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LEOPOLD v. LEVIN: PRIVACY 1970

In 1924, Nathan F. Leopold Jr. and Richard Loeb pleaded guilty to the kidnapping and murder of Bobby Franks and were given life sentences. Clarence Darrow represented the pair, and his plea for mitigation produced great interest which remained undiminished by the passage of time. In 1956, Meyer Levin, a fellow student of Leopold and Loeb, published a novel, *Compulsion,*[1] which was based on the Bobby Franks' murder. The novel was made into a play, and later a motion picture. In 1958, when Leopold was granted parole, his autobiography along with other fictional and documentary works was published concerning his notorious crime.[2] Finally in 1970 Leopold brought an action "which was in the nature of a suit alleging a violation of the right of privacy"[3] against the author, publisher, and distributor

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[1] M. LEVIN, COMPULSION, (1956).

[2] Leopold v. Levin, 45 Ill. 2d 434, 437-38, 259 N.E.2d 250, 252-53 (1970). N. LEOPOLD, LIFE PLUS 99 YEARS, (1958); M. MCKERNAN, THE AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB, (1957); J. YAFFE, NOTHING BUT THE NIGHT, (1957).

[3] Leopold v. Levin, 45 Ill. 2d 434, 435, 259 N.E.2d 250, 251 (1970). Prior to trial, at Mr. Leopold's deposition, the following discussion concerning the nature of the action took place between Mr. Gertz, plaintiff's attorney and Mr. London.

> Mr. London: Mr. Gertz, may we have now — and I think it's important at this stage to have an understanding because we may not have another opportunity to examine Mr. Leopold in person — that there is no claim for libel in this action?
>
> Mr. Gertz: That's right. I would like, since the question has been raised, to state briefly what our case is about. It's set forth in the pleadings, but it will do no harm to repeat it here. Briefly, we are claiming that the writing, publication and distribution of the novel, the publication and distribution of the play and the subsequent production and distribution and exhibition of the moving picture, all named Compulsion, by the named defendants, was an appropriation of the name, likeness and personality of the plaintiff, Nathan F. Leopold, Jr., by all and each of the said defendants, and a conversion of the said name, likeness and personality, to their use for their profit and gain and more fully set forth in the individual counts. That, in brief, is what our cause of action is about. It is not a libel action in any sense of the word. It doesn't depend on truth or falsity or, rather, anything derogatory or not. It's the appropriation of property which is the gist of this action.

In the course of plaintiff's deposition, the following colloquy occurred:

> Mr. London: I think it would be proper now, in relation to this examination for you, Mr. Gertz, to indicate the basis for damages so that we can determine whether it's necessary to go into that question and the extent to which it's necessary to go into the question.
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> Mr. Gertz: Under our study of the cases, we believe the measure of the damages are the profits made by the defendants and each of them, attributable to the appropriation of the property right of the plaintiff in his name, likeness, life story and in personality, and, in addition, what he may have lost himself by reason thereof, and we are not waiving any other elements of damage that there may be recoverable as a matter of law. If, as a matter of law, there is any element of punitive damages, we are not waiving it. If there are any other elements of damages, this is not to say that we are waiving any of those. But basically the measure of damages is, as I have just defined to you, the profits of each of the defendants attributable to the appropriation.

Excerpts from Record for Appellee at 110, 111, Leopold v. Levin, 45 Ill. 2d

of the novel and motion picture, *Compulsion.* The trial court granted plaintiff's motion for summary judgment on the question of liability, while reserving the issue of damages. The defendant's appeal from the ruling of the trial court was dismissed on the ground that the judgment was interlocutory.[4] On remand, to determine the issue of damages, a new judge vacated the summary judgment for plaintiff and granted defendant's motion for summary judgment and judgment on the pleadings.[5]

The plaintiff then appealed directly to the Illinois Supreme Court on the grounds that he had been denied his "inherent" right to pursue "happiness" guaranteed by the Illinois Constitution,[6] and that a constitutional question was, therefore, involved. The supreme court held that although privacy and the right thereto is within the purview of the above provision of the Illinois Constitution, the plaintiff did not have a legally protected right of privacy since the right is limited when areas of legitimate public interest are involved. Specifically, a private person would be protected against the use of his portrait for commercial advertising purposes, while a public figure would not be similarly protected.[7]

