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Talk Show Torts Turn Deaf Ear to Plaintiffs

JOSEPH A. TOMAIN

In August 2004, a New York appellate court dismissed a lawsuit filed by Sheila C., a minor, who alleged that talk show host Maury Povich and the producers of The Maury Povich Show had negligently put her in contact with a limousine driver who later raped her. This dismissal is the latest in a line of defense victories in cases involving “talk show torts”—claims based on appearances on popular television talk shows—illustrating that the talk show genre has provided less than fertile ground for plaintiffs.

This article reviews Sheila C. v. Povich and its predecessor talk show cases. As the cases demonstrate, the courts have been reluctant to impose duties on talk show producers that extend beyond the conduct of the talk show taping itself, and also have rejected claims of invasion of privacy and defamation on the part of talk show guests and those connected to them. At least for the time being, it seems unlikely that the talk show genre will be the next big hit for plaintiffs.

Sorry, Guests, Our Duty Is to the Viewers
Sheila C. and the well-known case against the producers of The Jenny Jones Show reflect the judiciary’s reluctance to impose a duty on talk show producers to protect their guests from the tortuous acts of third parties that occur after an episode has been taped and the guests have left the studio, even though the show may have played a role in stirring the tortfeasor to action.

In Sheila C., a fourteen-year-old female guest of The Maury Povich Show, Sheila, sued Povich, the show, its producers, and its distributors, alleging that they negligently allowed a man who identified himself as “Maury’s limo driver” to rape her hours after taping the episode, even though she had left the studio and had been released into the custody of her mother and grandmother. When The Maury Povich Show solicited guests to appear on an episode entitled “Out of Control Teens,” Sheila’s mother responded. Sheila’s mother allegedly informed the show’s staff of Sheila’s age and told them that she was undergoing counseling, she was on medication for emotional illness, she recently attempted suicide, she recently lost an immediate family member, and she reported having sexual intercourse with one twenty-nine-year-old man and five males who were under age sixteen. In exchange for Sheila’s appearance on Maury Povich, the defendants offered to provide follow-up psychological counseling, send Sheila to a corrective “teen boot camp,” make transportation and hotel arrangements, and pay related expenses.

Before taping began, a defendant and another staff member allegedly told Sheila to act sexually provocative and to wear only her thigh-length top without slacks so that she would appear “sexier,” which would be “better for the show.” As Sheila watched other guests being taped, a man introduced himself to her as “Maury’s limo driver.” He asked for her contact information in New York and offered to show her around the city later that night. Sheila gave him this information, taped the episode, and returned to her hotel with her mother and grandmother. When “Maury’s limo driver” showed up at Sheila’s hotel, her mother and grandmother turned him away, but he persuaded Sheila to sneak out. Allegedly, “Maury’s limo driver” drove her to a dark area, climbed in the back of the limousine, and raped her.

Sheila sued for negligent retention and negligent supervision, both based on the limousine driver’s conduct. The defendants contended that the negligence claims should be dismissed because they did not owe a duty of care to Sheila. After noting that negligence is a “matter of time, place, and circumstance,” the trial court found that the following allegations established the existence of a duty of care: (1) the show solicited a minor for commercial purposes and brought her into the state; (2) it knew that she had emotional difficulties; (3) it represented itself as having expertise in remedying problems of “out of control” teens; (4) “Maury’s limo driver” was able to approach Sheila on the set and gain her contact information; (5) after taping, the show permitted the minor to leave under the supervision of two adults who admittedly could not control her; and (6) no other precautions were taken to protect the minor.

On the negligent hiring and retention claim, the trial court held that there were relevant facts exclusively within the defendants’ control regarding “Maury’s limo driver” that made dismissal at the pleading stage improper. As to the negligent supervision claim, the defendants unsuccessfully argued that the show should not be responsible for the alleged rape because they were not directly supervising “Maury’s limo driver” at the time of the incident. In response, the trial court stated: “A caretaker is not automatically exempt from responsibility merely because of a suspension of physical supervision of an injured minor where, as here, the conditions created by the caretaker are still in effect.”

The appellate court reversed the trial court on both claims. First, it dismissed the negligent hiring and retention claim because Sheila failed to allege that defendants knew or should have known of “Maury’s limo driver’s” propensity for the type of conduct that allegedly occurred.

