

January 1995

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### Recommended Citation

Padraic D. Lee, *Howell v. New York Post: Patient Rights versus the Press*, 15 Pace L. Rev. 459 (1995)

DOI: <https://doi.org/10.58948/2331-3528.1365>

Available at: <https://digitalcommons.pace.edu/plr/vol15/iss2/3>

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# ***Howell v. New York Post:* Patient Rights versus the Press**

**Padraic D. Lee, Esq.\***

## **I. Introduction**

*Howell v. New York Post*<sup>1</sup> was a case of first impression where the New York State Court of Appeals considered the relationship between two separate but potentially overlapping bodies of law: infliction of emotional distress and invasion of privacy.<sup>2</sup> By a unanimous decision, New York State's highest court held that a "real relationship" between an individual photographed and a news article would defeat any statutory privacy claim.<sup>3</sup> The court held that conduct otherwise found to be extreme and outrageous might yet be privileged, "meaning that defendants acted within their legal rights," under certain circumstances such as newspaper publication.<sup>4</sup>

The Court of Appeals warned that an individual might still "defeat the privilege and state a claim for emotional distress," given the right set of facts.<sup>5</sup> The court explicitly validated reckless infliction of emotional distress as a cause of action in New

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1. 81 N.Y.2d 115, 612 N.E.2d 699, 596 N.Y.S.2d 350 (1993).

2. *Id.* at 118, 612 N.E.2d at 700, 596 N.Y.S.2d at 351.

3. *Id.* at 124, 612 N.E.2d at 704, 596 N.Y.S.2d at 355. The court explained its reluctance "to intrude upon reasonable editorial judgments in determining whether there is a real relationship between an article and a photograph." *Id.* (citing *Finger v. Omni Publications Int'l, Ltd.*, 77 N.Y.2d 138, 143, 566 N.E.2d 141, 144, 564 N.Y.S.2d 1014, 1017 (1990)); *see also* *Gaeta v. New York News*, 62 N.Y.2d 340, 349, 465 N.E.2d 802, 805, 477 N.Y.S.2d 82, 85 (1984). Then, seemingly *sua sponte*, the court expanded the definition of "real relationship" to include anything that would affect the "visual impact" of the photograph. *Howell*, 81 N.Y.2d at 125, 612 N.E.2d at 704, 596 N.Y.S.2d at 355. Now editors essentially have full authority to define real relationship. *See infra* notes 198-201 and accompanying text.

4. *Howell*, 81 N.Y.2d at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356.

5. *Id.* at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356.

York State<sup>6</sup> and implicitly qualified the media's privilege by stating that the publication of unauthorized photographs "without more — could not *ordinarily* lead to liability for infliction of emotional distress."<sup>7</sup>

This Article discusses both the tort of intentional infliction of emotional distress and of invasion of privacy under New York law in relation to patients' rights. Part II provides background on the tort of infliction of emotional distress (intentional and reckless) and the statutory provisions regarding invasion of privacy. Particular attention is paid to the requirements for liability pursuant to established case law and treatise opinion. Part II also examines relevant public health laws and historical legislative intent aimed at protecting the rights of psychiatric patients.

Part III discusses the facts, procedural history and the decisions in *Howell v. New York Post*. Part IV analyzes the opinion of the New York Court of Appeals, with particular focus on the court's grudging but ultimate recognition that liability may attach for infliction of emotional distress pursuant to the manner in which the press gathers and publishes the news, provided the "rigorous requirements" of the tort are met.<sup>8</sup>

This Article concludes that the decision in *Howell* fails to provide adequate protection to New York State psychiatric patients (and patients in general) by allowing media entities to use their right of free press to publish photographs of patients undergoing treatment, without consent and against medical warning. The *Howell* decision obliterates a fundamental patient right — the right to undergo psychiatric/medical treatment in a dignified, confidential and non-threatening environment.

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6. *Id.* at 121, 612 N.E.2d at 702, 596 N.Y.S.2d at 353.

7. *Id.* at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356 (emphasis added).

8. *Id.* at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356; *see also infra* notes 26-27 and accompanying text.

## II. Background

### A. *Infliction of Emotional Distress*

The Court of Appeals described the tort of infliction of emotional distress as a tort with a "long history."<sup>9</sup> Initially, the court recalled the historical aversion to recognizing any claim for emotional distress even where, as in a nineteenth century case, for example, a woman suffered a "miscarriage" after being frightened by a defendant's horses.<sup>10</sup> Although emotional distress damages were allowed "as an adjunct, or 'parasitic' " to recognized torts,<sup>11</sup> New York common law did not recognize emotional injury as a valid independent basis for recovery, even if there were attendant "physical manifestations."<sup>12</sup> Indeed, the First Restatement of Torts essentially insulated an actor from liability for conduct which caused only emotional distress.<sup>13</sup> The concerns about such claims were the same then as now. Essentially, courts feared a flood of litigation and the ability of potential plaintiffs to "feign" emotional distress.<sup>14</sup>

Despite this attitude against emotional distress claims standing on their own, courts did allow damages for such injury if they accompanied traditional causes of action such as defama-

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9. *Howell*, 81 N.Y.2d at 119, 612 N.E.2d at 701, 596 N.Y.S.2d at 352.

10. *Id.* at 119-20, 612 N.E.2d at 701, 596 N.Y.S.2d at 352 (citing *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896)). In *Mitchell*, the plaintiff was standing on a crosswalk waiting to board defendant's car when the car's team of horses was driven to come "so close to the plaintiff that she stood between the horses' heads when they stopped." *Mitchell*, 151 N.Y. at 108, 45 N.E. at 354. The court held that the "plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury." *Id.* at 109, 45 N.E. at 354.

11. *Howell*, 81 N.Y.2d at 120, 612 N.E.2d at 701, 596 N.Y.S.2d at 352 (citing *Garrison v. Sun Print & Publishing Ass'n*, 207 N.Y. 1, 6-7, 100 N.E. 430, 431 (1912)). The court in *Garrison* held that in an action to recover for defamatory words, damages for mental distress are recoverable if "physical sufferings" attend such distress. *Garrison*, 207 N.Y. at 6-7, 100 N.E. at 431.

12. *Howell*, 81 N.Y.2d at 119, 612 N.E.2d at 701, 596 N.Y.S.2d at 252 (citing *Mitchell*).

13. *Howell*, 81 N.Y.2d at 120, 612 N.E.2d at 701, 596 N.Y.S.2d at 352. The court noted that "conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability . . . for emotional distress resulting therefrom." *Id.* (citing RESTATEMENT (FIRST) OF TORTS § 46 (1934)).

14. *Id.* at 120, 612 N.E.2d at 701, 596 N.Y.S.2d at 352 (citing *Mitchell*, 151 N.Y. at 110, 45 N.E. at 354-55).

tion, assault, battery, false imprisonment or seduction.<sup>15</sup> Earlier "courts often struggled to find an established cause of action upon which to base an award of emotional distress damages to a deserving plaintiff."<sup>16</sup>

By the mid-twentieth century, however, the law was clearly changing. Legal scholars like Dean Prosser were making pointed and reasonable arguments to legitimize emotional distress claims.<sup>17</sup> Eventually, the Second Restatement of Torts embraced these new concepts and coalesced these emerging principles into a clear declaration that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . . ."<sup>18</sup>

Prior to 1993, the New York Court of Appeals had adopted the rule set out in the Second Restatement of Torts, which delineates reckless infliction of emotional distress as a viable cause of action.<sup>19</sup> The comments to the Second Restatement detail the burden of proof for reckless conduct as that conduct

15. *Id.* (citing *Garrison v. Sun Print & Publishing Ass'n*, 207 N.Y. 1, 100 N.E. 430 (1912)); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 56-57 & n.18-20 (5th ed. 1984).

16. *Howell*, 81 N.Y.2d at 120, 612 N.E.2d at 701, 596 N.Y.S.2d at 352; see also *Boyce v. Greeley Square Hotel*, 228 N.Y. 106, 126 N.E. 647 (1920); *Aaron v. Ward*, 203 N.Y. 351, 96 N.E. 736 (1911).

17. *Howell*, 81 N.Y.2d at 120-21, 612 N.E.2d at 701, 596 N.Y.S.2d at 352.

18. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). The RESTATEMENT (FIRST) OF TORTS 1948 amendment at § 46 was the forerunner of the final Restatement section.

19. See *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 480 N.E.2d 349, 490 N.Y.S.2d 735 (1985); *Fischer v. Maloney*, 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978). In *Freihofer*, defendant newspaper accessed court files of a matrimonial proceeding involving the plaintiff, a wealthy and well-known business man, in order to publish a series of articles. *Id.* at 137-38, 480 N.E.2d at 351, 490 N.Y.S.2d at 737. The Court of Appeals applied the recklessness rule of the Second Restatement. *Id.* at 143, 480 N.E.2d at 355, 490 N.Y.S.2d at 741; see also *Murphy v. American Home Prod. Corp.*, 58 N.Y.2d 293, 303, 448 N.E.2d 86, 90, 461 N.Y.S.2d 232, 236 (1983) ("[T]o survive a motion to dismiss, plaintiff's allegations must satisfy the rule set out in the Restatement of Torts, Second, which we adopted in *Fischer v. Maloney* . . ."). In *Howell*, the Court of Appeals has explicitly stated that reckless conduct, as opposed to intentional conduct, can be one of the four elements necessary to bring a claim for emotional distress. *Howell*, 81 N.Y.2d at 121, 612 N.E.2d at 702, 596 N.Y.S.2d at 353. Specifically the court stated that "[t]he tort has four elements: . . . (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress . . . ." *Id.* (emphasis added).

which is "in deliberate disregard of a high degree of probability that the emotional distress will follow."<sup>20</sup> In addition, Professors Prosser and Keeton pointed out that the conscious disregard of a considerable probability of mental distress has formed the basis for pleading reckless infliction of emotional distress.<sup>21</sup>

One "basis on which extreme outrage can be found is the defendant's knowledge that the plaintiff is especially sensitive, susceptible and vulnerable to injury through mental distress at the particular conduct."<sup>22</sup> The Second Restatement reasons that "[t]he extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity."<sup>23</sup>

The Second Restatement details the elements of the tort of infliction of emotional distress as follows: "(i) extreme and outrageous conduct; (ii) intent to cause, or a disregard of a substantial probability of causing, emotional distress; (iii) a causal connection; and (iv) severe emotional distress."<sup>24</sup>

It is well established that liability will only be found where the conduct is so outrageous that it goes beyond all possible bounds of decency.<sup>25</sup> Although no court (including the Court of Appeals)<sup>26</sup> has specifically delineated this conduct, the Restatement defines it as "intolerable in a civilized community."<sup>27</sup> Prosser and Keeton note cases ranging from cruel practical jokes and rumors,<sup>28</sup> to the more egregious conduct of prolonged and indecent solicitation of a woman.<sup>29</sup>

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20. RESTATEMENT (SECOND) OF TORTS § 46 cmt. i (1965); see also *id.* cmt. a.

21. KEETON ET AL., *supra* note 15, § 12, at 64.

22. *Id.* at 62.

23. RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (1965).

24. *Howell*, 81 N.Y.2d at 121, 612 N.E.2d at 702, 596 N.Y.S.2d at 353 (construing RESTATEMENT (SECOND) OF TORTS § 46(1) (1965)).

25. See *Murphy*, 58 N.Y.2d at 303, 448 N.E.2d at 90, 461 N.Y.2d at 236 (holding that the defendant's termination of plaintiff's employment was not conduct that could be described as outrageous according to the Restatement).

26. *Howell*, 81 N.Y.2d at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356.

27. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d ("Generally, the case is one in which the recitation of the facts to an average member of the community would arouse resentment against the actor, and lead him to exclaim, 'Outrageous!'").

28. KEETON ET AL., *supra* note 15, § 12, at 60-61.

29. *Id.* at 61.

