PRIVACY AND PUBLICITY: FLIP SIDES OF THE SAME COIN

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A common query I receive from writers is a variation of the following: What are my risks and obligations in using people's real names or images in my work? This article explains two sets of rights: one related to publicity and one to privacy. (Bonus: This article also illustrates the mysterious legal term "tort"—a wrongful act or infringement of a right.)

The courts have recognized privacy rights for decades. In some provinces (but not Alberta), those rights are codified in legislation. Since we writers recognize the value of a story, and stories are embedded in every lawsuit, let's look at the facts of the early cases.

In the first case, decided in 1973, a well-known Hamilton Tiger-Cats football player sued Chrysler Canada for using his image without his consent. Bob Krouse's image appeared on a spotter distributed to football fans to help them track scores using player numbers. Krouse's back and distinctive number 14 appeared on the scorecard, along with images of Chrysler vehicles. Krouse argued the photo implied he endorsed Chrysler, therefore his ability to profit from other car manufacturers' endorsements was reduced. The Ontario judge created a new tort: misappropriation of personality. He awarded Krouse $1,000 in damages. The Ontario appeal court agreed that the new tort existed, however, because it held that no one would assume Krouse was endorsing Chrysler, he wasn't entitled to damages.

Four years later, George Athans, a world-class water skier, sued Canadian Adventure Camps (CAC) for using a drawing, based upon his photograph, on its promotional brochures. The court held that the commercial use of Athans' representational image by CAC was a wrongful appropriation of personality. It was an invasion of the plaintiff's exclusive right to market his persona. Athans received $500 in damages.

Fast forward to 1996, when the Gould estate sued Stoddart Publishing for publishing a book about the life of Glenn Gould, based on consensual interviews and photos of the famous pianist 40 years earlier. Wrongful appropriation of personality was alleged, but the court found the tort had not been proven. That's because the Gould interview and images weren't used to endorse anything, or for any commercial purpose. The subject matter was the personality himself. "Biographies, other books, plays and satirical skits are by their nature different," the judge said. "The subject of the activity is the celebrity, and the work is an attempt to provide some insights about that celebrity."

One common denominator in these three cases is the plaintiffs' fame. What about people who are not celebrities? In a lesser-known Alberta case, Hay v. Platinum, an accountant successfully used the tort of misappropriation of personality when his signature was forged by the defendant to obtain a bank loan. This case is critical because it was decided in Alberta and showed that the courts protect ordinary people—not just their images, but also other aspects of their personalities, such as their signatures.

In a 1998 case, a young (non-famous) woman, Pascale Aubry, sued an obscure literary magazine and photographer for using a photograph of her sitting alone in a public place. The Supreme Court of Canada held the defendants liable, not under the tort of misappropriation of personality, but for violating the woman's right to privacy. "Since the right to one's image is included in the right to respect for one's private life, it is axiomatic that every person possesses a protected right to his or her image," the top court said. Since the case was partly decided upon specific Québec law, its application in provinces where similar legislation does not exist is unclear.

The protection of privacy rights was also recognized in a 2012 Ontario case. The plaintiff, Sandra Jones, and the defendant, Winnie Tsige, worked at different branches of the same bank, enabling the defendant to access the plaintiff's bank accounts at least 174 times. The court adopted a new privacy tort: intrusion upon seclusion. Jones was awarded $10,000 in damages. The new tort was argued again in 2017. Basia Vanderveen sued a media company for using a two-second clip of herself jogging in a public place in a two-minute promotional video for a condo development. She claimed the heavier version of herself portrayed in the video caused her distress and amounted to intrusion upon her seclusion, and the Ontario court awarded her $4,100 in damages.

The case law may be fledgling, but a direction is discernible. Someone whose persona is used without permission could make a tort claim based upon flip sides of the same coin: misappropriation of personality (breach of publicity rights) or intrusion upon seclusion (breach of privacy rights). When in doubt, seek the person's consent. ■

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