Second, the court dismissed the negligent supervision claim, finding that the defendants owed no duty to Sheila at the time of the alleged rape. Generally, the court noted, defining the orbit of duty is not the result of an algebraic formula. “Rather, [duty] coalesces from vectored forces including logic, science, weighty competing socioeconomic policies and...”

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Courts have been reluctant to impose duties on talk show producers that extend beyond the conduct of the talk show taping itself. Courts have been reluctant to impose duties on talk show producers that extend beyond the conduct of the talk show taping itself.

In May 1999, a Michigan jury found the defendants liable to Scott’s personal representatives for $29 million. The jury verdict was based on a finding that the producers “ambushed”17 Schmitz with the surprise topic and revelation of a same-sex crush. The award raised concerns that a wave of lawsuits seeking to hold talk shows, their hosts, producers, and owners civilly liable might be next season’s big trend. Multiple commentators addressed this decision, noting that the law of talk show torts “remains unsettled”12 and that viewers should “stay tuned”14 to find out just how far this emerging trend of talk show torts would go toward expanding media liability.

In 2002, however, the Michigan appellate court reversed and granted summary judgment to the defendants, holding that the talk show owed no duty to Amedure to protect him from Schmitz. Specifically, the court found that no special relationship existed between the television show and its guest that created an obligation to protect Amedure from the criminal acts of a third party. Invoking a basic negligence standard, the court ruled that the only duty owed to Amedure was that of a business host to a business guest, an obligation that ended three days prior to the murder, hundreds of miles away in another state.15

Graves includes a strong dissent, which argues that the plaintiffs adequately demonstrated active misconduct on the part of the defendants.16 According to the dissent, the defendants used lies, deceit, and outrageous behavior to ensure that Schmitz would appear on the show, while hiding the true nature of the episode—same-sex crushes. The dissent concluded that, for the defendants to be held liable for the consequences of Schmitz’s actions, Schmitz’s murder of Amedure did not itself need to be foreseeable. Rather, the dissent concluded more generally that as a matter of public policy, if defendants, for their own benefit, wish to produce “ambush” shows that can conceivably create a volatile situation, they should bear the risk if a guest is psychologically unstable or criminally dangerous by being charged with that knowledge in the context of any foreseeability analysis.17

The Graves dissent notwithstanding, both Graves and Sheila C. were ultimately resolved, as a matter of law, in the defendants’ favor. Both courts found that a talk show does not owe its guests a duty of care for the intentional acts of a third party that occur away from the studio, whether that third party be the host’s limo driver or another guest. A brief review of other talk show cases reveals a similar reluctance to impose tort liability.

That’s None of Your Business!
In addition to negligence claims, talk show plaintiffs have attempted to rely on several other tort claims, including the four privacy torts. Interestingly, the invasion of privacy cases show that willing talk show guests are not the only plaintiffs who face difficulty in establishing these claims, but that family, friends, and “acquaintances” of guests, regardless of their consent, are also subject to having their dirty laundry aired before millions of viewers.

Anonsen v. Donahue8 applies the First Amendment principle that precludes a claim for public disclosure of private facts when a logical nexus exists between a person’s identity and a matter of public interest. While Miriam Booher and her ex-husband were still married, he raped and impregnated her eleven-year-old daughter, his stepdaughter. She gave birth to a son, who was raised as her half-brother, the “son” of Miriam. Many years later, the truth was told to the “son.” Sometime after that, Miriam appeared on Donahue and revealed this story of rape, incest, and her own victimization resulting from these life-changing events. Miriam’s daughter and grandson filed suit against her, Phil Donahue, the show’s producer, the show’s owner, and a local television station for invasion of privacy—public disclosure of private facts. The appellate court affirmed the trial court’s summary judgment for the defendants, holding that Miriam’s story was protected by the First Amendment.

Although Miriam did not reveal the identity of her daughter or grandson, she did reveal her own. The plaintiffs alleged that Miriam’s revelations neces-
sarily led to the discovery of their identities, thereby invading their privacy. While the court acknowledged that such revelation was a likely outcome, Miriam was free to disclose her own identity. The court reasoned that there was a logical nexus between Miriam’s identity and a matter of legitimate public interest, i.e., the rape, incest, cover-up, and eventual discovery. The court emphasized that “to hold otherwise would be to imply that one’s autobiography must be written anonymously.” Thus, Anonsen signals that if there is a logical nexus between a matter of legitimate public interest and one’s identity as revealed on a talk show, then a claim for public disclosure of private facts cannot trump the First Amendment right to free speech, even outside of a hard news context.

