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THE RIGHT OF PRIVACY IN LOUISIANA

As American society has progressed, increasing emphasis has been placed upon the protection of individual rights. This trend has prompted American courts to recognize what is generally known as the "right of privacy." Although many legal writers have dealt with the right of privacy,¹ much confusion still exists from state to state as to its nature and to what extent, if any, courts will afford it protection against violation. This Comment is designed to examine the development and application of the right of privacy by Louisiana Courts.

Recognition and Definition of the Right

Louisiana, one of the majority of states recognizing the right of privacy,² first dealt with the question in an 1811 decision³ which effectively protected the right of privacy, though not expressly describing it as such. By 1906 the right of privacy was expressly recognized by name in at least two Louisiana decisions.⁴ Later decisions have held that the right of privacy is protected under the broad coverage of article 2315 of the Civil Code⁵ and that a violation of this separate and distinct legal right is tortious in nature.⁶

Our courts' definitions of this offense have been somewhat obscure. Under one definition the right of privacy consists of

1. Brittan, *The Right of Privacy in England and the United States*, 37 TUL. L. REV. 235 (1963); Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713 (1948); Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Ludwig, "Peace of Mind" in *48 Pieces vs. Uniform Right of Privacy*, 32 MINN. L. REV. 734 (1948); Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526 (1941); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); Yankwich, *The Right of Privacy*, 27 NOTRE DAME LAW. 429 (1952).

2. *McAndrews v. Roy*, 131 So.2d 256, 258 (La. App. 1st Cir. 1961); W. PROSSER, LAW OF TORTS § 112, at 831 (3d ed. 1964); 41 AM. JUR. *Privacy* § 5, at 927 (1942); Annot., 138 A.L.R. 22, 28 (1942).

3. *Denis v. Leclerc*, 1 Mart. (O.S.) 297 (1811) (defendant enjoined from publishing a letter, annexed a copy of it to his answer, and by a newspaper advertisement invited all who wished to see the letter to call at the clerk's office, held in contempt of the injunction); see Bennett, *Injunctive Protection of Personal Interests—A Factual Approach*, 1 LA. L. REV. 665, 680 (1939); Note, 21 TUL. L. REV. 639, 640 (1942).

4. *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905), *second appeal*, 117 La. 708, 42 So. 228 (1906); *Schulman v. Whitaker*, 115 La. 623, 39 So. 737 (1905), *second appeal*, 117 La. 704, 42 So. 227 (1906).

5. Which, in pertinent part, states: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

6. *Tuyes v. Chambers*, 144 La. 723, 81 So. 265 (1919); *Pack v. Wise*, 155 So.2d 909 (La. App. 3d Cir. 1963); *Quina v. Roberts*, 16 So.2d 558 (La. App. Ori. Cir. 1944).

the right to live one's life in seclusion without being subjected to unwarranted and undesired publicity, or simply the right to be let alone.⁷ According to another, the right of privacy is the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.⁸ A third definition envisions the right of privacy as a part of the general right of the immunity of the person, similar to the right not to be defamed and the right not to be maliciously prosecuted.⁹ One court in discussing the various attempts at defining the right of privacy stated that each definition conveys but one meaning, that being the right to an inviolate personality.¹⁰

*Determining When Relief Should Be Granted for an
Invasion of the Right*

These definitions because of their very broad language are of little, if any, assistance to a court in resolving a case involving the right of privacy. In order reasonably to limit the area of protection afforded under the right of privacy, the courts in Louisiana, either expressly or tacitly, have distinguished between "actual" and "actionable" invasions of the right of privacy with legal redress being granted only when the invasions are deemed to be actionable.¹¹ Since this distinction is the crucial determinate of whether recovery will be allowed, much discussion will be devoted to the test used by the courts to ascertain whether certain conduct is an actionable invasion of the right of privacy. As employed by the courts, the word "actual" describes conduct for which no recovery will be granted even though such conduct may seem to invade the right of privacy as that right has been so broadly defined.

