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Torts--Initial Recognition of Right of Privacy--Allegation of Publication Unnecessary To Maintain Action

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TORTS—INITIAL RECOGNITION OF RIGHT OF PRIVACY—ALLEGATION OF PUBLICATION UNNECESSARY TO MAINTAIN ACTION.—*P* alleged that before she rented an apartment from *D*, he caused to be installed therein a listening device connected with a speaker in his office, by means of which he listened to *P's* private and confidential conversations. *D* demurred to this declaration. *Held*, reversing the trial court's decision which sustained the demurrer, that the right of privacy, including the right to keep private one's communications, is a right which gives rise to an action for damages, and it is unnecessary to state in the declaration that special damage resulted, or that there was a publication of information obtained through the invasion. *Roach v. Harper*, 105 S.E.2d 564 (W. Va. 1958).

Tort liability resulting from the invasion of another's privacy is comparatively new, evolving in this country not from judicial opinion, but from a law review article. Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890), recognized that the law had long protected a right to privacy, as a personal right, but had done so under the more familiar concepts of property rights, implied contractual rights, and confidential relationships. Because of this, they advocated that the right of an individual to be let alone, to be free from unwarranted and unauthorized publication of his pictures, name, and stories concerning his personal affairs, when such publication was made for commercial purposes, should be recognized by the courts as one capable of legal enforcement, without waiting for the legislative branch of government to solve the problem.

The doctrine thus advocated was the subject of much discussion, and was not everywhere accepted. One of the earliest leading decisions which rejected the right was *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902). The court refused to enjoin the use of an individual's picture for commercial purposes, and used the reasoning that to do so would lead to a flood of litigation and thus reduce the doctrine to absurdities. The decision, however, proved so unpopular that the legislature almost immediately enacted a statute which prohibited the use of a living person's name or picture for purposes of advertisement. N. Y. CIVIL RIGHTS LAW §§ 50-51. Decided two years later was the landmark case that recognized the right of privacy. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905), allowed recovery in a similar fact situation to the *Roberson* case, *supra*. The court said that the absence of precedent was not conclusive in the determination of the right of privacy, but that a person had the right to exist, and that this

was invaded by a deprivation of things necessary to the enjoyment of life. This included the right of one to order his life and his affairs in a manner most agreeable to him, so long as this did not violate the rights of others.

While situations have not arisen in all jurisdictions which involve decisions as to whether a right of privacy exists, the majority of states in which the issue has been raised indicate that this right will be protected. It has been suggested by one text writer that the right exists in twenty states, and indications are that it will be recognized in nine more, while only three states have completely rejected the doctrine. PROSSER, TORTS 636 (2d ed. 1955).

The principal case is one of first impression in this jurisdiction, and our court, after a review of both primary and secondary authorities, recognized the right of an individual to be let alone, and to live a life of seclusion which is free from unwarranted publicity—each person is entitled to a right of privacy. In so doing, the court was forced by the fact situation to do more than recognize this right, and by its decision has advanced the doctrine beyond the original contemplation of Warren and Brandeis. The usual case which poses the issue involves an unauthorized invasion of privacy by means of a publication or commercialization of some element of one's personality or his name. The most common situation, and the one most easily reconcilable with the original reason for the establishment of the tort is the using of one's picture for advertisment. *E.g., Continental Optical Co. v. Reed,* 119 Ind. App. 643, 86 N.E.2d 306 (1949); *Hinish v. Meier & Frank Co.,* 166 Ore. 482, 113 P.2d 438 (1941). In their article, Warren & Brandeis, *supra,* recognized this, saying that because of innovations in mechanical means of reproduction, the press had made an unwarranted invasion into the secret precinct of private and domestic life.