Judge Posner’s “Final Thoughts”

Sixteen-year-old Tammy, her sister, and their stepmother and stepsister volunteered to appear on The Charlie Perez Show when they learned that the show was planning to tape an episode about tensions between stepparents and stepchildren. Tammy joined her sister in making some sharp-tongued attacks directed at her stepmother, accusing her of beginning an affair with their father before he divorced their mother. The stepmother fired back by reading from a police report or the tape before the broadcast.”

The trial court dismissed Tammy’s claims, and the Seventh Circuit affirmed. The court noted that reading from a police record may not even qualify as a private fact, but stated that it need not address this issue. Instead, the court held that “a person whose character is assailed can respond with facts bearing on the character of her assailant that might otherwise be off limits.”

The Seventh Circuit also recognized that a talk show should not be liable for the acts of a third party: “It is one thing to impose liability on the press for invading someone’s privacy, and another to prevent or take steps to rectify an invasion of privacy by another.” Moreover, the court stated that “the stepmother and derivatively the broadcaster were entitled to use private facts about the plaintiff to rebut her very public attack on the stepmother’s own private character.”

While finding for the defense, the Seventh Circuit in Howell stopped short of expressing approval for the talk show from which the lawsuit arose. Rather Judge Posner offered his own “final thoughts” on the case: “[W]e do not mean to express approval of the practice of broadcasters of inviting teenagers to place themselves in embarrassing situations on television.”

Topless Dancers in a False Light?

In Froming v. Jones, topless dancers unsuccessfully alleged that an episode of The Jenny Jones Show entitled “His Bachelor Party Ruined Our Marriage” gave rise to invasion of privacy. During this episode, Mr. and Mrs. Busch appeared and told their story of how their marriage suffered due to the hiring of topless dancers for his bachelor party. As Mrs. Busch told the audience of her anger upon discovering photos of two topless dancers giving Mr. Busch a “lap dance,” these photos were intermittently shown to the studio and television audiences. Although the dancers’ names were not mentioned, their faces were identifiable in several of the pictures. The dancers, who were described as “home wreckers,” received no advance notice that their images would appear on the show, and sued for misappropriation of likeness, public disclosure of private facts, and false light. The trial court granted summary judgment to the defendants on all three claims.

The dancers appealed the dismissal of their false light claim. The Sixth Circuit affirmed summary judgment on this claim, reasoning that “[a]lthough the title of the show was His Bachelor Party Ruined Our Marriage, the Busches—who are still married—appeared good-humored and at ease with each other throughout the broadcast.” Moreover, Mrs. Busch stated that she intended to remain married. Thus, the court held that no reasonable juror could conclude that the dancers’ performance actually ruined the Busches’ marriage or that they were “home wreckers.”

Bad Boys’ Names Have No Intrinsic Value

Although COPS is not a talk show, Reeves v. Fox Television Network follows a similar line of analysis to talk show cases, and illustrates the difficulty that a plaintiff is likely to encounter in establishing a claim for invasion of privacy if he or she has willingly agreed to appear on television.

On August 30, 1993, Willie Reeves was in an altercation with another man. When police and a COPS camera crew arrived at his home to investigate, Reeves answered the door and allowed them inside. After the incident appeared on COPS, Reeves sued Fox Television, the producer of COPS, as well as the police and the City of Cleveland, alleging that these defendants had committed all four privacy torts. The court granted summary judgment on all of Reeves’s claims.

First, the court found that the “Cleveland Police Department’s response to a call regarding a violent crime, their investigation and arrest of a suspect are all matters of legitimate public concern.” Further, the court held that Reeves’s address, his physical description, and images of him being escorted in handcuffs were not private facts.

