Mercer Law Review

Volume 3 | Number 2 Article 8

5-1952

Television Tort

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TELEVISION TORT*

Our new medium of television has opened up entirely new vistas of entertainment, news coverage, and advertising. Though this medium is somewhat like radio and somewhat like that of the motion picture, the resulting combination of the two physical attributes of those two mediums, plus the factor of network-wide publication of events at the time those events are happening, has had unprecedented appeal to the public resulting in a stupendous increase in the number of television receivers in all parts of this country within range of television transmitters.

Over all this quietly hangs a veritable sword of Damocles, embodied in this question posed by the industry, "How may we exploit this new medium to its maximum capabilities without subjecting ourselves to an overwhelming number of damage suits based on some invasion of the right of privacy of the individual bringing suit?"

The industry's concern is genuine and not merely academic, for if the danger of damage suits deters the industry from utilizing this new medium to its fullest capabilities, then its appeal to the public may wane; and if the industry wades into the problem and lets the chips fall where they may, the result may be so great a number of suits based on some invasion of the right of privacy that the tort may well be dubbed the "Television Tort."

The industry's apprehension may best be illustrated by considering five typical situations causing such apprehension:

CASE NO. 1

John Doe, department store executive of Atlanta, Georgia, explains to Mrs. Doe that it is absolutely necessary for him to make a trip to New York for the purpose of buying a stock of goods for the coming season; but Mr. Doe also has the unexplained and ancillary purpose of meeting there one Miss Ruth Roe, his paramour. Mr. Doe forthwith departs. A few nights later Mrs. Doe and all the little Does are gathered around their television receiver. A network program originating in a New York night club shows John cavorting with a shapely young lass, namely the aforesaid Miss Roe, and though the consequences of his buying trip may be very costly, Mr. Doe is, manifestly, not on a buying spree. He files suit and alleges

*For supplying technical information utilized here grateful acknowledgment is made to the production manager of Station WAGA-TV, Atlanta, Ga.

that his right of privacy has been invaded by an unauthorized publication of his image which resulted in commercial benefit to the defendants, which publication caused him to be shamed, ridiculed, and humiliated, caused his wife to divorce him, and caused him to be discharged from his position as a department store executive.

CASE NO. 2

Assume the same facts as in Case No. 1, except that Mr. Doe and Miss Roe are televised as spectators at a football game at the Polo Grounds, or a boxing match at Madison Square Garden, or a baseball game at Yankee Stadium.

CASE NO. 3

Assume the same facts as in Case No. 1, except that Mr. Doe and Miss Roe are televised without their consent by a man-on-the-street program, they being unexpectedly approached by the interviewer.

CASE NO. 4

Assume the same facts as in Case No. 1, except that Mr. Doe and Miss Roe are televised unintentionally and incidentally with the telecast of some newsworthy occurrence such as a conflagration, political speech, etc.

CASE NO. 5

Let us assume a vastly different set of facts than we have had in the foregoing four hypothetical cases, for instance, a play is presented by a television network depicting some shameful aspect of Mr. Doe's early life using his name, or by other means pointing out to those viewers who are acquainted with Mr. Doe that he is the subject of the dramatization, which results in the same dire consequences as were described in Case No. 1.

The principles of law underlying the right of privacy are rather aptly stated by the court in *Melvin v. Reid*[1] which case recognized a few general principles that seem to run through most of the better considered decisions recognizing the right of privacy and summarized them as follows:

(1) The right of privacy was unknown to the ancient common law.

1. 12 Cal. App. 285, 297 Pac. 91, 93 (1931).

(2) It is an incident of the person and not of property—a tort for which a recovery is given in some jurisdictions.[2]

(3) It is a purely personal action, and does not survive, but dies with the person.[3]

(4) It does not exist where the person himself has published the matter complained of, or consented thereto.

(5) It does not exist where a person has become so prominent that by his very prominence he has dedicated his life to the public, and thereby waived his right of privacy.[4]

(6) It does not exist in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit, as in the case of a candidate for public office.

