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Lovgren v. Citizens First National Bank: Illinois Recognizes the False Light Invasion of Privacy Tort, 22 J. Marshall L. Rev. 943 (1989)

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RECENT DEVELOPMENTS

*Lougren v. Citizens First National Bank**: Illinois Recognizes the False Light Invasion of Privacy Tort

The common law right to privacy protects a person's right "to be let alone."¹ In 1970, the Illinois Supreme Court in *Leopold v. Levin* recognized the right to privacy in general.² Since then, courts have struggled to define the limits of this common law right.³ In

* 126 Ill. 2d 411, 534 N.E.2d 987 (1989).

1. *Leopold v. Levin*, 45 Ill. 2d 434, 440, 259 N.E.2d 250, 254 (1970), quoting, T. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 29 (2d ed. 1888).

In 1890, the Harvard Law Review published the now famous article by Samuel Warren and Louis Brandeis. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). In their article, the authors supported a new 'right of privacy' based on a combination of existing common-law doctrines and a need to protect privacy from advances in society and technology. *Id.* at 210-14. Courts quickly reacted to the article, and the first court to recognize the right to privacy was the Georgia Supreme Court, in *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 214, 50 S.E. 68, 78 (1905) (finding the use of plaintiff's name and picture in an advertisement was an invasion of privacy). The next major development in the right to privacy came in 1960, when Dean Prosser, after analyzing the existing cases on the right to privacy and discerning certain trends in its development, categorized the right into four separate torts. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). These categories have become standard definitions, and are found in the Second Restatement of Torts, which defines them as:

- (1) intrusion into the seclusion of another;
- (2) appropriation of name or likeness of another;
- (3) publicity given to private life; and
- (4) publicity placing a person in false light.

W. PROSSER & W. KEETON, THE LAW OF TORTS § 117, at 849-69 (5th ed. 1984). See also M. POLELLE & B. OTTLEY, ILLINOIS TORT LAW 177-213 (1985).

2. 45 Ill. 2d 434, 259 N.E.2d 250 (1970).

3. Reasons courts down through the ages have not allowed separate actions for the protection of privacy include: a lack of precedent; the purely mental character of the injury; the increase in the amount of litigation that would result; the difficulty of distinguishing between private and public persons; and the concern that recognition of a right to privacy would unduly restrict freedom of speech and press. See generally W. PROSSER & W. KEETON, *supra* note 1, § 117, at 850.

The right to privacy in general was introduced in Illinois in the 1952 case of *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952). In *Eick*, a blind girl brought an action against a dog food company for placing her photograph in an advertisement promoting the company's dog food without her permission. *Id.* at 294, 106 N.E.2d at 743. The advertisement falsely depicted the girl as a recipient of a

Lougren v. Citizens First National Bank,⁴ the Illinois Supreme Court, joining a majority of states,⁵ expanded the right to privacy in

"Master Eye Dog" when she already owned a seeing eye dog and did not need another. The girl failed to allege any specific or pecuniary damages as required in a defamation action. Instead, she pled only that she lost the respect and admiration of those who know her and suffered mental anguish and humiliation as a result of defendant's actions.

Reversing the trial court's dismissal of the plaintiff's case, the appellate court noted:

Basically, recognition of the right to privacy means that the law will take cognizance of an injury, even though no right of property or contract may be involved and even though the damages resulting are exclusively those of mental anguish. A person may not make an unauthorized appropriation of the personality of another, especially of his name or likeness, without being liable to him for mental distress as well as the actual pecuniary damages which the appropriation causes. The right to privacy is, of course, limited in cases of express or implied consent and in areas of legitimate public interest. But no such limitations are relevant in the instant case.

Eick, 347 Ill. App. at 299, 106 N.E.2d at 745. The court centered its decision on the as yet unnamed tort action of appropriation of the name or likeness of another. The privacy cases which followed *Eick* also analyzed the fact patterns in their respective cases under the appropriation of some aspect of the plaintiff's identity or personality. See, e.g., *Buzinski v. DoAll Co.*, 31 Ill. App. 2d 191, 175 N.E.2d 577 (1961); *Bradley v. Cowles Magazine, Inc.*, 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960); *Annerino v. Dell Publishing Co.*, 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958).

