

“INVASION OF PRIVACY” FOR UNAUTHORIZED USE OF TEAM PHOTO?

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Recently, I received an inquiry regarding the unauthorized use of photographs as a basis for an invasion of privacy claim. As illustrated by the case of *M.G. v. Time Warner, Inc.*, 89 Cal.App.4th 623, 107 Cal.Rptr.2d 504 (Cal.App. Dist. 4 05/30/2001), an invasion of privacy claim may arise from public disclosure of a private fact which would be offensive and objectionable to the reasonable person and which is not of legitimate public concern. In this particular case, former players and coaches on a Little League team claimed an “invasion of privacy” arising out of the use of a team photo in a Sports Illustrated article and an HBO television program on child molestation in youth sports. The facts of the case were as follows:

In September 1999, Sports Illustrated and an HBO television program, Real Sports, used the 1997 team photograph of a Little League team to illustrate stories about adult coaches who sexually molest youths playing team sports. Plaintiffs, all of whom appear in the photograph, were formerly players or coaches on the Little League team. The team's manager, Norman Watson, pleaded guilty to molesting five children he had coached in Little League...

The 10 plaintiffs were eight players and two coaches for a Little League team in Highland, California. Norman Watson was the team's manager in 1996 and 1997, until it was discovered in September 1997 that he had a long history of sexually abusing children, beginning with a molestation conviction in 1971. Watson pleaded guilty in April 1998.

In September 1999, Sports Illustrated published a cover story, "Every Parent's Nightmare," on incidents of child molestation in youth sports. Using Watson as one example, the article reported Watson had "pleaded guilty to 39 counts of lewd acts with children, four boys and a girl, that had occurred between 1990 and '96, when Watson was a San Bernardino Little League coach and umpire and the five kids were all playing in the league." Watson was further described as having "spent most of his 54 years sexually preying on children . . . [m]ost of . . . whom he first met through his work in Little League."

Accompanying the article was a team photograph of 18 people, including the 10 plaintiffs in this case. The photograph featured a sign board reading: "East Baseline S____ P____ 1997." [The court used only the team's initials to “preserve its members from further notoriety.”] The photograph also bore a caption: "A fixture Watson (center, in black) coached for years not far from a hospital where he'd been incarcerated as a molester."

Also in September 1999, HBO broadcast a similar report on child molesters in youth sports. The story discussed Watson and his involvement with plaintiffs' team. The story employed a fleeting shot of the team photograph.

The Sports Illustrated article and the HBO program did not name any of the people shown in the team photograph except Watson. The article did not identify any of Watson's victims by his or her real name. Two victims were identified by pseudonyms. One player, who is not a plaintiff, was interviewed on the HBO program, apparently using his real name. According to their declarations opposing the motion to strike, four of the eight player-plaintiffs had been molested by Watson and four had not.

Plaintiffs filed suit against Time Warner for invasion of privacy. The trial court rejected Time Warner's motion to dismiss plaintiffs' claims. Time Warner appealed.

As described by the appeals court, "the right of privacy means the right to be left alone." Further, in a case involving unauthorized use of a photograph, the court noted that a claim for invasion of privacy may be upheld where "the public interest did not require require the use of any particular person's likeness nor that of plaintiffs without their consent." Moreover, in this particular instance, the court found plaintiffs had a viable claim for invasion of privacy claim because the article about sexual molestation was "juxtaposed with an illustrative photograph that makes a negative association between the subject matter and the subjects of the photograph."

LEGITIMATE PUBLIC CONCERN?

According to the court, the public interest may require require the use of any particular person's likeness when the unauthorized use of a photograph involves a matter of "legitimate public concern." In determining whether a particular matter involves a legitimate public concern, the court would subject the facts at issue to a three-part "newsworthiness" test. This test considers (1) the social value of the published facts, (2) the depth of intrusion into ostensibly private affairs, and (3) whether the person acceded voluntarily to a position of public notoriety.

Time Warner did not dispute plaintiffs' assertion that "disclosure of information connecting a person with sexual molestation potentially may offend a reasonable person." Time Warner, however, maintained that "the photograph of plaintiffs was not private and its publication met the test of newsworthiness." Specifically, Time Warner contended that that unauthorized use of the team photograph did not constitute publication of a private fact because "plaintiffs had played a public sport and the team photograph had been taken on a public baseball field." Moreover, Time Warner claimed that "use of the team photographs disclosed only information that was already publicly known":

[D]uring the two years after Watson was found out, it had been widely reported that Watson had coached a Little League team, occasionally

identified as the S____ P____, and that Watson had admitted molesting Little League players.