(7) The right of privacy can only be violated by printings, writings, pictures, or other permanent publications or reproductions, and not by word of mouth.[5]

2. Sixteen by court decision: Arizona, Reed v. Real Detective Publishing Co., 63 Ariz. 294, 162 P.2d 133 (1945); California, Melvin v. Reid, *supra* note 1; District of Columbia, Peed v. Washington Times Co., 55 Wash. L. Rep. 182 (1927); Florida, Cason v. Boskin, 155 Fla. 198, 20 So.2d 243 (1944); Georgia, 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101 (1904); Indiana, Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 775 (1946); Kansas, Kung v. Allen, 102 Kan. 833, 170 Pac. 532 (1918); Kentucky, Brents v. Morgan, 221 Ky. 765, 299 S.W. 967, 55 A.L.R. 964 (1927); Louisiana, Utzkovitch v. Whitaker, 15 La. 479, 39 So. 499, 1 L.R.A. (N.S.) 1147 (1905); Missouri, Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); New Jersey, McGovern v. Van Riper, 137 N.J.Eq. 24, 43 A.2d 514 (1945), affirmed 137 N.J.Eq. 548, 45 A.2d 842 (1946); North Carolina, Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Ohio, Friedman v. Cincinnati Local Joint Executive Board, 20 Ohio Ops. 473 (1941); Oregon, Hinish v. Meier and Frank Co., 166 Ore. 482, 113 P.2d 438 (1941); Pennsylvania, Chapman v. Bernstein, 38 Pa. O.&C. 543 (1940); South Carolina, Holloman v. Life Insurance Co. of Virginia, 192 S.C. 454, 7 S.E.2d 169, 127 A.L.R. 110 (1940).

And three by statute: New York, Utah and Virginia.

3. But, see Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930), where an action for invasion of privacy was maintained by parents of a deceased child based on publication of a picture of the child while living.

4. However, this waiver applies only to the public aspect of his personality and not to the purely private aspects of his personality. Pavesich v. New England Mutual Life Ins. Co., *supra*, note 2; Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207, 127 P.2d 577 (1942).

5. In a few cases recovery has been allowed for intrusion upon the plaintiff's privacy in the sense of his solicitude or his right to be let alone in his own affairs. Thus, a cause of action has been found in bursting into a woman's bedroom on a steamship, Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905 (1924); in tapping one's telephone wire,

(8) The right accrues when the publication is made for gain or profit.[6]

In considering the five hypothetical cases previously set forth we need bear in mind that Mr. Doe need not allege special damages,[7] the fact that damages cannot be measured is no bar to recovery,[8] general damages may be recovered though no special damages are shown,[9] and truth is no defense.[10]

The right of privacy consists of primarily the right to be let alone, the right to live one's life as chosen, and the right to be free from intruders and unauthorized publicity.[11] The invasion of the right has been defined as, "The unwarranted appropriation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."[12] Neither the article by Warren and Brandeis,[13] which is recognized as the energizing force that led to recognition of the right, nor the leading case of *Pavesich v. New England Mutual Life Ins. Co.*[14] limited the right to a person of ordinary sensibilities, and the *Pavesich* case expressly recognized one's right to live as a *recluse* and be free from *all* intrusions. Thus, one person's right of privacy may be more easily invaded than another's, and it seems that each case must turn upon its own peculiar facts and be balanced against the interests of society under the circumstances of every individual case.[15] The Restatement of Torts has injected the element of foreseeability,[16] but the cases simply do not justify the view taken by the American Law Institute. It is not here

Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931); and in listening to one's conversation with a dictaphone, McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939).

6. The *lex delicti* is the state where the last event necessary to make the defendant liable for the tort took place, and this would be the state where the seal of privacy was first broken. Banks v. King Feature Syndicate, 30 F. Supp. 352 (D.C. N.Y. 1939).
7. Pavesich v. New England Mutual Life Ins. Co., *supra*, note 2.
8. Brents v. Morgan, *supra*, note 2.
9. Munden v. Harris, *supra*, note 2.
10. Melvin v. Reid, *supra*, note 2; Pavesich v. New England Mutual Life Ins. Co., *supra*, note 2; Brents v. Morgan, *supra*, note 2.
11. Pavesich v. New England Mutual Life Ins. Co., *supra*, note 2.
12. 138 A.L.R. 125, R. T. Kimbrough, annotator.
13. *The Right of Privary*, 4 HARV. L. REV. 193 (1890).
14. *Supra*, note 2; also see Kerby v. Hal Roach Studios, 53 Cal. App.2d 207, 127 P.2d 577 (1942).
15. Mavity v. Tyndall, *supra*, note 2; Sidis v. F-R Publishing Co., 113 F.2d 806 (2nd Cir. N.Y. 1940).
16. " . . . Liability exists only if the defendant's conduct was such that he should have realized that it would be offensive to person of ordinary sensibilities. . . . " REST., TORTS, Section 867, comment d.

considered whether or not the element of foreseeability is desirable, or whether the right of privacy itself is desirable, but it is here said that where the right has been recognized the element of foreseeability, if injected, would practically destroy the right, for it is the exception rather than the rule when a publisher foresees the harmful aspect of his conduct, especially where it is unintentional.[17]

