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WARNING TO THE PRESS: KNOCK BEFORE ENTERING

In *Miller v. National Broadcasting Co.*¹ (“*Miller*”), a woman was found to have actionable claims for trespass, invasion of privacy and intentional infliction of emotional distress based upon her viewing of television broadcasts depicting her (now deceased) husband. The decedent’s daughter, who did not reside with her parents, was found not to have a cause of action for invasion of privacy or intentional infliction of emotional distress against the National Broadcasting Company (“NBC”). The Court of Appeal for the Second District partially reversed and partially affirmed the trial court’s summary judgment in favor of NBC holding that the wife, but not the daughter, had alleged three valid causes of action and had presented triable issues of material fact.

In late 1979 defendant television network, NBC, produced a “mini-documentary” about the work of the Los Angeles Fire Department Paramedic Corps.² The series focused on the life-saving techniques of the paramedics. To document the paramedics’ on-the-job efforts, NBC obtained permission from the Los Angeles Fire Department to accompany a unit as they responded to citizen calls.³ On October 30, 1979, an NBC film crew accompanied the paramedic unit that responded to a call that plaintiff’s husband, Dave Miller, had suffered a heart attack in the couple’s bedroom. Upon arrival at the Miller home, the film crew immediately entered the bedroom where they filmed the paramedics administering cardiopulmonary resuscitation (“CPR”) to Mr. Miller.⁴ Plaintiff Brownie Miller, was present at the scene, but unaware that NBC was filming the paramedics as they tried to revive her husband. Furthermore, she was not approached by anyone for permission to film the incident.⁵ The NBC crew left with the paramedics after their attempts to resuscitate

1. 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668 (1986).

2. *Id.* Other named defendants were NBC producer Ruben Norte and the City of Los Angeles. The City was dismissed by stipulation. Reference to NBC includes Norte.

3. *Id.* at 1474, 232 Cal. Rptr. at 673. The producer, Ruben Norte, testified that “My intent was to film and document whatever their work was and whatever it happened to be when we filmed.” He told the paramedic’s media representative that he wanted to film something “dramatic.” *Id.*

4. *Id.* at 1475, 232 Cal. Rptr. at 673. Norte testified that it was standard practice in the television industry to secure consent before entering someone’s home to film, but that he had not considered the necessity for such permission when accompanying the paramedics on their rounds. *Id.*

5. *Id.* In his deposition, Norte testified: “[T]here was a woman in the hallway, which was outside the bedroom where the heart attack victim was. I didn’t speak to her.” *Id.* at 1475 n.4, 232 Cal. Rptr. at 674 n.4.

tate Mr. Miller failed.⁶

The film obtained at the Miller home was aired in November, 1979 on an NBC news program. In addition, it was later used in a promotional spot advertising the "mini-documentary."⁷ In both instances, the film was broadcast without first receiving Mrs. Miller's consent.⁸ On November 19, Mr. Miller's daughter, plaintiff Mrs. Belloni, was watching the six o'clock evening news when she viewed the footage. Although Mr. Miller's face was not shown, she knew the victim was her father because of a distinctive tattoo on his arm. Approximately one week later, Mrs. Miller, while watching late morning television, viewed the promotional spot and recognized her husband.⁹ Both women became very upset while viewing the footage and complained by telephone to NBC.¹⁰ Despite these complaints, NBC aired the film several more times.¹¹

The trial court entered summary judgment in favor of NBC, concluding that the causes of action stated by Mrs. Miller and Mrs. Belloni for invasion of privacy, intentional or negligent infliction of emotional distress, based upon their viewing of NBC broadcasts depicting the attempts to revive Mr. Miller, were meritless. The court also held that Mrs. Miller had no cause of action for trespass since there was neither

6. *Id.* Mr. Miller was transported to Mount Sinai Hospital where he subsequently died. *Id.* at 1475, 232 Cal. Rptr. at 673.

7. *Id.* at 1474, 232 Cal. Rptr. at 673. The "mini-documentary" was to run during the five weekdays for two weeks, airing for five minutes at the end of the six o'clock evening news, and about half that time on the eleven o'clock nightly news. The first week concerned the paramedics' work generally. The promotional spot was to advertise the second week's focus on the administering of CPR by a paramedic team.

8. *Id.* at 1475, 232 Cal. Rptr. at 673. Norte did not attempt to ascertain the identity of the deceased's relatives because "there was no identity of the victim verbally or visually [on film]." Mrs. Belloni, Mr. Miller's daughter, testified that Norte told her over the phone that he didn't get permission to do the telecast because "[he] didn't think of it." *Id.* at 1477, 232 Cal. Rptr. at 675.