Finally, the Illinois Supreme Court entered the fray in *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970). In *Leopold*, an author published a novel based upon the Bobby Franks murder case. The author stated in the foreword of his book that, while the actions in the novel were based on the actual case, the thoughts and emotions of the characters were of his own making. The actual names of the defendants in the murder case were used to promote the book. Furthermore, a movie based upon the novel was produced three years later in which the characters resembled the real defendants from the murder case and the book. One of the original defendants sued the author and publishers of the book, and the producers, distributors and exhibitors of the movie.

Although the Illinois Supreme Court affirmed the grant of summary judgment in favor of the defendants, it gave its approval to the developing right of privacy in Illinois, "We agree that there should be recognition of a right to privacy. . . . Privacy is one of the sensitive necessary human values and undeniably there are circumstances under which it should enjoy the protection of law." *Id.* at 440, 259 N.E.2d at 254.

The next important case in the course of the emerging right to privacy in Illinois was the 1975 case of *Midwest Glass Co. v. Stanford Dev. Co.*, 34 Ill. App. 3d 130, 339 N.E.2d 274 (1st Dist. 1975). This case set forth the four forms of the tort of invasion of privacy, which have been followed by Illinois courts until then:

In analyzing the common law right to privacy, Professor William L. Prosser has delineated four distinct kinds of torts which constitute an invasion of privacy. This breakdown, which has been adopted by the [RESTATEMENT (SECOND) OF TORTS] as well as many other foreign jurisdictions [citations omitted] comprise the following situations: (1) an unreasonable intrusion into the seclusion of another, (2) the appropriation of another's name or likeness, (3) a public disclosure of private facts or (4) publicity which unreasonably places another in a false light before the public.

Midwest, 34 Ill. App. 3d at 133, 339 N.E.2d at 277.

4. 126 Ill. 2d 411, 534 N.E.2d 987 (1989).

5. The states which have specifically recognized the false light cause of action include: Ohio, in *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974); Texas, in *Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984); Wyoming, in *Pring v. Penthouse*, 695

Illinois by recognizing the fourth of the four privacy torts, the use of publicity to place a person in a false light in the public eye.⁶

F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); the District of Columbia, in *Dresbach v. Doubleday*, 518 F. Supp. 1285 (D.D.C. 1981); Maryland, in *Fitzgerald v. Penthouse Int'l, Ltd.*, 525 F. Supp. 585 (D. Md. 1981); Virginia, in *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204 (W.D. Va. 1981); Pennsylvania, in *Bromhall v. Rorrik*, 478 F. Supp. 361 (E.D. Pa. 1979); Mississippi, in *Wilson v. Retain Credit Co.*, 325 F. Supp. 460 (S.D. Miss. 1971); South Carolina, in *Holmes v. Curtis Pub. Co.*, 303 F. Supp. 522 (D. S.C. 1969); Alabama, in *Daily Times Democrat v. Graham*, 276 Ala. 380, 162 So. 2d 474 (1964); Arkansas, in *Dodrill v. Arkansas Democrat*, 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 44 U.S. 1076 (1980); California, in *Kapellas v. Kofman*, 1 Cal. 3d 20, 549 P.2d 912, 81 Cal. Rptr. 360 (1969); Connecticut, in *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 488 A.2d 1317 (1982); Florida, in *Byrd v. Hustler Magazine*, 433 So. 2d 593 (Fla. App. 1983); Georgia, in *Cabaniss v. Hipsley*, 114 Ga. App. 367, 151 S.E.2d 496 (1966); Idaho, in *Taylor v. K.T.V.B., Inc.*, 96 Idaho 202, 525 P.2d 984 (1974); Iowa, implicitly in *Winegard v. Larsen*, 260 N.W.2d 816 (Iowa 1977); Kansas, in *Rinsley v. Frydman*, 221 Kan. 297, 599 P.2d 334 (1977); Kentucky, in *McCall v. Courier Journal*, 623 S.W.2d 882 (Ky. Ct. App. 1980); Louisiana, in *Tooley v. Canal Motors, Inc.*, 296 So. 2d 543 (La. 1974); Maine, implicitly in *Matheson v. Bangor Publishing, Inc.*, 414 A.2d 1203 (Me. 1980); New Jersey, in *Devlin v. Greiner*, 147 N.J. Super. 446, 371 A.2d 380 (1977); Oklahoma, in *McCormack v. Oklahoma Pub.*, 613 P.2d 737 (Okla. 1980); Oregon, in *Martinez v. Democrat-Herald*, 669 P.2d 64, 818 Or. App. 690 (1983); Nebraska in *NEB. REV. STAT. sec. 20-204* (1983); Rhode Island, in *R.I. GEN. LAWS sec. 9-1-28* (1985).

