Free Speech and the Impact of 'Snyder v. Phelps' on New York

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The recent U.S. Supreme Court decision of *Snyder v. Phelps* will require New York to alter its standards for upholding the sufficiency of lawsuits based upon the tort of intentional infliction of mental or emotional distress. For reasons discussed below, I believe that under existing New York law, the plaintiff in *Snyder* might very well have been successful in a New York court. As a result of *Snyder*, however, that no longer is the case. The purpose of this article is to discuss the New York rule and to explain why *Snyder* requires changes to be made.

In *Snyder*, the Westboro Baptist Church claims to have staged demonstrations at nearly 600 funerals for more than 20 years. Their picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The funeral that was evoked in the *Snyder* case was that of Marine Lance Corporal Matthew Snyder, who was killed in Iraq in the line of duty. Lance Corporal Snyder's father, Arthur Snyder, selected the Catholic church in the Snyders' hometown of Westminster, Md., as the site for his son's funeral and local newspapers provided notice of the time and location of the service.

On the day of the memorial service, the Westboro congregation members picketed on public land adjacent to public streets near the Maryland State House, the U.S. Naval Academy, and Matthew Snyder's funeral. The Westboro picketers carried signs that were largely the same at all three locations. They stated, for instance: "God Hates the USA/Thank God for 9/11," "America Is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You."

Before the demonstration, the church had notified local authorities in advance of its intent to picket and it complied with police instructions in staging the demonstration. The picketing took place within a 10-by 25-foot plot of public land adjacent to a public street, behind a temporary fence.

A jury found for Mr. Snyder, on claims based upon intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, and held Westboro liable for $2.9 million in compensatory damages and $8 million in punitive damages. Based upon the finding of the jury and the remarks of the
Supreme Court justices, it must be accepted that the father of Lance Corporal Snyder suffered profound and severe emotional distress as a result of the actions of Westboro.

The case involved Maryland tort law. While the Supreme Court may not alter the tort remedies of the various states, it can and will enforce the protections of the U.S. Constitution, in this case, the Free Speech clause of the First Amendment, in state tort actions. According to Chief Justice John Roberts, the First Amendment "can serve as a defense in state tort suits, including suits of intentional infliction of emotional distress." 2

According to Justice Roberts, determination of whether Westboro could be held liable for exercising its right of free speech depended upon whether the speech is of public or private concern, as determined by all of the circumstances of the case. All speech is not equal. "Speech of public issues occupied the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." 3 On the other hand, where speech involves matters of purely private significance, the Supreme Court stated that First Amendment protections are often less rigorous. 4

Speech deals with matters of public concern when it can be fairly considered to relate to any matter of political, social or other concern of the community. No matter how crude or offensive Westboro's speech may have been, it did involve the political and moral conduct of the United States and its citizens, and other matters of public import. "The fact that Westboro spoke in connection with a funeral...cannot by itself transform the nature of Westboro's speech." 5 Furthermore, there was nothing in the record to suggest that the speech was intended to mask an attack on Mr. Snyder over a private matter. "A group of parishioners standing at the very spot where Westboro stood, holding signs that said 'God Bless America' and 'God Loves You,' would not have been subjected to liability. It was what Westboro said that exposed it to tort damages." 6

Justice Roberts concludes his decision by stating that: "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case." 7

New York's Criteria

In New York, whether or not the speech involved matters of public or private concern is not among the criteria. In Howell v. New York Post Company, 8 a photographer from the New York Post trespassed onto the grounds of Four Winds Hospital, a private psychiatric facility in Westchester County. A patient at Four Winds was Hedda Nussbaum, the de facto adoptive mother of Lisa Steinberg, whose death in 1987 generated great public interest. Shortly after the death, a photograph of Ms. Nussbaum appeared in several newspapers showing her face to be bruised and disfigured, her lips split and swollen, and with her matted hair covered with a scarf.