9. *Id.* at 1476, 232 Cal. Rptr. at 674. Mrs. Miller viewed the film once. Mrs. Belloni, subsequent to her initial viewing, saw one showing of a portion of the documentary for promotional purposes. *Id.* at 1476-77, 232 Cal. Rptr. at 674-75.

10. *Id.* at 1477, 232 Cal. Rptr. at 675. Mrs. Belloni phoned NBC (Ruben Norte) the first time on November 19, after viewing the six o'clock evening news. The gist of the conversation was to tell him how upset she was and ask that the film not be shown again. Norte responded that it was part of NBC's entire week's special, but that he would look into not airing the film again. However, it aired again that day on the eleven o'clock nightly news. Mrs. Belloni then called NBC a second time to protest.

Mrs. Miller phoned NBC once after she viewed the footage and said: "What nerve did you have to come into my home and invade my privacy . . . My husband was a very private person. He would never have liked anything like that to have been on television." *Id.* at 1476, 232 Cal. Rptr. at 674.

11. *Id.* at 1477, 232 Cal. Rptr. at 675. Four or five close friends, who had been advised to keep track of promotional showings on advice of plaintiff's counsel, had seen several other telecasts.

evidence that NBC maliciously entered her property nor that she suffered actual damage as a result of the entry.¹²

In reviewing the trial court's decision, the court of appeal acknowledged the standard of review applicable in First Amendment matters.¹³ While the test as to whether to grant summary judgment remains the same in free speech cases,¹⁴ courts impose a more stringent burden on the party opposing the motion and require a showing of a high probability that the plaintiff will ultimately prevail on the merits.¹⁵ Thus, the court recognized that it had to evaluate the extent to which First Amendment rights protect the news gathering techniques employed by NBC, in addition to identifying the proper causes of action available to the plaintiff.

A. *Trespass: Mrs. Miller's First Cause of Action*

To begin, the court of appeal relied on the common law definition of trespass, based on an unauthorized entry onto the land of another.¹⁶ Such an invasion is characterized as an intentional tort regardless of the actor's motivation.¹⁷ Since it is undisputed that NBC made an unauthorized entry into the Miller's home, the court found there was indeed a trespass.¹⁸ In rejecting the lower court's determination that there was no trespass since NBC had not maliciously entered the property, the court of appeal focused on the word "intentional" in the sense that the law understands and uses it. Specifically, NBC intended to cross the threshold of the Miller home,¹⁹ and therefore, committed an intentional tort, regardless of its motivation or intention.²⁰

Turning to the issue of damages, the court held that under California law, the "consequences" flowing from an intentional tort, such as trespass, may include emotional distress.²¹ Thus, NBC could be liable for any resulting anguish experienced by Mrs. Miller when NBC broad-

12. *Id.* at 1473-74, 232 Cal. Rptr. at 672.

13. For purposes of discussion, "First Amendment rights" refers collectively to the First Amendment of the United States Constitution and Article I section 2 of the California Constitution.

14. The test is whether there is a triable issue of fact presented in the case. CAL. CIV. PROC. CODE § 437(c) (West Supp. 1987).

15. *Miller*, 187 Cal. App. 3d at 1479, 232 Cal. Rptr. at 676.

16. *Id.* at 1480, 232 Cal. Rptr. at 677.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1481, 232 Cal. Rptr. at 677 (citing *Acadia, California, Ltd. v. Herbert*, 54 Cal. 2d 328, 353 P.2d 294, 5 Cal. Rptr. 686 (1960)).

cast her husband's dying moments.²²

B. Invasion of Privacy: Mrs. Miller's Second Cause of Action

In addressing the invasion of privacy claim, the court looked to Dean Prosser's classic 1960 article on the categorization of privacy interests,²³ concluding that the case at hand involved the first category of rights—the right to be secure from intrusion.²⁴ More explicit is the Restatement of Torts, section 652B setting forth the parameters for the court's analysis,²⁵ stating, "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."²⁶

Before the court could decide whether Mrs. Miller had an actionable claim for intrusion, it had to make a preliminary determination of "offensiveness."²⁷ Turning to California case law, the court found little assistance since cases based on facts showing actual physical intrusion were scarce. The court deduced that this was probably because widely held notions of decency preclude individuals from entering private homes without the consent of those living there.²⁸ Despite this lack of assistance, the court went on to list several factors to be considered in determining "offensiveness." These factors included the degree of intrusion; the context, conduct and circumstances surrounding the intrusion; the intruder's motives and objectives; the setting into which he intrudes; and the expectations of those whose privacy is invaded.²⁹ The *Miller* court did not expound on the interplay between the facts of the case and these factors. Instead, the court concluded independently that reasonable people could construe NBC's intrusion into the Millers' bedroom, at a time of vulnerability and confusion, as a lack of restraint and sensitivity rising to the level of "highly offensive conduct."³⁰

22. *Miller*, 187 Cal. App. 3d at 1481, 232 Cal. Rptr. at 677.