For a survey of the four privacy torts in each state, see Kovner, *Recent Developments In Intrusion, Private Facts, False Light and Commercialization Claims*, 2 PRACTICING LAW INSTITUTE, COMMUNICATIONS LAW 1983 at 289, 366-92 (1983). For a survey of the false light tort in each state, see Annotation, *False Light Invasion of Privacy — Cognizability and Elements*, 57 A.L.R. 4th 22, 58-69 (1987).

6. The cause of action for false light protects the life or behavior of an individual from false impressions created when erroneous information is published about the individual. The publication can degrade, be highly personal, or it can simply depict the individual "more favorably than reality warrants." Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 296 (1983). All the statement need be is false and attributing characteristics, beliefs, or conduct to a person that he does not possess. Zolich, *Laudatory Invasion of Privacy*, 16 CLEV. MARSHALL. L. REV. 540 (1967). The protected interest in a false light action is the plaintiff's dignity. All that is needed is a publication that is highly offensive to a reasonable person. RESTATEMENT (SECOND) OF TORTS § 652E (1976). In most cases the publication is also defamatory, although for a false light cause of action, it need not be. In those cases where a defamation action also lies, a plaintiff can plead both actions, although he can only recover once.

The standard definition of the false light tort is found in the Second Restatement of Torts, which states:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter, and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS § 652E, at 394 (1977).

The earliest known case involving the essence of a false light cause of action occurred in England in 1816, when Lord Byron successfully brought an action to enjoin the publication of a bad poem which was falsely signed with his name. *Lord Byron v. Johnston*, 35 Eng. Rep. 851 (1816).

Several courts have dealt with the false light privacy action in Illinois, either expressly or implicitly. See, e.g., *Rozhon v. Triangle Publications, Inc.*, 230 F.2d 359

The plaintiff alleged the following facts: plaintiff, Harold Lovgren (Lovgren) owned a farm on which he took out a second mortgage from the defendant, the Citizens First National Bank of Princeton (Bank) in April 1983.⁷ When Lovgren fell behind in his payments on the mortgage, the Bank exhorted Lovgren to sell his farm.⁸ Lovgren declined and instead, asked the Bank for more time to pay back the mortgage.⁹

In November, 1985, despite Lovgren's statement of intention to repay the mortgage, the Bank placed advertisements in local newspapers and passed out handbills announcing that Lovgren was selling his farm at a public auction.¹⁰ According to the announcements, the auction was to take place on November 25, 1985.¹¹ These announcements did not mention the Bank, its mortgage on the property, or whether Lovgren was holding the auction to meet his financial obligations.¹² Lovgren had never scheduled any such sale and had no knowledge of it nor had he given consent to the announcements.¹³

Based on the facts set forth above, Lovgren filed a complaint for invasion of privacy based on the unreasonable intrusion into the seclusion of another.¹⁴ Lovgren alleged that as a result of the Bank's false announcement, he had endured mental anguish and suffering, and could not obtain refinancing on the Bank's loan.¹⁵ The Bank filed a motion to dismiss the complaint for failure to state a cause of action, which the trial court granted.¹⁶

(7th Cir. 1956) (implicitly recognizing the action); *Cantrell v. American Broadcasting Cos.*, 529 F. Supp. 746 (N.D. Ill. 1981) (expressly allowing a false light claim); *Adreani v. Hansen*, 80 Ill. App. 3d 726, 400 N.E.2d 679 (1st Dist. 1980) (rejecting the false light action); *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970) (implicitly recognizing the cause of action); *Aronson v. North Park College*, 94 Ill. App. 3d 211, 418 N.E.2d 191 (1st Dist. 1961) (implicitly recognizing the action); *Annerino v. Dell Publishing Co.*, 17 Ill. App. 2d 205, 149 N.E.2d 761 (1st Dist. 1958) (implicitly recognizing the action).