*Mitchell v. Rochester Railway Co.*<sup>30</sup> was one of the early New York cases that considered a claim for emotional distress as an independent cause of action.<sup>31</sup> In *Mitchell*, a claim was brought by the plaintiff, a pregnant woman, for emotional distress as a result of being frightened by the defendant's horses.<sup>32</sup> The court, however, denied a remedy for shock or fright stemming from the defendant's negligent conduct.<sup>33</sup> As is true today, the court feared a flood of litigation and the potential for false claims.<sup>34</sup> *Battalla v. State*,<sup>35</sup> however, overruled *Mitchell* and allowed recovery for mental or emotional injuries incurred by fright caused by a defendant's negligence.<sup>36</sup>

A review of New York case law indicates that some claims of emotional distress have prevailed against dismissal motions. In *Sullivan v. Board of Education of Eastchester Union Free School District*,<sup>37</sup> the court noted that spreading false rumors about and alleged improper treatment of a tenured instructor was sufficiently outrageous conduct to allow a remedy.<sup>38</sup> In *Prince v. Gurvitz*,<sup>39</sup> the court held that merely threatening someone with "criminal prosecution," in an attempt to coerce that individual into transferring certain stock, was legally sufficient to impose liability.<sup>40</sup>

Notwithstanding, the media usually prevails against claims of emotional distress, invariably because the conduct complained of is not deemed outrageous enough. For example, in *Doe v. American Broadcasting*,<sup>41</sup> the defendant news station was reporting on rape victims.<sup>42</sup> The station assured the plaintiff rape victims' anonymity in exchange for consent to pub-

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30. 151 N.Y. 107, 45 N.E. 354 (1896).

31. *Id.*

32. *Id.* at 108-09, 45 N.E. at 354.

33. *Id.* at 110, 45 N.E. at 355.

34. *Id.*

35. 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

36. *Id.* The *Battalla* court opined: "It is our opinion that *Mitchell* should be overruled. It is undisputed that a rigorous application of its rule would be unjust, as well as opposed to experience and logic." *Id.* at 239, 176 N.E.2d at 730, 219 N.Y.S.2d at 35.

37. 131 A.D.2d 836, 517 N.Y.S.2d 197 (2d Dep't 1987).

38. *Id.* at 839, 45 N.E. at 200.

39. 37 A.D.2d 727, 323 N.Y.S.2d 861 (2d Dep't 1971).

40. *Id.* at 727-28, 323 N.Y.S.2d at 862.

41. 152 A.D.2d 482, 543 N.Y.S.2d 455 (1st Dep't 1989).

42. *Id.* at 483, 543 N.Y.S.2d at 456 (Rosenberger, J., dissenting).

lish.<sup>43</sup> The media entity had rightfully conducted the consensual interviews, and at least tried to conceal the victims' identities upon broadcast.<sup>44</sup> But the techniques used by the news station failed to adequately conceal the plaintiffs' identity, and they were recognized by others.<sup>45</sup> Subsequent actions for emotional distress were unsuccessful.<sup>46</sup> In short, the media's negligence, consisting essentially of a technical error, was not deemed outrageous under the circumstances.<sup>47</sup>

Likewise, in *Costlow v. Cusimano*,<sup>48</sup> the defendant photographer "arrived at the scene" of a horrific event and photographed two children found suffocated in an abandoned refrigerator.<sup>49</sup> The distraught parents of the children brought an action for intentional infliction of emotional distress.<sup>50</sup> The actions of the media were not deemed outrageous under the circumstances.<sup>51</sup> The court reasoned that reporting of the tragedy was of public interest, and warned other parents of such dangers.<sup>52</sup> In addition, as in *Doe*, the reporter was rightfully present at the scene.<sup>53</sup>

Even in three of the leading cases on emotional distress, *Fischer v. Maloney*,<sup>54</sup> *Murphy v. American Home Products Corp.*<sup>55</sup> and *Freihofer v. Hearst Corp.*,<sup>56</sup> the plaintiffs failed to

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. 34 A.D.2d 196, 311 N.Y.S.2d 92 (4th Dep't 1970).

49. *Id.* at 197, 311 N.Y.S.2d at 93.

50. *Id.* at 198, 311 N.Y.S.2d at 94.

51. *Id.* at 198, 311 N.Y.S.2d at 94-95.

52. *Id.*

53. *Id.*

54. 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978). In *Fischer*, a tenant and shareholder in a cooperative corporation alleged that the Board of Directors commenced a defamation action against him frivolously and in retaliation for his attempt to remove the Board from office. *Id.* at 556, 373 N.E.2d at 1216, 402 N.Y.S.2d at 992. The tenant/shareholder brought an action against the Board for intentional infliction of emotional distress. *Id.* The court held that the Board's action against the plaintiff did "not constitute conduct within the Rule described by Dean Prosser and the Restatement." *Id.* at 557, 373 N.E.2d at 1217, 402 N.Y.S.2d at 993.

55. 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983). In *Murphy*, the plaintiff was employed, without contract ("at will"), at various accounting positions for over twenty years. *Id.* at 293, 448 N.E.2d at 87, 461 N.Y.S.2d at 233. The court



meet their respective burdens of proof regarding the "outrageous conduct" requirement. *Fischer*, however, dealt merely with a claim of "vexatious" litigation.<sup>57</sup> In *Murphy*, the plaintiff complained of age discrimination and wrongful discharge from employment carried out in a "humiliating manner."<sup>58</sup> In *Freihofer*, as well, the claim was ultimately denied.<sup>59</sup> In that case, a media entity published three articles about alleged "marital difficulties" between the plaintiff and his wife.<sup>60</sup> The plaintiff, however, was a principal of a well known baking company.<sup>61</sup> One of the articles was entitled "Freihofers Fighting Over the Dough."<sup>62</sup> This kind of publication was simply not deemed outrageous beyond all bounds of decency.<sup>63</sup>

Aside from determining whether a defendant's conduct is outrageous, however, a court must also determine the intentional or reckless nature of the conduct. Indeed, one of the reasons the court ruled favorably for the defendant in *Costlow* was that it felt the defendant had not acted with intent to harm but was reporting on an issue of grave public concern.<sup>64</sup> As detailed above, the Court of Appeals has adopted the rule set out in the Second Restatement, which specifically allows for liability to attach to "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another . . . ."<sup>65</sup>

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found that the plaintiff's discharge at age 59 was not outrageous conduct. *Id.* at 303, 448 N.E.2d at 90, 461 N.Y.S.2d at 236.

56. 65 N.Y.2d 135, 480 N.E.2d 349, 490 N.Y.S.2d 735 (1985).

57. *Fischer*, 43 N.Y.2d at 555, 373 N.E.2d at 1216, 402 N.Y.S.2d at 992.

58. *Murphy*, 58 N.Y.2d at 298, 448 N.E.2d at 87, 461 N.Y.S.2d at 233.

59. *Freihofer*, 65 N.Y.2d at 143-47, 480 N.E.2d at 355, 402 N.Y.S.2d at 741.

60. *Id.* at 137, 480 N.E.2d at 351, 402 N.Y.S.2d at 737.

61. *Id.*

62. *Id.*

63. *Id.* at 143-44, 480 N.E.2d at 355, 402 N.Y.S.2d at 741. See also *Burlew v. American Mut. Ins.*, 99 A.D.2d 11, 471 N.Y.S.2d 908 (4th Dep't 1984). The plaintiff in *Burlew* was injured at work and received Worker's Compensation benefits. *Id.* at 12, 471 N.Y.S.2d at 910. When follow-up surgery was necessary, the plaintiff claimed that the defendant insurance company delayed coverage and implied the plaintiff was a malingerer. *Id.* When the plaintiff sued the insurance company for intentional infliction of emotional distress, again, such conduct was not deemed outrageous. *Id.* at 16-17, 471 N.Y.S.2d at 913.

64. *Costlow*, 34 A.D.2d at 198, 311 N.Y.S.2d at 94-95.

65. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

Although the *Post* argued that case law of the Appellate Division, First Department required a pattern of intentional and malicious conduct before liability could attach for infliction of emotional distress,<sup>66</sup> no such theory was in any way adopted by the Court of Appeals, nor has it been adopted by the remaining Departments.<sup>67</sup> Indeed, it would be illogical to do so. If the Court of Appeals has recognized causes of action for both intentional and reckless infliction of emotional distress, how could a pattern of intentional conduct be "required" as a basis for both?<sup>68</sup> Finally, as in any tort, there must be causation of injury. Emotional distress claims not associated with negligence (i.e., zone of danger),<sup>69</sup> can often have difficulty with this particular element of proof.

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66. See *Nader v. General Motors*, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970). In *Nader*, the First Department stated that a remedy for mental anguish is available to redress "a deliberate and malicious campaign of harassment or intimidation." *Id.* at 569, 255 N.E.2d at 770, 307 N.Y.S.2d at 654; see also *Owen v. Leventritt*, 174 A.D.2d 471, 571 N.Y.S.2d 25 (1st Dep't 1991). In *Owen* the First Department, citing *Nader* and *Doe v. American Broadcasting*, 152 A.D.2d 482, 543 N.Y.S.2d 455 (1st Dep't 1989), again stated that "[a] person may recover 'only where severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation.'" *Id.* at 472, 571 N.Y.S.2d at 25. The *Doe* court cited *Nader* and reasoned that a claim for emotional distress required "intentional, deliberate and outrageous" conduct. *Doe*, 152 A.D.2d at 483, 543 N.Y.S.2d at 456; but see *Gordon v. Roche Laboratories*, 90 A.D.2d 722, 455 N.Y.S.2d 785 (1st Dep't 1982). In *Gordon*, the First Department stated that the elements required for a claim of intentional infliction of emotional distress "are extreme and outrageous conduct which intentionally or *recklessly* causes emotional distress to another." *Id.* at 722, 455 N.Y.S.2d at 787 (emphasis added).

67. See *Richard L. v. Armon*, 144 A.D.2d 1, 536 N.Y.S.2d 1014 (2d Dep't 1989). In *Armon*, the Second Department stated that the second element of an intentional infliction of emotional distress claim "is that the defendant be proved to have intended to cause emotional distress, or to have acted with conscious disregard of a substantial risk that such distress would result from his conduct . . ." *Id.* at 5, 536 N.Y.S.2d at 1016; *Impastato v. Hellman Enterprises*, 147 A.D.2d 788, 537 N.Y.S.2d 659 (3d Dep't 1989) (stating that recovery for intentional infliction of emotional distress required either intentional or reckless conduct); *Burlew v. American Mut. Ins.*, 99 A.D.2d 11, 471 N.Y.S.2d 908 (4th Dep't 1984). The Fourth Department, in *Burlew*, stated "[a]n action for intentional infliction of emotional distress lies only where there has been intentional or *reckless* conduct toward another which is so shocking and outrageous that it exceeds all reasonable bounds of decency . . ." *Id.* at 17, 471 N.Y.S.2d at 917.

68. See Appellant's Reply Brief at 4-5, *Howell v. New York Post*, 81 N.Y.2d 115, 612 N.E.2d 699, 596 N.Y.S.2d 350 (1993) (No. 43723/89) [hereinafter Reply Brief].

69. See generally *Jensen v. Whitford*, 167 A.D.2d 826, 562 N.Y.S.2d 317 (4th Dep't 1990). The court in *Jensen* held that individuals must be in reasonable fear

## B. *The Right to Privacy*

Sections 50 and 51 of the New York State Civil Rights Law outline the statutory right to privacy.<sup>70</sup> In New York, there is no common law right to privacy.<sup>71</sup> The civil statute, section 51, allows for liability to attach if a person's "name, portrait or picture" is used for trade or advertising purposes without prior "written consent."<sup>72</sup> This statute grew out of *Roberson v. Rochester Folding Box Co.*,<sup>73</sup> where a young woman's likeness was appropriated, without consent of any kind, for use in the advertisement of flour.<sup>74</sup> The New York State Court of Appeals, while recognizing the serious nature of the defendant's conduct, still allowed no remedy, since it did not find the photograph at issue "libelous."<sup>75</sup> There was such an outcry about this harsh decision

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for their own safety before they can bring an action for negligent infliction of emotional distress due to witnessing the injury of an immediate family member. *Id.* at 826, 562 N.Y.S.2d at 318. *See also* *Bovsun v. Sanperi*, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1983), where the court held:

The zone of danger rule, which allows one who is himself or herself threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress resulting from viewing the death or serious physical injury of a member of his or her immediate family, is said to have become the majority rule in this country.

*Id.* at 228-29, 461 N.E.2d at 847, 472 N.Y.S.2d at 361; *see also* RESTATEMENT (SECOND) OF TORTS § 436(2), (3) (1965).

70. N.Y. CIV. RIGHTS LAW §§ 50 & 51 (McKinney 1992).

71. *Howell*, 81 N.Y.2d at 123, 612 N.E.2d at 703, 596 N.Y.S.2d at 354.