23. *Id.* at 1482, 232 Cal. Rptr. at 678. Prosser categorized and defined four basic privacy interests as follows: (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. (2) Public disclosure of embarrassing private facts about the plaintiff. (3) Publicity which places the plaintiff in a false light in the public eye. (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

24. *Miller*, 187 Cal. App. 3d at 1482, 232 Cal. Rptr. at 678.

25. *Id.*

26. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652B (1977)).

27. *Miller*, 187 Cal. App. 3d at 1483, 232 Cal. Rptr. at 678.

28. *Id.* at 1483, 232 Cal. Rptr. at 678-79.

29. *Id.* at 1483-84, 232 Cal. Rptr. at 679.

30. *Id.* at 1484, 232 Cal. Rptr. at 679.

The court of appeal then considered the potential for damages for such an intrusion. In finding that damages flowing from an invasion of privacy logically would include an award for mental suffering, the court relied on *Fairfield v. American Photocopy Equipment Co.*,³¹ which held that special damages need not be charged or proven, and, if the proof discloses a wrongful invasion of the right to privacy, substantial damages for mental anguish alone could be recovered. Giving full weight to *Fairfield*, the *Miller* court concluded that all the consequences and events flowing from NBC's trespass could be subject to legitimate inquiry by a jury.³² In so holding, the court of appeal stated that the lower court, in granting summary judgment in favor of NBC on Mrs. Miller's causes of action for invasion of privacy and intentional infliction of emotional distress, mistakenly relied on *Flynn v. Higham*.³³ The *Flynn* court held that the right to privacy is purely personal and dies with the person.³⁴ The trial court's error was in finding that Mrs. Miller's causes of action were "relational," based on her relation to Mr. Miller, and not personal. The court of appeal pointed out that the Miller home belonged to the couple, and consequently, the uninvited NBC crew invaded Mrs. Miller's rights directly and personally.³⁵

31. 138 Cal. App. 2d 82, 291 P.2d 194 (1955).

32. *Miller*, 187 Cal. App. 3d at 1485, 232 Cal. Rptr. at 680.

33. 149 Cal. App. 3d 677, 197 Cal. Rptr. 145 (1983), *cert. denied*, Feb. 15, 1984. In *Flynn*, the complaint alleged that the defendants, the author and publisher of "Errol Flynn—The Untold Story," defamed plaintiffs, children of the deceased Errol Flynn, by writing that their father was a homosexual and a Nazi spy. In affirming the order of dismissal after demurrer was sustained and plaintiffs failed to amend their complaint, the court included the following discussion:

It is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that his privacy has been invaded. Further, the right does not survive but dies with the person. It is clear that the publication must contain some direct reference to the plaintiff. The publication must invade the plaintiff's privacy. Where the publication was directed at another individual and referred incidentally to the plaintiff but was not directed at him, no recovery can be had. Where the plaintiff's only relation to the asserted wrong is that he is a relative of the victim of the wrongdoer and was unwittingly brought into the limelight, no recovery can be had.

187 Cal. App. 3d at 1485, 232 Cal. Rptr. at 680 (citations omitted).

34. To support its position, the court quoted *Nelson v. Main Times*, 373 A.2d 1221, 1225 (1977): "[I]f actions for violating the right of privacy are allowed by other than the person directly involved, fixing their boundaries and parameters would become an almost impossible task. For example, within what degree of relationship, if any, must a prospective plaintiff be?" *Miller*, 187 Cal. App. 3d at 1486, 232 Cal. Rptr. at 681.

35. *Miller*, 187 Cal. App. 3d at 1486-87, 232 Cal. Rptr. at 681.