It is evident that malicious intent is not necessary in order to have an actionable invasion of the right of privacy, and that truth and the absence of malice are not defenses to such an

7. *Pack v. Wise*, 155 So.2d 909, 913 (La. App. 3d Cir. 1963); *McAndrews v. Roy*, 131 So.2d 256, 258 (La. App. 1st Cir. 1961); *Souder v. Pendleton Detectives, Inc.*, 88 So.2d 716, 718 (La. App. 1st Cir. 1956); *Hamilton v. Lumbermen's Mut. Cas. Co.*, 82 So.2d 61, 63 (La. App. 1st Cir. 1955).

8. See cases cited note 7 *supra*.

9. See cases cited note 7 *supra*.

10. *Hamilton v. Lumbermen's Mut. Cas. Co.*, 82 So.2d 61, 63 (La. App. 1st Cir. 1955).

11. *Cunningham v. Securities Investment Co. of St. Louis*, 278 F.2d 600, 602 (5th Cir. 1960); *Pack v. Wise*, 155 So.2d 909, 913 (La. App. 3d Cir. 1963); *Reed v. Orleans Parish School Board*, 21 So.2d 895, 897 (La. App. Or. Cir. 1945).

action.¹² In determining the criterion for liability the courts have looked to what was done rather than the precise motives which accompanied the acts. A few Louisiana decisions¹³ have referred specifically to section 867 of the American Law Institute's *Restatement of Torts* as the test to be used in determining whether certain conduct constitutes an actionable invasion of the right of privacy.¹⁴ Section 867 provides:

"A person who *unreasonably* and *seriously* interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." (Emphasis added.)

Explicit in section 867 is a test of reasonableness with regard to the conduct in question. Other decisions without specifically referring to Section 867, have applied this test by balancing the interests of the defendant in pursuing his course of conduct against the interest of the plaintiff in having his privacy protected.¹⁵ Under the reasonableness test a defendant may lawfully act in a reasonable manner even though this conduct may to a slight degree result in an actual invasion of the plaintiff's right to privacy. When the court determines that the defendant's conduct is unreasonable and seriously interferes with the plaintiff's privacy, there is an actionable invasion of the right of privacy. As the issue of reasonableness always depends upon the specific facts of each case, no rigid rules can be established for the resolution of future cases. However, a review of the jurisprudence is helpful in demonstrating what conduct the courts have considered reasonable or unreasonable.

12. *Cunningham v. Securities Investment Co. of St. Louis*, 278 F.2d 600, 604 (5th Cir. 1960); *Tuyes v. Chambers*, 144 La. 723, 730, 81 So. 265, 267 (1919); *Quina v. Roberts*, 16 So.2d 558, 560 (La. App. Orl. Cir. 1944).

13. See *Cunningham v. Securities Investment Co. of St. Louis*, 278 F.2d 600, 604 (5th Cir. 1960); *Pack v. Wise*, 155 So.2d 909, 912 (La. App. 3d Cir. 1963).

14. In *Pack v. Wise*, 155 So.2d 909, 912 (La. App. 3d Cir. 1963), the court also referred to RESTATEMENT OF TORTS SECOND § 46, Tentative Draft No. 1 (adopted 1957). Section 46 reads: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from it." However, this was the only decision found which expressly referred to Section 46.

15. *Cunningham v. Securities Investment Co. of St. Louis*, 278 F.2d 600, 602 (5th Cir. 1960); *Pack v. Wise*, 155 So.2d 909, 913 (La. App. 3d Cir. 1963); *Souder v. Pendleton Detectives, Inc.*, 88 So.2d 716, 718 (La. App. 1st Cir. 1956); *Reed v. Orleans Parish School Board*, 21 So.2d 895, 897 (La. App. Orl. Cir. 1945).

Louisiana Jurisprudence

The Louisiana cases have been divided into three groups. The first group consists of cases involving debt collection, and the second covers the general publication and disclosure of private matters, names, and photographs. The last group of cases involves physical intrusions and interference with social relations.