72. *Id.*; *see also* *Finger v. Omni Publications Int'l Ltd.*, 77 N.Y.2d 138, 566 N.E.2d 141, 564 N.Y.S.2d 1014 (1990). In *Finger*, the plaintiff was pictured in a photograph with his wife and six children. *Id.* at 141, 566 N.E.2d at 142, 564 N.Y.S.2d at 1015. The photograph was used by the defendant in an article about in vitro fertilization, even though none of the plaintiff's children were produced by such methods. *Id.* at 140-42, 566 N.E.2d at 142-44, 56 N.Y.S.2d at 1015-17. When the plaintiff brought an action for invasion of privacy, the court referenced section 51 and stated that "[a]lthough the statute does not define 'purposes of trade' or 'advertising,' courts have consistently refused to construe these terms as encompassing publications concerning newsworthy events or matters of public interest . . . ." *Id.* at 141-42, 566 N.E.2d at 143, 564 N.Y.S.2d at 1016. The court found that the photograph in question bore a real relationship to a newsworthy article and so the failure to obtain consent was not a violation. *Id.* at 143, 566 N.E.2d at 144, 564 N.Y.S.2d at 1017.

73. 171 N.Y. 538, 64 N.E. 442 (1902).

74. *Id.* at 542, 64 N.E. at 442. Approximately 25,000 lithographic screen prints of the plaintiff in *Roberson* were distributed as part of an advertisement to sell flour. *Id.*

75. *Id.* at 556-57, 64 N.E. at 447-48. In an interesting dissent, Justice Gray noted "that courts have power, in some cases, to enjoin the doing of an act, where

the Legislature enacted the privacy statutes.<sup>76</sup>

The use of one's name or likeness in the publication and sale of newspapers is considered a First Amendment right of "free press" and not "trade," provided there is a reasonable relationship between the individual and the newsworthy issue.<sup>77</sup> However, where a photo is used as an "advertisement in disguise"<sup>78</sup> or to just enhance the sales of a periodical, that use may be considered a commercial one for the purpose of trade.<sup>79</sup>

It is clear that the unmistakable intent of the privacy statute is to protect the property right of an individual's likeness from commercial exploitation.<sup>80</sup> These statutes were not enacted as a preemptive remedy voiding all other forms of redress for tortious conduct; courts have reasoned that liability could

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the nature, or character, of the act itself is well calculated to wound the sensibilities of an individual, and where the doing of the act is wholly unjustifiable . . . ." *Id.* at 559-60, 64 N.E. at 449 (Gray, J., dissenting) (quoting *Schuyler v. Curtis*, 147 N.Y. 434, 443, 42 N.E. 22, 24 (1895)). This dissent seems to have been yet another herald of the change in the law as eventually codified in the Second Restatement.

76. *Howell*, 81 N.Y.2d at 122-23, 612 N.E.2d at 703, 596 N.Y.S.2d at 354.

77. *Delan v. CBS*, 91 A.D.2d 255, 458 N.Y.S.2d 608 (2d Dep't 1983); *Wallace v. Weiss*, 82 Misc. 2d 1053, 372 N.Y.S.2d 416 (Sup. Ct. Monroe County 1975); *Lahiri v. Daily Mirror*, 162 Misc. 776, 295 N.Y.S. 382 (Sup. Ct. N.Y. County 1936).

78. *Murray v. New York Magazine*, 27 N.Y.2d 406, 409, 267 N.E.2d 256, 258, 318 N.Y.S.2d 474, 476 (1971). In *Murray*, the defendant newspaper took a photograph of the plaintiff wearing an "Irish" hat, green bow tie and pin at the St. Patrick's Day Parade in New York City. *Id.* at 408, 267 N.E.2d at 257, 318 N.Y.S.2d at 475. The photograph was used in an article entitled "The Last of the Irish Immigrants." *Id.* The plaintiff brought an action against the newspaper under section 51. *Id.* The Court held for the defendant stating that the photograph related to the article and was used in a news publication, not for trade so that the privacy statute did not apply. *Id.* at 409-10, 267 N.E.2d at 258, 318 N.Y.S.2d at 476-77.

79. *Delan*, 91 A.D.2d at 258, 458 N.Y.S.2d at 613. In *Delan*, a documentary was being made about the deinstitutionalization of mental patients. *Id.* at 256-57, 458 N.Y.S.2d at 611-12. The media did obtain written informed consent from the subjects of the interview but the plaintiff, from whom consent was not obtained, was accidentally pictured for a few seconds in this sixty minute documentary. *Id.* The *Delan* court defined advertising purposes as "use in, or as part of, an advertisement or solicitation for patronage." *Id.* at 258, 458 N.Y.S.2d at 613. See also *Lerman v. Flynt Distrib.*, 745 F.2d 123 (2d Cir. 1984); *Pagan v. New York Herald Tribune*, 32 A.D.2d 341, 301 N.Y.S.2d 120 (1st Dep't 1969); *Hill v. Hayes*, 18 A.D.2d 485, 240 N.Y.S.2d 286 (1st Dep't 1963); *Rinaldi v. Village Voice*, 79 Misc. 2d 57, 359 N.Y.S.2d 176 (Sup. Ct. N.Y. County 1975).

80. See *Gautier v. Pro-Football*, 278 A.D. 431, 106 N.Y.S.2d 353 (1st Dep't 1951), *aff'd*, 304 N.Y. 354, 107 N.E.2d 485 (1952); *Cardy v. Maxwell*, 9 Misc. 2d 329, 169 N.Y.S.2d 547 (Sup. Ct. N.Y. County 1957). The *Cardy* court found that "the statute was obviously aimed at exploitation for purposes of commerce." *Id.* at 331-32, 169 N.Y.S.2d at 551.

attach for the media's tortious conduct independent of any section 51 claim.<sup>81</sup>

The concept of free press and the right to report on newsworthy issues form the basis for any claim of privileged conduct.<sup>82</sup> To date, the issue of "free press" has come into play more with issues of privacy than with emotional distress.<sup>83</sup> Since media "publications concerning newsworthy events or matters of public interest" are not considered to be made for purposes of "advertisement or trade,"<sup>84</sup> the practical result is that the press, essentially, is not subject to the state's only privacy statutes.<sup>85</sup>

Notwithstanding, this privilege or right to publish may still be overcome by facts found to be "outrageous."<sup>86</sup> The Court of Appeals has reasoned that the media's right to free press is not absolute and, on the right facts, liability may attach specifically for the intentional infliction of emotional distress.<sup>87</sup>

As a result, the press must meet a minimal standard of acceptable conduct, even when reporting on subjects of legitimate public concern.<sup>88</sup> The media may not act in an irresponsible manner, nor commit torts while gathering or publishing the news and then use their right to publish as a shield, or worse, a license.<sup>89</sup> As the First Department has held, "[c]learly, the First

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81. *Vogel v. Hearst Corp.*, 116 N.Y.S.2d 905 (Sup. Ct. Kings County 1952). The *Vogel* court held that "apart from these statutes there is no so-called 'right of privacy' except in so far as invasion of a person's privacy involves other tortious acts . . . ." *Id.* at 906; see also *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

82. See generally *Stephano v. News Group Publications*, 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S.2d 220 (1984); *Arrington v. New York Times*, 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941 (1982), *cert. denied*, 459 U.S. 1146 (1983); *Murray v. New York Magazine*, 27 N.Y.2d 406, 267 N.E.2d 256, 318 N.Y.S.2d 474 (1971); *Creel v. Crown Publishers*, 115 A.D.2d 414, 496 N.Y.S.2d 219 (1st Dep't 1985); *Delan v. CBS*, 91 A.D.2d 255, 458 N.Y.S.2d 608 (2d Dep't 1983).

83. See generally *Finger v. Omni Publications Int'l Ltd.*, 77 N.Y.2d 138, 566 N.E.2d 141, 564 N.Y.S.2d 1014 (1990).

84. *Id.* at 141-42, 566 N.E.2d at 143, 564 N.Y.S.2d at 1016.

85. This makes it even more important that redress through torts like intentional infliction of emotional distress be available to plaintiffs as a check on media activities.

86. *Howell*, 81 N.Y.2d at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356.

87. *Id.*

88. *Gaeta v. New York News*, 62 N.Y.2d 340, 465 N.E.2d 802, 477 N.Y.S.2d 82 (1984); *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

89. *Gaeta*, 62 N.Y.2d at 351, 465 N.E.2d at 806, 477 N.Y.S.2d at 86; see also

Amendment is not a shibboleth before which all other rights must succumb.<sup>90</sup>

### C. *Health Law and Policy Considerations*

The New York State Legislature has taken steps to ensure that patients, especially psychiatric patients, receive even more protection from disturbance than the ordinary private person. The New York Mental Hygiene Law sets limits on communications and visits to psychiatric facilities.<sup>91</sup> This demonstrates the delicate nature of psychiatric treatment and the need for privacy. Indeed, the Public Health Law commands that every patient will have the "right to privacy in treatment" because privacy is imperative for proper treatment and successful recovery.<sup>92</sup>

Although these statutes and regulations were not specifically enacted to protect patients from the media, the legislative intent is clear. The state has an interest in affording privacy and confidentiality to patients seeking psychiatric care in New York.<sup>93</sup> Patients have the right to expect considerate, respectful care and privacy during treatment, so as to ensure sufficient protection of their dignity and personal integrity.<sup>94</sup>

Such patients' rights embody the legislative intent of affording patients privacy, dignity and an optimal therapeutic en-

Vogel v. Hearst Corp., 116 N.Y.S.2d 905 (Sup. Ct. Kings County 1952).

90. *LeMistral Inc. v. Columbia Broadcasting*, 61 A.D.2d 491, 494, 402 N.Y.S.2d 815, 817 (1st Dep't 1978).

91. N.Y. MENTAL HYG. LAW §§ 33.5, 33.13 (McKinney Supp. 1994); *see also* N.Y. COMP. CODES R. & REGS. tit. 14 § 21.2 (1974).

92. N.Y. PUB. HEALTH LAW §§ 2803-C(3)(f), 2805 (McKinney Supp. 1994).

93. *MacDonald v. Clinger*, 84 A.D.2d 482, 446 N.Y.S.2d 801 (4th Dep't 1982); *see also* *Fedell v. Wierzbieniec*, 127 Misc. 2d 124, 485 N.Y.S.2d 460 (Sup. Ct. Erie County 1985) (finding the conduct of a doctor revealing a patient's psychiatric background outrageous); *Doe v. Roe*, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup. Ct. N.Y. County 1977); *Munzer v. Blaisdell*, 183 Misc. 773, 774, 49 N.Y.S.2d 915, 916 (Sup. Ct. N.Y. County 1944) (holding that the primary purpose for enacting these kinds of mental health statutes is to prevent disclosure of facts that might cause "humiliation, embarrassment and disgrace").

94. *See generally* N.Y. MENTAL HYG. LAW § 33.05 (McKinney Supp. 1994); *see also id.* §§ 33.13, 33.16; N.Y. COMP. CODES R. & REGS. tit. 14 § 21.2 (1974) (further limitations on visits); N.Y. COMP. CODES R. & REGS. tit. 14 § 374.14 (1993) (patients' rights); N.Y. COMP. CODES R. & REGS. tit. 10, § 405.7 (1993) (patients' rights); N.Y. COMP. CODES R. & REGS. tit. 14, § 587.7 (1993) (patients' rights).

vironment.<sup>95</sup> Psychiatric healthcare providers have drafted patients' rights policies that adopt the concepts, if not the language, of the Mental Hygiene and Public Health laws to assist in insuring these rights to their patients.<sup>96</sup>

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95. The policy reprinted *infra* note 96 is from a major psychiatric hospital in the New York metropolitan area but not the hospital involved in *Howell*. It is important to note how many patient's rights actually deal with privacy and confidentiality. Due to the threat posed by the media, hospitals have even enacted specific "media policies" as a method to protect themselves and their patients.

96. The policy outlined below, from a major New York metropolitan hospital [hereinafter *Patients' Rights Policy*] (on file with the author), is indicative of the kinds of policies established by hospitals to deal with issues of privacy and confidentiality. This typical policy statement is as follows:

[This] hospital endorses the concepts of human dignity embodied in the Patient's Bill of Rights and in the patients' rights provisions delineated in 10 NYCRR 405.7, 14 NYCRR 372.12, 14 NYCRR 374.14, 14 NYCRR 587.7, and in the accreditation standards of the JCAHO (RI.1 - RI.2.5). The hospital will ensure that these rights are respected and made known to patients.