Since the *Leopold* case was the first Illinois Supreme Court decision to find the existence of a right to privacy, it was necessary for the Court to examine the numerous decisions of the

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

[4] Leopold v. Levin, No. 38912 (Ill., June 19, 1964). The basis used for the dismissal was ILL. REV. STAT. ch. 110 §57 (3) (1969) which reads as follows:

> Procedure. The opposite party may prior to or at the time of the hearing on the motion file counteraffidavits. The judgment or decree sought shall be rendered forthwith if the pleadings, depositions, and admissions in file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law. A summary judgment or decree, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

[5] Excerpts from Record of Appellee at 73, Leopold v. Levin, 45 Ill. 2d 434, 259 N.E.2d 250 (1970). For cases on this point *see* Roach v. Village of Winnetka, 366 Ill. 578, 581, 10 N.E.2d 356, 357 (1937); Shaw v. Dorris, 290 Ill. 196, 204, 124 N.E. 796, 800 (1919); Richichi v. City of Chicago, 49 Ill. App. 2d 320, 325, 199 N.E.2d 652, 655 (1964).

[6] ILL. CONST. art. 2, §1 (1870), which states:

> All men are by nature free and independent, and have certain inherent and inalienable rights — among these are life, liberty, and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.

[7] Leopold v. Levin, 45 Ill. 2d 434, 441, 259 N.E.2d 250, 254 (1970). The court went on to say:

> However, we must hold here that the plaintiff did not have a legally protected right of privacy. Considerations which in our judgment require this conclusion include: the liberty of expression constitutionally assured in a matter of public interest, as the one here; the enduring public attention to the plaintiff's crime and prosecution which remain an American *cause celébre*; and the plaintiff's consequent and continuing status as a public figure.

appellate court on this point.[8] The first such decision to recognize this right was *Eick v. Perk Dog Food Co.*,[9] where the court said:

> 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.[10]

It is to be noted that Illinois cases on this point, subsequent to *Eick*, have maintained the position that this right is limited to private persons and not to public figures, since society as a whole has a right to receive factual reporting about newsworthy persons and events.[11]

In his direct appeal to the Illinois Supreme Court, the plaintiff in *Leopold* contended first that the constitutional guarantees of free speech and press do not allow exploitation of one's name or likeness for gain in knowingly fictionalized accounts of his private life.[12] As authority for his contention, plaintiff cited *Time Inc. v. Hill*,[13] which was the first United States Supreme Court decision to consider this point. The Court, in *Time*, held that the constitutional safeguard of freedom of expression precludes redress for false reports of newsworthy events in the absence of proof that the publisher knew the reports were false or published them with a reckless disregard for their truth or falsity.[14] The fact that the magazine was published for profit was

[8] Leopold v. Levin, 45 Ill. 2d 434, 439, 259 N.E.2d 250, 253 (1970). *See* Carlson v. Dell Publishing Co., 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965); Smith v. WGN Inc., 47 Ill. App. 2d 183, 197 N.E.2d 482 (1964); Dabbs v. Robert S. Abbott Publishing Co., 44 Ill. App. 2d 438, 193 N.E.2d 876 (1963); Buzinski v. Do-All Co., 31 Ill. App. 2d 191, 175 N.E.2d 577 (1961); Bradley v. Cowles Magazines 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); Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952).

[9] 347 Ill. App. 293, 106 N.E.2d 742 (1952). The court held that the right to privacy is guaranteed by Article 2, Section 1 of the Illinois Constitution of 1870.

[10] *Id.* at 299, 106 N.E.2d at 745.

[11] Leopold v. Levin, 45 Ill. 2d 434, 440, 259 N.E.2d 250, 254 (1970). See note 8 *supra*; *But cf.* Annerino v. Dell Publishing Co., 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958).

[12] Leopold v. Levin, 45 Ill. 2d 434, 439, 259 N.E.2d 250, 253 (1970).