Debt Collection

In this area the courts clearly recognize a creditor's right to collect his debts legally due, but they have required that the collections be made in a reasonable manner. A creditor has been found guilty of an actionable violation of his alleged debtor's right of privacy when, after receiving a letter from the alleged debtor's attorney expressly informing him of a defense to the claim and that his client desired no more intrusion by the creditor into his employment relationship, the creditor subsequently brought such letter to the attention of the alleged debtor's employer. Plaintiff, who had lost \$2,000 in earnings because of discharge from his employment, was awarded \$5,000 for the creditor-defendant's invasion of his right of privacy.¹⁶ Apparently, the court found that the debtor's interest in being secure in his employment relationship outweighed any interest the creditor may have had in coercing payment of the disputed debt by exerting pressure on the debtor through his employer.

In a similar case, it was held that a creditor's sending a letter enclosing a "Final Notice Before Suit" requesting the debtor's employer's assistance in collecting the \$1.45 balance of a debt was an unreasonable invasion of the debtor's privacy. The debtor was awarded \$100 for his creditor's tort.¹⁷ Another debtor was awarded \$500 for an actionable invasion of her privacy when a creditor had her name published on a list of delinquent debtors and threatened to advertise the list by displaying it in merchants' store windows.¹⁸ The court found the creditor's threat to be clearly coercive and, therefore, unreasonable.

16. *Pack v. Wise*, 155 So.2d 909 (La. App. 3d Cir. 1963), *cert. denied*, 245 La. 84, 157 So.2d 231 (1963); see Note, 24 LA. L. REV. 953 (1964); *The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Torts*, 25 LA. L. REV. 341 (1965).

17. *Quina v. Roberts*, 16 So.2d 558 (La. App. Orl. Cir. 1944).

18. *Tuyes v. Chambers*, 144 La. 723, 81 So. 265 (1919).

On the other hand, a routine call by a creditor to verify employment and to ascertain the employer's policy toward garnishment has been held to be reasonable and, therefore, not an actionable invasion of the debtor's right of privacy.¹⁹ No actionable invasion was found when the creditor's agent inquired of the debtor's doctor whether he could speak with the debtor about her past due car notes while she was recovering from a heart attack.²⁰ The doctor refused the request and told the debtor's son, who later informed the debtor of the request. In denying the debtor a recovery, the court stated that no case in Louisiana or elsewhere has held that these facts or any similar thereto amount to an actionable invasion of the right of privacy.²¹

General Publication and Disclosure of Private Matters, Names, and Photographs

In order to protect effectively an individual's right of privacy, the publication of private letters has been enjoined.²² A defendant who published "before" and "after" pictures of the plaintiff purporting to show his development after having taken the defendant's physical improvement course, approximately ten years after plaintiff had gratuitously given his consent to the use of such pictures, was found guilty of an actionable invasion of plaintiff's privacy. The court determined that defendant acted unreasonably in not seeking a renewal of plaintiff's consent to the publication and awarded plaintiff \$1,000 for the invasion of his right of privacy.²³

Two decisions have clearly established that when the publication of an accused person's picture in a rogues' gallery is not necessary to prove his guilt or for identification of his person, such publication may be enjoined on the grounds that it would constitute an actionable invasion of the accused's right of privacy.²⁴ In further protecting the right of privacy the court enjoined unauthorized publication of a petition signed by plaintiffs, under a misrepresentation and later repudiated as no

19. *Columbia Fin. Corp. v. Robitcheck*, 142 So.2d 625 (La. App. 4th Cir. 1962), *modified*, 243 La. 1084, 150 So.2d 23 (1963).

20. *Cunningham v. Securities Investment Co. of St. Louis*, 278 F.2d 600 (5th Cir. 1960).

21. *Id.* at 602.

22. *Denis v. Leclerc*, 1 Mart.(O.S.) 297 (1811).

