TORT OF APPROPRIATION OF PERSONALITY

The tort of appropriation of personality was first expressed by the Ontario Court of Appeal in *Krouse v. Chrysler Canada Ltd.*, (1973), 1 O.R. (2d) 225 (Ont. C.A.). The tort of appropriation of personality law allows a person to control the commercial use of his or her name, likeness, voice, reputation, image, or other unequivocal aspects of his or her identity. According to case law, the Plaintiff must prove at least two elements. First, the exploitation of the plaintiff’s identity was for commercial purposes and secondly, the exploitation clearly and primarily captures the plaintiff.

With respect to determining whether the exploitation of the Plaintiff’s identity was for commercial purposes, the judge in *Gould Estate v. Stoddart Publishing Co*, (1996), 30 O.R. (3d) 520 (Ont. Gen. Div.) adopted the U.S. courts “Sales v. Subject” distinction. Specifically, if the Defendant has used the Plaintiff’s likeness or name ‘predominantly in connection with the sale of consumer merchandise or solely for the purpose of trade’, then the tort would be established.

An example of this would be a product using the name of famous celebrities to increase the sales of the product would likely constitute an infringement on the celebrities’ personality rights. If however, the Plaintiff was the subject of the defendants work or establishment, the defendant’s actions would likely not constitute an infringement of the Plaintiffs personality rights because the defendants work would be considered work in the public’s interest. An example of this is a biography or biopic, where the purpose of the work is not to augment the sale of a product by associating the product with the plaintiff, but to showcase the plaintiff’s life.

The first element of the tort test applied in *Gould Estate v. Stoddart Publishing Co*. In *Gould Estate v. Stoddart Publishing Co*, a famous pianist was interviewed by Jock Carroll for an article in Weekend Magazine. Carroll published a book approximately 40 years later entitled “Glenn Gould: Some Portraits of the Artist as a Young Man”, which included some of the photographs and conversations from the initial interview with Gould. Gould Estate did not authorize the publication and did not receive royalties. Gould Estate sued Stoddart Publishing Co. on the ground of tort of appropriation of personality. The trial judge applied the ‘sales v. subject’ distinction and held that the book was about Gould and provided insight into the famous pianist and was in the public interest. As a result, the defendant was not found liable as the first element of the tort was not established.
The second element of the tort test applied in *Joseph v. Daniels* and *Krouse v. Chrysler Canada Ltd.* In *Joseph v. Daniels* the Plaintiff sued the defendant for appropriation of personality arising from unauthorized use of a plaintiff’s photograph, which depicted the Plaintiff’s neck to his waist holding a cat. It was held by the court in that instance that the tort of appropriation did not apply as the audience of the photograph wouldn’t have been able to identify the plaintiff since the photograph only depicted the plaintiff’s torso.

In *Krouse v. Chrysler Canada Ltd.*, the Plaintiff, a famous football player was depicted in his uniform in a promotional item distributed by Chrysler Canada. Krouse sued Chrysler Canada for appropriation of personality. The Ontario Court of Appeal held the defendant not to be liable because the image was not the primary object of the photograph. The defendant, while he sought to gain advantage by associating his product with football, he did was not trying to gain advantage by associating his product with a particular team or participant.

The tort of appropriation of personality was made out in the case of *Athans v. Canadian Adventure Camps Ltd. et. al*, (1977), 17 O.R. (2d) 425 (Ont. H.C.). The Defendant was a student camp. The Plaintiff was a famous water skier. The Defendant used a picture of the Plaintiff in order to promote its business. The Plaintiff initiated an appropriation of personality lawsuit. The courts held that the tort was not established as the “ordinary parent” who sends their child to the camp would not have recognized the Plaintiff in the picture. However, the Plaintiff was nevertheless awarded damages due to the “equality” exception, which holds that clear description is not required in order for the tort to be established. Where the Plaintiff would suffer commercial loss as a result of their image being used, because the Plaintiff already marketed and charged for the use of their image, the exception applies. In *Athans* because the Defendant used the exact same picture that the Plaintiff had used to promote himself, the court found the Defendant liable insofar as he could have chosen another picture of the Plaintiff, and the Plaintiff lost the opportunity to control the exclusive use of his promotional photograph and charge for the commercial use of that photograph.

The case was significant in that it determined that although the plaintiff was not recognizable, “the commercial use of his representational image by the defendant without his consent constituted an invasion and impairment of his exclusive right to market his personality and this constitutes an aspect of the tort of appropriation of personality”.