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Torts -- The Right of Privacy and Television

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Torts

THE RIGHT OF PRIVACY AND TELEVISION

At the early common law there was no provision for the protection of one's right of privacy; it was considered a matter of individual effort. Modern life with its widespread communications publicizes events which would have gone unnoticed a century ago. Most publications then served only local communities where people were well known to each other. Unauthorized publication in the form of a picture, writing, or printing, was able, for the most part, to be corrected by an injured party through his own efforts. The situation gradually changed: unscrupulous advertisers and promoters advanced their schemes and lined their pockets at the expense of private individuals' interests. To remedy this situation, courts began to recognize the right of privacy near the beginning of the century, and granted relief for its violation.[1]

Recently the District Court of the District of Columbia stated: [2]

> A decision against the right of privacy would be nothing less than an invitation to those so inclined who control these instrumentalities of communication, information and education, to put them to base uses, with complete immunity, and without regard to the hurt done to the sensibilities of individuals whose private affairs might be exploited, whether out of malice or for selfish purposes.

I

Origin and Development of the Right

Television is a new medium of publication. In many ways it is similar to others which have developed with the right of privacy, and in some ways it presents its own unique questions concerning invasion of this right. Certain basic principles always apply in determining liability, whether the problem raised by a telecast is similar to cases involving newspapers, radio, and motion pictures, or whether it is an entirely new situation. To understand and answer questions involving television and the right of privacy one must use the rules formulated by the courts as applied to television's above-named ancestors.

Recognition of the right of privacy is a comparatively recent development in the law of torts. Its extent, limitations, and exceptions have varied in different states; over twenty jurisdictions, either in dicta or by decision, recognize the right as existing at common law,[3] and others

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[1] *See* Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.(2d) 133, 138 (1945).

[2] Peay v. Curtis Pub. Co., 78 F. Supp. 305, 308 (D.D.C. 1948).

[3] *Alabama,* Smith v. Doss, 251 Ala. 250, 37 So.(2d) 118 (1948); *Arizona,* Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.(2d) 133 (1945); *District of Columbia,* Peay v. Curtis Pub. Co., 78 F. Supp. 305 (D.D.C. 1948); *Florida,* Cason v. Baskin, 159 Fla. 31, 30 So.(2d) 635 (1947); *Georgia,* Pavesich v. New England

recognize it only by constitution[4] or statute.[5] Massachusetts,[6] Texas,[7] Washington,[8] and Wisconsin[9] have expressly reserved decision as to the existence of any common law right, and Rhode Island [10] stands alone as the only state where no action may be maintained at all.

Relief in early cases was based on the established doctrines of breach of trust and confidence, invasion of plaintiff's property rights, or breach of an expressed or implied contract.[11] In 1890, an article by Samuel D. Warren and Louis D. Brandeis called for specific recognition of the right of privacy and the abolition of fictions, which the courts were using to permit recovery for invasion of that interest in personality.[12] A few years later a New York court, in *Roberson v. Rochester Folding Box Co.*,[13] denied the plaintiff any cause of action, in the absence of a statute, to enjoin the publication by defendant milling company of her picture for advertising purposes. The court stated that no right existed in the law for a person to prevent his picture from being published, his business affairs discussed, or his eccentricities commented on.[14] The decision rested upon the grounds that the right had not been referred to by com-

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Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); *Indiana,* Pritchett v. Board of Comm'rs, 42 Ind. App. 3, 85 N.E. 32 (1908); *Illinois,* Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.(2d) 742 (1952); *Kansas,* Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918); *Kentucky,* Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909); *Louisiana,* Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905), *aff'd,* 117 La. 708, 42 So. 228 (1906); *Michigan,* Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W.(2d) 911 (1948); *Missouri,* Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); *New Jersey,* Vanderbilt v. Mitchell, 72 N.J. Eq. 910, 67 Atl. 97 (Ct. Err. & App. 1907); *North Carolina,* Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); *Oregon,* Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.(2d) 438 (1941); *South Carolina,* Holloman v. Life Ins. Co. of Virginia, 192 S.C. 454, 7 S.E.(2d) 169 (1940).

4 Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931).