23. *McAndrews v. Roy*, 131 So.2d 256 (La. App. 1st Cir. 1961).

24. *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905), *second appeal*, 117 La. 708, 42 So. 228 (1906); *Schulman v. Whitaker*, 115 La. 628, 39 So. 737 (1905), *second appeal*, 117 La. 704, 42 So. 227 (1906).

longer representing objectives desired by plaintiffs.²⁵ It was found unreasonable to allow the defendants to use plaintiff's petition since it had been signed because of a misunderstanding. Our Supreme Court in overruling an exception of no cause of action indicated that the unauthorized publishing in a newspaper of a marvelous cure given a patient may be an actionable invasion of the physician's right of privacy.²⁶

In a leading case, an insured recovered \$3,000 from his liability insurer for an invasion of his privacy when the insurer without authorization used the insured's name in a newspaper advertisement seeking information concerning an automobile accident in which the insured had been involved.²⁷ The court recognized the right of liability insurers to make reasonable investigations of accidents, but determined that the use of an advertisement which contained the insured's name, address, and phone number was unreasonable. Another decision in which the individual's right of privacy was protected held that the plaintiff in conducting an investigation of alleged discriminatory insurance rates could not compel the defendant to deliver private papers which were not kept in fulfillment of a public duty.²⁸

However, a questionnaire issued by a school board during wartime requiring teachers to disclose their war work was found to be reasonable and not an actionable invasion of the teacher's

25. *Schwartz v. Edrington*, 133 La. 235, 62 So. 660 (1913). The court stated: "The question . . . in the case thus cited [State *ex rel.* Liversey v. Judge, 34 La. Ann. 741 (1882)] was whether the relators had been properly condemned to imprisonment for having violated an injunction prohibiting them from publishing certain "false, malicious, and libelous cartoons and editorial paragraphs," to the alleged irreparable injury of the applicant for the writ." *Id.* at 240, 62 So. at 662.

"What they were enjoined from doing was the publication of a petition purporting to be signed by, and which was in fact, signed by, the plaintiffs in injunction, and purporting to be their petition, but which was not their petition, because, having signed it under a misapprehension, they disavowed and repudiated it, and no longer desired that to be done which it was the purpose of the petition to accomplish." *Id.* at 241-42, 62 So. at 662-63.

26. *Martin v. The Picayune*, 115 La. 979, 40 So. 376 (1906).

27. *Hamilton v. Lumbermen's Mut. Cas. Co.*, 82 So.2d 61 (La. App. 1st Cir. 1955); see Note, 16 LA. L. REV. 275 (1956).

28. *Jung Hotel, Inc. v. Insurance Comm'n of La.*, 179 La. 551, 154 So. 448 (1934). The court in this decision protected the right of privacy on the ground that it was a constitutional right. Plaintiff complained that his insurance rates were excessive and sought to have the Insurance Commission adopt a different scheme of classification than it had previously enacted. Pursuant to this claim, plaintiff demanded that the Commission issue an order requiring the filing of certain information, so that after examining this information, the Commission would change the classification. The court held that plaintiff could not invoke the court's power to investigate the private papers of insurance companies which were not kept in fulfillment of a public duty.

right of privacy.²⁹ The court stressed that the information was necessary in altering the school curriculum so as not to interfere with war work, and that the questionnaire would not seriously violate the teacher's right of privacy. Likewise, the recordation of a mineral lease containing the names of all joint owners including the plaintiffs, although plaintiffs had not signed the lease, does not constitute an actionable invasion of plaintiffs' privacy.³⁰ Implicit in this holding is the court's recognition of the reasonableness of and the necessity for the execution of counterpart mineral leases. A doctor and a hospital have been held not to have violated a patient's right of privacy by disclosing communications and medical records once the patient had instituted a suit in which the communications and records were necessary, admissible, and relevant for prosecution or defense of the suit.³¹ This holding seems consonant with the position that there is no doctor-patient privilege in civil suits in Louisiana.³² The court emphasized the fact that a suit had been instituted and left open the question of whether or not a patient would have a valid cause of action for the invasion of his privacy when no suit is pending.