C. *Intentional Infliction of Emotional Distress: Mrs. Miller's Third Cause of Action*

The court began by identifying the elements of a prima facie case of intentional infliction of emotional distress.³⁶ In evaluating the conduct of NBC, the court employed the reasonable person standard.³⁷ NBC's trespass, committed with little or no thought to its obvious transgression, was crucial to finding that NBC had acted in reckless disregard of the rights and sensitivities of others.³⁸ The court of appeal was also troubled by NBC's apparent lack of sensitivity to Mrs. Miller's protests of the film being aired.³⁹ Reiterating that Mrs. Miller's home was invaded without her consent and her dying husband's last moments filmed and broadcast to the world, the court left it to a jury to decide whether NBC's conduct was outrageous.⁴⁰ In finding a legal basis for Mrs. Miller's claim for intentional infliction of emotional distress, the court emphasized that "[i]t was immaterial that in NBC's judgment the body of Mr. Miller was not identifiable by the average viewer. Mrs. Miller was not an average viewer. The film depicted her house and her husband, and that fact was known to her."⁴¹

D. *Mrs. Belloni's Causes of Action*

In affirming the trial court's holding that Mrs. Belloni had not stated a cause of action for invasion of privacy or for intentional infliction of emotional distress, the court of appeal once again addressed *Flynn v. Higham*.⁴² It found that because the principle thrust of Mrs. Belloni's claims was her relationship to her parents who were victimized by NBC's outrageous conduct, rather than NBC's conduct toward her, her claims fell within the policy limitations set out in *Flynn*.⁴³ The determining factor was that, unlike her mother, Mrs. Belloni was not present during the invasion of the Miller home.⁴⁴ The court declined to accept Mrs. Bel-

36. *Id.* "(1)extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard [for] the probability of causing emotional distress; (2)the plaintiff's suffering severe or extreme distress; and (3)actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Id.* (citing *Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, 595 P.2d 975, 156 Cal. Rptr. 198 (1979)).

37. *Miller*, 187 Cal. App. 3d at 1487, 232 Cal. Rptr. at 681.

38. *Id.* at 1487, 232 Cal. Rptr. at 681-82.

39. *Id.* at 1488, 232 Cal. Rptr. at 682.

40. *Id.*

41. *Id.*

42. 149 Cal. App. 3d 677, 197 Cal. Rptr. 145 (1983). *Miller*, 187 Cal. App. 3d at 1489, 232 Cal. Rptr. at 682.

43. *See supra* note 34.

44. *Miller*, 187 Cal. App. 3d at 1489, 232 Cal. Rptr. at 682.

loni's argument that the broadcasts into her home of her father's dying moments in and of themselves constituted "photographic intrusions," thereby falling within the ambit of invasion of privacy by intrusion.⁴⁵

E. First Amendment Rights

Lastly, the court addressed NBC's vigorous defense that its First Amendment right to gather news relieved them of liability. Initially, the court recognized that "[i]ntrusion does not raise [F]irst [A]mendment difficulties since its perpetration does not involve speech or other expression. It occurs by virtue of the physical or mechanical observation of the private affairs of another, and not by the publication of such observations."⁴⁶ Nevertheless, the court went on to explore NBC's contention since both physical observation of the private affairs of another and the filming and dissemination of the observation were involved.⁴⁷

Looking to both the Federal and California Constitutions, the court found ample support for the right of individuals to be "let alone."⁴⁸ Likewise, it recognized that the protection afforded news persons has been perceived throughout United States history as of the utmost importance in maintaining a free society.⁴⁹ But assuming that public education about paramedics and CPR qualifies as news, the court insisted that constitutional protection for news gathering is limited rather than absolute.⁵⁰ The First Amendment, the court emphasized, has "never been construed to accord newsmen immunity from torts or crimes committed during the

45. *Id.*

46. *Id.* at 1490, 232 Cal. Rptr. at 683. (citing Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 957 (1968)).

47. *Miller*, 187 Cal. App. 3d at 1490, 232 Cal. Rptr. at 683.

48. Borrowing from *Gallela v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972), the court noted that the individual's right to be let alone permeates the Federal Constitution in a number of different ways. "The First Amendment protects the right of freedom of association. The Fourth Amendment protects the individual from unreasonable searches and seizures. The Fifth Amendment and its privilege against self-incrimination safeguards the individual in a zone of privacy into which the Government may not intrude, and the Ninth Amendment provides that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." *Miller*, 187 Cal. App. 3d at 1490, 232 Cal. Rptr. at 683. (quoting *Gallela*, 353 F. Supp. at 231).

The California Constitution provides that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life, and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I § 1.

49. *Miller*, 187 Cal. App. 3d at 1491, 232 Cal. Rptr. at 684.