7. *Lovgren*, 126 Ill. 2d at 414, 534 N.E.2d at 988.

8. *Id.* at 414-15, 534 N.E.2d at 988. The suggestions to sell the farm came from agents and employees of the Bank. *Id.*

9. *Id.* at 415, 534 N.E.2d at 988.

10. *Id.* However, the announced auction was never scheduled. *Id.*

11. *Id.*

12. *Id.* The Bank made the announcements without initiating mortgage foreclosure proceedings on the farms. *Id.*

13. *Id.*

14. *Id.* The complaint contained three counts for intrusion into seclusion, one each directed at the Bank, the Bank's Vice-President, James Miller, and William Etheridge, the auctioneer that the announcements listed. *Id.*

15. *Id.* The complaint included prayers to recover for costs of litigation, compensatory damages and punitive damages. *Id.* The Court refused to decide whether or not Plaintiff could recover punitive damages based on the facts in this case. *Id.* at 423, 534 N.E.2d at 992.

16. *Id.* at 415, 534 N.E.2d at 987. The other two defendants made similar motions, both of which the trial court also granted. *Id.*

The Fifth District Appellate Court, concluding that Lovgren had pled sufficient facts to sustain a cause of action for intrusion into the seclusion of another, reversed and remanded the case.¹⁷ Upon granting leave to appeal, the Illinois Supreme Court held that although Lovgren failed to state a cause of action for intrusion into seclusion of another, he properly pled a cause of action for publicity placing a person in false light.¹⁸

The court started its analysis with a brief review of its treatment of the right to privacy.¹⁹ The court then considered Lovgren's complaint as a possible action for unreasonable intrusion into the seclusion of another, finding that Lovgren's cause of action did not fit into this tort because there was no intrusion; the harm to Lovgren occurred when the Bank published the announcements.²⁰ The Court further stated that it in no way recognized the action for intrusion into seclusion in considering Lovgren's complaint under that privacy tort.²¹

The court then examined Lovgren's action under the privacy tort of false light.²² The court held that Lovgren alleged the necessary facts in his complaint to fulfill the three basic elements the

17. *Lovgren v. Citizens National Bank*, 166 Ill. App. 3d 582, 520 N.E.2d 91 (1988).

18. 126 Ill. 2d at 420, 534 N.E.2d at 989.

19. The court reviewed the development of Professor Prosser's four privacy torts which are listed in the RESTATEMENT (SECOND) OF TORTS. For a list of these four torts, see *supra* note 1. The court also referred to its decision in *Leopold v. Levin*, where it had said that "[p]rivacy is one of the sensitive and necessary human values and undeniably there are circumstances under which it should enjoy the protection of law." *Leopold*, 45 Ill. 2d at 440-41, 259 N.E.2d at 254.

20. *Lovgren*, 126 Ill. 2d at 416-17, 534 N.E.2d at 989, *citing*, RESTATEMENT (SECOND) OF TORTS § 652B comments a and b at 378-79 (1977). The court compared the facts in this case to the examples of an intrusion given in Prosser and Keeton's hornbook on torts. These include the invasion of the plaintiff's home, an illegal search of the plaintiff's shopping bag in a store, eavesdropping on the plaintiff by wiretapping, peering into the plaintiff's windows at his private home, and unwanted and persistent phone calls. The court held that Plaintiff's action was not analogous to these examples. See W. PROSSER & W. KEETON, *supra* note 1, § 117, at 854-55.

21. *Id.*, 534 N.E.2d at 989. The court explained that it wished to continue to allow the appellate courts to decide whether to permit the cause of action. *Id.* at 417-18, 534 N.E.2d at 989. At present the Illinois appellate courts are split on this issue. See *Melvin v. Burling*, 141 Ill. App. 3d 786 (3d Dist. 1986) (recognizing intrusion into seclusion as a cause of action); *Kelly v. Franco*, 72 Ill. App. 3d 642 (1st Dist. 1979) (refusing to recognize intrusion into seclusion as a cause of action); *Bank of Ind. v. Tremunde*, 50 Ill. App. 3d 480 (5th Dist. 1977) (implicitly recognizing cause of action for intrusion into seclusion); *Bureau of Credit Control v. Scott*, 36 Ill. App. 3d 1006 (4th Dist. 1976) (refusing to recognize intrusion into seclusion as a cause of action).

