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Torts – Unreasonable Investigation – Right of Privacy

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taxpayer to deduct all the expenses incurred for her meals and lodging and a "reasonable amount for incidental expenses."

The significance of this decision lies in its liberal construction of the medical deduction provision of the 1939 code on the part of the district courts in the sixth circuit.¹⁹ Furthermore, it supports the proposition generally accepted that the district courts favor a more liberal construction of the revenue code than the Tax Court.²⁰ However, since no cases involving the item of transportation essential to medical care and having application under the 1954 code have been reported, one can reasonably assume that the decisions and rules set forth in the cases decided under the 1939 code will be applicable. The principal case seems to go far in finding that the trip taken by the taxpayer and his wife was primarily for the alleviation and cure of the taxpayer's stroke. Under the present tax law the problem, in this regard, is essentially the same. Taxpayers might certainly be justified in claiming the deduction here involved whenever possible.

CARL G. PAFFENDORF

TORTS — UNREASONABLE INVESTIGATION — RIGHT OF PRIVACY

A workmen's compensation claimant brought suit against the compensation carrier and a detective agency employed to investigate the claim. It was alleged that the claimant suffered damages due to mental distress caused by the unreasonable manner in which investigations were conducted. The action was dismissed and plaintiff appealed. *Held*, reversed, the investigative activities, if unreasonable, constituted an invasion of the right of privacy. *Souder v. Pendleton Detectives*, 38 So.2d 716 (La. 1956).

Since the right of privacy was not recognized at the old common law, the courts that have considered the question have been absorbed in deciding whether such a right exists. It was not until 1904 that a state court of last resort, in *Pavesich v. New England Life Inc. Co.*,¹ perceived that a person had a legal right "to be let alone"² — a purely personal right³ unsupported

19. Generally, district courts follow the previous decisions of other courts in the same circuit but are not bound by the decisions rendered in other circuits.

20. Both courts have original jurisdiction over tax questions. The taxpayer has the choice of contesting the disputed tax assessment in the tax Court before paying the assessment, or paying the assessment and bringing his suite in the District Court for a refund. (Originally the tax court was an administrative board, but although still technically a board, has since acquired the character, respect and dignity of a true court).

1. 122 Ga. 190, 50 S.E. 68 (1904).

2. COOLEY, TORTS, 2d Ed., 29 (1888).

3. The definition most frequently quoted by the courts appears in 41 AM. JUR., *Privacy*, § 11 (1939). "In order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable man could see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant, and this question is to some extent one of law."

by property rights or breach of contract or trust. This prescient Georgia court, influenced by a provocative article by Warren and Brandeis,⁴ emphatically rejected the holding of a then famous New York case.⁵ Today, the overwhelming majority⁶ of the courts that have adjudicated the question have affirmed the existence of the right of privacy, and have held that the invasion of such right is a tort. A few jurisdictions deny the right,⁷ and several other states limit it by statute.⁸ Because recognition of the right is in its infancy, the law surrounding it is somewhat amorphous.⁹

The applicability of the law of privacy is most clearly defined where some element of a person's personality has been appropriated for commercial use. Although emphasizing the mental aspect, the courts have created something of a property right in personal attributes, granting relief frequently where the defendant made unauthorized use of an individual's name or picture in an advertisement.¹⁰ Even in those jurisdictions which

4. *The Right to Privacy*, 4 HARV. L. REV. 198 (1890). This article is quoted in 43 out of the 61 cases cited in this note.

5. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902). (Defendant used the picture of the plaintiff, a pretty young girl, to advertise its flour without her consent. Relief was denied on the basis of the purely mental nature of the injury, lack of precedent, and fear of a "vast amount of litigation" which might follow. This decision proved so unpopular that a justice was moved to defend his position by writing an article.) See note 3, 18 NOTRE DAME LAW. 161 (1942). In 1903 N.Y. enacted a remedial statute: NEW YORK CIVIL RIGHTS LAW, § 5-51.

6. *Ala.*: *Abernathy v. Thornton*, 83 So.2d 235 (1955); *Alaska*: *Smith v. Suratt*, 7 Alaska 416 (1928); *Ariz.*: *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P.2d 133 (1945); *Cal.*: *Gill v. Curtis Pub. Co.*, 38 Cal.2d 273, 231 P.2d (1951); *Dist. of Col.*: *Bernstein v. National Broadcasting Co.*, 129 F.Supp. 817 (D.D.C. 1955); *Peay v. Curtis Pub. Co.*, 78 F. Supp. 305 (D.D.C. 1948); *Fla.*: *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243 (1944); *Ga.*: *Bazemore v. Savannah Hospital*, 171 Ga. 257, S.E. 194 (1930); *Ill.*: *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952); *Iowa*: *Bremmer v. Journal-Tribune Pub. Co.*, 76 N.W.2d 762 (1956); *Ind.*: *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949); *Kan.*: *Kunz v. Allen*, 102 Kan. 883, 172 P. 532 (1918); *Ky.*: *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931); *La.*: *Hamilton v. Lumbermen's Mut. Cas. Co.*, 82 So.2d 61 (1954); *Mich.*: *Pallas v. Crowley, Milner & Co.*, 322 Mich. 411, 33 N.W.2d 911 (1948); *Mo.*: *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W. 2d 291 (1942); *Mont.*: *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952); *Nev.*: *Norman v. City of Las Vegas*, 64 Nev. 38, 177 P.2d 442 (1947); *N.J.*: *Frey v. Dixon*, 141 N.J. Eq. 481, 58 A.2d 86 (1948); *N.C.*: *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938); *Ohio*: *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956); *Or.*: *Hinish v. Meier & Frank Co.*, 166 Or. 482, 113 P.2d 438 (1941); *Pa.*: *Leverton v. Curtis Pub. Co.*, 192 F. 2d 974 (3rd Cir. 1951); *S.C.*: *Holloman v. Life Ins. Co.*, 192 S.C. 454, 7 S.E.2d 169 (1940).

