element of foreseeability, but because they simply could not, as a matter of justice and fairness to all the parties involved, extend liability to include such a situation. It is a policy decision, and the court so states. Such an analysis is commendable and far more to be desired than decisions which cover up the real reasons behind the result with terms the ultimate definition of which depends upon those undisclosed policy factors.[17]

TORTS—RIGHT OF PRIVACY—NO RIGHT OF RECOVERY FOR PUBLICATION CONCERNING DECEASED RELATIVES

Defendant newspaper published a report of the death of Ben Milner in an automobile accident, describing the accident, and mentioning the fact that he was one of a group of men who had been indicted for theft. The deceased's widow, son and parents instituted an action, claiming that the report violated their right of privacy. Defendant moved for a summary judgment in the

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The principal case, Resavage v. Davies, 86 A.2d 879 (Md. 1952), is to the same effect:

> . . . If such a rule [of liability] were adopted it would involve a tremendous extension of liability to the world at large, not justified by the best considered authorities.

Id. at 883.

The English courts show both sides of the argument. In Dulieu v. White & Sons, [1901] 2 K.B. 669, Kennedy, J., stated:

> . . . I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claims.

Id. at 681. In Hambrook v. Stokes Bros., [1925] 1 K.B. 141 (1924), Atkin, L.J., said:

> . . . It may be that to negative Kennedy J.'s restriction [*i.e.*, the statement in the *Dulieu* case that the plaintiff must have suffered apprehension for herself, not for another, in order to recover for resultant physical injuries] is to increase possible actions. I think this may be exaggerated.

Id. at 158. In his dissent in the same case, Sargant, L. J., argued:

> . . . [I]t would be a considerable and unwarranted extension of the duty of owners of vehicles towards others in or near the highway, if it were held to include an obligation not to do anything to render them liable to harm through nervous shock caused by the sight or apprehension of damage to third person.
>
> . . . And the extent of this extra liability is necessarily both wide and indefinite. . . .

Id. at 163.

17. See RESTATEMENT, TORTS §§ 312, comment *e*, 313, *caveat* (1934). It is interesting to note that the RESTATEMENT has refused to take a stand on the question whether or not the scope of liability as drawn in the American cases, or in the English cases, is correct.

trial court, and the motion was granted. On appeal, held: affirmed. The common law of 1841, unless altered or repealed by statute, is controlling in Texas,[1] and since the right of privacy was not recognized at common law, it is not recognized in Texas.[2]

The problem of the existence of the right of privacy has not been treated uniformly in all jurisdictions. Some courts have refused to recognize it, apparently on the ground that it was unrecognized at common law, and therefore can be created only by the legislature.[3] Other courts recognize the right of privacy as a constitutional or an inherent right, or extend established doctrines of the common law to include it.[4] In three states a limited right of privacy is created by statute.[5] Other jurisdictions have succeeded, at least for a time, in avoiding the problem of recognition by holding in cases where the problem has arisen that even if such a right existed, it had not been violated under the facts of those cases.[6] In the principal case, however, the court decided that there is no right of privacy in the state without examining the question of its violation. Whether the principal case is definitive of the status of the right of privacy in Texas is not absolutely certain; one Texas Court of Civil Appeals case seems to be clearly inconsistent with the principal case,[7] and another Civil Appeals case may be inconsistent.[8]

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1. TEX. STAT., REV. CIV. art. 1 (1948).
2. Milner v. Red River Valley Publishing Co., 249 S.W.2d 227 (Tex. Civ. App. 1952).
3. Henry v. Cherry & Webb Co., 30 R.I. 13, 73 Atl. 97 (1909); Hillman v. Star Publishing Co., 64 Wash. 691, 117 Pac. 594 (1911). New York apparently recognized the right of privacy in Schuyler v. Curtis, 147 N.Y. 434, 42 N.E. 22 (1895), but in the later case of Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), the court flatly stated that there was no right of privacy in New York. Subsequently, a limited right of privacy was created by the legislature. N.Y. CIVIL RIGHTS LAW §§50, 51.
4. See Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526 (1941).
5. N.Y. CIVIL RIGHTS LAW §§ 50, 51; UTAH CODE ANN. §§ 103-4-7, 103-4-8, 103-4-9 (1943); VA. CODE ANN. § 8-650 (1950).
6. Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948); Elmhurst v. Shoreman Hotel, 58 F. Supp. 484 (D.D.C. 1945), *aff'd*, 153 F.2d 467 (D.C. Cir. 1946); Thayer v. Worcester Post Co., 284 Mass. 160, 187 N.E. 292 (1933); Lewis v. Physicians and Dentists Credit Bureau, 27 Wash. 2d 267, 177 P.2d 896 (1947).
7. Hawks v. Yancey, 265 S.W. 233 (Tex. Civ. App. 1924) (injunction was granted which restrained defendant from publicizing his past illicit relations with plaintiff or annoying her).
8. Meadows v. First National Bank of Harlingen, 149 S.W.2d 591 (Tex. Civ. App. 1941) (right of privacy not violated by action on note already paid).

