for her child. The article reported that Maxson had made arrangements in 1967 for a babysitter to keep the child for a few weeks while he and his wife moved on with the carnival. After describing Mrs. Gottschalk's futile search for her daughter, the article concluded by asking readers who had information about the daughter's whereabouts to contact the Gottschalks at a local motel.

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[53] *Id.* at 669.

[54] Hall v. Post, 323 N.C. 259 (1988). *See also*, Burgess v. Busby, 142 N.C. App. 393, 405 (March 20, 2001) ("North Carolina does not recognize a cause of action for the invasion of privacy by disclosure of private facts.")

After the Post's story appeared, several people called the motel, identified the child in the story as Susie Hall, the adopted daughter of Mary Hall, and provided the Gottschalks with the family's address and telephone number. A follow-up story published in the Post two days later reported that the Gottschalks had located Susie and her adoptive mother and had talked with them on the telephone and through an intermediary. However, Mrs. Hall had refused to permit them to visit Susie.

In 1985, both Mary and Susie Hall filed suit alleging that the Post had invaded their privacy by publishing previously private information about Susie's background and adoptive status. The suit claimed that they had fled their home in order to avoid public attention resulting from the newspaper articles and that both had sought psychiatric care as a result of the unwanted publicity.

The trial court threw out the Halls' suit because the Post produced affidavits from friends, neighbors and former co-workers saying that Mary Hall had voluntarily disclosed the facts about Susie's background and her adoptive status. Mary and Susie Hall appealed, and the N.C. Court of Appeals reversed the trial court, holding that the plaintiffs had stated valid private facts claims and that they were entitled to a jury trial. [55]

At the request of the Post, the Supreme Court of North Carolina agreed to hear the case. In 1988 the court ruled, 5-2, that the private facts tort would not be recognized as part of the common law of North Carolina. [56] The court's rejection of the private facts tort, like its earlier refusal to recognize false light claims, hinged on the court's perception that the tort would duplicate or overlap existing claims for relief (especially intentional infliction of emotional distress) and that it would add to the "tension" between the First Amendment and the law of torts.[57]

North Carolina apparently is the only state whose highest court has specifically declined to recognize both private facts claims and false light claims. Both the results and the reasoning in *Renwick v. News and Observer Publishing Co.* and *Hall v. Post* place North Carolina

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[55] Hall v. Post, 85 N.C. App. 610 (1987).

[56] Hall v. Post, 323 N.C. 259.

[57] *Id.* at 265.

outside the mainstream of American jurisprudence. Consequently, journalists and broadcasters in North Carolina have little reason to fear suits for these types of invasion of privacy. As noted above, however, there can be consequences if an individual posts something online that is viewed in another state.[58]

What constitutes intentional infliction of emotional distress?

In order to prevail in a suit claiming intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct, (2) that is intended to cause and does cause (3) severe emotional distress to another.[59] A plaintiff has three years to bring an action for emotional distress, intentional or negligent.[60]

In a case brought against Hustler magazine by the Rev. Jerry Falwell, the Supreme Court ruled that the First Amendment imposes constitutional limits on emotional distress claims asserted by public officials and public figures.[61] Falwell sued the magazine because it published a satirical parody of an advertisement for Campari, an aperitif made in Italy.[62] For years Campari had utilized a successful, sophisticated advertising campaign in which celebrities talked about their "first time," i.e., their first encounter with Campari. In Hustler's parody, however, Falwell's "first time" referred to a sexual encounter with his mother in an outhouse. The parody portrayed Falwell as a hypocrite and a drunk and his mother as a drunkard and an immoral woman.

Falwell sued Hustler for libel, appropriation of his name or likeness for commercial purposes and intentional infliction of emotional distress. The trial court threw out Falwell's appropriation claim because the

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[58] The law of when a defendant can be sued in a particular state for information posted in another state is not uniform. Generally speaking, however, courts require something more than a posting being available online. The N.C. Court of Appeals has adopted a test articulated by the Fourth Circuit Court of Appeals that the dispositive question is "whether the defendant 'through the Internet postings, manifest[ed] an intent to target and focus on [the forum state's] readers.'" Dailey v. Popma, 191 N.C. App. 64, 72, (2008)(quoting Young v. New Haven Advocate, 315 F.3d 256 (4th Cir.2002), *cert. denied*, 538 U.S. 1035, 123 S. Ct. 2092, 155 L.Ed.2d 1065 (2003)).