Second, the court dismissed Reeves’s misappropriation claim on the basis...
that it requires more than the mere publication of one's name or likeness. Instead, a plaintiff must allege that his or her "name or likeness has some intrinsic value, which was taken by defendant for its own benefit, commercial or otherwise." On this element, the court found that Reeves's name and likeness had no intrinsic value, notwithstanding the profit motive of the COPS producers: "[T]he fact that the defendant is engaged in the business of publication... out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness."

Third, Reeves lost on his claim for false light because Ohio does not recognize this invasion of privacy tort. Finally, Reeves's claims for intrusion upon seclusion and trespass failed. His own testimony, as well as videotaped footage of the arrest, show that he consented to the police and the camera crew entering his home.

Talk show guests have not had any greater success with defamation claims than with other torts.

Apparitions Have No Claim to Privacy

Mineer v. Williams is a story about a mother, a psychic, and a talk show. In October 1997, a teenage girl, Erica, disappeared. In September 1998, while Erica was still missing, a psychic appeared on The Montel Williams Show to help guests learn information about loved ones who were missing or dead. Erica's mother appeared on the show and asked the psychic whether anyone had information about her missing daughter. The psychic told her that Erica was murdered and that a man named Chris had information. Although the show edited the sound to eliminate the name "Chris," viewers could read the psychic's lips and discern the name. One day after the show aired, Chris Mineer, who knew Erica, shot and killed her girlfriend and then committed suicide. Four months later, the psychic appeared on Montel Williams again. Describing the psychic's "powers," Williams told the audience that the psychic had given Erica's mother Chris Mineer's name during the break of the September 1998 episode. Williams explained that Chris killed his girlfriend and himself in a panic, believing that he would soon be arrested for a crime that he committed.

Chris's mother sued Williams, the producers of The Montel Williams Show, and the psychic for false light invasion of privacy. The court granted defendants' motion to dismiss, applying the Restatement principle that, "[except for the appropriation of one's likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded."

Guest Pass for Defamation?

Talk show guests have not had any greater success with defamation claims than with other torts. As with other tort claims, defamation claims generally fail because talk show guests create or voluntarily participate in situations that they eventually regret.

When Everybody Knows Your Name

Reeves v. Fox Television, discussed above, rejected privacy claims based on an appearance on COPS, largely because the plaintiff permitted a camera crew to enter his home. Similarly, defamation claims arising from the talk show context have been dismissed as a result of the plaintiffs' voluntary conduct in appearing on television, which in some instances has been held to give rise to public figure status.

In Anderson v. Rocky Mountain News, the plaintiff sued a newspaper based on the defamatory statement that he was jailed for violating a child custody agreement. The appellate court affirmed summary judgment for the newspaper because the plaintiff was a public figure—based on his prior appearance on a television talk show—who could not establish actual malice.

While in the middle of a custody dispute, the plaintiff crossed state lines with his daughter. In response to a request for guests, the plaintiff contacted the Phil Donahue Show, offering to appear on an episode concerning fathers' rights. He appeared on two episodes. Although he appeared in disguise, his wife recognized him and the plaintiff was apprehended. Shortly thereafter, the newspaper published an article on this custody battle, including a prior incident in which the Houston police asked the plaintiff to remain in a holding room. The plaintiff sued over the paper's characterization of the Houston incident as an arrest.

The court granted the defendants summary judgment, finding that the father was a public figure and that he could not establish actual malice. Citing Gertz v. Robert Welch, Inc., the court held that, when the father invited media attention by appearing on Donahue to discuss child snatching and fathers' rights, he thrust himself into a public controversy and became a public figure for these issues. This status and his inability to establish actual malice resulted in summary judgment for the defendants. Similarly, in Contemporary Mission, Inc. v. New York Times Co., the U.S. Court of Appeals for the Second Circuit affirmed summary judgment for the New York Times Co., finding that the plaintiffs were limited-purpose public figures who could not establish actual malice. The New York Times reported on religious and business controversies concerning Contemporary Mission, Inc., and several of its priests. Specifically, the Times reported allegations that the priests forged proof of their ordinations and that the Mission was a front to attain tax-exempt status for its successful mail-order business. The priests and the Mission sued the newspaper for defamation.

