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Tort -- Invasion of Right to Privacy -- Telephone Monitoring

Meyer M. Brilliant

investigation into legislative intent. The dissent, on the other hand, considered the statute too indefinite and reached its conclusion strictly on the basis of construction of an ambiguous tax statute. The majority relied heavily on the case of *State* ex rel. *Tampa Electric Co. v. Gay*[17] in which the facts were similar to those of the instant case. There the court held that the taxpayer's rights were barred by the time limitation set forth in the same statute with which we are here concerned. The dissent in the instant case dismisses the *Tampa Electric* case by pointing out that in that decision the right of the taxpayer grew out of the judicial construction of a valid statute, and not from the determination that the taxing statute was unconstitutional. The dissent relies upon *Walgreen Drug Store Co. v. Lee*[18] and what it considers the obvious intent of the lawmaking body.

It appears that the taxpayer was dealt with rather harshly in the instant case. It does not seem logical that the legislature, having envisaged a situation such as this, would have intended the right to refund to accrue as of the date of payment, but rather when the statute was declared unconstitutional. Plaintiff paid the tax willingly, and thus could not bring an action for a refund until he was given statutory authorization, unless he brought an action to attack the constitutionality of the statute. Is this not a harsh requirement to be imposed upon any law-abiding citizen?

Herbert Jay Cohen.

TORT—INVASION OF RIGHT TO PRIVACY—TELEPHONE MONITORING

Plaintiff subscriber sought to recover damages for alleged invasion of her privacy resulting from the monitoring of her private telephone conversations by the defendant telephone company who suspected plaintiff was using such telephone for business purposes. *Held*, that no invasion of privacy resulted since plaintiff suffered no damages, secrecy had been maintained and there had been no publication except to her. *Schmukler v. Ohio Bell Telephone Co.*, 116 N.E. 2d 819 (Ohio 1953).

The recognition of the personal right to privacy is comparatively new in the law of torts,[1] and is not a subject covered by any of the old commentators of the law. Relief in early cases was always based on established theories of breach of confidence or trust,[2] breach of contract,[3]

17. 40 So.2d 225 (Fla. 1949).
18. See note 16, *supra*.

1. 4 Harv. L. Rev. 193 (1890). The doctrine of the law of privacy, as such, was first advanced in this country in an article written by Louis D. Brandeis and Samuel D. Warren. This was the first United States comment advancing that we ought to recognize it as a personal right and not one of property only.

2. Robertson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902) (which led to enactment of a statutory right of privacy).

3. Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918).

or invasion of one's property rights.[4] The exceptions, extent, and limitations of such a right vary in the different jurisdictions. The right is recognized by some jurisdictions as existing at common law;[5] by others as created by statute,[6] and still by others as a fundamental constitutional right.[7] However, liability for the invasion of such right is determined not by the *lex fori*, but by the *lex loci delictus*.[8]

The law of privacy has been applied mainly when dealing with the unauthorized use of a person's name,[9] or of a picture,[10] or of the showing of a likeness in a motion picture,[11] publication,[12] radio and television,[13] or a right to a private letter.[14] Some cases denied any such right at common law,[15] and no action could be maintained at all upon the theory that such a right must be created by the legislature and not by the courts.[16]

Today, the right is designed primarily to protect the feelings and sensibilities of human beings, rather than to safeguard property, business, or other pecuniary interests.[17] However, it protects only the ordinary sensibilities of an individual and not supersensitiveness.[18] Where the right is violated, its violation is a tort[19]—the right being the compliment of the right of immunity of one's person; not on the principle of private property but on the principle of an individual personality.[20]