50. *Id.* at 1492, 232 Cal. Rptr. at 684.

course of news gathering."⁵¹

The court of appeal concluded that the obligation not to make unauthorized entry onto the private premises of individuals like the Millers does not place an impermissible burden on newsgatherers; nor is it likely to have a chilling effect on the exercise of First Amendment rights.⁵² Emphasizing again that others beside the media have rights, the court of appeal held that in the context of the events at the Miller home on October 30, 1979, those personal rights must prevail.⁵³

The court of appeal refused to uphold the summary judgment in favor of NBC as to Mrs. Miller since it found that she had stated causes of action and there were triable issues of material fact. It is obvious that the court was strongly sympathetic to Mrs. Miller and the unfortunate circumstances surrounding this litigation. First, it prefaced its opinion with the remark that the designation and form of the complaint are immaterial in determining what causes of action are stated by the facts as pleaded.⁵⁴ With that in mind, the court went on to disregard some of the plaintiff's more plausible theories of recovery⁵⁵ and identified its own causes of action. Second, the court went to great lengths to describe the tragedy Mrs. Miller suffered and the apparent lack of sensitivity NBC showed for her plight.⁵⁶ Third, the court stated it was mindful that NBC's First Amendment rights were a principle issue in the case. It went on, however, to give them only cursory review in holding that Mrs. Miller's rights prevailed. The overall result was a decision that extends the law of trespass and confuses the developing law of privacy invasion. By interchanging theories of "trespass," "intrusion" and "intentional infliction of emotional distress," the court allowed Mrs. Miller to recover for the harm she suffered as a result of NBC's publication—a *consequence* of the entry which itself did not directly cause Mrs. Miller harm.

The court of appeal's analysis of Mrs. Miller's claim of trespass was straightforward and uncomplicated,⁵⁷ relying simply on common law and common sense. Since it was undisputed that NBC entered the Miller home without consent, its entry fell squarely within the definition of tres-

51. *Id.* at 1492, 232 Cal. Rptr. at 685 (citing *A.A. Dietem v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971)).

52. *Miller*, 187 Cal. App. 3d at 1492-93, 232 Cal. Rptr. at 685.

53. *Id.* at 1493, 232 Cal. Rptr. at 685.

54. *Id.* at 1479, 232 Cal. Rptr. at 676 (citing 4 WITKIN, CALIFORNIA PROCEDURE, § 367 at 420 (3d ed. 1985)).

55. *Miller*, 187 Cal. App. 3d at 1471 n.2, 232 Cal. Rptr. at 670-71 n.2.

56. *Id.* at 1474-1478, 232 Cal. Rptr. at 673-75.

57. *Id.* at 1480-81, 232 Cal. Rptr. at 677.

pass—an unauthorized entry.⁵⁸ Since there was no question that NBC intended to cross the Millers' threshold, by definition, they committed an intentional tort.⁵⁹ The court's reasoning was logical and rested on basic principles well grounded in trespass law.

The court then turned to the issue of damages. Unquestionably, Mrs. Miller should recover for any damage proximately caused by injury or interference with her possessory rights at the time of the trespass.⁶⁰ The court goes further, however, to state that NBC may be liable for the "consequences" that flow from its trespass. Such "consequences" would include emotional distress neither accompanied by a physical injury to person or land.⁶¹ Accordingly, the court of appeal held that NBC could be held liable for Mrs. Miller's anguish when it broadcast her husband's dying moments. The court cites *Acadia, California, Ltd. v. Herbert*,⁶² for this proposition. This results however, in an extension of *Acadia's* holding that undoubtedly the *Acadia* court did not intend.

In *Acadia*, the malicious shutting off of plaintiff's water supply caused his wife's relapse into mental illness requiring extensive medical care and hospitalization. The court reasoned that the "[d]efendant's disruption [was] closely analogous to a trespass . . . in that it interfered with the use and enjoyment of the land by [plaintiff] and his wife, and such conduct warrants liability for mental distress . . . at least where . . . *the tortious acts are wilful*."⁶³ Subsequent cases have interpreted *Acadia* as allowing recovery for emotional distress only where intentional and outrageous conduct is found.⁶⁴

Although it relied on *Acadia*, the *Miller* court's analysis under trespass never identified NBC's entry as extreme or outrageous. The court's finding that the entry was intentional is not sufficient, particularly since the court acknowledged that "[NBC's] more refined motivation or intentions [were] immaterial"⁶⁵ in making that determination. As Prosser and

58. *Id.* at 1480, 232 Cal. Rptr. at 677.