The parents of a boy who was killed by a knife-wielding assailant sued the publisher and distributor of a magazine which contained an article relating the events surrounding his death on the ground that the publication violated their right of privacy. The court in denying recovery held that the contents of the article were of public interest, newsworthy, and, therefore, were privileged.³³

Physical Intrusions and Interference with Social Relations

In overruling an exception of no cause of action, the court clearly indicated that an insurer and its detective agency would be liable for an actionable invasion of plaintiffs' right of privacy if, in fact, the detectives had violated the "Peeping Tom" statute³⁴ by trespassing on plaintiffs' property and looking into their

29. *Reed v. Orleans Parish School Board*, 21 So.2d 895 (La. App. Orl. Cir. 1945).

30. *Nunez v. Collins*, 180 So.2d 553 (La. App. 3d Cir. 1965).

31. *Pennison v. Provident Life & Acc. Ins. Co.*, 154 So.2d 617 (La. App. 4th Cir. 1963).

32. *Moosa v. Abdalla*, 248 La. 344, 178 So.2d 273 (1965); see Note, 27 LA. L. REV. 361 (1967).

33. *Mahaffey v. Official Detective Stories, Inc.*, 210 F. Supp. 251 (W.D. La. 1962).

34. LA. R.S. 14:284 (1950).

windows.³⁵ A squatter who had for many years possessed two acres of land was denied recovery for an alleged invasion of his privacy when a realtor with the consent of the record owner placed a "for sale" advertisement sign on the property.³⁶ Apparently the court felt it more reasonable to allow the realtor to rely on the consent of the property owner as reflected by the public records, rather than to require dealing with a squatter whose possible prescriptive title remained untested.

Home owners, whose homes had been damaged by defendant's blasting operations, were awarded \$250 each for an actionable invasion of their privacy.³⁷ In granting the award the court held that the invasion of plaintiffs' privacy constituted distinct damages separate from the physical damage to their homes. Apart from physical intrusions, it has been stated that it is the right of every man to enjoy social relations with his friends and neighbors and that the person unlawfully deprived of this right is entitled to redress.³⁸ This right to social relations is a logical extension of the area protected under the privacy theory. In resolving a suit of this nature the court could and apparently should balance any interest the defendant may have had in interfering with plaintiff's social relations against plaintiff's interest in not having his social relations interfered with unreasonably. If the interference in light of the actual facts of the case is unreasonable and serious, the plaintiff should then be entitled to relief.

Remedies Available in Protecting the Right of Privacy

As indicated by the previous discussion, once the court determines that the defendant's conduct constitutes or will constitute an actionable invasion of plaintiff's privacy, two remedies are available. First, Louisiana courts on several occasions have granted injunctions prohibiting conduct that would constitute an actionable invasion of plaintiff's privacy.³⁹ Second, a plaintiff

35. *Souder v. Pendleton Detectives, Inc.*, 88 So.2d 716 (La. App. 1st Cir. 1956).

36. *White v. Authement*, 104 So.2d 273 (La. App. 1st Cir. 1958).

37. *Fontenot v. Magnolia Petroleum Co.*, 227 La. 866, 80 So.2d 845 (1955).

38. *Deon v. Kirby Lumber Co.*, 162 La. 671, 680, 111 So. 55, 58 (1926). Plaintiff alleged defendants asked its employees in a group meeting not to trade with plaintiff or visit his store, or associate with his family. The court said that if these allegations were true a violation would result. See Note, 21 TUL. L. REV. 639, 640 (1942).