5 N.Y. CIV. RIGHTS LAW §§ 50-2; UTAH CODE ANN. §§ 76-4-8,9 (1953); VA. CODE § 8-650 (1950). The New York statute was passed soon after the decision in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

6 Kelley v. Post Pub. Co., 327 Mass. 275, 98 N.E.(2d) 286, 288 (1951).

7 U.S. Life Ins. Co. v. Hamilton, 238 S.W.(2d) 289, 292 (Tex. Civ. App. 1951).

8 Lewis v. Physicians and Dentists Credit Bureau, 27 Wash.(2d) 267, 177 P.(2d) 896, 899 (1947).

9 Judevine v. Benzies-Montanye Fuel & Warehouse Co., 222 Wis. 512, 269 N.W. 295, 302 (1936).

10 Henry v. Cherry & Webb, 30 R.I. 13, 73 Atl. 97, 109 (1909).

11 Abernethy v. Hutchinson, 1 H. & T. 28, 47 Eng. Rep. 1313 (Ch. 1825); Prince Albert v. Strange, 1 M. & Gord. 45, 41 Eng. Rep. 1171 (Ch. 1849); Tuck v. Priester, 19 Q.B.D. 629 (C.A. 1887); Pollard v. Photographic Co., 40 Cr. D. 345 (1888). Lord Cottenham, in Prince Albert v. Strange, *supra* at 47, 41 Eng. Rep. at 1179, inferred that privacy was the right invaded by defendant's unauthorized publication of etchings made by Prince Albert and Queen Victoria. See Mackenzie v. Soden Mineral Springs Co., 18 N.Y. Supp. 240 (Sup. Ct. 1891).

12 Warren and Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

13 171 N.Y. 538, 64 N.E. 442 (1902).

14 *Id.,* 64 N.E. at 443.

mon law writers nor could it be inferred from their writings, and that acknowledgement would result in excessive litigation.

Pavesich v. New England Life Ins. Co.[15] was the first case in which a supreme court upheld recovery for violation of the right of privacy as it is known at present. This opinion, in criticizing the *Roberson* case, said that the right is in man by his nature; if the law does not protect man from invasion of this liberty he will protect himself, causing a breach of peace. Even though, under the facts,[16] defendant would have been accountable in a libel action, the court chose to establish invasion of privacy as an actionable tort.

Because an action for invasion of the right of privacy in New York is permitted only by statute,[17] early development there was much different than in jurisdictions where the common law right has been judicially held to exist.

In common law jurisdictions it has been defined as the right to be let alone,[18] or the right to live in a community without coming into the public eye against ones will.[19] The *Restatement of Torts* imputes liability to any 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." [20]

Special damages need not be alleged. If the proof shows a wrongful invasion of the right of privacy, substantial damages for mental anguish alone may be recovered.[21] There is some authority that recovery should be limited to disturbance of ordinary sensibilities,[22] but the majority is *contra*.[23] In addition to difficulties of proof and of granting just redress, courts must also consider the public interest in freedom of speech and freedom of the press. The individual's interest in peace of mind and freedom from emotional disturbances must be balanced against the im-

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15 122 Ga. 190, 50 S.E. 68 (1905).

16 Defendant printed plaintiff's picture and signature under an untrue statement in an insurance advertisement without his consent.

17 N.Y. Civ. Rights Law § 51 provides in part: "Any person whose name, portrait or picture is used within this state for advertising purposes or for purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. . . ."

18 Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68, 71 (1905).

19 Cason v. Baskin, 159 Fla. 31, 30 So.(2d) 635, 638 (1947).

20 Restatement, Torts § 867 (1939).

21 Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918); Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.(2d) 438, 448 (1941). Mental anguish however is not a necessary element of damage, Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911).

