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Commentary

A Legal Calculus Ignored

Court overlooks long-settled principle that newsperson's privilege protects nonconfidential information

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In the dense forest of privilege law, the newsperson's privilege or "shield law" is a rarely seen and much misunderstood principle.

The privilege is rare because it may be invoked by a very limited class of people, that is, professional journalists and their immediate employers. It is misunderstood because, on the few occasions when courts encounter this privilege, its roots in a constitutionally free press are often not recognized, much less appreciated. A recent Superior Court decision rejecting the privilege exemplifies such misunderstanding.

The privilege is a creature of legislation under N.J.S.A. 2A:84A-21, et seq. (N.J.Evid.R. 508). Dating to 1933, the law has undergone a series of revisions, each time strengthening the privilege in the wake of judicial attempts to limit or erode it. In its current form, the privilege protects from compelled disclosure the newsgathering function of the media. Simply put, a journalist cannot be compelled to disclose what he or she did in writing a story. Confidential and nonconfidential sources are protected.

The privilege may be overcome by clear and convincing evidence of a knowing and voluntary waiver, i.e., disclosure by the journalist to a third party. Alternatively, it may yield to the competing Sixth Amendment fair trial rights of a criminal defendant subject to a preponderant showing of relevance, materiality and necessity, as well as the absence of no less intrusive sources of information and the relative value to criminal liability.

Even publication does not constitute a waiver, except as to the specific materials published. This stands to reason: since a published article is the product of the privileged newsgathering process, the privilege would be meaningless if defeated by the publication that invariably followed. On the other hand, in order to accommodate evidentiary needs, published articles are self-authenticating.

The courts have described this privilege as both comprehensive and absolute. Such opinions appreciate the democratic principle that a constitutionally free press can only achieve its function of promoting an informed citizenry if the process of gathering news is protected from compelled disclosure.

As a consequence of the privilege, parties embroiled in litigation may not enlist the professional media in the service of civil or criminal discovery. A prosecutor may not subpoena a reporter to testify about his or her jailhouse interview of an inmate. A personal injury attorney may not demand that a newspaper involuntarily produce photographs of a car accident. Even the plaintiff in a civil defamation action is prohibited from extracting information from a media defendant concerning the newsgathering process.

The recent opinion in *Kinsella v. Welch*, Mon-L 1836-02, fails to appreciate these principles. On July 9, 2001, Joseph Kinsella was a patient in the emergency room of Jersey Shore Medical Center, where a subsidiary production studio of *The New York Times* had been given permission by the hospital to film. Following the course of his emergency room treatment, Kinsella provided written consent to the production studio as well.

The video was created for a television show, "Trauma — Life in the ER," but was never aired. Nonetheless, Kinsella subsequently sued *The New York Times* for violation of his privacy rights, in the context of which he sought from the defendants a copy of the videotape. The defendants declined on the basis of the newsperson's privilege.

Judge Louis Locascio had little difficulty in ascertaining that the privilege did in fact apply. Instead, the court's interest was with the relevancy of the videotape "to show the severity of [Kinsella's] injuries in plaintiff's [privacy] claim" against defendants. Toward this end, the court provided a constitutional foundation for Kinsella's privacy

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claim, thereby elevating it above a garden-variety common law tort action, such as the defamation claim found in *Maressa v. New Jersey Monthly*, 89 N.J. 176, *cert. denied*, 459 U.S. 907 (1982), where the privilege was declared "absolute."

Regrettably, the court's supporting analysis for its constitutional foundation was inartful. The court first cited case law from Idaho for the proposition that "because no confidential source or information was involved, the newsperson's privilege did not apply." Yet, in doing so, the court overlooked the unique quality of the newsperson's privilege law in New Jersey as well as the long-settled principle that this privilege protects nonconfidential information.

The opinion then offered a correct exegesis of the constitutional right of privacy, though reaching the incorrect conclusion that such a constitutional patina be conferred upon Kinsella's claim. When defendants properly pointed out the absence of any governmental intrusion normally giving rise to such a constitutional right, the court found state action here because "defendants … rely upon an affirmative legislative effort (the shield law) and … [defendants'] request an affirmative judicial effort (by this court) to prohibit plaintiff from obtaining the videotape in issue."

Thus, said the court, given Kinsella's vulnerable state in the emergency room, as well as the absence of any confidential information and less intrusive source, Kinsella's constitutional right to privacy trumped the defendants' assertion of protection under the statutory shield law.

The outcome here was flawed. The subject of the filming was Kinsella's treatment in a hospital emergency room; this much is acknowledged. Whether the filming constituted an actionable intrusion turns on the following questions: (1) the defendants' liability for violating Kinsella's reasonable privacy expectations, implicating issues of consent; and (2) Kinsella's damages and consequent publicity.

To compel disclosure of the videotape, which never aired, does not assist the resolution of any fact in issue, much less is it relevant, material and necessary. Equally troubling is the constitutional patina afforded the plaintiff's privacy claim.

While many of the facts material to these questions appear to be undisputed, the facts attending the video filming are irrelevant, a video that in any case was never aired. Under these circumstances, to compel disclosure of the videotape does not assist the resolution of any fact in issue, much less is it relevant, material and necessary.

Equally troubling is the constitutional patina afforded Kinsella's privacy claim. Constitutional rights define the limits of government action. The media are not the government. Nor are the media transformed into the government, and newsgathering into state action, through reliance on judicial enforcement of a legislative privilege.

For example, attorneys and physicians are not deemed state actors by seeking the protection of the attorney-client and physician-patient privileges. Ironically, the very source of the privacy claims asserted by Kinsella is rooted not in constitutional law but in regulatory provisions enforceable against the hospital, which permitted the filming and, curiously, was not a party-defendant in this case. The simple fact was there is no constitutional privacy interest at stake in this case, and the attempt to find one was error.

Privacy torts are the first cousin of the tort of defamation. While distinct in the redressable conduct at issue and the requisite elements needed to state such claims, these common law causes of action have similar aspects, one being the application of the newsperson's privilege. The contours of that privilege in New Jersey are unique to this jurisdiction and have been thoroughly articulated by our courts.

The resulting jurisprudence accommodates essential evidentiary needs while advancing important constitutional principles. This important and delicate balance achieved by our legal system in New Jersey is easily disturbed by decisions that fail to follow this legal calculus. Unfortunately, the *Kinsella* opinion is such a decision, lost in the dense forest of privilege law. ■