The principal case, however, must be differentiated, both factually and doctrinally, from the ordinary right of privacy cases in that it is concerned with the right to be free from unwarranted publicity about deceased relatives, the relational right of privacy, which is a separate right in the living relatives, distinct from the ordinary right of privacy of the publicized individual. Although the prevailing view is that an action for the invasion of the right of privacy does not survive to the estate of the publicized individual,[9] this rule does not bar recovery by relatives for violations of the relational right. This is clearly illustrated by the case of *Bazemore v. Savannah Hospital*,[10] in which parents recovered for an unauthorized publication of a photograph of their deceased malformed child, both the photographing and the publication having taken place after the death of the child. The concept of the relational right is relatively new, and although the *Bazemore* case is the only case actually allowing recovery solely on the ground of a violation of that right, other courts have indicated their willingness to allow recovery for its violation.[11]

Of course, the relational right must be subject to at least the same limitations as the ordinary right of privacy. One of these limitations is that the freedom of the press to publish news of public interest must be paramount,[12] and this limitation has been applied to deny recovery in at least four cases involving the relational right.[13] In addition, another restriction on the

9. Metter v. Los Angeles Examiner, 35 Cal App. 2d 304, 95 P.2d 491 (1939); Wyatt v. Hall's Portrait Studio, 71 Misc. 199, 128, N.Y.S. 247 (Sup. Ct. 1911). For a collection of cases parallel and to the same effect, see Note, 41 ILL. L. REV. 114 (1946). *Contra:* Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945).

10. 171 Ga. 257, 155 S.E. 194 (1930).

11. Clayman v. Bernstein, 38 Pa. D. & C. 543 (1940) (husband deemed proper party plaintiff along with wife, in action to restrain use of pictures of wife taken without their consent). See discussion of Douglass v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912) in Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927). *See:* Smith v. Doss, 251 Ala. 250, 253, 37 So.2d 118, 121 (1948) (dicta recognizing relational right).

12. Corliss v. E. W. Walker Co., 64 Fed. 280 (C.C.D. Mass. 1894); Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948); Smith v. Doss, 251 Ala. 250, 37 So.2d 118 (1948); Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939); Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929); Kelley v. Post Publishing Co., 98 N.E.2d 286 (Mass. 1951); Thayer v. Worcester Post Co., 284 Mass. 160, 187 N.E. 292 (1933); Smith v. Suratt, 7 Alaska 416 (1926).

13. Corliss v. E. W. Walker Co., 64 Fed. 280 (C.C.D. Mass. 1894); Smith v. Doss, 251 Ala. 250, 37 So.2d 118 (1948); Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939); Kelley v. Post Publishing Co., 98 N.E.2d 286 (Mass. 1951).

relational right of privacy seems to have been implicitly accepted. It is that a plaintiff can recover for a violation of his relational right of privacy only if the deceased himself could have recovered in he were alive.[14]

An application of this analysis to the principal case indicates that even if Texas did recognize the right of privacy the plaintiffs could not recover. Automobile accidents have been held so newsworthy that publications concerning them have not been deemed to be violations of the right of privacy.[15] It has also been held that information concerning those connected with the judicial processes could not be a violation,[16] and included in this category are involuntary participants in criminal actions.[17] One court has said that a right of privacy cannot be claimed in connection with events which could not remain private by operation of law and that publication of information on the public records could not violate anyone's right of privacy.[18] It should be noted, however, that a report of an event may not be a violation of privacy if made for news purposes, while a report of the same event, if made for commercial or entertainment purposes, will be a violation.[19]

In view of these limitations on the ordinary and relational right of privacy, it would seem that although the result in the principal case was correct, the court, in justifying its decision, did not have to go so far as to say flatly that no right of privacy existed in Texas.

14. Corliss v. E. W. Walker Co., 64 Fed. 280 (C.C.D. Mass. 1894); Smith vs. Doss, 251 Ala. 250, 37 So.2d 118 (1948); Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939); Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930); Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972 (1929); Douglass v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912); Kelley v. Post Publishing Co., 98 N.E.2d 286 (Mass. 1951).

15. Leverton v. Curtis Publishing Co., 192 F.2d 974 (3rd Cir. 1951); Kelley v. Post Publishing Co., 98 N.E.2d 286 (Mass. 1951).

16. Estill v. Hearst Publishing Co., 186 F.2d 1017 (7th Cir. 1951); Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948); Smith v. Doss, 251 Ala. 250, 37 So.2d 118 (1948) (will as public record); Coverstone v. Davies, 239 P.2d 876 (Cal. App. 1952); Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939) (coroner's report of suicide); Thayer v. Worcester Post Co., 284 Mass. 160, 187 N.E. 292 (1933); Martin v. Dorton, 50 So.2d 391 (Miss. 1951). *Contra:* Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931).

17. Elmhurst v. Pearson, 153 F.2d 467 (D.C. Cir. 1946).

18. Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939).

19. Leverton v. Curtis Publishing Co., 192 F.2d 974 (3rd Cir. 1951); Reed v. Real Detective Publishing Co., 63 Ariz. 294, 162 P.2d 133 (1945); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931).