7. *Neb.*: *Brunson v. Rouke Army Store*, 161 Neb. 519, 73 N.W.2d 803 (1956); *R.I.*: *Henry v. Cherry & Webb*, 30 R.I. 13, 73 A. 97 (1909); *Texas*: *McCullagh v. Houston Chronicle Pub. Co.*, 211 F.2d 4 (5th Cir. 1954); *Wis.*: *Yoeckel v. Samonig*, 75 N.W. 2d 965 (1956). See 1952 Wis. L.Rev. 507.

8. *N.Y.*: *Gautier v. Pro-Football, Inc.*, 278 App.Div. 431, 106 N.Y.S.2d 553, *aff'd* 304 N.Y. 354, 107 N.E. 2d 485 (1952). See note 5 *supra*. *Utah*: UTAH CODE ANN. 76-4-7 to 76-4-9 (1953); *Va.*: VA. CODE § 8-650 (1950).

9. *DICKLER, Right of Privacy; a proposed redefinition*, 70 U.S.L. 435 (1937) (classifies the tort as to (1) intrusion, (2) publicity, (3) appropriations).

10. *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938); *Kunz v. Allen*, 102 Kan. 883, 172 P. 532 (1918); *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909); *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952); *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E. 2d 306 (1949); *Pallas v. Crowley, Milner & Co.*, 322 Mich. 411, 33 N.W.2d 911 (1948).

deny the right *per se*, statutes have been enacted to prevent such practices.¹¹ Where the purely mental character of the tort has been the sole basis for relief, a cause of action has been held to lie where publication concerning a person transcended ordinary decencies;¹² or where there has been an intrusion upon an individual's right to solitude.¹³ The privilege of the press to publish newsworthy facts is an important limitation on the right of privacy.¹⁴ However, the right is not extended to include the supersensitive but is designed to protect persons of ordinary sensibilities.¹⁵ Since the right is purely personal, the cause of action does not survive the plaintiff.¹⁶ A fortiori, a child too young to suffer mental distress¹⁷ or an "artificial person"¹⁸ (corporation or partnership) cannot maintain the action. Although no special monetary damages need be alleged, recovery of substantial damages may be allowed for the infliction of mental suffering. Unlike the torts of defamation, libel, and slander, truth is no defense.²⁰

Where the facts presented, as in the instant case, have involved the

11. See note 8 *supra*.

12. Kirby v. Hal Roach Studios, 53 Cal. App. 2d 207, 127 P.2d 577 (1942) (letters which seem to suggest an assignation were sent to 1000 men over actress's supposed signature); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931) (motion picture revived the career of a reformed prostitute who was a defendant in a notorious murder trial); Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930) (publication of a picture of a deformed child); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927) (defendant publicized fact that a doctor had not paid his debt); State *ex rel* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946) (plaintiff's picture included in rogue's gallery after he had been acquitted of any crime); Barber v. Time, Inc., 348 Mo. 1199, 58 S.W.2d 291 (1942) (plaintiff's picture published along with story about hospitalized "starving glutton").

13. Walker v. Whittle, 83 Ga. App. 445, 64 S.E.2d 87 (1951) (unlawful entry by an officer); Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905 (1924) (entering a woman's stateroom aboard a boat); Welsh v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952) (entry by a landlord); Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931) (wiretapping); *But see* Schmuckler v. Ohio Bell Tel. Co., Ohio C.P. 1953, 116 N.E.2d 819 (1953) (telephone company privileged to monitor call where plaintiff suspected of practicing fraud against the company).

14. Bremmer v. Journal Tribune Pub. Co., 76 N.W. 2d 762 Iowa (1956); Jacova v. Southern Radio and Television Co., 82 So.2d 34 (Fla. 1955); See PROSSER, TORTS 97 (2d ed. 1955); Warren & Brandeis, note 4 *supra*; Nizer, *Right of Privacy*, 39 MICH. LAW REV. 526 (1941).

15. Schuyler v. Curtis, 147 N.Y. 434, 42 N.E.2d (1895) ". . . there must be some reasonable and plausible ground for the existence of this mental distress and injury. . . . It must not be the creature of mere caprice nor of pure fancy, not the result of a super-sensitive and morbid mental organization."