In contrast, the photograph taken of her at Four Winds showed that her facial wounds had healed, her hair was coiffed and she was neatly dressed in jeans, a sweater and earrings. The purpose of the "before" and "after" photographs of Ms. Nussbaum was to demonstrate the great progress she had
made from the time of Lisa’s death, something that was not unflattering.

Unfortunately, the image and likeness of plaintiff were also captured in the photograph. Although plaintiff was not named in the New York Post article, her face was readily discernible. Up until the publication of her photograph, plaintiff had kept secret the fact that she was being treated in a psychiatric hospital. When the fact of her psychiatric treatment became known to persons from whom she had tried to keep her treatment secret, plaintiff claimed to have suffered emotional distress and humiliation. Thereafter, she commenced an action based upon several torts, one of which was the intentional and negligent infliction of emotional distress.

The court noted the four elements of the tort. The first is extreme and outrageous conduct. The second is the intent to cause, or disregard of a substantial probability of causing, severe emotional distress. The third is that there must be a causal connection between the conduct and the injury. The final element is that the plaintiff has experienced severe emotional distress that is genuine.

According to the court, the first element, that of outrageous conduct, both filters out trivial and petty complaints that do not belong in court and assures that the plaintiff's claim of severe emotional distress is genuine. While no specific conduct is proscribed, "[t]he tort is as limitless as the human capacity for cruelty." According to the court, every emotional distress claim that had been considered by the court failed because "the conduct has [not] been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

Rather than base the distinction on whether the conduct involved matters of public interest as compared to private interest, the Court of Appeals distinguished between conduct that is privileged, as compared to conduct that is not privileged. The publication of the photograph by a newspaper was privileged. Hence, even had the newspaper known that publication of the photograph would have caused plaintiff emotional distress, such publication, without more, would not ordinarily lead to liability for intentional infliction of emotional distress.

Different Outcome?

Which brings us to the question posed at the beginning of this article, which is what would be the outcome of Snyder v. Phelps had it been decided under New York law? A strong case can be made that the conduct of Westboro was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. Indeed, it was precisely because picketing at funerals was so outrageous that Westboro chose such events as its forum of choice. Had the church chosen to demonstrate on the main street of a small town on a Saturday morning, few would have noticed. By choosing to demonstrate at funerals when families and friends are saying goodbye to loved ones, Westboro was assured that a large audience would hear its sick, twisted message. As Justice Samuel Alito noted in his dissent, when the church recently announced its intention to picket the funeral of the 9-year-old girl killed in the shooting spree in Tucson—proclaiming that she was "better off dead"—its announcement became national news.

While perhaps the primary purpose of Westboro was not to add to the grief of those mourning the loss
of a friend or family member, it surely must have known that what it was doing would have that effect. Without a doubt, the church’s actions went far beyond all possible bounds of decency, and should be regarded as atrocious, and utterly intolerable in a civilized community. That is what makes the holding of Snyder v. Phelps so difficult for some to accept.

In dissent, Justice Alito certainly thought so. "In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner." 11 Although deciding that Westboro’s action were constitutionally protected, Justice Roberts felt the same way. "The record makes clear that the applicable legal term—"emotional distress"—fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief." 12 A reading of all of the opinions in Snyder leads to the conclusion that had the Supreme Court applied only the four criteria used in New York, it would have affirmed the finding of the jury that Westboro had committed extremely outrageous acts that caused significant harm to Mr. Snyder.

While New York plaintiffs rarely succeed in prosecuting claims for intentional infliction of mental and emotional distress, because of Snyder, where the acts complained of involve speech or the equivalent of speech protected under the First Amendment, the successful prosecution of such cases will become even more rare. Like it or not, Snyder v. Phelps is a tribute to our country’s values as expressed in the First Amendment.

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Endnotes:

1. 2011 U.S. LEXIS 1903 (U.S. Supreme Court March 2, 2011)

2. Id. at 14.


5. Id. at 20.

6. Id. at 25.

7. Id. at 30-31.


9. Id. at 81 N.Y. 122.


11. Snyder at 54.

http://www.law.com/jsp/nylj/PubArticleFriendlyNY.jsp?id=1202494736995
12. Id. at 22.