During the underlying religious controversy, the Mission had formed a folk-rock group, The Mission Singers. In addition to performing hundreds of concerts, The Mission Singers "appeared on numerous television and talk radio shows, including television shows such as the Ed Sullivan Show, the Mike Douglas Show, and the Joey Bishop Show." One of the priests composed a rock-opera, Virgin, which sold 20,000 copies.
These public appearances, particularly the television shows, formed the basis of the court's finding that the plaintiffs were public figures. After citing Gertz, the court also cited the four-part test announced in *Lerman v. Flynt Distributing Co., Inc.*, for determining limited-purpose public figure status.4

A defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.5

Applying the *Lerman* test, the court found that the priests were limited-purpose public figures because they thrust themselves to the forefront of a public controversy, the religious controversy.6 Seeking to avoid public figure status, the priests argued that because the religious controversy occurred almost twenty years earlier, they were no longer public figures. The court rejected this argument noting that "the passage of time will not necessarily change an individual's status as a public figure."7

The plaintiffs then argued that they were not limited-purpose public figures for purpose of the business controversy because they had not voluntarily entered into this controversy. The court agreed that the plaintiffs did not thrust themselves to the forefront of the business controversy because "they had not utilized the media to further their points or to sway public opinion on the matter."8 Nevertheless, the court held that the plaintiffs qualified as limited-purpose public figures for the business controversy because it was "necessarily intertwined with the religious controversy."9 Thus, when two public controversies intertwine, a party can become a limited-purpose public figure for both simply by thrusting itself, even on a television show, to the forefront of one of them.

**Misty Tales Episode I**
Misty Nicole Weber, a minor, and her mother sued Sally Jesse Raphael and the producers of her show for defamation based on the allegation that they induced Misty to portray a prostitute on the episode entitled "I Want My Teen Daughter Off the Street." Before the show, Misty claimed she was a prostitute, but in her lawsuit she alleged that she was not a prostitute and had only been induced by the show to portray one. To determine which statement was truthful, the defendants propounded interrogatories requesting the names of every person with whom Misty had a sexual relationship, and every person who provided Misty with illegal drugs.10

The plaintiffs sought to limit the scope of these interrogatories to whether she was a prostitute and, if so, the names of her customers. The court found that the defendants were entitled to the interrogatory responses requested, noting that the defendants were "not required to accept plaintiff Weber's self-reporting on this issue."11 The court further explained that not only was the information relevant to whether Misty was a prostitute but it was also relevant to her claim for damages for injury to her reputation. But this decision is only a small part the Misty Nicole Weber legal saga.

**Misty Tales Episode II**
In addition to asserting a defamation claim, Misty claimed that the show misappropriated her image for commercial purposes by portraying her as a prostitute, even though she told the show before taping that she was one and that her appearance was voluntary. The defendants moved to dismiss Misty's claims for misappropriation, arguing that the newsworthiness privilege applied.12

The court rejected Misty's argument that *The Sally Jesse Raphael Show* is "unnworthy" of the newsworthiness privilege "because of the nature of the forum, a television talk show."13 In a passage unlikely to amuse print journalists, the court observed that "television talk shows are the equals of *The New York Times* in the eyes of the law."14 Based on that finding, plus the plaintiffs' concession that the show's topic—teen runaways and teenage prostitution—was a matter of public concern, the court found that the newsworthiness privilege can apply to talk shows.

Nonetheless, the court denied the motion to dismiss based on a factual dispute: "If the defendants knew that Weber was not a prostitute, then the Show was riddled with substantial falsification and fictionalization."15 Thus, this invasion of privacy claim survived dismissal because the court found that substantial fictionalization of Misty could trump the newsworthiness privilege.

**Misty Tales Episode III**
Although the misappropriation claims survived the motion to dismiss, they were defeated on summary judgment.16 As noted, the court previously sustained the misappropriation claims because the newsworthiness privilege would not apply if the show engaged in substantial fictionalization concerning whether Misty was a teenage prostitute. But, an unrelated case intervening between these two Misty opinions held that "there is no 'substantial fictionalization' limitation on the newsworthiness exception."17 In the face of this holding, the court granted summary judgment on the misappropriation claims.