[59] Dickens v. Puryear, 302 N.C. 437, 452 (1981).

[60] Soderlund v. Kuch, 2001 WL 526693, *3 (N.C. App.) (citing N.C. GEN. STAT. § 1-52(5); Russell v. Adams, 125 N.C. App. 637, 640 (1997)).

[61] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

[62] Falwell v. Flynt, 797 F.2d 1270, 1273 (4th Cir. 1986).

advertisement was a satire that was not intended to convey a commercial message. The trial court jury found in Hustler's favor on Falwell's libel claim because no reasonable person would believe that the statements in the parody were factual.[63] However, the jury found in favor of Falwell on his emotional distress claim and awarded him $100,000 in actual damages and $100,000 in punitive damages. The U.S. Court of Appeals for the 4th Circuit upheld the award, but the Supreme Court, in a unanimous opinion written by Chief Justice William Rehnquist, reversed.[64]

The Supreme Court's opinion in *Falwell* acknowledged that the ad parody published by Hustler was gross, repugnant and offensive but held that even offensive satire directed toward public officials and public figures is protected by the First Amendment unless it includes false statements presented as fact. Even then, the Court said, the plaintiff must meet the *New York Times v. Sullivan* standard of proving that the false statements were published with knowledge that they were false or in "reckless disregard' of their truth of falsity.[65] The Court said the Campari ad parody was simply a particularly tasteless example of the kind of political satire that the First Amendment was intended to protect.

The Supreme Court's opinion in *Hustler v. Falwell* was particularly welcomed by editorial cartoonists and humor columnists, who frequently use biting satire to convey opinions and criticisms of public officials and public figures. The opinion has no effect, however, on claims brought by persons who are neither public officials nor public figures.

In the 1985 N.C. case of *Briggs v. Rosenthal*, the parents of a young man who died sued John Rosenthal, a Chapel Hill writer and friend of the deceased, for publishing a poignant reminiscence in which he described some of his friend's self-destructive behavior.[66] The court dismissed the parents' claim, holding that the "mere publication" of distressing information does not constitute the sort of "extreme and outrageous conduct" required to support an emotional distress claim.

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[63] *Id.*

[64] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46.

[6563] *Id.*

[66] Briggs v. Rosenthal, 73 N.C. App. 672, *cert. denied,* 314 N.C. 114 (1985).

In a later case, the Court of Appeals, relying on *Briggs v. Rosenthal*, reinstated an intentional infliction of emotional distress case dismissed by the trial court but affirmed the dismissal of the plaintiffs' invasion of privacy claims.[68] The defendant in the case was Rowan County physician Rudy Busby, one of several physicians who had been sued for medical malpractice. Although he was found not liable by the jury in the medical malpractice case, Dr. Busby included the names, addresses and telephone numbers of jurors and witnesses in a letter that he placed in every physician's mailbox at Rowan Regional Medical Center. Busby referred to the jurors and witnesses as people who have "sued doctors," "found a doctor guilty" and "others of whom I am leery" but did not include any factual statements that were untrue.

Several of the individuals identified in the letter sued Dr. Busby, alleging that the letter was a warning to the entire Rowan County medical community to punish the jurors and witnesses for their roles in the judicial proceeding. The suit stated claims for intentional infliction of emotional distress, the tort of "outrage," tortious interference with a contractual relationship, interference with a fiduciary relationship, invasion of privacy, unfair and deceptive trade practices and obstruction of justice.