22 Pound, *Interests of Personality*, 28 Harv. L. Rev. 343, 363 (1915).

23 Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68, 70 (1905).

portance of dissemination of news, information and education. When words relating to, or actual pictures of a person are published, surrounding facts may show that public interest is predominate. Factors considered by the courts are the medium of publication, its value to the public, and the seriousness of interference with the plaintiff's privacy.[24] Because of the large variety of situations which arises in this field, it has been said that every controversy must necessarily turn on its own facts.[25]

The right of privacy, whether statutory or common law, has certain other limits and exceptions. It is an incident of the person and not of property.[26] It is subject to the right to publish current news, to portray actual events of public interest as is ordinarily done in a newspaper or on a newsreel.[27] Matters essentially educational or informative in nature are expected [28] as well as information concerning persons who have waived their right by putting themselves in the public spotlight as, for example, entertainers,[29] athletes,[30] politicians,[31] or criminals.[32] The right, however, may be waived completely or only in part. It can be waived for one purpose and not for another,[33] and the existence of the waiver carries with it the right to invade the interest of the individual only to the extent legitimately necessary and proper in dealing with the matter which established the waiver.

At first impression the New York statute, with its "strict" requirement of use for trade or advertising purposes, might seem to necessitate different decisions than other jurisdictions would make, given similar facts. The term "advertising purposes" has been defined as "solicitation for patronage," [34] and unless the name, portrait, or picture appears

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24 Gill v. Curtis Pub. Co., 38 Cal.(2d) 273, 239 P.(2d) 630, 634 (1952); Barber v. Time, 348 Mo. 1199, 159 S.W.(2d) 291, 295 (1942). See RESTATEMENT, TORTS § 867, comments c and d (1939).

25 Gill v. Curtis Pub. Co., 231 P.(2d) 565, 568 (Cal. App. 1951), *aff'd*, 38 Cal. (2d) 273, 239 P.(2d) 630 (1952); Stryker v. Republic Pictures, 108 Cal. App.(2d) 191, 238 P.(2d) 670, 672 (1951); Donahue v. Warner Bros. Pictures, 194 F.(2d) 6, 13 (10th Cir. 1952).

26 Wyatt v. Hall's Portrait Studio, 71 Misc. 199, 128 N.Y. Supp. 247 (Sup. Ct. 1911).

27 Smith v. Doss, 251 Ala. 250, 37 So.(2d) 118 (1948); Molony v. Boy Comics Publishers, 277 App. Div. 166, 98 N.Y.S.(2d) 119 (1st Dep't 1950); Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y. Supp. 752 (1st Dep't 1919).

28 Stryker v. Republic Pictures, 108 Cal. App.(2d) 191, 238 P.(2d) 670 (1951); Koussevitzky v. Allen, Towne & Heath, Inc., 188 Misc. 479, 68 N.Y.S.(2d) 779 (Sup. Ct.), *aff'd*, 272 App. Div. 759, 69 N.Y.S.(2d) 432 (1st Dep't 1947).

29 Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.(2d) 485 (1952).

30 O'Brien v. Pabst Sales Co., 124 F.(2d) 167 (5th Cir. 1941), *cert. denied*, 315 U.S. 823 (1942).

31 Estill v. Hearst Publishing Co., 186 F.(2d) 1017 (7th Cir. 1951).

32 State *ex rel* Mavity v. Tyndall, 225 Ind. 360, 74 N.E.(2d) 914 (1947).

33 Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E.(2d) 306 (1949).

34 Sarat Lahiri v. Daily Mirror, 162 Misc. 776, 295 N.Y. Supp. 382, 386 (Sup. Ct. 1937).

within the physical limits of an advertisement its use is not regarded as for advertising purposes.[35] Even when used for advertising, no recovery is allowed unless there is a relation to an attempt to sell some product or business.[36]

The fact that almost all newspapers, magazines, and motion pictures are published for profit is not the criterion for "purposes of trade" under the statute.[37] The exception of news reporting, public information and education has become part of New York law, though publication is undoubtedly for the commercial benefit of the publishers, whether it be the owner of a magazine or motion picture, or the sponsor of a telecast.

The test has been limited to the extent that, with few exceptions, decisions under the statute are the same as at common law.[38] Cases decided without a statute on the basis of injury to feelings of the plaintiff are decided in New York by the fiction of "purposes of trade," the decision really resting on interests of the public in news and information and on the possibility of waiver by the plaintiff.[39]

II

The Principles Applied to Television

Like radio, motion pictures, and national magazines, television has become a permanent fixture on the everyday scene. As with any important newcomer to such large fields as communications and entertainment, some adjustment is necessary in order for the latest arrival to fit in its proper place — to use fully its new found talents, yet respect fully the rights of individuals. In the six years of extensive commercial television few suits have been brought to vindicate invasion of the right of privacy.