Misty's defamation and negligence claims also failed on summary judgment. The defamation claim failed for three independent reasons. First, Misty's voluntary appearance on the show claiming to be a prostitute barred her defamation claim. As the court observed, "there is no publication, and therefore no liability, 'if the defamatory statement is exposed to a third party by the person claiming to be defamed.'"18

Second, under New York law, a party cannot be liable for defamation when a story is "'arguably within the sphere of legitimate public concern'... unless the publisher acted in a grossly irresponsible manner."19 The court held that the talk show defendants did not act in a grossly irresponsible manner because they reasonably relied on the...
expertise of a person hired to identify potential guests. Third, this person, to whom Misty allegedly said before the show that she was not a prostitute, was an independent contractor with expertise in finding potential guests for the show, was not an employee of the show, and his knowledge could not be imputed to the show’s producers.

As a result of the elimination of the defamation claim, Misty’s negligence claim necessarily failed. Because the negligence claim was merely a derivative of the defamation claim, it could not survive standing alone. The court noted that to hold otherwise would be a “transparent and impermissible attempt to evade the exacting requirements that New York has imposed on a claim for defamation.”

When Smoke Gets in Your Eyes

Even when a court allows a talk show tort case to survive dismissal, it can express its displeasure in doing so. Ahron Leichtman, a guest on a talk radio show, sued the host, the host’s employer, and another guest (a talk show host from the same station) for battery, invasion of privacy, and violation of a city health regulation. Specifically, Leichtman alleged that he was a nationally known antismoking advocate who appeared on Bill Cunningham’s radio talk show on the date of the Great American Smokeout. During Leichtman’s appearance, Cunningham’s other guest, Andy Furman, repeatedly blew cigar smoke in his face, allegedly “for the purpose of causing physical discomfort, humiliation, and distress.”

The appellate court reversed the trial court’s dismissal of the battery claim because, under Ohio law, smoke is a “particulate matter” capable of making contact, thus satisfying the physical contact element of the battery tort.

The court did, however, affirm the dismissal of the invasion of privacy and city smoking regulation claims. The court found that the invasion of privacy claim could not withstand dismissal because Leichtman “willingly entered the WLW studio to make a public radio appearance with Cunningham, who is known for his blowtorch rhetoric.” Thus, there could be no claim for intrusion upon seclusion. The smoking regulation claim was dismissed because the regulation did not create a private right of action.

Although the court permitted the battery claim to survive, it spent two paragraphs expressing its disdain that such a case would clog a court’s docket. The court noted that this “case emphasizes the need for some form of alternative dispute resolution operating totally outside the court system as a means to provide an attentive ear to the parties and a resolution of disputes in a nominal case.”

And Now . . . A Word from Our Sponsor

Barring the Graves dissent’s viewpoint being adopted by a majority, the courts that have considered talk show torts offer scant reason for optimism among would-be plaintiffs. Graves and Sheila C. both hold that courts view the relationship between a talk show and its guests as one between a business invitor and invitees. Once this temporary relationship ends, so does the duty of care. In Graves, that relationship was clearly over when three days had passed since the taping and the guests were hundreds of miles away in another state before the incident giving rise to the suit occurred. In Sheila C., that duty ended at the time the guest left the physical custody of the talk show and was released into the custody of her mother and grandmother, even though the incident occurred the same night of taping and involved the host’s limo driver.

Courts considering claims of defamation and invasion of privacy have shown a similar reluctance to impose liability on talk show producers. On those claims, the courts have emphasized that a plaintiff’s voluntary appearance and disclosure of personal information, or the public significance of a talk show’s topic, likely will defeat claims based on reputational or privacy interests.

On the whole, talk show cases and their outcomes strongly suggest that the safest place for talk show fans is at home watching television, rather than on the stage of this still-evolving form of broadcast entertainment.

Endnotes

4. Sheila C., 768 N.Y.S.2d at 575.
5. Id. at 576.
6. Id. at 577.
7. Sheila C., 11 A.D.3d at 130.
8. Id. at 126.
9. Id.
15. Graves, 656 N.W.2d at 202-03.
16. Id. at 207.
17. Id. at 211.
19. Id. at 706.
20. 106 F.3d 215, 219 (7th Cir. 1997).
21. Id. at 220.
22. Id.
23. Id. at 221.
24. Id. at 222.
25. Id.
27. Id. at *5.
28. Id.
30. Id. at 709.
31. Id.
32. Id. at 710 (citations omitted).
34. Id. (citations omitted).
(Continued on page 25)
argument could effectively narrow the class of conduct falling within the ambit of the First Amendment.