Thus, in Case No. 1 it seems that the only defense available to the defendants in such an action would be that Mr. Doe has waived his right of privacy by his conduct, or had expressly done so. Mr. Doe in entering the night club supposedly had no reason to suspect that his presence there would be publicized over a nation-wide television network. It seems that the very nature of a cabaret is clandestine, and if one expects television cameras to be present at all, one would only expect the floor show to be televised. However, there is a practice in some of our large cities, where the floor show is to be televised, that small cards stating that fact are placed on each table. But, as Mr. Doe's cause of action would arise under the New York statute which requires written consent to constitute a waiver of the right of privacy,[18] it is highly doubtful that such a notice would suffice. Then, too, before Mr. Doe saw the card he had probably become liable for either a cover charge or a minimum charge. However, his conduct in disregarding such a notice might well go to mitigate damages,[19] and could possibly exclude all but very nominal damages.[20]

So far, we have assumed that Mr. Doe and Miss Roe were televised as part of the audience. In the event that Mr. Doe and Miss Roe became part of an audience participation floor show, which was being televised which was made known to them, then, clearly, it seems that no right of privacy has been invaded,[21] rather than such action constituting a waiver.

17. And it has been said. "Whenever a man publishes, he publishes at his peril." Rex v. Woodfall, Lofft. 776,781, 98 Eng.Rep. 914, 916 (1774), per Lord Mansfield.
18. NEW YORK CIVIL RIGHTS LAW. Sections 50, 51.
19. Hammond v. Crowell Publishing Co., 253 App. Div. 205, 1 N.Y.S.2d 728 (1938).
20. Harris v. H. W. Gossard Co., 194 App. Div. 688, 185 N.Y.S. 861 (1921); Miller v. Madison Square Garden Corp., 176 Misc. 714, 28 N.Y.S.2d 811 (1941) (verdict for 6c).
21. Gautier v. Pro-Football, Inc., 198 Misc. 850, 99 N.Y.S.2d 212 (1950), affirmed 199 Misc. 850, 106 N.Y.S.2d 667 (1950), reversed 279 App. Div. 431, 106 N.Y.S.2d 553 (1951), where the Appellate Division in reversing the decision of the trial court held that one who presented an animal act during half time activities at a football game had no action under the New York statute for invasion of his right of privacy even though his act was televised over his express objection. However, in a common law action such conduct probably would constitute a waiver of the right. See: Chavez v. Hollywood Post No. 43, American

In case No. 2, if Mr. Doe and Miss Roe are televised as part of a large crowd at a public event, there may be some merit to the probable claim by the defendants that the people were televised incidentally to the televising of a newsworthy item,[22] *i.e.*, spectators at a public event, either to show that the group was unusually large or unusually small. However, it seems totally unnecessary to scan such a group at close enough range to enable one who is acquainted with an individual member of that group to recognize the individual.

In Case No. 3 Mr. Doe and Miss Roe are unexpectedly approached by the interviewer. They are the direct subjects of the television camera, and their images are telecast without first procuring their consent, and by the time they are able to voice their objections their images have flashed over the network, and the damage has been done. Here, seemingly, is a clear case of invasion of the right of privacy.

In Case No. 4 if Mr. Doe and Miss Roe are televised incidentally in the immediate vicinity of a newsworthy occurrence, then, clearly, there has been no invasion of the right of privacy.[23]

In Case No. 5, in presenting a play, movie, or kinescope recording bringing out some aspect of Mr. Doe's early life that is not of ligitimate public interest, other than the usual public interest in the sensational or lurid, where the person of Mr. Doe is definitely pointed out so that his present acquaintances perceive that he is the character referred to, then, it seems, Mr. Doe has an action for invasion of the right of privacy;[24] however, where the use of a person's name is purely coincidental, no cause of action arises.[25]

The damages to be recovered in an action for invasion of the right of privacy are those which the law authorizes in cases of torts of that character, and if the law authorizes a recovery for wounded feelings in other torts of a similar nature, such damages would be recoverable in an action for the invasion of this right.[26] Thus, one whose right of privacy is unlawfully in-

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Legion, 16 U. S. Law Week 2632 (Cal. S.Ct.), *ore tenus*, "A prize fighter who participates in a public boxing match waives his right of privacy as to that fight. . . ."