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35 Jeffries v. N.Y. Evening Journal Pub. Co., 67 Misc. 570, 124 N.Y. Supp. 780 (Sup. Ct. 1910).

36 Wallach v. Bacharach, 192 Misc. 979, 80 N.Y.S.(2d) 37 (Sup. Ct.), *aff'd*, 274 App. Div. 919, 84 N.Y.S.(2d) 894 (1st Dep't 1948). The notable event or achievement used in the advertisement must be directly connected with the product or service offered and not merely draw attention to the advertisement.

37 Molony v. Boy Comics Publishers, 277 App. Div. 166, 98 N.Y.S.(2d) 119, 124 (1st Dep't 1950). Also see Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y. Supp. 752 (1st Dep't 1919); Koussevitzky v. Allen, Towne & Heath, Inc., 188 Misc. 479, 68 N.Y.S.(2d) 779 (Sup. Ct.), *aff'd*, 272 App. Div. 759, 69 N.Y.S.(2d) 432 (1st Dep't 1947); Sarat Lahiri v. Daily Mirror, 162 Misc. 776, 295 N.Y. Supp. 382 (Sup. Ct. 1937). *But see* Blumenthal v. Picture Classics, 235 App. Div. 570, 257 N.Y. Supp. 800, 803-04 (1st Dep't 1932), *aff'd*, 261 N.Y. 504, 185 N.E. 713 (1933).

38 Probably the only real differences arises in the case of photographing and finger-printing suspected criminals. State *ex rel* Mavity v. Tyndall, 225 Ind. 360, 74 N.E.(2d) 914 (1947); Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905), *aff'd*, 117 La. 708, 42 So. 228 (1906); McGovern v. Van Riper, 137 N.J. Eq. 24, 43 A.(2d) 514 (1945), *aff'd*, 137 N.J. Eq. 548, 45 A.(2d) 842 (1946). By not stretch of the imagination could these situations be construed as falling within the "purpose of trade" provision of the New York statute.

39 Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.(2d) 485 (1952).

The reason for this appears to be that in the majority of situations a close analogy may be drawn to litigation which has arisen involving radio, motion pictures, or newspapers. There should, for example, be no different principle in the case of invasion of right of privacy by reference to the plaintiff on a television broadcast than if the same statement had been made by radio or in a newspaper.

In a recent libel suit arising from a television broadcast,[40] the defendant, Arthur Godfrey, made deprecating remarks about the quality of ukuleles which sold for $2.99, and showed one to the audience comparing it unfavorably with higher priced ones and stating that anyone who sold such an instrument should be put in jail. Plaintiff, who was the only manufacturer of ukuleles at that price, succeeded in an action for libel because the statements were injurious to his business. In libel and slander the basis for the cause of action is damage to the character or reputation, which pertains only to one's standing in the minds of others and is an attribute in law separate from the person.[41] Recovery for violation of one's right of privacy is grounded on the mental strain and distress, on the humiliation, on the disturbance of the peace of mind suffered by the individual affected.[42] Notwithstanding the differences in libel and the invasion of privacy, a parallel can be drawn between them in suits resulting from motion pictures or radio broadcasts and telecasts. In this case, if defendant Godfrey had made the same statements on his radio program, in a newspaper column, or in a film, the damages suffered might have been greater or less, but the statement would still have been libelous. Whatever the method of publication, if the necessary elements of libel are present, recovery is permitted.

