precedent and fear of burdensome litigation relied upon to deny recovery); *Henry v. Cherry & Webb*, 30 R.I. 13, 73 Atl. 97 (1909) (same broad language and recovery refused even though plaintiff's picture was used for advertising purposes); *Atkinson v. Doherty*, 121 Mich. 372, 80 N.W. 285 (1899) (plaintiff refused an injunction where deceased husband's name and picture were used to advertise defendant's product). But see *Pavesich v. New Eng. L. Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905) (plaintiff recovered for unauthorized use of his picture in defendant's advertisement); *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532 (1918) (another advertising case in which plaintiff recovered); *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909) (plaintiff recovered for unauthorized use of his name as endorsement of defendant's product). *Cf. Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927) (plaintiff recovered for defendant's placarding him as a debtor—not an advertising case); *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905) (police inspector enjoined from placing innocent plaintiff's picture in rogue's gallery); *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930) (plaintiff recovered for publication of picture of his deceased deformed child).

Probably the most cogent argument against the recognition of any right of privacy is that such recognition will endanger the freedom of the press. See *Hillman v. Star Publishing Co.*, 64 Wash. 691, 117 Pac. 594 (1911). But this freedom extends only to the dissemination of matters of public interest, and the experience of New York courts has shown that such matters are easily distinguishable from advertising. See *Jeffries v. N. Y. Evening Journal*, 67 Misc. 570, 124 N.Y.S. 780 (1910); *Moser v. Press Pub. Co.*, 59 Misc. 78, 109 N.Y.S. 963 (1908). And these courts have construed the phrase "purposes of trade" as applying only to the sale or publication of matters *not* of public interest. *Humiston v. Universal Film Co.*, 189 App. Div. 467, 178 N.Y.S. 752 (1919); *Colyer v. Fox*, 162 App. Div. 297, 146 N.Y.S. 999 (1914); *cf. Binns v. Vitagraph Co.*, 210 N.Y. 51, 103 N.E. 1108 (1913); *Blumenthal v. Picture Classics*, 235 App. Div. 570, 257 N.Y.S. 800 (1932). On the other hand where the plaintiff's picture or name has been used in a publication for advertising purposes, he has been allowed to recover. *Martin v. New Metropolitan Fiction*, 139 Misc. 290, 248 N.Y.S. 359 (1931); *D'Altomonte v. N. Y. Herald*, 154 App. Div. 453, 139 N.Y.S. 200 (1913); *Eliot v. Jones*, 66 Misc. 95, 120 N.Y.S. 989 (1910).

Finally, the threat of unduly burdensome litigation has not been borne out. In the thirty-three years since the statute was passed, New York courts have been obliged to decide some twenty-odd cases. In view of the more clearly-defined need for protection of a right of privacy in advertising and trade purpose cases and of its demonstrated ease of application, the way for legislative or judicial action in other states seems free from the preconceived difficulties of the older cases.

Torts—Death Statutes—Liability of Telephone Company for Failure in Service—[New York].—Unable to obtain a response from the central operator of the defendant company, the plaintiff, a subscriber, was delayed in reaching his physician in attendance upon his sick child. The child died. Alleging that the child would not have died it there had been no delay, plaintiff sued under the Decedent Estate Law (Cahill's N.Y. Cons. L. 1930, c. 13, art. 5), which provides that the next of kin of a decedent has a cause of action for wrongful death against the one who "would have been liable to an action in favor of the decedent by reason thereof if death had not ensued."

(§ 130). *Held*, (1) the telephone company should not be liable for injuries resulting from failure of service since it did not have notice of so indefinite a risk; (2) the Decedent Estate Law does not provide a remedy, since defendant would not have been liable to deceased had she survived, for her injury would have been merely pain and distress. No recovery. *Emery v. Rochester Telephone Corp.*, 271 N.Y. 306, 3 N.E. (2d) 434 (1936).

There are many legalistic approaches to the problem of a telephone company's liability for failure in service. It might be disputed, for example, whether or not the *proximate cause* of the death was not the failure but only the illness, the failure merely obstructing the intervening agencies necessary to the cure as would a flat tire on the physician's automobile. *Cf.* 46 Yale L. J. 167, 169–70 (1936). It is contended that the duty to make connections is a *contract duty*, and hence that there can be no liability unless the company has notice of the specific illness. But the defendant's failure has made it impossible to give such notice. Clay, The Liability of a Telephone Company, 1 Va. L. Rev. 337, 339 (1914); 46 Yale L. J. 167, 168–69 (1936). In the telegraph cases notice of the specific emergency is a prerequisite to liability for delay. *Williams v. Western Union Tel. Co.*, 136 N.C. 59; 48 S.E. 559 (1904), annotated in 1 Am. Eng. Ann. Cas. 359 (1906). Again, even if the duty is a *tort duty*, it might be disputed whether or not the injury is sufficiently *foreseeable* to the company's employees to render the company liable. These concepts and others similar are useful in some cases because they neatly express the difference between the preceding cases which allowed recovery and those which denied it, and because they point out the characteristics which must be examined in the facts of any particular case in order to classify it with similar cases. In borderline cases like the principal case, however, the concepts are not at all useful as tools for decision because, since the facts are borderline, similar characteristics can be found in decisions on both sides. Moreover, their use here works affirmative mischief because it tends to discourage analysis of competing social advantages.