**PROCEDURE**

A. Pursuant to 10 NYCRR 405.7, the hospital will afford each patient the right to:

1. exercise the rights delineated in the Patient's Bill of Rights regardless of the patient's native language or impairment of hearing or vision. Skilled interpreters shall be provided to assist patients in exercising these rights;
2. treatment without discrimination as to race, color, religion, sex, national origin, disability, sexual orientation or source of payment;
3. *considerate and respectful care in a clean and safe environment*;
4. receive emergency medical care as indicated by the patient's medical condition upon arrival at the hospital;
5. limit the use of physical restraints to those patient restraints authorized in writing by a physician after a personal examination of the patient for a specified and limited period of time to protect the patient from injury to himself/herself or to others. In an emergency, the restraint may be applied only by or under the supervision of and at the direction of a registered professional nurse who shall set forth in writing the circumstances requiring the use of restraints. In such emergencies, a physician will be immediately summoned and pending the arrival of the physician, the patient will be kept under supervision as warranted by the patient's physical condition and emotional state. At frequent intervals while restraints are in use, the patient's physical needs, comfort and safety will be monitored. An assessment of the patient's condition will be made at least once every thirty minutes or at more frequent intervals if directed by a physician;
6. the name of the medical staff member who has the responsibility for coordinating his/her care and the right to discuss with his/her practitioner the type of care being rendered;
7. the name, position and function of any person providing treatment to the patient;
8. obtain from the responsible medical staff member complete current information concerning his/her diagnosis, treatment and prognosis, in accord-

ance with his/her treatment plan, in terms the patient can be reasonably expected to understand. The patient will be advised of any change in health status, including harm or injury, the cause for the change and the recommended course of treatment. The information will be made available to an appropriate person on the patient's behalf and documented in the patient's medical record, if the patient is not competent to receive such information;

9. receive information necessary to give informed consent prior to the start of any non-emergency procedure or treatment or both. An informed consent will include, at a minimum, the specific procedure or treatment or both, the reasons for it, the reasonably foreseeable risks and benefits involved, and the alternatives for care or treatment, if any, as a reasonable practitioner under similar circumstances would disclose. Documented evidence of such informed consent will be included in the patient's medical record;

10. refuse treatment to the extent permitted by law and to be informed of the reasonably foreseeable consequences of such refusal;

11. receive from the responsible medical staff or designated hospital representatives information necessary to give informed consent prior to the withholding of medical care and treatment;

12. *privacy consistent with the provisions of appropriate care to the patient;*

13. *confidentiality of all information and records pertaining to the patient's treatment, except as otherwise provided by law;*

14. a response by the hospital, in a reasonable manner, to the patient's request for services customarily rendered by the hospital consistent with the patient's treatment;

15. be informed by the responsible medical staff member or appropriate hospital staff of the patient's continuing health care requirements following discharge, and before any transfer to another facility, all relevant information about the need for and all reasonable alternatives to such a transfer;

16. prior to discharge, receive an appropriate written discharge plan and a written description of the patient discharge review process available to the patient under Federal or State law;

17. be apprised of the identity of any hospital personnel (including students) that the hospital has authorized to participate in the patient's treatment; and to refuse treatment, examination and/or observation by any personnel;

18. refuse to participate in research and human experimentation in accordance with federal and state law;

19. examine and receive an explanation of his/her bill, regardless of source payment;

20. be informed of the hospital rules and regulations that apply to a patient's conduct;

21. be admitted to a non-smoking area;

22. register complaints and recommend changes in policies and services to the facility's staff, the governing authority and the New York State Department of Health without fear of reprisal;

23. express complaints about the care and services provided and to have the hospital investigate such complaints. The hospital will provide the patient or his/her designee with a written response if requested by the patient indicating the findings of the investigation. The hospital will notify the patient or his/her designee that if the patient is not satisfied with the hospital's oral or written response, the patient may complain to the New York State De-



partment of Health's Office of Health Systems Management. The hospital shall provide the telephone number of the local area office of the Health Department to the patient;

24. obtain access to his/her medical record pursuant to the provisions of Part 50 of this title. The hospital will impose reasonable charges for all copies of medical records provided to patients, not to exceed costs incurred by the hospital. A patient will not be denied a copy of his/her medical record solely because of inability to pay; and

25. receive supportive services to meet the changing care needs of the patient and the patient's family/representative provided by qualified individuals who collectively have expertise in assessing the special needs of hospital patients and their families.

B. Pursuant to 14 NYCRR 587.7, patients admitted to any [hospital] outpatient program are entitled to the following rights:

1. Patients have the right to an individualized plan of treatment services and to participate to the fullest extent consistent with the patient's capacity in the establishment and revision of that plan.

2. Patients have the right to a full explanation of services provided in accordance with their treatment plan.

3. Participation in treatment in an outpatient program is voluntary and patients are presumed to have the capacity to consent to such treatment. The right to participate voluntarily in and to consent to treatment shall be limited only to the extent that:

a. section 330.20 of the Criminal Procedure Law and Part 541 of Title 14 NYCRR provide for court-ordered receipt of outpatient services;

b. articles 77 and 78 of the Mental Hygiene Law provide for the surrogate consent of a court-appointed conservator or committee;

c. section 33.21 of the Mental Hygiene Law provides for the surrogate consent of a parent or guardian of a minor;

d. a patient engages in conduct which poses a risk of physical harm to himself or others.

4. While a patient's full participation in treatment is a central goal, a patient's objection to his or her treatment plan, or disagreement with any portion thereof, shall not, in and of itself, result in the patient's termination from the program unless such objection renders the patient's continued participation in the program clinically inappropriate or would endanger the safety of the patient or others;

5. *the confidentiality of patient's clinical records shall be maintained in accordance with section 33.13 of the Mental Hygiene Law;*

6. patients shall be assured access to their clinical records consistent with section 33.16 of the Mental Hygiene Law;

7. *patients have the right to receive clinically appropriate care and treatment that is suited to their needs and skillfully, safely and humanely administered with full respect for their dignity and personal integrity;*

8. patients have the right to receive services in such a manner as to assure nondiscrimination;

9. patients have the right to be treated in a way which acknowledges and respects their cultural environment;

10. *patients have the right to a maximum amount of privacy consistent with the effective delivery of services;*

11. patients have the right to freedom from abuse and mistreatment by

Patients' rights policies deal with the need to provide care in a considerate and respectful environment.<sup>97</sup> Privacy and confidentiality of "all information," not just medical records, are explicitly stated as specific patients' rights.<sup>98</sup> Patients have the right to receive clinically appropriate care and treatment, humanely administered with full respect for their dignity and personal integrity.<sup>99</sup>

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employees;

12. patients have the right to be informed of the provider's patient grievance policies and procedures, and to initiate any question, complaint or objection accordingly;

13. patients have access to the New York State Commission on Quality of Care for the Mentally Disabled and other advocacy groups such as the Protection and Advocacy for Mentally Ill Individual program, and Alliance for the Mentally Ill and the Regional Office of Mental Health. Information about how to contact any of these agencies will be provided to patients upon request.

*Id.* at 1-6 (emphasis added). Another policy statement from the same hospital, [hereinafter *Press Statement*] (on file with author), concerns hospital policies when dealing with the media:

#### *POLICY*

The Director of Community Relations should be contacted for all media requests, regardless of the subject matter. To insure that media coverage is in the best interest of the hospital, no statement should be released or interviews granted to the press without the Director being first notified. Likewise, to ensure maximum efficiency and accuracy in responding to media requests, it is essential that all hospital and medical personnel fully cooperate in providing the Director with immediate access to information.

#### *PROCEDURE*

When a reporter calls or visits the hospital requesting information about a patient, incident, etc., the reporter should be referred to the Office of Community Relations. If a crisis occurs at the hospital (explosion, fire, walkout, etc.) which would likely attract press coverage, the Director of Community Relations should be contacted immediately by the Administrator on call or other appropriate administrator(s).

*When a person of celebrity status is admitted to the hospital the Director of Community Relations should be contacted immediately by the Administrator on call or other appropriate administrator(s).*

*When reporters call or visit the hospital requesting information for a feature story not related to an emergency situation, they should be directed to contact the Director of Community Relations.*

*Id.* at 1.

97. *Patients' Rights Policy*, *supra* note 96, at 1.

98. *Id.* at 2-3.

99. *Id.* at 5.

A lack of respect for patients' rights concerning privacy and confidentiality resurfaced in *Andrews v. Bruk*.<sup>100</sup> Although the case did not deal with the media or specifically with psychiatric care, it did deal with the rights of privacy and confidentiality to which patients should be entitled. In *Andrews*, the defendant, a nontreating physician, attached a copy of the plaintiff's medical records as an exhibit to court papers he was filing in a personal action.<sup>101</sup>

The court noted that the "critical issue involved in this matter is the applicability of one of the least utilized and understood doctrines of law — the tort of intentional infliction of severe emotional distress."<sup>102</sup> While aware of the limited success emotional distress claims have had, especially with the Court of Appeals,<sup>103</sup> the *Andrews* court found defendant's breach of the plaintiff's patients' rights to be "reprehensible," especially in light of the "unauthorized acquisition" of the medical records at issue.<sup>104</sup> "The average person in the community could well find that the defendant's conduct exceeded all bounds usually tolerated by decent society and so abused his position as a physician as to seriously effect plaintiff's [patient's] rights . . . ."<sup>105</sup>

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100. *Andrews v. Bruk*, 160 Misc. 2d 618, 610 N.Y.S.2d 752 (Sup. Ct. Nassau County 1994).

101. *Id.* at 619, 610 N.Y.S.2d at 753. In *Andrews*, the defendant physician attached the plaintiff's medical record (vasectomy surgery), without consent, as an exhibit to an affidavit in defendant's divorce action. *Id.*

102. *Id.* Even after *Howell*, courts continue to struggle with this tort and how to best protect patient's rights.

103. *Id.* at 623, 610 N.Y.S.2d at 755.

104. *Id.* at 624, 610 N.Y.S.2d at 756. Recall that in *Howell* the *Post* trespassed onto hospital grounds and then, without consent, took photographs of private psychiatric patients and published them against medical warning. *Howell*, 81 N.Y.2d at 118, 612 N.E.2d at 700, 596 N.Y.S.2d at 351.

105. *Andrews*, 160 Misc. 2d at 624, 610 N.Y.S.2d at 756 (citation omitted). In addition, the court seems to have asserted its right to decide this issue, as opposed to appellate review, by citing *Lovcen Const. v. Culbreth*, 196 A.D.2d 445, 601 N.Y.S.2d 286 (1st Dep't 1993); *Long v. Beneficial Fin.*, 39 A.D.2d 11, 330 N.Y.S.2d 664 (4th Dep't 1972); and *Hailo v. Lurie*, 15 A.D.2d 62, 222 N.Y.S.2d 759 (2d Dep't 1961).

III. The Case: *Howell v. The New York Post*A. *The Facts*

The appellant, Mrs. Howell, was a patient at a private psychiatric hospital in New York State.<sup>106</sup> The hospital was set back and hidden from view by a considerable amount of wooded property in a quiet, secluded setting.<sup>107</sup> The entrance to the hospital was clearly marked and "no trespassing" signs were posted.<sup>108</sup> In short, the appearance of the hospital and its entrance was not that of a public thoroughfare. It looked very much like what it was — a secluded private hospital.<sup>109</sup>

At the same time that Mrs. Howell was hospitalized, Hedda Nussbaum, a key witness in a highly publicized abuse/homicide case, was admitted for psychiatric treatment.<sup>110</sup> The *New York Post* had sent still-photojournalists to obtain photographs of Ms. Nussbaum for use in articles about the homicide.<sup>111</sup>

These journalists, without invitation or consent, trespassed onto hospital grounds in their vehicle and used a telephoto lens to photograph Hedda Nussbaum and other patients at the hospital.<sup>112</sup> Some photos were taken while the journalists were concealed, observing the patients from a distance.<sup>113</sup> Upon learning of these activities, the hospital Medical Director contacted the *Post's* photography editor.<sup>114</sup> First, the Director insisted that the *Post* refrain from trespassing upon hospital property.<sup>115</sup> Second, the *Post* was warned against publishing any photographs of the patients because of the adverse psycho-

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106. *Howell v. New York Post*, 81 N.Y.2d 115, 118, 612 N.E.2d 699, 700, 596 N.Y.S.2d 350, 351 (1993).