[13] 385 U.S. 374 (1967). The facts of the case were as follows: James Hill and his family were held captive in their Pennsylvania home for several hours in September 1952. The convicts treated Hill and his family respectfully, considering the circumstances. Subsequent to the incident Hill and his family moved and shunned all future publicity concerning the incident. A novel and later a play called the *Desperate Hours* was written about a family who had an experience similar to that of the Hill family with one exception. While no violent acts had been committed against the Hill family, several violent acts were directed against the family in *Desperate Hours*. LIFE magazine in reviewing the play falsely reported that the play was a re-enactment of the Hill family's experience.
LIFE, Feb. 28, 1955 at 75.

[14] 385 U.S. 374, 390 (1967). In formulating a rule for determining when a public figure has a legally protected right of privacy which may be invaded, the Court adopted certain rules developed in libel cases. *See* New

found to have no adverse effect on its constitutional right of free expression.[15]

After giving consideration to the *Time* case, the Court rejected plaintiff Leopold's contention, holding that the First Amendment does not protect knowingly fictionalized accounts of private lives but that defendant's novel, *Compulsion,* while suggested by plaintiff's crime, was obviously a creative piece of drama and was represented as such by the defendant.[16] Therefore, it became unnecessary to apply the "actual malice" standard or the "knowingly reckless disregard for truth or falsity" test of the *Time* case,[17] since *Compulsion* was not a knowingly false account nor was it a fictionalized account of plaintiff's life.

Next, Leopold contended that the defendants caused the public to identify him with fictionalized episodes in the book and motion picture which were so offensive as to outrage notions of decency in the community.[18] Plaintiff based his position on judicial dictum from *Sidis v. F - R Pub. Co.*[19] There, Sidis, a former child prodigy who became a clerk as an adult, was the subject of a painfully accurate and intimate biographical sketch.[20] The court held that although the magazine article was published without plaintiff's consent, his status as a public figure made details of his private life subject to scrutiny by the press.[21] Further, a newspaper advertisement announcing the article was held to have en-

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York Times Co. v. Sullivan, 376 U.S. 254, 279, 280 (1964) where the Court held:

> The constitutional guarantees require, we think, 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.

and Curtis Publishing Co. v. Butts, 388 U.S. 130, 155, (1967) where the Court said:

> We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

[15] Time Inc. v. Hill, 385 U.S. 374, 397 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Smith v. California, 361 U.S. 147, 150 (1959); Joseph Burstyn Inc. v. Wilson, 343 U.S. 495, 501-02 (1952); *cf.* Lovell v. Griffin, 303 U.S. 444, 450-51 (1938); Grosjean v. American Press Co., 297 U.S. 233, 243 (1936); *Ex Parte* Jackson 96 U.S. 727, 733 (1877).

[16] Leopold v. Levin, 45 Ill. 2d 434, 445, 259 N.E.2d 250, 256 (1970).

[17] *Id.* See text at note 14 *supra.*

[18] Leopold v. Levin, 45 Ill. 2d 434, 443, 259 N.E.2d 250, 255 (1970).

[19] 113 F.2d 806 (2d Cir. 1902).

[20] NEW YORKER, Aug. 14, 1937 at 22. The magazine ran a biographical sketch of William James Sidis under the title of *Where Are They Now?* The article was subtitled *April Fool.* Sidis, a mathematical genius as a youth showed his disdain for fame and fortune by retiring to the life of an insignificant clerk. He had over the years attempted to conceal his identity from the public. The article exposed his former genius and present eccentricities. As a result, Sidis brought an action for invasion of privacy.

[21] 113 F.2d at 809, *cf.* Bernstein v. National Broadcasting Co., 129 F. Supp. 817, 835 (D.D.C. 1955); Estill v. Hearst Publishing Co., 186 F.2d 1017,

joyed the same privilege as the article itself. The Court reasoned that since the article itself was unobjectionable because of its veracity, a newspaper advertisement referring to it was likewise unobjectionable and therefore shared the same privilege.[22] While holding the publication of the article and its advertisement proper, the court placed a limitation on the rule saying, "Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notion of decency."[23]

Apparently the Illinois Supreme Court was unimpressed with this argument when made on behalf of Leopold. The Court held that the fictionalized incidents portrayed in the novel and motion picture *Compulsion* were logical derivations of the actual crime committed by Leopold, and that the public, therefore, could be no more outraged by these fictionalized episodes than they were by the actual crime of Leopold which was a matter of public record.[24] As a result, the court concluded that plaintiff's argument "that the decency of the community would be outraged" was at best "fanciful."[25]