22. Martin v. F. I. Y. Theatre Co., 26 Ohio L. Abs. 67, 10 Ohio Ops. 338 (1938); Pavesich v. New England Mutual Life Ins. Co., *supra*, note 2; Metler v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939).
23. *Ibid.*
24. Melvin v. Reid, *supra*, note 1; but see: Sidis v. F-R Publishing Corp., *supra*, note 15.
25. Damron v. Doubleday, Doran & Co., 133 Misc. 302, 231 N.Y.S. 444 (1928), affirmed without opinion 226 App. Div. 796, 234 N.Y.S. 773, 774 (1929); *Swacker v. Wright*, 154 Misc. 822, 277 N.Y.S. 296 (1935).
26. Pavesich v. New England Mutual Ins. Co., *supra*, note 2.

vaded is entitled to recover substantial damages, although the only damages suffered by him resulted from mental anguish.[27]

If the element of malice appears, punitive damages may be recovered,[28] but the defendant is entitled to set up and prove any facts which might be considered in extenuation or mitigation of damages, although not constituting a complete defense.[29]

In proper case the plaintiff may have injunctive relief,[30] and under the New York statute it has been held that separate actions for damages and for an injunction are proper;[31] and an action for invasion of the right of privacy may be joined with an action for libel.[32]

There are, generally, five types of television programs presented by local television stations:

(1) The play, or skit, usually rehearsed and governed by a script.

(2) Movies, which are edited as to time only.

(3) Kinescope recordings, which come directly from the network and cannot be edited at all by the local stations.

(4) Round table discussions and quiz programs, some of which are partially governed by a script in that the questions are prepared; of course, the answers are totally extemporaneous.

(5) Spontaneous (man-on-the-street) programs.

The question of the liability of the various persons connected with the above types of television programs, *i.e.*, probably the sponsor, the network, the persons actually participating in the program, the originating station, and the local transmitter, is much beyond the scope of this article, so suffice it here to point out the problem and to recognize the modern tendency of the courts in determining the persons liable in such a chain of publishers as was laid down in *Summitt Hotel Co. v. National Broadcasting Co.*,[33] where it was held that there is no liability for an extemporaneous remark interjected by a radio comedian in a sponsored program, on the part of the broadcasting company using due care in selecting and leasing its time and facilities

27. Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931); Brents v. Morgan, *supra*, note 2.
28. Munden v. Harris, *supra*, note 2; Hinish v. Meier and Frank Co., *supra*, note 2.
29. McDaniel v. Atlanta Coca-Cola Bottling Co., *supra*, note 5.
30. Bazemore v. Savannah Hospital, *supra*, note 3.
31. Ashley v. Gimbel Bros., 170 Misc. 369, 11 N.Y.S.2d 128 (1938).
32. D'Altomonte v. New York Herald Co., 208 N.Y. 596, 102 N.E. 1101 (1913), modifying 154 App. Div. 453, 139 N.Y.S. 200 (1913).
33. 336 Pa. 182, 8 A.2d 302 (1939).

to a commercial advertising company for the transmission of such programs, whose agent produced and carried on the program, where the defendant inspected and edited the script thereof, and had no reason to believe that such a statement would be made, regardless of failure to explain fully or apologize for the remark, the court refusing to apply the doctrine of "liability without fault" upon the plaintiff's theory that the defendant was engaged in such a speedy and universal dissemination of matter reaching the public that public policy required the application of that doctrine.[34]

In all probability the test in most television cases will be, "Was there an unauthorized telecasting of the plaintiff's image which resulted in some commercial benefit to the defendants?," for by far the greater number of privacy cases invoke a commercial aspect as typified by the leading case.[35]

The emergence of the right of privacy was a magnificent triumph for individual rights, and where the industry, by reason of its own commercial gratification, finds it necessary to invade the right of privacy, it seems to follow that the industry must bear the consequences; however, a different case is presented where legitimate interests of the public demand adoption of such a policy by the industry. Where to draw the line between commercial gratification and legitimate public interest, if they grapple with the problem, will surely vex the courts. It seems that if the right is to exist at all it must not be limited to a person of ordinary sensibilities, nor should the element of foreseeability determine liability on the part of the publisher; but it must first be determined whether or not any right of privacy of the particular and individual plaintiff has been invaded, and if this be affirmatively determined, then the interests of society and the public should be balanced against the invasions on the individual in relation to the customs of the time and place to determine whether or not a proper case exists for the enforcement of the right of privacy. In other words, the right of privacy should be looked upon as a relative right.

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34. But see: *Locke v. Benton and Boles*, 253 App. Div. 369, 2 N.Y.S.2d 150 (1938), which seems to indicate that if the audience thought that ad lib remarks were part of a script the fact might be considered in determining whether a defamatory remark constituted libel or slander.
35. Pavesich v. New England Mutual Life Ins. Co., *supra*, note 2.