107. Brief for Appellant at 4, *Howell v. New York Post*, 81 N.Y.2d 115, 612 N.E.2d 699, 596 N.Y.S.2d 350 (1993) (No. 43723/89) [hereinafter Appellant's Brief].

108. *Id.*

109. *Id.*

110. *Howell*, 81 N.Y.2d at 118, 612 N.E.2d at 700, 596 N.Y.S.2d at 351. Hedda Nussbaum was the "adoptive" mother of Lisa Steinberg. *Id.*

111. *Id.*

112. *Id.*

113. Appellant's Brief, *supra* note 107, at 4-5; see also *Howell*, 81 N.Y.2d at 118, 612 N.E.2d at 700, 596 N.Y.S.2d at 357.

114. *Howell*, 81 N.Y.2d at 118, 612 N.E.2d at 700, 596 N.Y.S.2d at 351; see also Appellant's Brief, *supra* note 107, at 5.

115. Appellant's Brief, *supra* note 107, at 5.

logical impact such publication could have upon the patients involved.<sup>116</sup>

Although the *Post* eventually agreed never to trespass again,<sup>117</sup> the Medical Director's warnings were dismissed and a large, full length, clearly identifiable photograph of Hedda Nussbaum and Mrs. Howell was published on the following morning's front page.<sup>118</sup> Follow-up articles, including photos, were published on subsequent pages.<sup>119</sup>

The hospital immediately sought injunctive relief and the *Post* was enjoined from further trespass.<sup>120</sup> Unfortunately, there was no such relief for Mrs. Howell, whose hospitalization was completely confidential and known only to a few close family members. As a direct result of the publication, Mrs. Howell's psychiatric hospitalization became known to friends, business associates and other family members, as well as the *Post*'s general readership.<sup>121</sup> Mrs. Howell was devastated upon seeing the photographs and suffered a severely compromised recovery, requiring further treatment and counseling.<sup>122</sup> Due to the response she experienced after discharge, new employment and drastic lifestyle changes were necessary.<sup>123</sup> Mrs. Howell brought an action against the *Post* alleging, amongst other things, invasion of privacy and infliction of emotional distress.<sup>124</sup>

### B. *Procedural History*

The *Post*, prior to discovery, moved for summary judgment dismissing the complaint for failure to state a cause of action

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116. *Howell*, 81 N.Y.2d at 118, 612 N.E.2d at 700, 596 N.Y.S.2d at 351; see also Appellant's Brief, *supra* note 107, at 5.

117. Appellant's Brief, *supra* note 107, at 5.

118. *Howell*, 81 N.Y.2d at 118, 612 N.E.2d at 700, 596 N.Y.S.2d at 351; see also Appellant's Brief, *supra* note 107, at 5.

119. Appellant's Brief, *supra* note 107, at 5.

120. *Four Winds Hosp. v. New York Post*, No. 15578-88 (Sup. Ct. Westchester County Nov. 29, 1988) (Ruskin, J.) (order granting preliminary injunction), in Record on Appeal at 27, *Howell v. New York Post*, 181 A.D.2d 597, 581 N.Y.S.2d 330 (1st Dep't 1992) (No. 43723/89) [hereinafter Record on Appeal].

121. Appellant's Brief, *supra* note 107, at 6.

122. *Id.*

123. *Id.*

124. *Howell*, 81 N.Y.2d at 119, 612 N.E.2d at 700, 596 N.Y.S.2d at 351.

upon which relief could be granted.<sup>125</sup> Essentially, the *Post* relied on its right to "free press" and the right to report on a "newsworthy" public figure (Hedda Nussbaum).<sup>126</sup> Mrs. Howell cross-moved for summary judgment on liability and relied heavily upon the findings of the court presiding over the injunction and settlement of the action by the hospital against the *Post*.<sup>127</sup>

In a relatively detailed decision, the New York County Supreme Court opined that at the heart of the complaint was an allegation of violated privacy.<sup>128</sup> After a review of the record, the court determined that Hedda Nussbaum was indeed "newsworthy."<sup>129</sup> It did recognize that "newspapers are not immune from liability for torts and crimes committed while gathering the news," but stated that a "plaintiff must state [a] cognizable cause[ ] of action."<sup>130</sup> The court then dismissed all but the cause of action for emotional distress.<sup>131</sup>

Regarding that remaining cause of action, the court said "with respect to the allegations of intentional infliction of emotional distress another result obtains."<sup>132</sup> The *Post* had argued that its conduct was not "atrocious and utterly intolerable in a civilized community."<sup>133</sup> Specifically citing the fact that the *Post* was issued a medical warning against publication of patient photographs, however, the court found the conduct to be outrageous.<sup>134</sup> The court stated that "the *Post* was on notice of the likelihood that the publication would cause psychological distress to the subjects of those photos."<sup>135</sup> The court went on to

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125. Notice of Motion to Dismiss Complaint, *Howell v. New York Post*, (Sup. Ct. N.Y. County 1990) (No. 43723/89), in *Record on Appeal*, *supra* note 120, at 9-10.

126. Affidavit in Support of Motion to Dismiss, *Howell v. New York Post* (Sup. Ct. N.Y. County 1990) (No. 43723/89), in *Record on Appeal*, *supra* note 120, at 11-12.

127. Affidavit in Opposition to Motion to Dismiss and in Support of Cross Motion of Summary Judgment, *Howell v. New York Post*, (Sup. Ct. N.Y. County 1990), in *Record on Appeal*, *supra* note 120, at 67-69.

128. *Howell v. New York Post*, No. 43723/89 (Sup. Ct. N.Y. County 1990), in *Record on Appeal*, *supra* note 120, at 8-2.

129. *Id.* at 8-3.

130. *Id.* at 8-5.

131. *Id.* at 8-5 to -6.

132. *Id.* at 8-6.

133. *Id.*

134. *Id.* at 8-7.

135. *Id.*

state that "the general problem which pervades claims of emotional distress, to wit, the amorphous nature of the tort and the concomitant subjective nature of the damages is not present in this case."<sup>136</sup>

As a result, the *Post's* motion to dismiss was granted to the extent that all causes of action were dismissed except intentional infliction of emotional distress.<sup>137</sup> Plaintiff's cross-motion on liability was denied.<sup>138</sup> Mrs. Howell appealed the dismissal of the invasion of privacy claim to the Appellate Division, First Department and the *Post* cross-appealed the trial court's maintenance of the emotional distress cause of action.<sup>139</sup>

Mrs. Howell argued that the *Post* had used the photograph as an "eye-catcher" to enhance that particular issue of the newspaper.<sup>140</sup> As a result, it was argued, the *Post* had used Mrs. Howell's likeness for trade/advertizing purposes (as an advertisement in disguise) without consent and in violation of section 51 of the New York State Civil Rights Law.<sup>141</sup> It was also argued that Mrs. Howell was in no way associated with Hedda Nussbaum.<sup>142</sup>

The Appellate Division issued a brief decision holding that Hedda Nussbaum was "newsworthy" and that the photographs bore a "real relationship" to the article.<sup>143</sup> The Appellate Division affirmed the dismissal of the invasion of privacy claim.<sup>144</sup> Furthermore, it modified the order of the trial court and dismissed the remaining cause of action, reasoning that publication of a recognizable photograph of the plaintiff was not grounds for a claim of intentional infliction of emotional distress.<sup>145</sup>

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136. *Id.* (citations omitted).

137. *Id.* at 8-8 to -9.

138. *Id.*

139. *Howell*, 81 N.Y.2d at 119, 612 N.E.2d at 701, 596 N.Y.S.2d at 352.

140. See Brief for Plaintiffs-Appellants/Respondents at 12, *Howell v. New York Post*, 181 A.D.2d 597, 581 N.Y.S.2d 330 (1st Dep't 1992) (No. 43723/89) [hereinafter Respondent's Brief].

141. N.Y. CIV. RIGHTS LAW § 51 (McKinney 1992).

142. See Respondent's Brief, *supra* note 140, at 10.

143. *Howell v. New York Post*, 181 A.D.2d 597, 581 N.Y.S.2d 330 (1st Dep't 1992).

144. *Id.*

145. *Id.*

Since the First Department did not address the claim of reckless conduct rising to the level of intent, a motion for leave to appeal was filed before the New York State Court of Appeals. The motion was granted and the appeal perfected.<sup>146</sup>

### C. *The Opinion of the Court of Appeals*

In a unanimous decision, the Court of Appeals affirmed the dismissal of the action by the Appellate Division but offered interesting reasoning that could be used to provide relief, under "the right facts," in the future.<sup>147</sup> This decision at least appears to open the door to actions against a media entity for the infliction of emotional distress pursuant to the way the news is gathered and published.<sup>148</sup>

While reviewing the pertinent facts, the court specifically referred to the trespass, the potential "newsworthy" nature of the photographs, and the medical warning against publication.<sup>149</sup> The court addressed the issues of privacy violation and infliction of emotional distress.<sup>150</sup> It specifically pointed to the novel nature of the appeal stating that it brought "together two separate bodies of law, each with a long history that is relevant to resolution of the issues . . . ."<sup>151</sup>

#### 1. *Intentional Infliction of Emotional Distress*

Citing nineteenth century cases such as *Mitchell v. Rochester Railway Co.*, the court noted the historical aversion to allowing claims of emotional distress.<sup>152</sup> Indeed, the court recited two specific concerns that have transcended a century of law: the potential for a flood of litigation and, relatedly, the potential for an increase in false claims.<sup>153</sup>

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146. *Howell*, 81 N.Y.2d at 119, 612 N.E.2d at 701, 596 N.Y.S.2d at 352.

147. *Id.* at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356. Judge Smith took no part in the decision and was recused due to his participation in the Appellate Division decision. *See id.* at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356.

148. *Id.* at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356.

149. *Id.* at 118-19, 612 N.E.2d at 700, 596 N.Y.S.2d at 351.

150. *Id.* at 119, 612 N.E.2d at 701, 596 N.Y.S.2d at 352.

151. *Id.*

152. *Id.* (citing *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896)).

153. *Id.*



As time passed, however, courts struggled with the need to compensate the victims of "unacceptable behavior."<sup>154</sup> The Restatement of Torts itself initially "insulated an actor from liability for causing solely emotional distress . . . ."<sup>155</sup> The court then recounted the contributions of a 1936 Harvard Law Review article by Calvert Magruder on emotional disturbance and the law which pointed out that "courts were already giving extensive protection to feelings and emotions"<sup>156</sup> as well as Professor Prosser's suggestion that it was "high time" to acknowledge the validity of such claims.<sup>157</sup> The court also noted that the Second Restatement had changed direction to allow liability for the infliction of emotional distress.<sup>158</sup>

The court then recited the four elements of the tort: 1) outrageous conduct; 2) intent or disregard for the substantial possibility of infliction of emotional distress (recklessness); 3)

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154. *Id.*

155. RESTATEMENT OF TORTS § 46 cmt. b (1965). The Second Restatement of Torts did specifically provide liability for both intentional and reckless (recklessness rising to the level of intent) infliction of emotional distress. *Id.* § 46. Mrs. Howell argued reckless infliction of emotional distress, as opposed to intentional conduct, to the court. Appellant's Brief, *supra* note 107, at 8-11. Importantly, the cases that had been before the Court of Appeals prior to *Howell* often dealt with intentional infliction of emotional distress coupled with other claims of intentional conduct such as harassment and malicious prosecution. Although it was eventually admitted by the *Post* at oral argument before the Court of Appeals that Mrs. Howell's image was "intentionally" kept in the photos because it made "a good foil," the fact remained that the *Post* had initially trespassed to obtain photos of Hedda Nussbaum also admitted as a patient at the hospital. Appellant's Brief, *supra* note 107, at 4-5. To maintain credibility and to focus arguments, the claim of reckless infliction of emotional distress was argued. *Id.*

The *Post* argued that there was no cause of action for reckless infliction of emotional distress and even went so far as to argue that a pattern of intentional malicious conduct was necessary to bring a claim for intentional infliction of emotional distress. Respondent's Brief, *supra* note 140, at 39-40. Mrs. Howell pointed out, however, that the current law allowed for both intentional and reckless infliction of emotional distress and "a need" for a pattern of intentional malicious conduct to prove both was, by definition, illogical. Appellant's Brief, *supra* note 107, at 4-5.