22. The court again considered Prosser and Keeton's examples of a false light tort and noted that the act which causes the injury for this action is publicity, not intrusion. *Lovgren*, 126 Ill. 2d at 418-19, 534 N.E.2d at 989. These examples included publicity falsely attributing to the plaintiff an opinion or statement, the filing of a suit on behalf of the plaintiff when he has not authorized it, and using the plaintiff's name on a petition without his authorization. See W. PROSSER & W. KEETON, *supra* note 1, § 117, at 863-64.

court established for this tort: first, a defendant must state a falsehood about the plaintiff; second, the defendant must publish this falsehood to the public; and third, the false light in which the falsehood places the plaintiff must be highly offensive to a reasonable person.²³

The fact that Lovgren was not selling his farm supplied the requisite falsity of the announcement under the first element.²⁴ Consequently, the announcement placed Lovgren in a false light; it said he was selling his farm when in fact he was not.²⁵ Under the second element, the court found the requisite publicity in the fact that the bank disseminated the announcement through advertisements in local newspapers and handbills.²⁶

Next, the court, relying on the Second Restatement's definition of what is highly offensive, analyzed the third element of the tort, whether a reasonable person would find the announcement highly offensive.²⁷ In examining this element, the court implored Illinois courts not to allow an action under this tort in those situations involving "minor mistakes" in reporting, or a "hypersensitive" plaintiff.²⁸

The court noted four facts which supported Lovgren's allegation that the Bank's acts were highly offensive. First, the Bank published the announcement throughout the county where Lovgren resided.²⁹ Second, Lovgren did not intend to sell his farm.³⁰ Third, Lovgren had no knowledge of nor gave his consent to the announcement before it was disseminated.³¹ Fourth, and most significantly for this court, Lovgren found it practically impossible to obtain refinancing after the Bank had made the announcement.³² In holding that Lovgren had adequately alleged a cause of action for false light, the court admonished other Illinois courts to heed its request in *Leopold v. Levin*, to "proceed with caution" in allowing any privacy-based cause of action.³³

23. 126 Ill. 2d at 419-20, 534 N.E.2d at 990.

24. *Id.* at 419, 534 N.E.2d at 990.

25. *Id.*

26. *Id.* at 420, 534 N.E.2d at 990.

27. The Restatement considers a defendant's actions highly offensive when "the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity." RESTATEMENT (SECOND) OF TORTS § 652E comment c, at 396 (1965).

28. 126 Ill. 2d at 420, 534 N.E.2d at 990.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 420-21, 534 N.E.2d at 990, quoting, *Bradley v. Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 334, 168 N.E.2d 64, 65 (1960). In *Bradley*, the First District Appellate Court noted that:

Guarantee of the right of privacy is not a guarantee of hermetic seclusion. We

Before ending its decision, the court appraised Lovgren's cause of action in light of first amendment and defamation limitations.³⁴ The court noted that the present case concerned only Lovgren and his Bank in a purely private matter and did not involve a public figure or matter of public interest.³⁵ Hence, the court correctly held that it need not consider the Bank's first amendment rights in this case.³⁶

The court next determined whether a false light action should include the defamation requirement that a plaintiff plead and prove 'actual malice'³⁷ on the part of the defendant. In *Time, Inc. v. Hill*,³⁸ the United States Supreme Court, holding that the constitutional privilege of freedom of the press extends to limit actions under false light, included the actual malice requirement of *New York Times Co. v. Sullivan*³⁹ in all false light actions.⁴⁰ Seven years later, the United States Supreme Court in *Gertz v. Welch*⁴¹ held that this requirement is inapplicable in *defamation* actions involving a private plaintiff.⁴² However, the United States Supreme Court has not decided if this limitation on the actual malice requirement applies to false light actions such as the present one where the published falsehood refers to a private matter concerning a private figure.⁴³

live in a society geared in the opposite direction; a society that makes public demands and imposes public duties This is the background of custom and habit against which the right of privacy must be defined. To find an area within which the citizen must be left alone is the purpose of this action. Even so, chance or destiny may propel a private citizen into the public gaze. It is important, therefore, that in defining the limits of this right, courts proceed with caution.