59. *Id.*

60. RESTATEMENT (SECOND) OF TORTS § 162 (1965).

61. *Miller*, 187 Cal. App. 3d at 1481, 232 Cal. Rptr. at 677. Note however, there appears to be a typographical error in the opinion published in 187 Cal. App. 3d. The word "either" should be "neither" as it appears in 232 Cal. Rptr. at 677.

62. *Acadia, California, Ltd. v. Herbert*, 54 Cal. 2d 328, 5 Cal. Rptr. 686 (1960).

63. *Id.* at 338, 232 Cal. Rptr. at 692 (emphasis added).

64. See, e.g. *Amaya v. Home Ice, Fuel and Supply Co.*, 59 Cal. 2d 295, 29 Cal. Rptr. 33 (1963) (disapproved on other grounds in *Dillon v. Legg*, 68 Cal. 2d 728, 69 Cal. Rptr. 72 (1968)) (disallowing recovery for emotional distress where there was no proof of wilful conduct and distinguishing *Acadia*, as an action involving wilful conduct); *Fuentes v. Perez*, 66 Cal. App. 3d 163, 136 Cal. Rptr. 275 (1977).

65. *Miller*, 187 Cal. App. 3d at 1480, 232 Cal. Rptr. at 677.

Keeton have explained, "[the rule for extreme misconduct is that] conduct exceeding all bounds usually tolerated by decent society, of a nature which is *especially calculated to cause . . . mental distress of a very serious kind.*"⁶⁶ Without a definitive finding of outrageous conduct, the court eliminates a crucial factor in the *Acadia* formula for recovery. This omission leads to the proposition that "mere intent" to enter the property of another is sufficient to justify damages for emotional distress.

It is doubtful that *Acadia* supports this broad proposition. In order to conclude that Mrs. Miller could recover under a theory of trespass, the *Miller* court was obliged to find that NBC's entry constituted extreme and outrageous conduct. Furthermore, it is an established principle in the law of trespass that the recoverable damage must be proximately caused by injury or interference with the possessory rights of the owner *at the time of the trespass*.⁶⁷ For example, in *Acadia*, the trespass included the act of turning off the water, an act which caused the mental suffering of the plaintiff. *Miller*, however, is a somewhat different situation. In *Miller*, the trespass included the act of filming, an act which did not cause the mental suffering of Mrs. Miller. In addition, there was no showing of interference with her possessory rights since she was unaware of NBC's presence on the night her husband died.⁶⁸ Lastly, since the tort of trespass is designed to protect interests in possession of property, damages for trespass should be limited to consequences (including emotional distress) flowing from interference with possession and not for separable acts more properly allocated under other categories of liability.⁶⁹

For example, in *Costlow v. Cusimano*,⁷⁰ defendants published a story which included photographs of plaintiffs' deceased children who had suffocated when they trapped themselves in a refrigerator located in the family home. The photographs were taken when defendants trespassed into the plaintiffs' home. The court held that "[t]here is no support for plaintiffs' argument that damages . . . for emotional disturbance are recoverable on the alleged facts as the natural consequence of the trespass. . . . [T]he harm arose as a consequence of acts performed after the trespass."⁷¹ Analogously, Mrs. Miller's anguish arose from the broadcast of her husband's last moments which occurred weeks after the tres-

66. W. PROSSER & R. KEETON, *THE LAW OF TORTS*, § 12, at 60 (5th ed. 1984) (emphasis added).

67. *See supra* note 60. (emphasis added).

68. *Miller*, 187 Cal. App. 3d at 1476, 232 Cal. Rptr. at 674.

69. *See e.g.* *Costlow v. Cusimano*, 34 A.D.2d 196, 198, 311 N.Y.S.2d 92, 97 (1970).

70. 34 A.D.2d 196, 311 N.Y.S.2d 92 (1970).

71. *Id.* at 198, 311 N.Y.S. 2d at 97.

pass. As stated above, the actual filming which occurred on the Miller property did not cause Mrs. Miller any distress. Thus, recovery for any damage would best be reviewed under invasion of privacy.