156. *Howell*, 81 N.Y.2d at 121, 612 N.E.2d at 701, 596 N.Y.S.2d at 352 (citing Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1064 (1936)).

157. *Id.* (citing William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 881 (1939)).

158. *Id.* The Second Restatement of Torts allowed liability for the intentional or reckless infliction of emotional distress. See RESTATEMENT (SECOND) OF TORTS § 46 (1965).

causation; and 4) severe emotional distress.<sup>159</sup> Observing that there was no specifically proscribed conduct for this tort, the court noted that it "is as limitless as the human capacity for cruelty."<sup>160</sup> The court then stated that "[t]he price for this flexibility . . . is a tort that . . . may overlap other areas of the law" (such as in this case) and impose liability, possibly without notice, for conduct that might otherwise be lawful.<sup>161</sup> To balance this, the court noted that the rigorous requirements of this tort are "'difficult to satisfy.'"<sup>162</sup> The conduct, according to the decision, must be "beyond all possible bounds of decency . . . atrocious, and utterly intolerable . . . ."<sup>163</sup> Indeed, the Court of Appeals stated that "of the intentional infliction of emotional distress claims considered by this Court, *every one has failed* because the alleged conduct was not sufficiently outrageous."<sup>164</sup>

## 2. *The Right to Privacy*

Although Mrs. Howell only briefly referenced arguments previously made to the Appellate Division, First Department concerning a violation of section 51 of the New York State Civil Rights Law, the *Post* strenuously argued that Mrs. Howell's action was a privacy claim "disguised" as an emotional distress claim.<sup>165</sup> Indeed, the *Post* argued that Mrs. Howell's sole remedy was under the civil rights law.<sup>166</sup> The court, however, did

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159. *Howell*, 81 N.Y.2d at 121, 612 N.E.2d at 702, 596 N.Y.S.2d at 353.

160. *Id.*

161. *Id.*

162. *Id.* (quoting KEETON ET AL., *supra* note 15, § 12, at 60-61).

163. *Id.*

164. *Id.* (emphasis added). If the courts cannot protect New York state patients from this kind of conduct because it is not deemed "outrageous enough," the Legislature must act.

165. See Respondent's Brief, *supra* note 140, at 28.

166. *Id.* It was the opinion of counsel for Mrs. Howell that this strategy was employed by the *Post* for two reasons. First, the *Post* would have a stronger argument since, as detailed below, a claim under the civil rights law was difficult. Second, and more importantly, it would allow the *Post* to avoid a review of its "free press" rights. The court, however, decided to review both types of claims including the constitutional concept of "privileged conduct." *Howell*, 81 N.Y.2d at 119-24, 612 N.E.2d at 701-04, 596 N.Y.S.2d at 352-55.

The court pointed out that the "[d]efendants would have our analysis end here—without considering whether the plaintiff has stated a cause of action for intentional infliction of emotional distress . . . ." *Id.* at 125, 612 N.E.2d at 704, 596 N.Y.S.2d at 355. The court, as Mrs. Howell requested, did review the case in terms of emotional distress. *Id.*

not agree. As is detailed below, the court reviewed both claims in relation to the facts of the case.<sup>167</sup>

The Court of Appeals recognized that there was no common law right to privacy in New York.<sup>168</sup> It limited its analysis solely to sections 50 and 51 of the New York Civil Rights Law, noting that privacy rights only applied to a commercial protection of "a living person's name portrait or picture for 'advertising' or 'trade' purposes without prior written consent."<sup>169</sup>

Interestingly, the *Howell* court cited and appears to have repeated the same fundamental analytical strategy used in *Roberson v. Rochester Folding Box Co.*<sup>170</sup> In *Roberson*, as in *Howell*, the court cited considerable scholarship on the law of privacy but provided no relief because it failed to find legal "support" for a tortious invasion of privacy theory.<sup>171</sup> The *Howell* court even acknowledged that its decision in *Roberson* was "roundly criticized . . . [and that] [t]he Legislature responded by enacting the Nation's first statutory right to privacy now codified as sections 50 and 51 of the Civil Rights Law."<sup>172</sup>

Notwithstanding, after briefly discussing other "privacy torts" such as unreasonable publicity, unreasonable intrusion and false light, the *Howell* court decided not to expand the law and create a common law right to privacy.<sup>173</sup> Despite its history with *Roberson*, or perhaps because of it, the court reasoned that "recovery for invasion of privacy is best left to the Legislature."<sup>174</sup>

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167. *Id.* at 123, 612 N.E.2d at 703, 596 N.Y.S.2d at 354. Furthermore, there were additional facts such as the medical warning and notice which are irrelevant to any claim under the privacy statutes, but which would be critical to a tort claim such as infliction of emotional distress.

168. *Id.*

169. *Id.*

170. *Id.*; *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 578, 64 N.E. 442 (1902).

171. *Howell*, 81 N.Y.2d at 123, 612 N.E.2d at 704, 596 N.Y.S.2d at 355 (citation omitted).

172. *Id.*

173. *Id.*

174. *Id.*; see also David D. Siegel, *Court Examines Right of Privacy and Tort of Inflicting Emotional Harm, and Exonerates Newspaper for Publishing Photo of Psychiatric Patient Walking with Public Figure*, N.Y. ST. LAW DIG., Aug. 1993, at 1. The article stated that

[t]he case occasions a review by the Court of Appeals of both categories of claim, but brings no relief to the plaintiff, who loses on both counts.

## IV. Analysis

Although there were no cases directly on point, the Court of Appeals noted that all of the emotional distress claims it had previously considered failed for lack of sufficiently outrageous conduct, as was ultimately decided here.<sup>175</sup> One aspect of Mrs. Howell's case that the Court of Appeals did acknowledge, however, was that the tort of "intentional" infliction of emotional distress can be based upon reckless conduct.<sup>176</sup> The *Post* argued that reckless infliction of emotional distress was a new tort and not actionable in New York.<sup>177</sup> The court did not agree, nor did it end its analysis with statutory "privacy" considerations<sup>178</sup> as the *Post* had urged.<sup>179</sup> Rather, the court considered the tort claim of intentional infliction of emotional distress and unequivocally stated that it had adopted the "Restatement formulation" which describes both intentional and reckless conduct as being sources of liability.<sup>180</sup>

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Whatever the photographer did did not amount to anything actionable under present statutes or under any theory the Court of Appeals was willing to adopt. Should this kind of thing become actionable, therefore, it will have to be the legislature that makes it so, and it hasn't made it so yet.

*Id.*

175. *Howell*, 81 N.Y.2d at 125-26, 612 N.E.2d at 705, 596 N.Y.S.2d at 356. Furthermore, the type of emotional distress inflicted in *Howell* was reckless in nature, not intentional as was true in the cases cited by the court. *Id.* at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356.

176. *Id.* at 125, 612 N.E.2d at 704, 596 N.Y.S.2d at 355. This Article focuses upon the aspects of the case dealing with infliction of emotional distress — essentially, the main argument made by Mrs. Howell. The first part of the court's "Application of the Law to the Present Appeal" actually dealt with the *Post*'s "privacy" arguments. *Id.* at 124-26, 612 N.E.2d at 704-05, 596 N.Y.S.2d at 355-56. It is the remainder of the decision upon which this article focuses. *Id.* at 125-26, 612 N.E.2d at 704-05, 596 N.Y.S.2d at 355-56.

177. See Respondent's Brief, *supra* note 140, at 38-39.

178. *Howell*, 81 N.Y.2d at 125-26, 612 N.E.2d at 704-05, 596 N.Y.S.2d at 355-56.

179. *Id.*; see also Respondent's Brief, *supra* note 140, at 37.

180. *Howell*, 81 N.Y.2d at 121, 612 N.E.2d at 702, 596 N.Y.S.2d at 353; see *supra* note 19. Mrs. Howell made an additional argument in which, at oral argument, the court seemed most interested: that the clear and unmistakable intent behind the privacy statute was to protect the property right of an individual's likeness from commercial exploitation. Appellant's Reply Brief, *supra* note 68, at 16; see also *Gautier v. Pro-Football*, 278 A.D. 431, 438, 106 N.Y.S.2d 553, 560 (1st Dep't 1951), *aff'd*, 304 N.Y. 354, 107 N.E.2d 485 (1952); *Cardy v. Maxwell*, 9 Misc. 2d 329, 331-32, 169 N.Y.S.2d 547, 551 (Sup. Ct. N.Y. County 1957) (finding that "the statute was obviously aimed at exploitation for purposes of commerce").

Notwithstanding, the Court of Appeals held that the *Post's* conduct was "privileged" and that it was within its constitutional rights to publish the photographs in question.<sup>181</sup> Again citing the Restatement, the court stated that even if the conduct might otherwise be considered outrageous, it may yet be privileged and so protected.<sup>182</sup> In fact, at least referencing the warning issue in *Howell*, the court opined that even if the *Post* was aware that it would inflict emotional distress upon the patients involved, its conduct might still be privileged.<sup>183</sup> The court then cited *Hustler Magazine v. Falwell*<sup>184</sup> for the proposition that the publication of a newsworthy photograph was considered a "privileged-conduct exception."<sup>185</sup>

The plaintiff in *Hustler* was Mr. Falwell, a nationally known minister and political commentator. Mr. Falwell sued to recover damages stemming from defendant *Hustler* magazine's publication of a parody depicting Mr. Falwell as having "engaged in a drunken incestuous rendezvous with his mother in an outhouse."<sup>186</sup> The United States Supreme Court stated that the "case presents us with a novel question involving First Amendment limitations upon a State's authority to protect its citizens from intentional infliction of emotional distress."<sup>187</sup> The Court reasoned that "[a]t the heart of the First Amendment is

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Indeed, courts have specifically held that redress against the media for tortious conduct is independent from any § 51 claim. *Vogel v. Hearst Corp.*, 116 N.Y.S. 905, 906 (Sup. Ct. Kings County 1952) ("Apart from these statutes there is no so-called 'right of privacy' except in so far as invasion of a person's privacy involves other tortious acts . . ."). Mrs. Howell argued that the clear intent behind sections 50 and 51 was to be a remedy for commercial exploitation and not as a way to preempt all other forms of redress. Appellant's Reply Brief, *supra* note 68, at 16-19; see also *Flores v. Mosler Safe*, 7 N.Y.2d 276, 280, 164 N.E.2d 853, 855, 196 N.Y.S.2d 978, 978 (1959) ("[T]he purpose of the statute is remedial and rooted in an individual's right to be free from commercial exploitation."); *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 140, 480 N.E.2d 349, 353, 490 N.Y.S.2d 735, 738 (1985).

There is no evidence that the New York Legislature meant the 'privacy statutes' to preempt all other forms of redress for tortious conduct, as the *Post* suggested. Appellant's Reply Brief, *supra* note 68, at 16-17.

181. *Howell*, 81 N.Y.2d at 124-25, 612 N.E.2d at 704-05, 596 N.Y.S.2d at 355.

182. *Id.* at 125-26, 612 N.E.2d at 705, 596 N.Y.S.2d at 356.

183. *Id.* at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356.

184. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

185. *Howell*, 81 N.Y.2d at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356.

186. *Hustler*, 485 U.S. at 48.

187. *Id.* at 50.

the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest.”<sup>188</sup>

Detailing the public nature of Mr. Falwell’s life, the Court opined that such public persons must, essentially, have tougher skins.<sup>189</sup> The Court held that “the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry ‘Foul’ when an opponent or an industrious reporter attempts to demonstrate the contrary.”<sup>190</sup>

The Court then reserved any remedy for alleged infliction of emotional distress upon a public figure for situations involving malice or ill will, stating:

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently “outrageous.” But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.<sup>191</sup>

The Supreme Court ultimately held that the publication was privileged conduct in the sense that *Hustler* was exercising its right to comment on a public figure,<sup>192</sup> and concluded:

that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with “actual malice,” i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a ‘blind application’ of the New York Times standard, it reflects our considered judgment that such a standard is necessary to give adequate “breathing space” to the freedoms protected by the First Amendment.<sup>193</sup>

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188. *Id.* at 50-51.

189. *Id.* at 51-52.

190. *Id.*

191. *Id.* at 53. Actually, this reasoning bolsters Mrs. Howell’s claim, since she was in no way a public figure.

192. *Id.* at 56.