39. *Schwartz v. Edrington*, 133 La. 235, 62 So. 660 (1913); *Iitzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905), *second appeal*, 117 La. 708, 42 So.2d 228 (1906); *Schulman v. Whitaker*, 115 La. 628, 39 So. 737 (1905), *second appeal*, 117 La. 704, 42 So. 227 (1906); *Denis v. Leclerc*, 1 Mart.(O.S.) 297 (1811).

is entitled to a money judgment in tort for an actionable violation of his privacy.⁴⁰ In regard to money judgments both special and general damages have been awarded.⁴¹ While special damages may be recovered for an actionable invasion if such damages were sustained as alleged, general damages may be recovered even though no special damages have been alleged or proved.⁴² Special damages have been awarded for specific identifiable injury such as loss of earnings,⁴³ while courts in fixing the quantum for general damages have considered the degree of embarrassment, humiliation, loss of self-esteem, injury to reputation, physical and mental pain and suffering sustained by the plaintiff.⁴⁴ At least one court expressly⁴⁵ and others by implication⁴⁶ have recognized mitigating circumstances which may be considered in fixing the quantum of damages.

Conclusion

Louisiana courts expressly recognize the right of privacy. It has been generally defined as the right to be left alone and a violation of this right constitutes a tort under article 2315 of the Civil Code. In order properly to limit and administer the right of privacy, the courts have drawn a distinction between actual and actionable invasions of the right with relief being granted only for actionable invasions. A test of reasonableness is used to make the distinction. This test contemplates a balancing of the defendant's interest in pursuing his course of conduct against the plaintiff's interest in having his privacy protected from serious invasions. Injunctions, special and general damages have

40. *McAndrews v. Roy*, 131 So.2d 256 (La. App. 1st Cir. 1961); *Hamilton v. Lumbermen's Mut. Cas. Co.*, 82 So.2d 61 (La. App. 1st Cir. 1955).

41. See *Pack v. Wise*, 155 So.2d 909 (La. App. 3d Cir. 1963).

42. *Tuyes v. Chambers*, 144 La. 723, 730, 81 So. 265, 267 (1919); *Pack v. Wise*, 155 So.2d 909, 912 (La. App. 3d Cir. 1963); *Quina v. Roberts*, 16 So.2d 558, 560 (La. App. Or. Cir. 1944); see also *McAndrews v. Roy*, 131 So.2d 256 (La. App. 1st Cir. 1961).

43. *Pack v. Wise*, 155 So.2d 909, 916 (La. App. 3d Cir. 1963).

44. *Fontenot v. Magnolia Petroleum Co.*, 227 La. 866, 880, 80 So.2d 845, 850 (1955); *Pack v. Wise*, 155 So.2d 909, 916 (La. App. 3d Cir. 1963); *Quina v. Roberts*, 16 So.2d 558, 561 (La. App. Or. Cir. 1944).

45. *Hamilton v. Lumbermen's Mut. Cas. Co.*, 82 So.2d 61, 65 (La. App. 1st Cir. 1955). The mitigating factor was that since the accident was of such a serious nature that an immediate and complete investigation would have aided both plaintiff and defendant.

46. *Cunningham v. Securities Investment Co. of St. Louis*, 278 F.2d 600, 602 (5th Cir. 1960) (court recognized that defendant had the right to make reasonable efforts to have the indebtedness liquidated); *Souder v. Pendleton Detectives, Inc.*, 88 So.2d 716, 718 (La. App. 1st Cir. 1956) (court recognized insurer's right to investigate any and all possible claims which might be filed against it).

been granted to protect the right of privacy. Special damages do not have to be alleged or proved in order to recover general damages. Truth and the absence of malice are not defenses to an action for an invasion of the right of privacy. The publication of newsworthy matters of public interest is privileged and will not constitute an actionable invasion.

The court's task in resolving right of privacy cases is a difficult one. For while protecting the right of privacy, the courts must be careful not to restrict unduly reasonable and proper conduct in the pursuit of business and other legitimate objectives even though that conduct may at times conflict with the individual's right to privacy. In the final analysis, Louisiana courts have performed admirably in this difficult area of the law.

James Fleet Howell