In response, plaintiffs countered that "their identities, as coaches or players on Watson's team, were not revealed in any of the coverage of the Watson case until the publication of the team photograph, an event which publicly linked plaintiffs with child molestation as either victims, perpetrators, or collaborators."

[A]ll the player-plaintiffs submitted declarations in which they stated that, immediately after the article and the program appeared, they were teased and harassed at school and called "gay," "faggot," "queer," and one of "Norm's boys." As a consequence, the players' academic performances suffered. Some of them were forced to quit school, to transfer, or to be home-schooled.

The two coach-plaintiffs have stated they were "ridiculed, questioned, and harassed" and received crank phone calls accusing them of being molesters or of condoning molestation.

The court agreed with plaintiffs. In so doing, the court rejected Time Warner's assertion that "plaintiffs' membership on Watson's Little League team had been publicly known for two years."

In the present case, none of the previous media coverage specifically identified plaintiffs as team members. Nor, as the trial court observed, is there evidence in the record that the team photograph was ever widely circulated...

Time Warner apparently equates "private" with "secret" and urges any information not concealed has been made public. But the claim of a right of privacy is not "so much one of total secrecy as it is of the right to define one's circle of intimacy-to choose who shall see beneath the quotidian mask." Information disclosed to a few people may remain private.

[P]laintiffs maintain the photograph was intended to be private, only for dissemination among family and friends. Although plaintiffs do not know how Time Warner acquired the photograph, they never consented to its use.

Accordingly, the appeals court found that the evidence before the trial court supported "plaintiffs' contention that their membership on Watson's Little League team was a private fact first publicly disclosed by Time Warner."

EDITORIAL DEFERENCE?

On appeal, Time Warner had also argued that the trial court was precluded from making editorial judgment about news content and whether use of the photograph was newsworthy. The appeals court conceded that “courts do not, and constitutionally could not, sit as superior editors of the press.”

Regarding the concept of newsworthiness, ...the courts must accord great deference to editorial decisionmaking in matters involving legitimate public interest but that newsworthiness can be limited in the proper circumstances...

In general, it is not for a court or jury to say how a particular story is best covered. The constitutional privilege to publish truthful material ceases to operate only when an editor abuses his broad discretion to publish matters that are of legitimate public interest. By confining our interference to extreme cases, the courts avoid unduly limiting the exercise of effective editorial judgment.

On the other hand, the appellate court acknowledged that “no mode of analyzing newsworthiness can be applied mechanically or without consideration of its proper boundaries.”

To observe that the newsworthiness of private facts about a person involuntarily thrust into the public eye depends, in the ordinary case, on the existence of a logical nexus between the newsworthy event or activity and the facts revealed is not to deny that the balance of free press and privacy interests may require a different conclusion when the intrusiveness of the revelation is greatly disproportionate to its relevance.

Intensely personal or intimate revelations might not, in a given case, be considered newsworthy, especially where they bear only slight relevance to a topic of legitimate public concern."

Time Warner had offered the following justification to establish the newsworthiness of showing the faces of the Little League team members:

By showing visually that any child who plays sports could be placed in harm's way, the team photos underscore the warnings of the experts featured in the Article and Broadcast.

In light of the evidence in the case, however, the appeals court found, "[t]his assertion [of newsworthiness] rings hollow." In the opinion of the court, the following reasoning supported plaintiffs' position that unauthorized publication of the team photograph "showing their faces was not a legitimate public concern and not newsworthy."

State law contains many statutes prohibiting the disclosure of the identity of both minors and victims of sex crimes. Public policy favors such

protection--as does the journalism profession. Plaintiffs supplied declarations from two journalism experts in which they confirm that use of the faces of the team members was not consonant with journalistic standards and practices. Plaintiffs also submitted examples of how the faces in the team photograph could have been obscured. Furthermore, the article and the program in themselves demonstrate the team members' faces should have been concealed.

Although the program showed footage of boys playing baseball, it did not show their faces but photographed them without their faces showing. In the program and the article, the victims were given pseudonyms unless they consented to using their real names. Nor is this case analogous to one in which a news documentary used the first name of a rape victim and a picture of her house. The intrusion here, in which the children's faces were revealed, is far greater and outweighs the values of journalistic impact and credibility.

Accordingly, the court found that plaintiffs had alleged sufficient facts to establish that "the private fact of their membership on Watson's team was not newsworthy." The appeals court, therefore, affirmed the judgment of the lower court which had denied Time Warner's motion to dismiss the case. As a result, plaintiffs' were permitted to proceed to trial to prove their invasion of privacy claims to a jury.