193. *Id.* (citation omitted). The author does not agree that the ‘thick skin’ New York Times standard should apply to private or even public persons when such persons are hospitalized for mental illness. Patients are, by definition, already challenged and should be protected—not exploited.

The wisdom of requiring public figures to have higher tolerance for emotional distress can be debated, but not when that public figure is hospitalized for mental illness, such as Hedda Nussbaum. The legislative intent behind many New York state patients' rights statutes (rights that apply to all patients) would appear to invalidate any such concept.<sup>194</sup>

Nonetheless, this theory is inapplicable to Mrs. Howell since she was not a public figure and never thrust herself into the public light, other than to have been hospitalized with Hedda Nussbaum at Four Winds Hospital. Rather, it was Mrs. Howell's intent to do the exact opposite. The *Howell* court's comparison of Mr. Falwell to Mrs. Howell shows tenuous reasoning and when coupled with the fact that a medical warning against publication was ignored, demonstrates a misapplication of the privileged-conduct rule.

#### A. *Privacy*

Noting that the core claim was the unauthorized publication of Mrs. Howell's photograph, the court first evaluated the *Post*'s conduct under a theory of invasion of privacy.<sup>195</sup> It stated there was no cause of action for the "publication of truthful but embarrassing facts."<sup>196</sup> Unfortunately, this aspect of the opinion trivializes the importance of patients' rights.<sup>197</sup>

The court stated that since the photograph bore a "real relationship" to the article, it was not an advertisement in disguise nor used for trade or advertising purposes.<sup>198</sup> Thus, the

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194. See *supra* notes 91-95 and accompanying text.

195. *Howell*, 81 N.Y.2d at 122-24, 612 N.E.2d at 703-04, 596 N.Y.S.2d at 354-55.

196. *Id.* at 124, 612 N.E.2d at 704, 596 N.Y.S.2d at 355; see also *infra* note 183.

197. See *supra* notes 91-95 and accompanying text.

198. *Howell*, 81 N.Y.2d at 124, 612 N.E.2d at 704, 596 N.Y.S.2d at 355. Without specifics, the court stated that the publication was "plainly not a veiled advertisement" dismissing any argument about an "advertisement in disguise" or the use of the photograph to sell that particular issue of the *Post*. *Id.* Such arguments were raised by Mrs. Howell to the Appellate Division and referenced to a lesser degree to the Court of Appeals. This is an interesting point since counsel for the *Post* actually acknowledged at the oral argument before the Court of Appeals that one of the reasons Mrs. Howell's image was used and not cropped or airbrushed out of the photograph was, indeed, because she was attractive and made "a good foil" or a good photo. The *Post* thereby admitted it used Mrs. Howell as an eye-catcher (advertisement in disguise) for that particular issue of the *Post*.

court reasoned, any claim under the civil rights law would fail and further decided that it would not "intrude upon reasonable editorial judgments . . . ." <sup>199</sup>

Indeed, without being asked, the court seems to have expanded the meaning of "reasonable relationship." It reasoned that the exclusion of Mrs. Howell's image might have changed the "visual impact" of the photo.<sup>200</sup> Under this reasoning, an editor could argue that any type of exclusion might alter the "visual impact" of a photograph. Therefore, it appears that "real relationship" may now depend on nothing more than an editor's subjective opinion.<sup>201</sup>

Section 51 of the New York Civil Rights Law,<sup>202</sup> however, is simply not an adequate protection of privacy for psychiatric patients in this state. Under most circumstances, the publication and sale of the news is not considered "trade."<sup>203</sup> Unless the news publication is deemed an advertisement in disguise, it is considered privileged conduct and not subject to the only privacy law in New York.<sup>204</sup>

More importantly, the privacy statute was intended to prevent commercial exploitation.<sup>205</sup> It was not meant as an all-encompassing right of privacy, preempting other forms of redress for tortious conduct.<sup>206</sup> Additionally, the concept of warning or notice of a "mental condition or peculiarity"<sup>207</sup>—critical to the claim of outrageous conduct in *Howell*—is irrelevant to the pri-

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199. *Howell*, 81 N.Y.2d at 124, 612 N.E.2d at 704, 596 N.Y.S.2d at 355.

200. *Id.* at 125, 612 N.E.2d at 704, 596 N.Y.S.2d at 355.

201. *Id.* at 124-25, 612 N.E.2d at 704, 596 N.Y.S.2d at 355. See also *Finger v. Omni Publications Int'l Ltd.*, 77 N.Y.2d 138, 142, 566 N.E.2d 141, 144, 564 N.Y.S.2d 1014, 1017 (1990).

202. See *supra* notes 70-90 and accompanying text.

203. *Howell*, 81 N.Y.2d at 123, 612 N.E.2d at 703, 596 N.Y.S.2d at 354. See also *supra* notes 78-79 and accompanying text.

204. *Murray v. New York Magazine*, 27 N.Y.2d 406, 409, 267 N.E.2d 474, 476, 318 N.Y.S.2d 256, 258 (1971).

205. *Gautier v. Pro-Football*, 278 A.D. 431, 438, 106 N.Y.S.2d 553, 560 (1st Dep't 1951), *aff'd*, 304 N.Y. 354, 107 N.E.2d 485 (1952); *Cardy v. Maxwell*, 9 Misc. 2d 329, 331-32, 169 N.Y.S.2d 547, 551 (Sup. Ct. N.Y. County 1957) (finding that "the statute was obviously aimed at exploitation for purposes of commerce").

206. *Vogel v. Hearst Corp.*, 116 N.Y.S.2d 905, 906 (Sup. Ct. Kings County 1952) ("Apart from these statutes there is no so called 'right of privacy' except in so far as invasion of a person's privacy involves other tortious acts . . .").

207. RESTATEMENT (SECOND) OF TORTS § 46 (1965).



vacy statute<sup>208</sup> and only has applicability in the law of torts.<sup>209</sup> Finally, strategically arguing that all "privacy claims" must be litigated under the civil rights law is not only inaccurate, it diverts attention away from the tort remedy of intentional infliction of emotional distress. This tactic, employed by the *Post*, was recognized and rejected by the *Howell* court.<sup>210</sup>

### B. *Emotional Distress*

The court went on, as requested by Mrs. Howell, to review the *Post's* conduct in relation to the tortious claim for intentional infliction of emotional distress.<sup>211</sup> The court cited the *Post's* argument that this tort could not be used as an "end run" around the privacy statutes, and then held that the *Post's* conduct fell within the realm of "privileged conduct."<sup>212</sup> The court cited the Restatement of Torts and established case law to explain that liability cannot be imposed for taking an action within one's legal rights (e.g., the media publishing the news).<sup>213</sup>

There are some troubling questions left unanswered by this decision. Although the Court discussed section 46, comment (g) of the Restatement, cited by the *Post* for the "privileged-conduct" proposition, it failed to address Restatement section comments cited by Mrs. Howell which were more relevant to the case.<sup>214</sup> For example, comment (c) specifically left open for the future "other situations in which liability may be imposed," indicating that this is a dynamic and fluid area of the law.<sup>215</sup> Comment (d) notes that the type of conduct necessary is the kind, as this author believes was present here, that would lead the average member of the community "to exclaim, 'Outrageous!'"<sup>216</sup>

Most importantly, however, the court did not address comment (f), which states that the "extreme and outrageous nature

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208. See *supra* notes 70-90 and accompanying text.

209. See *supra* notes 21-23 and accompanying text.

210. *Howell*, 81 N.Y.2d at 125, 612 N.E.2d at 704, 596 N.Y.S.2d at 355.

211. *Id.*

212. *Howell*, 81 N.Y.2d at 124-25, 612 N.E.2d at 704, 596 N.Y.S.2d at 355.

213. *Id.* at 125-26, 612 N.E.2d at 705, 596 N.Y.S.2d at 356.

214. Appellant's Brief *supra* note 107, at 12 (cmt. d), 19 (cmt. f).

215. RESTATEMENT (SECOND) OF TORTS § 46 cmt. c (1965).

216. *Id.* cmt. d.

of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity" and that the "conduct may become heartless, flagrant, and *outrageous* when the actor proceeds in the face of such knowledge . . . ." <sup>217</sup> Following this comment to the Restatement there is a most interesting example postulated:

A is in a hospital suffering from a heart illness and under medical orders that he shall have complete rest and quiet. B enters A's room for the purpose of trying to settle an insurance claim. B's insistence and boisterous conduct cause severe emotional upset and A suffers a heart attack. B is subject to liability to A if he knows of A's condition. <sup>218</sup>

In other words, if the conduct of the defendant in this example caused emotional distress that negatively impacted upon the cardiac condition for which the plaintiff was being treated and if the defendant had notice of that condition, liability would attach.

Mrs. Howell was admitted for a psychiatric illness. A specific medical warning not to publish her photograph was given by the hospital Medical Director, but it was ignored by the *Post* editors. The *Post* was, therefore, on notice of Mrs. Howell's condition. <sup>219</sup> The *Post*'s conduct (publication) caused emotional distress that negatively impacted upon the psychiatric condition for which Mrs. Howell was being treated. The *Post* should have been subject to liability because it had knowledge of Mrs. Howell's condition. <sup>220</sup> Since the *Post* "proceed[ed] in the face of

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217. *Id.* cmt. f (emphasis added).

218. *Id.* Based on this comment alone, the court should have reinstated Mrs. Howell's case and let the jury decide if the facts were outrageous. See also *Halio v. Laurie*, 15 A.D.2d 62, 222 N.Y.S.2d 759 (2d Dep't 1961). Since, in *Howell*, the Court of Appeals explicitly adopted the Second Restatement section regarding reckless infliction of emotional distress, it should have at least addressed this aspect of Mrs. Howell's argument in its decision. *Howell*, 81 N.Y.2d at 121, 612 N.E.2d at 701, 596 N.Y.S.2d at 353. See also *Andrews v. Bruk*, 160 Misc. 2d 618, 610 N.Y.S.2d 752 (Sup. Ct. Nassau County 1994).

219. In addition, as outlined in part I, the hospital to which Mrs. Howell was admitted looked very much like what it was — a private psychiatric hospital. Appellant's Brief, *supra* note 107, at 4. Additionally, since the *Post* was interested in Hedda Nussbaum because she was at a psychiatric hospital, the *Post* clearly had constructive notice as well as the actual notice given by the Medical Director.

220. Actually there was a nonspecific denial of any warning, made for the first time at oral argument, but no such denial had been briefed to the court.

such knowledge," their conduct is appropriately labeled "outrageous" under comment f. Moreover, since we may presume that the Restatement intended the term "outrageous" to have the same meaning in both comments d and f, such conduct on the part of the *Post* should satisfy the outrageous conduct element of a claim for intentional or reckless infliction of emotional distress. The trial court even opined that "the general problem which pervades claims of emotional distress, to wit, the amorphous nature of the tort and the concomitant subjective nature of the damages, is not present in this case."<sup>221</sup>

The Court of Appeals only cited cases that dealt with "newsworthy" persons or persons in public places. Yet, Mrs. Howell was in a private psychiatric hospital and not newsworthy other than happening to be at the same hospital as Hedda Nussbaum. Furthermore, the court did not discuss the fact that in virtually all of the cases cited by the *Post*, the media either had specific consent to be on the scene or was there by right (public place or record), obviously not the case in *Howell*.

No other case was cited where there was a specific medical warning against publication. The court, however, only felt that "embarrassing facts" were revealed and this seems to have been the underling premise for denying a remedy to Mrs. Howell.<sup>222</sup> The court held this opinion even though earlier courts had already determined that the state did indeed have a specific interest in the "protection of patients . . . [and] the mentally ill . . . and thus sav[ing] patients from humiliation, embarrassment and disgrace."<sup>223</sup>

Finally, the court did not address the fact that Mrs. Howell's inclusion in the photographs was simply not necessary and too tangential to the "newsworthy event" to warrant such a

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221. *Howell v. New York Post*, No. 43723/89 (Sup. Ct. N.Y. County Apr. 12, 1990) (Huff, J.).

222. *Howell*, 81 N.Y.2d at 125, 612 N.E.2d at 704, 596 N.Y.S.2d at 355.