It is the court's analysis of privacy invasion, however, that is most confusing. Initially, the court recognized four distinct branches of privacy interests.⁷² It then went on to determine that the right to be free from intrusion is involved in the *Miller* case. In finding that Mrs. Miller had suffered an invasion, the court found that "reasonable people could regard the NBC camera crew's intrusion . . . as highly offensive conduct," thus meeting the limitation imposed by the Restatement.⁷³

Although it is obvious that NBC's entry into the Miller home was a technical trespass, it is debatable whether it constitutes an actual intrusion as to Mrs. Miller. To be sure, had NBC filmed her reaction to the tragic events, such as bending over her husband's body, crying, or clutching others for comfort, the camera would indeed have intruded into a very private moment of her own.⁷⁴ But nothing of the sort happened. Mrs. Miller remained in another room and was oblivious to NBC's presence.⁷⁵ Regardless, the court was not unreasonable in holding that NBC's trespass also constituted the tort of intrusion.⁷⁶ Certainly, NBC's entry into Mrs. Miller's home alone, irrespective of who was filmed, could be regarded as "highly offensive conduct" by a jury. This determination does square with the rule that the right of privacy is a purely personal right.⁷⁷ No longer is management and control of property vested only in the husband.⁷⁸ Under present law, a wife possesses independent and coequal authority of commonly occupied areas.⁷⁹ As the *Miller* court pointed out, "[t]he NBC crew . . . not only invaded the Miller's bedroom without Dave Miller's consent, they also invaded the

72. See *supra* note 23 regarding the four branches of privacy invasion.

73. *Miller*, 187 Cal. App. 3d at 1484, 232 Cal. Rptr. at 679.

74. See Respondent's California Supreme Court Brief at 23, *Miller v. National Broadcasting Co.*, 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668 (1986) (hereinafter Respondent's Brief).

75. The author considers this argument not to be without some logic, but emotionally finds it a difficult one to make.

76. See *Fletcher v. Florida Publishing Co.* 319 So. 2d 100 (1975).

77. See *supra* note 33.

78. *Miller*, 187 Cal. App. 3d at 1486, 232 Cal. Rptr. at 681. "In the context of Fourth Amendment search and seizure law as applied in a criminal case, the California Supreme Court has observed that former case law had reflected 'the now defunct community property principle that management and control of real and personal property are vested in the husband (Former Civ. Code, §§ 162a, 172a, repealed by Stats. 1969, ch. 1608, § 3, p. 3313). Under present law a wife possesses independent and coequal authority to consent to a search of commonly occupied areas. (See Civ. Code, § 5105.)' (*People v. Haskett* (1982) 30 Cal. 3d 841, 857, fn. 5 [180 Cal. Rptr. 640, 640 P. 2d 776].)" *Id.*

79. See *supra* note 78.

home . . . of his . . . wife."⁸⁰ Thus, NBC's intrusion would be direct and personal to Mrs. Miller.

While this reasoning is sound, the court's discussion of damages is unnecessarily confusing. By defining NBC's activity as "intrusion," but permitting the recovery of damages caused by Mrs. Miller's reaction to the publication of private facts about her husband, the court seemingly melds two distinct branches of the invasion of privacy tort—intrusion and publication. Seizing upon the circumstances under which the footage was obtained, the court characterized Mrs. Miller's damage, suffered several weeks later, as derivative of the entry into her home rather than of the publication which actually caused her distress.⁸¹ This characterization allowed the court to avoid a potential barrier to Mrs. Miller's recovery.

Since the gravamen of Mrs. Miller's claims was the publication of the film depicting her husband, and not the trespass, the rule forbidding a relational right to privacy,⁸² (the same rule that precluded Mrs. Belloni's recovery) should come into play, potentially immunizing NBC from liability. Approaching the cause of action as an intrusive trespass with liability for all consequences flowing from it, the court of appeal was allowed to avoid the relational rights doctrine of *Flynn* that the trial court felt bound by.⁸³

Hinging Mrs. Miller's recovery on NBC's entry is troublesome for two reasons. First, it appears that the court was, in reality, trying to find a way for Mrs. Miller to recover for the publication because she suffered no harm from the intrusion. Assuming this was the case, there is no reason why Mrs. Belloni should not have been allowed to recover.⁸⁴ Her absence from the scene is a distinction without substance. Like her mother, she suffered no harm at the time of the intrusion but did suffer weeks later when she viewed the publication. If the court wants to sidestep the "no relational rights doctrine," it should do so for both Mrs. Miller and Mrs. Belloni.

Second, in striving to help Mrs. Miller recover, the court seems to merge intrusion and publication under one common analysis. Worse yet, it does so by completely sacrificing the common law standards applicable to a cause of action under the branch of publication⁸⁵ and addressing

80. *Miller*, 187 Cal. App. 3d at 1486, 232 Cal. Rptr. at 681.

81. Respondent's Brief, *supra* note 74, at 8-9.

82. *See supra* note 33.

83. *See Miller*, 187 Cal. App. 3d at 1485-86, 232 Cal. Rptr. at 680-81.

84. *See supra* notes 42, 44 and accompanying text.