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4. Prince Albert v. Strange, 2 De. & Sm. 652, 1 M & Gord. 45, 41 Eng. Rep. 1171 (1848) (England, though favoring a personal right of privacy now seems committed to the idea that there must be an injury to property or reputation).
5. Cason v. Baskin, 159 Fla. 31, 30 So.2d 635 (1947).
6. N.Y. CIVIL RIGHTS LAW, Art. 5, § 50.
7. Melvin v. Reid, 112 Cal. App. 285, 297 Pac. (1931).
8. Banks v. King Features Syndicate, 30 F. Supp. 352 (S.D.N.Y. 1939).
9. Edison v. Edison Polyform Co., 73 N.J.Eq. 136 (Ch. 1907).
10. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).
11. Donahue v. Warner Bros. Pictures, 194 F.2d 6 (10th Cir. 1952).
12. Kreiger v. Popular Publications, Inc., 168 Misc. 5, 3 N.Y.S.2d 480 (Sup. Ct. 1938).
13. Cohen v. Marx, 94 Cal. App.2d 704, 211 P.2d 320 (1949).
14. People v. Burns, 178 App. Div. 845, 166 N.Y.S. 323 (1st Dep't 1917).
15. State v. Davis, 139 N.C. 547, 51 S.E. 897 (1905); *In re* Hart's Estate, 193 Misc. 884, 83 N.Y.S. 2d 635 (Surr. Ct. 1948) (Subject to qualification that eavesdropping was a crime at common law); Fisher v. Murray M. Rosenberg, 175 Misc. 370, 23 N.Y.S. 2d 677 (Sup. Ct. 1940); Kline v. Robert M. McBride & Co., 170 Misc. 974, 11 N.Y.S. 2d 674 (Sup. Ct. 1939).
16. Vassar College v. Loose Wiles Biscuit Co., 197 Fed. 982 (D.C.Mo. 1912); Corliss v. Walker, 57 Fed. 434 (C.C. Mass. 1893) (An educational institution which is not only a corporation but a public institution has no right of privacy which will be conserved by injunction); Atkinson v. Doherty, 121 Mich. 372, 80 N.W. 285 (1899); Robertson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902); Henry v. Cherry & Webb, 30 R.I. 13, 73 Atl. 97 (1909).
17. Maysville Transit Co. v. Ort, 296 Ky. 524, 177 S.W.2d 369 (1944).
18. Gill v. Curtis Publishers Co., 231 P.2d 565 (Cal. 1951); Southwestern Bell Tel. Co. v. Cook, 30 S.W.2d 497 (Tex. Civ. App. 1930).
19. Reed v. Real Detective Publishing Co., 63 Ariz. 294, 162 P.2d 133 (1945); Cason v. Baskin, 159 Fla. 31, 30 So.2d 635 (1947); Davis v. General Finance & Thrift Corp., 80 Ga. App. 708, 57 S.E.2d 225 (1950); RESTATEMENT, TORTS § 867 (1939) defines the right of privacy as follows: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others . . . is liable to the other."
20. Robertson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

The right of privacy as such has not been constitutionally protected except possibly the right of one to enjoy his home against unreasonable invasion, which includes invasion of his private papers, writings, and belongings.[21] The right under the federal constitution is as broad as the concept of reasonableness, which means that it has no fixed boundaries, but is broad or narrow as facts and circumstances vary.[22] The Federal Communcations Act of 1934 imposes a civil as well as a criminal liability upon anyone who publishes an intercepted message.[23]

The instant case seems to be a case of first impression involving monitoring or tapping of a telephone by the telephone company itself. Although it has been held that the tapping of telephone wires and listening to private conversations constitutes an invasion of the right of privacy,[24] and there are cases involving intrusion of such right by eavesdropping by person or by mechanical means, nevertheless, such intrusion has always been committed by some party other than the telephone company.[25]

The court held that plaintiff's right to privacy had not been violated because the defendant had the right to prescribe rules and regulations to govern the furnishing of its services or the use of its facilities, and that the monitoring employed was the only means the defendant had available to detect the fraud being perpetrated upon it by the plaintiff. Also that the rules and regulations were reasonable,[26] were not against public policy,[27] and did not conflict or interfere with the public duties of the defendant company,[28] and that the very nature of the service undertaken exacts control by the company to assure its efficiency.[29] The company can require compliance with such rules by its patrons as a condition of serving or continuing to serve them,[30] and the subscriber is bound by

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21. U.S. CONST. Art. IV, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ."

22. United States v. Baxter, 89 F. Supp. 732, 744 (E.D. Tenn. 1950); McGovern v. Van Riper, 140 N.J.Eq. 34, 45 A.2d 842 (Ct. Err. & App. 1946); Fernicolav v. Keenan, 136 N.J.Eq. 9, 39 A.2d 851 (Ch. 1944); Pine v. Okzewski, 112 N.J.Eq. 429, 170 Atl. 825 (Ct. Err. & App. 1934).

23. Nardone v. United States, 302 U.S. 379 (1937); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); 47 U.S.C. § 605 (1934): "Whoever . . . shall, without authority and without the knowledge and consent of the users . . . tap any telegraph or telephone line would thereby commit a Federal offense."

24. Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931).

25. *Ibid.*

26. Wolverton v. Mountain States Tel. & Tel. Co., 58 Colo. 58, 142 Pac. 165 (1914); Kelly v. Southwestern Bell Tel. Co., 248 S.W. 658 (Com. App. Tex. 1923); Gillis v. Western Union Telegraph Co., 61 Vt. 461, 17 Atl. 736 (1889).