The same is true in an action for violation of the right of privacy: if the necessary elements as defined by common law decisions or by statutes are present the particular vehicle causing damage is immaterial. When Groucho Marx jokingly referred to a prize fighter as "Canvasback" Cohen on a radio program, the latter had no action for invasion of privacy since he had waived his right by entering upon a boxing career, and could not subsequently rescind such waiver.[43] Suit brought as a result of a similar statement made on a telecast would certainly produce the same decision. It is plain that when an alleged invasion of privacy occurs on a telecast only by verbal reference to the plaintiff, the situation is almost identical to that presented by the same type of program in a radio broadcast. The right might be violated in this way by almost any telecast, whether the show is produced from a prepared script, such as a news or sports commentator's report, or is the spontaneous type, as,

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40 Tex Smith, The Harmonica Man v. Godfrey, 198 Misc. 1006, 102 N.Y.S.(2d) 251 (Sup. Ct. 1951).

41 Cooper v. Greeley, 1 Denio 347, 366 (N.Y. 1845).

42 Cason v. Baskin, 159 Fla. 31, 30 So.(2d) 635 (1947).

43 Cohen v. Marx, 94 Cal. App. 704, 211 P.(2d) 320 (1949).

for example, a panel discussion or a quiz program. Nor would it make any difference whether the production is a "live" telecast or is filmed.

Obviously, the only distinguishing factor between radio and television, where one exists, is in publishing the image of the plaintiff or of someone purporting to be the plaintiff. For decisions analogous to suits arising from unauthorized televising of a complainant, one may, in many situations, look to the newspaper and motion picture industries. In *Barber v. Time*,[44] defendant magazine published, without permission, the name and picture along with a description of the hospitalized plaintiff as a "Starving Glutton" and "Insatiable-Eater." The court said that the right of privacy, if it exists at all, should certainly include the right to obtain medical treatment without publicity.[45] When a flyer, killed during the war, directed that one rose be sent to the plaintiff every week, and defendant newspaper printed a feature article changing the facts considerably, it was held that plaintiff stated a good cause of action for invasion of privacy.[46] If either of these articles were made the basis of a television program, and the subjects could be identified, there is no reason why a similar decision should not result.

The only case in which a supreme court has decided a question of violation of privacy by television is *Gautier v. Pro-Football, Inc.*[47] An unauthorized telecast of plaintiff animal-trainer's show between halves of a football game was held not to have constituted an invasion of the right. Though a majority of the court denied recovery because there was not a use for trade or advertising purposes as required by statute, the concurring opinion gives a better reason for the decision when it distinguishes between invasion of privacy and breach of contract not to televise, and rests the decision on the latter cause.[48] The basic policy underlying this holding was expressed by the lower court when it described television as a: [49]

> . . . medium which affords unique opportunities for the instantaneous dissemination of news and events of public import, a medium which should not be confined by too restricted a delineation of the permissible scope of its operation.

Probably all courts would reach the same result and deny relief for casual telecasting of spectators at sporting events and other public gatherings such as parades, political meetings, or conventions, basing

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44 348 Mo. 1199, 159 S.W.(2d) 291 (1942).

45 *Id.*, 159 S.W.(2d) at 295.

46 Sutton v. Hearst Corp., 277 App. Div. 155, 98 N.Y.S.(2d) 233 (1st Dep't 1950).

47 304 N.Y. 354, 107 N.E.(2d) 485 (1952).

48 *Id.*, 107 N.E.(2d) at 489.

49 Gautier v. Pro-Football, Inc., 278 App. Div. 431, 106 N.Y.S.(2d) 553, 559 (1st Dep't 1951).

their decisions either on lack of a commercial purpose, legitimate public interest, or waiver of right by the individual.[50]

In *Peterson v. KMTR Radio Corp.*,[51] no recovery for invasion of privacy was allowed a paid performer who took part in an aquatic show which was filmed by defendant and later televised. Plaintiff voluntarily waived his right of privacy by his original public performance in the show. A similar unreported case, *Chavez v. Hollywood Post No. 43, American Legion*,[52] held that a prize fighter by participating in a "public" boxing match, waived his right as to that particular match. The court said that he must specifically reserve television rights in his contract, or they belong to the promoter. Despite the apparent inflexibility of this rule, it does not exist without some limitations. For example, one court, in construing the New York statute, held that a complaint stated a claim upon which relief could be granted if it alleged that the defendant televised old movies of the plaintiff's prior fights.[53] It was further alleged that the showing of these films injured the plaintiff in his present professional activities although the films had been made some fifteen years previously.