Bradley v. Cowles Magazines, Inc., 26 Ill. App. 2d 331, 333-34, 168 N.E.2d 64, 65 (1960).

34. *Lovgren*, 126 Ill. 2d at 421, 534 N.E.2d at 990-91. For a discussion of the first amendment and defamation limitations, see M. POLELLE & B. OTTLEY, *supra* note 1, at 137-57.

35. *Lovgren*, 126 Ill. 2d at 421, 534 N.E.2d at 991.

36. *Id.*

37. The United States Supreme Court defines 'actual malice' in defamation cases as knowledge of the falsity of the publication or reckless disregard of the truth or falsity of the publication. See, e.g., *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 249 (1974); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

38. 385 U.S. 374 (1967).

39. 376 U.S. 254 (1964). In *Sullivan*, the U.S. Supreme Court held that:

The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80.

40. *Time, Inc.*, 385 U.S. at 394.

41. 418 U.S. 323 (1974).

42. *Id.* at 352.

43. See, e.g., *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974). In *Cantrell*, the U.S. Supreme Court considered a false light cause of action involving a

Noting that in *Gertz* the United States Supreme Court left this decision to the states,⁴⁴ the Illinois Supreme Court adopted an 'actual malice' requirement for all false light causes of action in Illinois.⁴⁵ The court based its decision not on constitutional necessity, but on the premise that the required acts under the false light tort (publication of a falsehood) must be done "deliberately" to be actionable, regardless of whether the plaintiff is a public or private figure or the action involves a matter of public or private interest.⁴⁶

In establishing this fourth element, the court made the false light tort almost indistinguishable from an action for defamation.⁴⁷

private person and not a public figure. The trial judge had instructed the jury that it could impose liability only if the jury found the defendant acted with actual malice. The Supreme Court allowed the instruction but did not decide if it was required. *Id.* at 250-51.

44. In *Gertz*, the United States Supreme Court held "that so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Gertz*, 418 U.S. at 347.

45. *Lovgren v. Citizens First Nat'l. Bank*, 126 Ill. 2d 411, 422, 534 N.E.2d 987, 991.

46. *Lougren*, 126 Ill. 2d at 422-23, 534 N.E.2d at 991-92. The Court, in its terse reasoning, looked to a rather cryptic passage from Prosser and Keeton for the rationale behind its resolution of this issue:

It is suggested that virtually all actionable invasions of privacy have been intentional invasions or invasions of a kind that defendant know or had reason to know would not only be offensive but highly so and are therefore examples of outrageous conduct that was committed with knowledge or with reason to know that it would cause serious mental stress . . . in other words, the outrageous character of the publicity comes about in part by virtue of the fact that some part of the matter reported was false and deliberately so.

W. PROSSER & W. KEETON, *supra* note 1, § 117, at 864-65.

In addition to the standard definition of 'actual malice' where the defendant must act knowingly or recklessly with regard to the *falsity* of a statement, the passage provides two different definitions: first, it states that a defendant acts with actual malice if he "knew or had reason to know [the statement] would not only be *offensive* but *highly so* . . ."; second, it states that actual malice is present when a defendant publishes a false statement "with knowledge or with reason to know that it would cause *serious mental stress*." (emphasis added). These potential variations, quoted without explanation, can only confuse the plaintiff who attempts to use this tort theory — must he plead and prove that the defendant knew or acted recklessly with regard to the falsity of the statement, the offensiveness of the statement, or the mental anguish which results from publishing the falsehood.

It makes sense to require a plaintiff to prove actual malice in a false light case when he would have to prove it in a corresponding defamation case based on the same facts. However, it does not make sense to require proof of actual malice in a false light action involving a private person when the court does not require the plaintiff to do so in a corresponding defamation action.