Almost in the same breath, these two writers recognized that the fact situation of the principal case would be likely to arise, saying that ". . . numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' " Warren & Brandeis, *supra* at 195. But in the limitations placed on the doctrine, they say ". . . the law would *probably* not grant any redress for the invasion of privacy by *oral publication* in the absence of special damage . . .", reasoning that the injury from such communications would be so trifling that it might well be disregarded. Warren & Brandeis, *supra* at 217. (Emphasis added.) Combining these statements, it would seem that

the concept of the right of privacy would recognize a tortious invasion of listening to the private conversations of another, but would allow no recovery without a written publication or commercialization of the information thus obtained.

Therein lies the problem of the principal case, where a good cause of action was held to exist without an allegation of special damages or publication. The question thus arises as to whether this is a valid extension of the doctrine, and if so, should the doctrine thus extended have any limitations placed on it?

Where there has been a publication of information gained by the wrongful invasion, cases are uniform in holding that it is not necessary to allege or prove that special damages resulted. *E.g., Pavesich v. New England Life Ins. Co., supra.* The fact that the damages are difficult to measure (the right of privacy having no pecuniary standard) is of no consequence as a bar to recovery. *Rhodes v. Graham,* 238 Ky. 225, 37 S.W.2d 46 (1931).

In certain situations, the fact that the person who has invaded the privacy of another has not disclosed the means or results of his violation will not prevent an action therefor. *McDaniel v. Atlanta Coca-Cola Bottling Co.,* 60 Ga. App. 92, 2 S.E.2d 810 (1939), is perhaps the leading authority for this proposition. In this case a listening device was placed in a private hospital room and it recorded numerous private conversations of the patient with her family and friends. This conduct was held to be an intrusion just as effective as if the individual had been in the room. The contention of the defense that the essence of the cause of action was publication was dismissed by the court, saying that in situations such as this, the privacy was invaded even though the information was restricted to the immediate transgressor, and although publication would aggravate the damages, it was not necessary to recovery for the invasion.

One has the legal right to enjoy social and business relations with his family, friends, and neighbors, and is entitled to converse with them without intrusion by another. This was recognized in *Rhodes v. Graham, supra.* There, damages were allowed where a device had been used to listen to telephone conversations, the recovery being based on a right of privacy. The absence of publication of the conversations or their results had no effect as a bar to recovery.

In conclusion, because of the existing law covering the fact situation, and a sense of justice determined by the mores and ethics

of a modern society, it is felt that the decision reached in the principal case is correct. It is submitted, however, that by a recognition of the existence of a right of privacy, the court will not in all cases permit a recovery in the absence of publication of the wrongfully gained material. It was necessary in this case to establish such a right in the plaintiff without a publication by the defendant, for if this had not been done, a privilege to willfully eavesdrop, with immunity therefor, would have been granted. Thus a justifiable result was reached in the principal case by giving primary consideration to the protection of the plaintiff.

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WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.—Deceased was employed by a tractor repair company. The owner of the company had an informal understanding with his employees that help was to be given by the employees to any motorist they found in distress on the highways, in the belief that this would indirectly help his business, in that other motorists would help his drivers if the need arose. Deceased, while driving a company truck in performance of his duties, stopped to assist a fellow trucker in difficulty. He was attempting to warn oncoming motorists with a flashlight when he was struck and killed by an approaching truck. The widow asks payment under the state workmen's compensation statute. *Held,* affirming the lower court, that the injury and death resulted from an accident arising out of and occurring in the course of employment. *U.S. Fidelity & Guaranty Co. v. Hamlin,* 105 S.E.2d 481 (Ga. 1958).

GA. CODE tit. 114, § 102 (1935), states that for an injury to come under that state's workmen's compensation statute, the injury must result from an accident "arising out of and in the course of employment."

The problem raised by the principal case and the applicable section of the *Georgia Code* is one which is extremely easy to isolate and pose, and just as difficult to resolve. It may be stated quite simply: When does an injury arise out of and in the course of employment? The majority of jurisdictions in this country have statutory provisions similar to that of Georgia, if not in form, at least in substance. Interpretation of these statutes has given rise to a multitude of cases in which the courts have attempted to formulate some