16. Schumann v. Loew's, Inc., 135 N.Y.S.2d 361 (Sup. Ct. 1954) (contains a statement of the law concerning survival of the action in all jurisdictions.)

17. Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930); Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912); Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911).

18. Maysville Transit Co. v. Ort, 296 Ky. 524, 177 S.W. 2d 369 (1943); Vassar College v. Loose-Wiles Biscuit Co., 197 F. 982 (D. Mo. 1912).

19. Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945); Hinich v. Meier & Frank Co., 166 Or. 428, 113 P.2d 438 (1941).

20. Mau v. Rio Grande Oil Co., 28 F. Supp. 845 (D. Cal. 1939); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

"trailing or following" of another, a mere handful of cases have been reported. In the famous early case of *Chappel v. Stewart*,²¹ an injunction was denied on the basis that equity would not protect a purely personal right; but a later Texas case,²² in an analogous fact situation, granted such relief. In *Schultz v. Frankfort Marine Accident & Plate G. Ins. Co.*, recovery was permitted on the basis of defamation for "rough shadowing," even though the technical requirements for defamation were lacking. Two Georgia cases²⁴ allowed relief where investigative activities exceeded reasonable bounds. The court, in the instant case, reaffirmed²⁵ its belief in the importance of the right of privacy, but recognized that the insurance company had a right to investigate the insured's claim, provided that such investigation was conducted within reasonable bounds. In asking what is *reasonable* under the circumstances, the court seemed to apply the only practical yardstick for measuring the correlative rights and privileges of the parties.

In recognizing the right of privacy, it becomes the duty of the courts to bring into harmony the conflicting interests of the individual with those of an increasingly complex society. Unquestionably, the practical difficulties inherent in the very nature of the right (and its reciprocal remedy)²⁶ based on purely mental elements have been the retarding factors in the development of the law of privacy. This is hardly a valid reason for the denial of such a fundamental spiritual need.²⁷ The right and the remedy are based on reason,²⁸ surely no new concept to the field of jurisprudence.²⁹ Between 1890³⁰ and 1940, only eight states expressly affirmed the existence of the right of privacy,³¹ but by 1956 this number has grown to twenty-four, with no added jurisdictions denying the right. The impassioned pleading of the many legal writers³² who have written so eloquently in behalf of the recog-

21. 82 Md. 323, 33 Atl. 542 (1896).

22. *Hawks v. Yancey*, 265 S.W. 233 (Tex. 1924).

23. 151 Wis. 537, 159 N.W. 386 (1913). This is one of the few jurisdictions that deny the existence of the right of privacy, yet the court permitted recovery, commenting ". . . that plaintiff was somewhat vague as to what particular law was breached and defendant's conduct amounted to that species of unlawful conduct called eavesdropping, or constituted such restraint of liberty as to amount to false imprisonment or that it was an invasion of privacy." (Italics supplied)

24. *Young v. Western & A.R. Co.*, 39 Ga. App. 761, 148 S.E. 414 (1929); *Newcomb Hotel v. Corbett*, 27 Ga. App. 365, 108 S.E. 309 (1921).

25. *Hamilton v. Lumbermen's Mut. Cas. Co.*, 82 So.2d 61 (La. 1955).

26. *Ubi jus ibi remedium*. BROOKS, LEGAL MAXIMS, 193 (8th ed. 1874).

27. See POUND, *Equitable Relief Against Defamation and Injuries to Personality*, 28 HARV. L. REV. 343 (1915); 29 HARV. L. REV. 640 (1916).

28. See RESTATEMENT, TORTS, § 867 (1939).

29. CARDOZO, GROWTH OF THE LAW (1924).

30. This is considered the birthday of the law of privacy, dating from the publication of the famous law review article of Warren and Brandeis. See note 3 *supra*.

31. 138 A.L.R. 22 (1940).

32. Warren & Brandeis, see note 30 *supra*; LARREMORE, *The Law of Privacy*, 19 COL. L. REV. 437 (1912); Pound, see note 27 *supra*; RAGLAND, *The Right of Privacy*,

dition of the individual as an "involute personality" has not fallen on deaf ears. The rapidly increasing tendency of the courts to recognize the right of an individual "to be let alone" is of practical significance to the attorney whose client has been subjected to mental suffering because of the "unwarranted, unreasonable, or unjustified" acts of another.

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17 KY. L.J. 85 (1929); WINFIELD, *Privacy*, 47 L.Q. REV. 23 (1931); KACEDAN, *The Right of Privacy*, 12 BOSTON U. L. REV. 353 (1932); DICKLER, *Right of Privacy*, 70 U.S.L. 435 (1937); NIZER, *The Right of Privacy; a Half Century's Developments*, 39 MICH. L. REV. 713 (1941); FEINBERG, *Recent Developments in the Law of Privacy*, 48 COL. L. REV. 713 (1948); LUDWIG, "Peace of Mind" in *48 Pieces v. Uniform Right of Privacy*, 32 MINN. L. REV. 734 (1948); YANKWICH, *The Right of Privacy*, 27 NOTRE DAME L. 499 (1952).