Similarly with old feature films often shown on television, the actor who once sought publicity and was paid for his acting performance should not be allowed to prevent showing of the films because he has retired or changed professions. It is true that the right of privacy once waived is not lost forever,[54] but it has never been held that an actor could prevent showing of his movies in a theater merely because of lapse of time since their making. The effect of televising old movies is the same, the only difference being that the projector and film are in a telecasting studio rather than in a theater.

When the telecast of private individuals is made with a direct commercial benefit in mind, the courts should be more willing to permit recovery. Though no suit has yet come before the courts, the situation might be analogous to facts presented in *Kunz v. Allen*.[55] Defendant,

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50 *Cf.* Blumenthal v. Picture Classics, 235 App. Div. 570, 257 N.Y. Supp. 800 (1st Dep't 1932), *aff'd*, 261 N.Y. 504, 185 N.E. 713 (1933), holding that a movie travelogue showing a six second shot of plaintiff selling bread on a street corner invaded her right of privacy. The court said in Sarat Lahiri v. Daily Mirror, 162 Misc. 776, 295 N.Y. Supp. 382, at 388 (Sup. Ct. 1937) of the *Blumenthal* case: "It is hardly conceivable that the Blumenthal Case was intended to stand for the proposition that the inclusion of passers-by in a current newsreel of a fire would give them a cause of action. It is also doubtful whether the decision may be construed to cover a film of Niagara Falls, for example, in which the pictures of some visitors to the Falls happened to be included."

51 18 U.S.L. WEEK 2044 (Cal. Super. Ct. July 26, 1949).

52 16 U.S.L. WEEK 2362 (Cal. Super. Ct. Feb. 3, 1948).

53 Sharkey v. National Broadcasting Co., 93 F. Supp. 986 (S.D.N.Y. 1950).

54 Leverton v. Curtis Pub. Co., 192 F.(2d) 974 (3d Cir. 1951).

55 102 Kan. 883, 172 Pac. 532 (1918).

unknown to the plaintiff customer, took pictures of her while she shopped in the defendant's store, and later showed the film in a neighborhood theater for purposes of advertisement. Plaintiff's privacy was said to be invaded since the film gave others the false impression that she was employed by defendant. Under the same line of reasoning, unpermitted televising of customers, whether in a store, restaurant, night club, or ballroom should be actionable in the absence of particular public interest in the event.

A more difficult case would be the accidental or incidental appearance of a person in the background during the telecast of a night club revue. Since the right is not absolute, recovery should be denied. The telecast would probably be only momentary, or if extended throughout the program, would be of so little importance in the show, that public policy favoring the telecaster should apply in such a borderline case. In practice, today many businesses warn patrons of impending telecasts with the result that they waive the right if they remain within range of the cameras.[56] In this instance the telecast would differ from publication by newspaper or motion picture in that, in these latter methods, editors have time to remove objectionable background before the public sees it, while publication of a "live" television show is instantaneous.

"Man-on-the-street" television programs present a situation not comparable to "inquiring reporter" newspaper features or radio broadcasts. In the latter instance, if the person to be interviewed by the radio announcer declines to participate, the audience will never identify him. If one is asked a question by a reporter, his refusing to answer does not result in publication of his name or picture in the paper. Television, however, shows the prospective subject before he has an opportunity to make his aversion known. By that time the damage is done. In such a case the telecaster should be liable upon showing of damage to a plaintiff. The benefit to the audience is ordinarily not great in this type of program, whereas injury to the plaintiff might well be considerable. Of course, a person who walks on a public street necessarily subjects himself to the view of others, but there is a great difference between being seen by passers-by on the street and having oneself flashed upon thousands of television screens. The situation differs from that where a spectator is shown at a sporting event or other public gathering in that the latter instances usaully involve a showing which is merely incidental, and the public interest in the program is greater. Too, the presumption of waiver should be stronger because of the difference in positions of the subjects telecast. The cheering fan at a baseball game is certainly more in the public eye than the same man would be in walking quietly down Main Street on his way to lunch.

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56 Yoder, *Be Good! Television's Watching*, SAT. EVENING POST, May 14, 1949, p. 24.