The best insight into the policy of the telephone cases will be gained by comparison with the water company cases, in which no recovery is granted for fire losses resulting from inadequate water pressure. *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928). The reasons for immunizing the water companies are (1) since fire is the only risk and fire insurance is very common among land owners, it is as easy for the subscriber to insure as for the company, and there will be double coverage in many cases; (2) a single failure might result in enormous liability by the spread of fire. In the telephone cases these reasons are inapplicable because (1) the risk is more extensive than in the water cases, involving at least illness, fire, and burglary, and hence is less commonly and less easily insured against by the telephone subscribers; (2) the possible recovery from the company for any single failure will normally be slight and rigidly limited. Indeed if a single failure should result in widespread losses, approximating those in the water cases, recovery might be denied by the same policy, even though granted in the usual case. For instance, business losses, especially in a general breakdown of telephone service, may reach gigantic proportions. This could be a factor in a denial of recovery for business losses.

There are many arguments of "general social expediency" which support the telephone company's liability. The telephone is advertised as an emergency instrument, and subscribers pay for it and rely on it as such. Recovery from the telephone company would provide an efficient method for distributing losses which may be staggering to the individuals upon whom they fall, especially in cases of fire or of death of breadwinners. It is hard to believe that the amount of recovery would significantly affect the resources of telephone companies or even force them to increase their rates. But see 46 Yale L.J. 167, 171–72 (1936). If business losses are held not recoverable, not only because the possible recovery might be very large as suggested above, but also because financial protection of businesses is usually not as necessary as financial protection of individuals and because risk of business loss by delay may be anticipated and often avoided or hedged against, the possible liability should be relatively slight. And the threat of liability may have a tendency to improve telephone service. On the other hand, if liability is imposed, the danger of faked suits is a very real one. See Clay, The Liability of a Telephone Company, 1 Va. L. Rev. 337 (1914) (discussing many cases). The difficulty of producing enough evidence to avoid a directed verdict for the company would be slight, and the likelihood of a favorable verdict from public-utility-conscious juries would be a great temptation. If the court in the principal case implicitly compared the danger of faked suits with the advantages suggested and considered the former more important, its decision should not be criticized.

That the court considered it extremely undesirable to hold against the telephone companies is apparent in its strained construction of the Decedent Estate Law. While the words of § 130 taken out of context seem to lead to the construction adopted it is clear from the whole act that it was intended to create a new category of liability which will reimburse families and dependents for damage sustained by *them* through the loss of the deceased. Cahill's N.Y. Cons. L. 1930, c. 13, § 132 (fixing measure of damages as the injury to the plaintiff); see *Littlewood v. Mayor*, 89 N.Y. 24 (1882) (almost identical death act). The essential distinction between the cause of action provided for and that in favor of the deceased is that the former arises only upon death. Since the death is an undoubted injury to the plaintiffs, it is unreasonable to suppose that the legislature intended to require injury to the decedent in addition to death. *Littlewood v. Mayor*, 89 N.Y. 24 (1882); Tiffany, Death by Wrongful Act § 65 (2d ed. 1913). *Cf.* note on the principal case in 31 Ill. L. Rev. 535 (1936). Statutes which are designed to preserve (in contrast to "create") causes of action which had already arisen before death are known as *survival statutes*. There the defendants are injured only in the sense that the estate is not as large as it would have been if the decreased had recovered for his injury. Confusion of the two types has often been roundly criticized. 80 U. of Pa. L. Rev. 993 (1932); McCormick, Damages 336 (1935); 5 Sutherland, Damages § 1260 (4th ed. by Berryman 1916).

Trusts—Liability of Trustee to Cestuis for Failure to Share Receipts from Common Debtor—[New York].—The plaintiffs were holders of notes issued by a German corporation pursuant to a trust indenture naming the defendant trustee for the benefit of the note-holders. The notes were fully secured by collateral on deposit with the defendant's agency in Germany. German moratorium laws prevented payment by the corporation of the interest and the principal, and made impossible the removal of the collateral to New York. The defendant received a substantial amount of money from the corporation in satisfaction of a major portion of an unsecured debt due to the defendant as a bank. The plaintiffs sued to remove the defendant as trustee and to re-