The Court of Appeals reversed the trial court's dismissal of the claims for intentional infliction of emotional distress and obstruction of justice. Despite the offensiveness of Dr. Busby's actions, the court's decision flies in the face of protection for communication of truthful, lawfully obtained information and, in particular, the U.S. Supreme Court decision in *Hustler Magazine, Inc. v. Falwell*. A small silver lining to the case is the appeals court's refusal to recognize the tort of outrage.[69]

The Court of Appeals' opinion in *Busby* relied on a 1983 case in which the defendant obtained, posted and circulated 30-year-old court documents regarding relatively minor convictions of the sitting

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[67] *Id.* at 677.

[68] Burgess v. Busby, 142 N.C. App. 393 (2001).

[69] *Id*. at 9.

superintendent.[70] In that case, *Woodruff v. Miller,* the Court of Appeals found that the publication was for the apparently vindictive purpose of humiliating and harassing the superintendent and therefore sustained the intentional infliction of mental distress claim. The court wrote:

That defendant's conduct, as recorded, was intended to cause plaintiff severe mental distress and in fact did so is so obviously inferable, it need not be discussed; and that defendant's conduct was extreme and outrageous is equally plain.[71]

It is noteworthy that the U.S. Supreme Court had not decided the *Falwell* case when *Woodruff* was decided, nor did the defendant in *Woodruff* offer any evidence or file a brief with the Court of Appeals.

What constitutes negligent infliction of emotional distress?

As of this publication, no successful suit for negligent infliction of emotional distress has been brought against the media in North Carolina. However, in a 1990 non-media case, the N.C. Supreme Court issued an opinion that outlined what a plaintiff must prove to prevail in a negligent infliction of emotional distress case in this state. The court said a plaintiff must prove:

(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as "mental anguish"), and (3) the conduct did in fact cause the plaintiff severe emotional distress.[72]

The court said that while some states require plaintiffs to prove they have suffered physical harm, such injury is not a requirement in North Carolina. The court also noted, however, that mere fright or temporary anxiety did not constitute severe emotional distress. Rather, severe emotional distress means "any emotional or mental disorder, such as for example, neurosis, psychosis, chronic

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[70] Woodruff v. Miller, 64 N.C. App. 364 (1983).

[71] *Id*. at 366.

[72] Johnson v. Ruark Obstetrics, 327 N.C. 283 (1990), *reh'g denied,* 327 N.C. 283 (1990), *reh'g denied,* 327 N.C. 644 (1990).

depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so," the court explained.[73]

Also the court said a plaintiff could recover for his or her severe emotional distress arising out of concern for another if he or she suffered that severe emotional distress as a foreseeable result of the defendant's negligence.

Media defendants in other states generally win negligent infliction cases because plaintiffs are required to show the media owed them a duty of care and are unable to do so. The courts generally determine that the media owe no duty of care to their audiences, and imposing such a duty might violate the First Amendment. It is unclear whether proof of a duty of care will be required of plaintiffs suing the media in North Carolina. It is clear, however, that negligent infliction of emotional distress claims against the media raise serious constitutional questions because the media often publish information that is upsetting but is also newsworthy.

Conclusions

As this chapter indicates, N.C. law provides journalists with almost unparalleled freedom from the threat of suits for invasion of privacy. In this state, as in England, the line between what sort of private information may be published and what may not is drawn not by the courts but by reporters, photographers and editors. As in England, however, the dissemination of gratuitously offensive information or the incessant and tasteless prying into the most private affairs of individuals might well result in a backlash against the press and the call for the courts or the General Assembly to curb journalistic excesses. Therefore, N.C. journalists would do well to attempt always to live up to Justice Burley Mitchell's description of them as set forth in his majority opinion in *Renwick v. News and Observer Publishing Co.*:

The conditions which led Warren and Brandeis to argue almost a century ago for a separate tort of invasion of privacy have at least to some extent subsided. Most modern journalists employed in

[73] *Id.*

print, television or radio journalism now receive formal training in ethics and journalism entirely unheard of during the era of “yellow journalism.” As a general rule journalists simply are more responsible and professional today than history tells us they were in that era.[74]

[74] Renwick v. News and Observer Publ'g Co., 310 N.C. at 325.