223. *Munzer v. Blaisdell*, 183 Misc. 773, 774, 49 N.Y.S.2d 915, 916 (1944). In *Munzer*, the defendant, a Medical Superintendent at Rockland State Hospital, disclosed the plaintiff's medical record to a third party while the plaintiff was still a patient at the hospital. *Id.* at 774, 49 N.Y.S.2d at 916. The court held that the defendant's conduct violated the Mental Hygiene Law. *Id.* at 775, 49 N.Y.S.2d at 917. "Clearly, the statute was enacted in the interest of the public generally and for the benefit and protection of patients." *Id.* at 773, 49 N.Y.S.2d at 916. Its primary purpose was to prevent unlawful disclosure of medical information "and thus save patients from humiliation, embarrassment and disgrace." *Id.*

risk of grave harm. In fact, this issue was specifically addressed by the trial court in the hospital's related action against the *Post*.<sup>224</sup> That court noted it was "abundantly clear from the papers and the various exhibits that the defendant *Post* and its photographers and reporters knew that [the hospital] was a private psychiatric hospital and that the patients confined therein are emotionally disturbed and are there for treatment and rehabilitation and not for uninvited picture taking . . . ." <sup>225</sup>

Notwithstanding, the court did offer what may be the most important statement on the issue of media liability for infliction of emotional distress. The Court of Appeals stated that "*publication—without more—could not ordinarily lead to liability for intentional infliction of emotional distress.*"<sup>226</sup> The court did not "explore" what circumstances might overcome the privileged-conduct doctrine, and left the meaning of "without more" wide open to interpretation.<sup>227</sup> Nevertheless, and more importantly, when read in the alternative, the court seems to have said that publication — without more — *sometimes* could lead to liability for intentional infliction of emotional distress.

It is this author's opinion that the New York State Court of Appeals has for the first time stated that, under "the right set of facts," a media entity's methods of gathering and publishing the

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224. *Four Winds Hosp. v. New York Post*, No. 15578-88 (Sup. Ct. Westchester County Nov. 29, 1988) (Ruskin, J.).

225. *Id.* at 3.

226. *Howell*, 81 N.Y.2d at 125, 612 N.E.2d at 705, 596 N.Y.S.2d at 356 (emphasis added). Due to the *Post*'s bankruptcy filing just prior to oral argument on appeal, the conduct of the corporate defendant (the *Post*'s editors) was not addressed in the first part of the decision rendered. *Id.* Only the conduct of the non-corporate defendants (the individual reporters) was reviewed. *Id.* Their trespass was not considered as conduct "beyond all possible bounds of decency." *Id.* Clearly, the really "outrageous" conduct was on the part of the *Post*'s editors, who were given a specific medical warning not to publish photographs of the psychiatric patients. *Id.* Indeed, the core issue of the warning was not even addressed in the decision reviewing the reporters' conduct, since they were not responsible for the actual publication. *Id.*

Unfortunately, when the bankruptcy stay pursuant to this specific case was lifted and the court rendered the final part of the decision regarding the corporate defendant, it offered no further reasoning to explain the ultimate holding and, surprisingly, no mention of the warning issue was made. *Id.* at 125, 612 N.E.2d at 705, 596 N.Y.S.2d at 356. Thus, the court never specifically commented on whether the refusal to heed a medical warning against the nonconsensual publication of photographs of private psychiatric patients was "outrageous."

227. *Id.*

news may cause liability for infliction of emotional distress.<sup>228</sup> Indeed, the court even stated that it "did not mean to suggest . . . that the plaintiff could never defeat the privilege and state a claim for intentional infliction of emotional distress."<sup>229</sup>

### C. *Patient's Rights*

This decision is a start, but it far from protects New York patients from the kind of harm inflicted in *Howell*. The New York State Legislature has enacted patients' rights statutes to ensure that patients, especially psychiatric patients, receive even more protection from disturbance than the ordinary private person.<sup>230</sup> The New York Mental Hygiene Law sets limits on communications and visits to psychiatric facilities,<sup>231</sup> recognizing the delicate nature of psychiatric treatment and the need for privacy.

Statutory patients' rights include "considerate and respectful care" and "a maximum amount of privacy consistent with the effective delivery of services."<sup>232</sup> These patients' rights are so important the Legislature has commanded "each patient or patient representative shall be given a copy of their rights . . . ."<sup>233</sup>

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228. Gary Spencer, *'Post' Cleared Over Photo Suit*, N.Y. L.J., Apr. 6, 1993, at 1, 1-2; see also Siegel, *supra* note 174, at 1.

229. *Howell*, 81 N.Y.2d at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356. Perhaps, in the end, this is a determination for the trial court. Perhaps appellate courts should not rule on whether conduct is "outrageous" and should leave that determination for the trier of fact. See *Halio v. Laurie*, 15 A.D.2d 62, 222 N.Y.S.2d 759 (2d Dep't 1961); see also *Richard L. v. Armon*, 144 A.D.2d 1, 536 N.Y.S.2d 1014 (2d Dep't 1989); RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1977). The Restatement provides:

It is for the Court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

*Id.*

230. See *supra* notes 92-106 and accompanying text.

231. N.Y. MENTAL HYG. LAW § 33.05(a) (McKinney 1993); see also *id.* §§ 33.13, 33.16; see also 14 N.Y. COMP. CODES R. & REGS. tit. 14, § 21.2 (1974) (further limitations on visits).

232. N.Y. COMP. CODES R. & REGS. tit. 14, § 374.14 (1993) (patients' rights).

233. N.Y. COMP. CODES R. & REGS. tit. 10, § 405.7(a)(1) (1993) (patients' rights).

Patients have the right to "[p]rivacy while in the hospital and confidentiality of all information and records regarding . . . care."<sup>234</sup> Patients also "have the right to receive clinically appropriate care and treatment . . . humanely administered with full respect for their dignity and personal integrity"<sup>235</sup> as well as "a maximum amount of privacy."<sup>236</sup> It is difficult to see how the *Howell* court, by allowing a newspaper like the *Post* to publish photographs of private psychiatric patients without consent and against medical warning, has advanced the legislative intent to insure patients privacy while in the hospital<sup>237</sup> and treatment "with full respect for their dignity and personal integrity."<sup>238</sup>

In New York, Public Health Law section 2083 expressly commands that "[e]very patient shall have the right to have privacy in treatment . . . ."<sup>239</sup> It is obvious that such privacy and confidentiality is imperative, not only for proper treatment, but for successful recovery from a psychiatric illness. The media should not be allowed to circumvent State interests in affording privacy to those seeking medical treatment. This is particularly true with psychiatric patients.<sup>240</sup>

A review of a typical psychiatric hospital's policy regarding patients' rights reveals an overwhelming concern for and endorsement of the concepts of patient privacy and simple human dignity.<sup>241</sup> Specific provisions of a patients' rights policy would include "considerate and respectful care in a clean and safe environment," "privacy consistent with the provisions of appropriate care to the patient" and "confidentiality of all information and records pertaining to the patient's treatment."<sup>242</sup> Patients are even to be apprised of the identity of any hospital person-

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234. *Id.* § 405.7(13).

235. *Id.* § 587.7(7).

236. *Id.* § 587(10).

237. *See id.* § 405.7(b)(12).

238. *See* N.Y. COMP. CODES R. & REGS. tit. 14, § 587.7(7) (1993).

239. N.Y. PUB. HEALTH LAW § 2803-C(3)(f) (McKinney 1985).

240. *MacDonald v. Clinger*, 84 A.D.2d 482, 446 N.Y.S.2d 801 (4th Dep't 1982); *see also* *Fedell v. Wierzbieniec*, 127 Misc. 2d 124, 425 N.Y.S.2d 460 (Sup. Ct. Erie County 1985); *Munzer v. Blaisdell*, 183 Misc. 773, 49 N.Y.S.2d 915 (Sup. Ct. N.Y. County 1944).

241. *See generally* *Patients' Rights Policy*, *supra* note 96.

242. *Id.* at 1-2.

nel<sup>243</sup> and again, most importantly, patients are to receive treatment "with full respect for their dignity and personal integrity."<sup>244</sup>

Some psychiatric facilities even have a specific "media policy."<sup>245</sup> When a person of "celebrity status" is admitted, appropriate hospital staff members are alerted and special procedures are followed to insure institutional integrity, and the integrity of the therapeutic environment.<sup>246</sup> These attempts to contain a threat, a threat so obvious that "special procedures" are necessary, can now be undermined with impunity relying upon *Howell* as precedent.

New York State patients cannot wait for the media to commit ever more outrageous conduct waiting for a court to act. The New York State Legislature must pick up from where the Court of Appeals has left off. Applying the reasoning behind the decision in *Howell*, any patient in a similar facility would automatically become "newsworthy" the moment a celebrity or other newsworthy person is admitted to the same facility. Regardless of medical warning or adverse impact, patients at such a facility could find themselves on the front page of any tabloid simply for being "at the scene of a newsworthy event."

Will patients, be they celebrities fearing no protection or non-celebrities fearing the fallout, want to go to such facilities? How will this liability impact upon the solvency of such facilities? Shall hospitals become armed fortresses? Should patients coping with illness be forced to sue their health care providers, destroying relationships filled with the trust and compassion upon which they depend, as their only recourse for conduct committed by a media entity?

Without some kind of intervention, the type of conduct demonstrated by the *Post* will decrease access to care through compromised treatment and chilled participation in psychiatric and related facilities. At a minimum, the media should obtain

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243. *Id.* at 3, 5. Patients have the right to know the identity of all hospital staff but, according to *Howell*, unidentified tabloid reporters can nevertheless trespass, photograph the patients without consent and publish those photos against medical warning.

244. *Id.* at 5.

245. *Press Statement*, *supra* note 96, at 1.

246. *Id.*

permission to be on the grounds of such a facility and written informed consent to photograph and publish should be mandatory.<sup>247</sup>

## V. Conclusion

The New York State Legislature has enacted various statutes and regulations to help insure that psychiatric patients can be treated in a safe, confidential and private environment with respect for their dignity and personal integrity. Now, using *Howell* as precedent, these patient's rights can be violated by the media when it deems fit and any physician's warning against such harmful conduct will be of no moment.

While the *Howell* court did opine that on the right facts<sup>248</sup> a claim for emotional distress may overcome the media's privilege,<sup>249</sup> this decision fails to adequately protect psychiatric patients. The Legislature must act to reaffirm and insure the integrity of psychiatric patients' rights and all patients' rights in New York State. The media must be required to obtain writ-

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247. The *Delan* case is interesting to note on this specific point. *Delan v. CBS*, 91 A.D.2d 255, 458 N.Y.S.2d 608 (2d Dep't 1983). Ironically, it was even one of the cases relied on by the *Post*. Respondent's Brief, *supra* note 140, at 23. In *Delan* (solely a privacy case without any claim for infliction of emotional distress), a documentary was made about the care and treatment of patients in a mental institution. *Delan*, 91 A.D.2d at 256-58, 458 N.Y.S.2d at 611-12. In that case, however, the media had permission to be on the grounds of the institution. *Id.* at 257, 458 N.Y.S.2d at 612. The physicians from the institution and CBS personnel carefully evaluated patients and explained the purpose of the proposed film prior to obtaining the involved patients' written informed consent. *Id.*

In *Delan*, the problem occurred when another patient, from whom consent was not obtained, happened to be featured accidentally during a "fleeting" four seconds of this sixty minute documentary. *Id.* at 256, 458 N.Y.S.2d at 611. The court held that the film was of legitimate public interest, legitimately related to the plaintiff and thus was a privileged subject. *Id.* at 259, 458 N.Y.S.2d at 613. As a result the court reasoned that consent was not necessary. *Id.* at 261, 458 N.Y.S.2d at 614.

In *Howell*, however, no attempt at such responsible reporting was made, and a specific medical warning was ignored. *Howell*, 81 N.Y.2d at 118, 612 N.E.2d at 700, 396 N.Y.S.2d at 351. Furthermore, the publication of Mrs. Howell's photograph on the front page was hardly a fleeting exposure. *Hedda Talks*, *NEW YORK POST*, Sept. 2, 1988, at 1. Indeed, the photo is still available in archives to this day.

Notwithstanding, the attempts made by the media in *Delan* go a long way to preventing the wrongs done in *Howell* and should be made mandatory when reporting on patients undergoing treatment. Since the Court of Appeals failed to specifically make such law, the Legislature must create such protection by statute.

248. *Howell*, 81 N.Y.2d at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356.

249. *Id.*



ten informed consent to photograph and to publish, and must not be allowed to use private psychiatric patients, or any patient, as interesting backdrop for tabloid news.