Plaintiff, finally, contended that the defendants appropriated his name and likeness without his consent for commercial gain through their advertisements.[26] While *Eick v. Perk Dog Food Co.* established a precedent in Illinois for this position,[27] the court held that the facts of the two cases were essentially dissimilar. The advertisement which contained Leopold's photograph concerned the murder to which he had pleaded guilty. Since this event was a matter of public record, no benefit of privacy could attach to it.[28] In the *Eick* case, however, a girl who had never been a public figure had her photograph used in advertising a product which was entirely commercial.[29] There was no issue of freedom of expression raised in the *Eick* case, as there was in *Leopold,* and hence, the court found no problem of balancing the

1022 (7th Cir. 1951).

[22] 113 F.2d at 810. It should be noted that the newspaper advertisement referred to in the text did not include the "name, portrait, or picture" of the plaintiff. This being the case, it would have been extremely difficult for plaintiff to prove that this essential element had been present in connection with the advertisement.

[23] 113 F.2d at 809. The court went on to say at 810 that intimate revelations about "public figures" will not usually trangress the community's notion of decency. They indicated, however, a willingness to hold differently when such "intimate revelations" become contrary to the "mores of the community."

[24] Leopold v. Levin, 45 Ill. 2d 434, 443-44, 259 N.E.2d 250, 255-56 (1970).

[25] *Id.* at 444, 259 N.E.2d at 256. The court apparently found plaintiff's contention based upon the dictum in *Sidis* amusing. Obviously, it seems highly unlikely that the fictional murder was any more "outrageous" than the "historical murder" which had inspired it.

[26] *Id.*

[27] 347 Ill. App. 293, 299, 106 N.E.2d 742, 745 (1952).

[28] Leopold v. Levin, 45 Ill. 2d 434, 444, 259 N.E.2d 250, 256 (1970).

[29] 347 Ill. App. 293, 106 N.E.2d 742 (1952).

constitutional guarantees of freedom of expression with that of an individual's right to privacy.[30]

CONCLUSION

Leopold v. Levin, was the first Illinois Supreme Court decision dealing with an action based on the individual's right of privacy. The court held that a plaintiff who attains the status of a public figure due to notoriety gained through an infamous criminal trial which is a matter of public record may not successfully maintain a cause of action for invasion of privacy based on the use of his name and photograph in connection with that crime or trial.[31] In so holding they affirmed the first Illinois case in this area, *Eick v. Perk Dog Food Co.*,[32] and all subsequent cases.[33] Cognizant of the constitutional guarantees of freedom of expression in matters of public interest, the court was careful not to extend the law in this area so as to inhibit legitimate discussion of public issues.[34]

This right to privacy has always been viewed by the judiciary with caution,[35] and Illinois is no exception to this rule. In fact, the courts have steadfastly refused to recognize a legally protected right of privacy where the alleged injured party is a public figure and the invasion consists of the printing of stories which constitute newsworthy items.[36] Further, since the Illinois Supreme Court defines rather narrowly the right of privacy when the alleged invasion thereof is brought about through the exercise of freedom of the press, there is serious doubt that the Court will adopt a different view in the future when cases of this kind are involved.

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[30] For a discussion of balancing constitutional guarantees of freedom of expression with that of the right to privacy, see Mr. Justice Black's concurring and dissenting opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130, 170 (1967), concurring and dissenting opinion in Rosenblatt v. Baer, 383 U.S. 75, 94 (1966), concurring opinion in New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964).

[31] Leopold v. Levin, 45 Ill. 2d 434, 444, 259 N.E.2d 250, 256 (1970).

[32] Note 29 *supra.*

[33] Note 8 *supra.*

[34] Leopold v. Levin, 45 Ill. 2d 434, 441, 259 N.E.2d 250, 255 (1970).

[35] *Id.* at 442, 259 N.E.2d at 254.

[36] Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir. 1940); Bernstein v. National Broadcasting Co., 129 F. Supp. 817 (1955); Estill v. Hearst Publishing Co., 186 F.2d 1017 (7th Cir. 1951).