Finally, the government is pressing a limiting view of the compelled speech doctrine. Building on the Court’s recent decision in *Johanns v. Livestock Marketing Association* (discussed above), the federal defendants contend that the doctrine is inapplicable to the Solomon Amendment, because the expression in question is “government speech” and, therefore, entirely beyond the purview of the First Amendment. This case thus presents the Court with its first opportunity to elaborate on newly clarified “government speech” theory.

Whether the Court will accept the government’s invitation to reshape free speech doctrine in the context of the FAIR case, of course, remains unclear. But given the complex, intersecting First Amendment issues at play in FAIR, the free speech bar undoubtedly will follow the case with great interest.

**Tory v. Cochran**

On May 31, 2005, the United States Supreme Court in *Tory v. Cochran* vacated a broad injunction obtained by famed lawyer Johnnie Cochran preventing a former client from picketing and publicly speaking about Cochran, holding that the injunction lacked justification after Cochran’s recent death and was an unconstitutional restraint on the client’s First Amendment rights. The Court did so, however, without passing on the more significant First Amendment questions presented by the case.

The case grew out of a successful defamation action brought in California by Cochran against Ulysses Tory. The state trial court found that Tory had engaged in an extended campaign of unlawful defamatory activity, and further that he had used such defamatory speech in an attempt to coerce Cochran into paying him a monetary “tribute” to desist from his activities. The court issued an injunction preventing Tory and his associates from picketing Cochran’s offices and from making any oral statements about Cochran in any public forum. The California Court of Appeal affirmed, and the Supreme Court granted certiorari to determine “[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment.”

While the case was pending, and after oral argument, Cochran died. Counsel for Cochran and his widow, who was substituted as respondent, moved the Court to dismiss the case as moot. In a seven-to-two opinion, the Court vacated the judgment of the California Court of Appeal. Justice Breyer, writing for the majority, first held that the case did not become moot upon Cochran’s death. Noting that no California law automatically invalidated the injunction, and that Tory could not know whether the injunction was void until a court ruled on it, the Court observed that the injunction continued to restrain Tory’s speech and therefore presented an ongoing controversy.

But the Court went on to note that, although it did not moot the case, Cochran’s death did make unnecessary any consideration of “petitioners’ basic claims.” “Rather,” the Court explained, “we need only point out that the injunction, as written, has lost its underlying rationale,” which was to prevent Tory from coercing Cochran to pay him a tribute. As a result, the injunction as written became “an overly broad prior restraint upon speech, lacking plausible justification.” Justice Thomas, joined by Justice Scalia, dissented, arguing that the writ of certiorari should have been dismissed as improvidently granted, and criticizing the majority for “strain[ing] to reach the merits of the injunction after Cochran’s death.”

**Endnotes**

5. Id. at 245.

**Talk Show Torts**

(Continued from page 10)

35. Id. at 713.
37. Id. at 704 (quoting RESTATEMENT (SECOND) OF TORTS (1976) § 652d); see also KY. REV. STAT. §§ 391.170, 411.140 (2004).
40. 842 F.2d 612 (2d Cir. 1988).
41. Id.
42. Id.
43. 745 F.2d 123, 136–37 (2d Cir. 1984).
44. *Contemporary Mission*, 842 F.2d at 617.
45. Id. (citing *Lerman*, 745 F.2d at 136–37).
46. Id. at 618.
47. Id. at 619 (citing *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977)).
48. Id. at 620.
49. Id.
51. Id. at *4.
53. Id. at *9.
54. Id.
55. Id. at *1l.
57. Id. at *15 (citing *Messinger v. Gruner & Jahr Printing & Publ’g*, 727 N.E.2d 549 (N.Y. 2000)).
58. Id. at *20 (quoting *Church of Scientology of California, Inc. v. Green*, 354 F. Supp. 800, 804 (S.D.N.Y. 1973)).
59. Id. at *21 (quoting *Chapadeau v. Utica Observer-Dispatch*, 341 N.E.2d 569, 571 (N.Y. 1975)).
60. Id. at *35 (citation omitted).
62. Id. at 698 (internal quotation omitted).
63. Id. at 699.
64. Id.
65. Id. at 700.