27. Southern Bell Tel. & Tel. Co. v. Beach, 86 Ga. App. 720, 70 S.E. 137 (1911).

28. Central Union Tel. Co. v. Swoveland, 14 Ind. App. 341, 42 N.E. 1035 (1896).

29. Huffman v. Marcy Mutual Tel. Co., 143 Iowa 590, 121 N.W. 1033 (1909).

30. McDaniel v. Faubush Tel. Co., 32 Ky. 572, 106 S.W. 825 (1908); Bess v. Citizens' Tel. Co., 315 Mo. 1056, 287 S.W. 466 (1926); Gardner v. Providence Tel. Co., 23 R.I. 262, 49 Atl. 1004 (1901).

such lawful rules and regulations.[31] The defendant may make a classification of the telephone into business and residential and may charge a different fee as to each class.[32]

The court upheld defendant's contention that since its service is a quasi-public one,[33] that it was under a duty to serve the public impartially and without discrimination, and that if the plaintiff was allowed to continue her fraud it would result in discrimination. Plaintiff would then be paying less for the type of service used than others who practiced no such fraud. Where use of a private branch exchange of a corporation for a personal business was expressly prohibited, a person entitled to use the exchange for corporate business is not entitled to recover for a denial of personal use.[34]

The court also found that there was no publication of the conversations overheard, the conduct of the plaintiff was unethical and she suffered no real damage except perhaps from mental anguish as a result of being frustrated in her attempt to acquire for herself a more attractive telephone rate. It is submitted that perhaps the court erred in this case because the court apparently was influenced more by the unethical conduct of the defendant than by her substantive right to privacy. The court should not have looked for special damages, for it is not necessary that they should have occurred in order to entitle plaintiff to recover.[35] One whose right of privacy has been invaded is entitled to recover substantial damages although the only damages suffered resulted from mental anguish.[36] The fact that the damages may be difficult to ascertain or cannot be measured by a pecuniary standard is not a valid reason for denying any recovery at all.[37] The unethical conduct of plaintiff is immaterial for the truth of the matter is not involved in such a violation of privacy.[38] Neither are the motives of the defendant material with respect to the determination whether there is a right of action.[39] It makes no difference that defendant did not communicate

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31. Bartlett v. Western Union Telegraph Co., 62 Me. 209 (1873) (dictum that knowledge of a rule is sufficient to bind a patron, consent not being required); Western Union Telegraph Co. v. Neel, 86 Tex. 368, 25 S.W. 15 (1894).

32. Cumberland Tel. & Tel. Co. v. Hartley, 127 Tenn. 187, 154 S.W. 531 (1913).

33. Southern Bell Tel. & Tel. Co. v. Beach, 86 Ga. App. 720, 70 S.E. 137 (1911).

34. McGrew v. Nebraska Tel. Co., 109 Neb. 264, 190 N.W. 783 (1922).

35. McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939) (classic example of the violation of a person's right of privacy, wherein defendant tape recorded plaintiff's conservations); Goodyear Tire & Rubber Co. v. Vandergriff, 52 Ga. App. 662, 184 S.E. 452 (1936).

36. Brents v. Morgan, 221 Ky. 763, 299 S.W. 967 (1927).

37. 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).

38. Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942).

39. Sidis v. F. R. Publishing Co., 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940); Lewis v. Physicians and Dentists Credit Bureau, 27 Wash.2d 267, 177 P.2d 896 (1947).

to anyone else the conversations overheard,[40] for the intrusion had already been committed. Even a suspected criminal's privacy is protected by a requirement that a court order be procured before his telephone conversation may be monitored,[41] and many states have a law against tapping into a telephone conversation.[42] In our present society which is becoming extraordinarily complex, there is a great need for the doctrine of the right of privacy.

> . . . invasion of one's privacy is repugnant to all Americans. Even if properly controlled it is an intolerable instrument of tyranny, impinges on the liberty of the people and should not be sanctioned.[43]

Plaintiff should have recovered at least nominal damages.

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40. Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931) (. . . it is the legal right of every man to enjoy social and business relations with his friends, neighbors, and acquaintances, and he is entitled to converse with them without molestation by intrusion . . . .).
41. N.Y. CODE OF CRIMINAL PROCEDURE, § 813(a).
42. Ala., Ark., Colo., Conn., Ill., Iowa, Kan., Ky., Mass., Neb., N.M., N.C.
43. Herbert Brownell, Jr., 39 CORNELL L.Q. 2 (Winter 1954).