85. The court gave no consideration to NBC's state of mind in regards to the *airing* of the film, or the constitutional privilege of newsworthiness applicable in actions based on a publica-

only those applicable to intrusion. Again, relying on the trespass, the court found that any First Amendment issues were subject to *A.A. Dietemann v. Time*.⁸⁶ In *Dietemann*, the court held that “[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass”⁸⁷

Most troublesome, however, is that the resulting inconsistencies and confusion are completely unnecessary. Although the court was allowing recovery based on publication, it was not necessary for the “relational” right of privacy to be at issue or for damages based on publication to ride the coat tails of NBC’s intrusive trespass. At the beginning of this analysis, it was pointed out that the court was obviously sympathetic to Mrs. Miller.⁸⁸ However, in its eagerness to find some basis under which Mrs. Miller could recover, the court rejected the cause of action originally pleaded in her complaint;⁸⁹ the insistence that the publication of her dying husband’s photograph during her time of grief, was the invasion of her privacy—an intrusion on her solitude—not merely a consequence of the intrusion that occurred when NBC entered her home.

Whether Mrs. Miller, or Mrs. Belloni for that matter, could recover would then depend on two questions.⁹⁰ First, did the media lawfully acquire the picture it published? Second, was the account of the death, accompanied by the picture, the legitimate reporting of news?⁹¹ Natu-

tion. This, naturally, is the core of respondent’s defense. See Respondent’s Brief, *supra* note 74, at 11-20.

86. *A.A. Dietemann v. Time Inc.*, 449 F.2d 245 (9th Cir. 1971).

87. *Miller*, 187 Cal. App. 3d at 1492, 232 Cal. Rptr. at 685 (citing *A.A. Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (1971) (emphasis original)).

88. See *supra* note 56.

89. See *supra* note 55.

90. This approach was proposed in the appellant’s brief. See Appellant’s California Supreme Court Brief at 29-30, *Miller v. National Broadcasting Co.*, 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668 (1986) (hereinafter Appellant’s Brief).

91. The appellants illustrate this approach as follows:

[A]ttention is first directed to *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (1939). The plaintiff’s wife committed suicide by leaping from one of the tallest buildings in Los Angeles. The Examiner published her picture, which it had legitimately acquired Although publication of that picture and the account of her death undeniably exacerbated the grief which her bereaved husband was experiencing, no invasion of privacy was found because the newspaper had lawful possession of her picture and the story was legitimate news.

By way of contrast, attention is now directed to *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930). A child was born with its heart outside its body—unquestionably, “news.” Rushed to the hospital and operated on, it nevertheless died. The hospital authorities summoned the press, which photographed and then published pictures of the child’s body. Held, a cause of action by the parents was stated (emphasis original).

Where lies the distinction? In the legitimacy of the acquisition of the offending

rally, under this analysis, the court will ultimately turn to the trespass to determine whether the photograph was lawfully required. But an important distinction is made. Under this analysis, there is no recovery for publication under the separate branch of privacy invasion—intrusion. This approach makes it clear that publicity is not the issue. What is involved, rather, are two separate intrusions: when NBC entered the Miller home to film and when it telecast Mr. Miller's dying moments, without consent or warning, into the home of his loved ones.

Moreover, this approach lends itself well to the court of appeal's analysis of intentional infliction of emotional distress. In evaluating NBC's conduct, the court found its trespass to be in reckless disregard of the sensitivities of others,⁹² and left it up to a jury to decide whether its conduct rose to the level of outrageousness. But the court further stressed that it was troubled by NBC's lack of sensitivity to the protests of Mrs. Miller and by the broadcast of Mr. Miller's last moments.⁹³ Akin to this language is the argument that the unsanctioned broadcasts, in and of themselves, constituted an intrusion.

In sum, although the court of appeal's decision unnecessarily extends the law of trespass and confuses the developing law of privacy invasion, it creates no doubt or confusion regarding the message that it sends out to newsgatherers: The First Amendment cannot be used as a shield against liability for tortious misconduct. As the court emphasized, others beside the media have rights. "To hold otherwise might have extraordinarily chilling implications for all of us; instead of a zone of privacy protecting our secluded moments, a climate of fear might surround us instead."⁹⁴

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photograph. The hospital authorities had no right to let the press photograph the deceased child. . . . Since the picture had not been lawfully acquired, its publication was actionable.

Appellant's Brief at 29-30.

92. *See supra* note 38.

93. *See supra* note 39.

94. *Miller*, 187 Cal. App. 3d at 1493, 232 Cal. Rptr. at 685.