47. Earlier in its opinion the court noted that while all defamation cases also present a false light cause of action, not all false light cases present a defamation action. *Lougren*, 126 Ill. 2d at 421, 534 N.E.2d at 991, *citing*, M. POLELLE & B. OTTLEY, *supra* note 1, at 199-200.

The most fundamental difference between the two torts is the interest each protects. The defamation tort protects a person's reputation and the false light tort protects a person's peace of mind. *See, e.g.*, *Froelich v. Adair*, 213 Kan. 357, 360, 516 P.2d 993, 996-97 (1973) ("[Invasion of Privacy] is a cause of action based upon injury

Although the court provided no clear reason for creating this requirement,⁴⁸ the more probable reason is found in comment e to section 652E of the Second Restatement of Torts, to which the court cited, providing that "limitations of long standing that have been found desirable for the action for defamation should not be successfully evaded by proceeding upon a different theory of later origin."⁴⁹ In other words, the court probably did not want to create a more easily attainable cause of action in the false light tort that would swallow up the law of public defamation.

In so deciding, the court has created an element for the false light action involving a private plaintiff, and eliminated liability for those defendants whose negligent acts give rise to a false light cause of action but not to a defamation cause of action. For example, suppose that in the present case Lovgren had not found it impossible to obtain refinancing on his mortgage, and in fact, had refinanced his mortgage with another bank.⁵⁰ Presumably, the facts would present an action for false light because Lovgren could still allege the mental anguish and suffering caused by the false auction announcement. However, the facts would not present an action for defamation be-

to plaintiff's emotions and his mental suffering; . . . [defamation] is a remedy for injury to plaintiff's reputation"); Comment, *False Light: Invasion of Privacy?*, 15 TULSA L.J. 113, 115-19 (1979) (suggesting that mental anguish should be the only measure for recovery in privacy cases and harm to plaintiff's reputation should not be compensable under privacy claims); Comment, *Privacy: the Search for a Standard*, 11 WAKE FOREST L. REV. 659, 665-69 (1975).

However, some commentators argue that the false light tort protects the reputation of a person just like defamation does. See, e.g., Note, *Tort Recovery for Invasion of Privacy*, 59 NEB. L. REV. 808, 825 (1980) ("The quintessence [sic] of the false light action is the protection of the plaintiff's reputation rather than his or her right to be free from public scrutiny.") Because these two torts are easily confused, it is important for Illinois courts to remember and keep clear this distinction in allowing the false light tort to develop.

Another difference is that a false light action is more liberal than defamation. Defamation requires a plaintiff demonstrate how he suffered public contempt or avoidance or to suffer in his business or employment as a result of the falsehood; false light only requires the plaintiff to demonstrate that the falsehood was "highly offensive."

The publication requirement is another factor which distinguishes false light from defamation. False light requires the defendant to "publish" the falsehood to the public in general, so that it understands that the plaintiff is the subject of the false statement. Defamation requires the defendant to make only a private communication which can be satisfied by telling the falsehood to a limited number of people. Note, *Defamation, Privacy and the First Amendment*, 1976 DUKE L.J. 1016, 1024 n.34 (1976). Some authorities have developed an intermediate "particular public" publication requirement for false light. See *Beaumont v. Brown*, 401 Mich. 80, 105, 257 N.W.2d 522, 531 (1977).

48. For a discussion of the court's reasoning, see *supra* note 46.

49. RESTATEMENT (SECOND) OF TORTS § 652E comment e, at 399 (1977).

50. The fact that plaintiff could not obtain refinancing was "of considerable significance" to the court in finding the bank's actions highly offensive. *Lovgren*, 126 Ill. 2d at 420, 534 N.E.2d at 990. If this fact were not present, the court would have had a hard time justifying its decision under the reasoning it used.

cause Lovgren, having obtained refinancing despite the false announcement, could not successfully plead and prove any damage to his reputation.⁵¹

The justification for the court's actual malice requirement does not hold true in this hypothetical situation. Lovgren cannot evade the restrictions on the defamation action by proceeding with a false light cause of action because his injury leaves him no choice but to proceed under a false light theory. What's more, if in this hypothetical situation, the bank had acted negligently with regard to the veracity of the announcement, Lovgren could not allege actual malice and would not recover under the tort of false light either. This hypothetical situation demonstrates how the court's reasoning is not justified for a false light cause of action, and how the court's decision bars recovery for plaintiffs in cases involving only a false light cause of action which is based on the negligence of the defendant. The court could have limited the need to plead and prove the actual malice requirement to those cases where the facts present both a defamation and a false light cause of action, matching its justification for the actual malice requirement with the situation where the justification is valid.

Perhaps, the court considers false light claims involving falsehoods that do not meet defamation standards to be "minor mistakes" in reporting or not "highly offensive" and not deserving of recovery.⁵² Or maybe, the court was exercising judicial expediency⁵³; because defamation and false light torts both provide recovery for injuries resulting from the publishing of false statements, it is easier to uniformly require plaintiffs to plead and prove actual malice for

51. The defamation cause of action protects a person's reputational interest while the false light cause of action protects a person's interest in remaining free from serious mental suffering. For a discussion of the difference in interests protected, see *supra* note 47.

52. Some commentators argue that plaintiffs choose the false light action because some false statements that are not compensable under defamation are compensable under false light. See, e.g., M. MAVER, *RIGHTS OF PRIVACY* 118 (1972) ("The falsehoods in privacy litigation have traditionally been of a less serious character than that for which relief is granted in defamation.")

53. Commentators have criticized the false light tort as providing a means for plaintiffs with weak defamation cases to avoid the defamation restrictions and limitations. See, e.g., *Rinsley v. Brandt*, 446 F. Supp. 850, 858 (D. Kan. 1977) (holding that a libel claim is barred by statute of limitations but not the false light claim arising out of the identical facts); Wade, *Defamation and the Right of Privacy*, 15 *VAND. L. REV.* 1093, 1121 (1962) ("[T]he great majority of defamation actions can now be brought for invasion of the right of privacy and . . . many of the restrictions and limitations of libel and slander can be avoided."); Note, *Torts: Right of Privacy: Is "False Light" Recognized in California? — Werner v. Times Mirror Co. (Cal. 1961)*, 50 *CALIF. L. REV.* 357, 364 (1962) ("The denial of a remedy in . . . [false light] cases seems preferable to a complete abrogation of the defamation limitations.")

all such claims.⁵⁴

The next question becomes, what other defamation defenses and limitations, if any, will the court apply to the false light tort?⁵⁵ By stating that it was not concerned with these questions, the court has left several issues unresolved, including: whether a plaintiff must plead and prove special damages when the published falsehood is not actionable *per se* under defamation⁵⁶; whether the options and restrictions presented by retraction statutes and the innocent construction rule apply to false light actions⁵⁷; and whether newsworthiness is a defense to claims of false light.⁵⁸

The Illinois Supreme Court, in recognizing the tort of placing another in a false light, has heeded its own call to "proceed with caution" by imposing an actual malice requirement. In adding this extra element to a traditional false light cause of action, it may have restricted its availability to situations where the sister tort of defamation is also available, making the privacy tort of false light largely superfluous.

F. John Steffen

54. As one commentator has put it:

Discreditable remarks by the media will usually be defamatory as well, and even when they are not . . . it probably makes sense to treat them as if they were. Insofar as privacy as such is in issue, the defamation rules are less obviously pertinent — though analysis suggests that the issues are often the same and call for similar treatment.

Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1274 (1976) (footnote omitted).

55. The court avoided these issues, stating "We need not be concerned here with whether typical defamation restrictions and requirements apply." *Lougren*, 126 Ill. 2d at 421, 534 N.E.2d at 991.

56. See, e.g., *Fellows v. National Enquirer Inc.*, 42 Cal. 3d 234, 721 P.2d 97, 228 Cal. Rptr. 215 (1986) (holding that plaintiff alleging false light must plead and prove special damages when claim based on language that is defamatory *per quod*, or defamatory only by reference to extrinsic facts). See also M. POLELLE & B. OTTLEY, *supra* note 1, at 114-26.

57. See W. PROSSER & W. KEETON, *supra* note 1, § 117, at 867-68; RESTATEMENT (SECOND) OF TORTS § 652E comment e, at 399-400 (1977); . See also M. POLELLE & B. OTTLEY, *supra* note 1, at 126-34.

58. *Id.*

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