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Torts - Invasion of Privacy - Conduct of a Debt Collector

Russel A. McNair Jr.
University of Michigan Law School

TORTS—INVASION OF PRIVACY—CONDUCT OF A DEBT COLLECTOR—In an action for the balance due on account for merchandise purchased defendants counterclaimed for damages alleging that an agent of the plaintiff, on three separate days, went to the restaurant where the defendant-wife worked as a waitress and in a loud and degrading manner made demands that defendants pay the account. On each occasion many customers were present. Plaintiff's agent accused the defendants of being "dead beats" and of never intending to pay for the merchandise when it was purchased. The trial court sustained plaintiff's demurrer to this counterclaim. On appeal, *held,* reversed and remanded. Conduct of a debt collector which degrades and humiliates the debtor in public and which would be deemed offensive to persons of ordinary sensibilities gives rise to a cause of action for invasion

of privacy. *Biederman's of Springfield v. Wright,* (Mo. 1959) 322 S.W. (2d) 892.

It was only at the turn of the century that privacy achieved judicial recognition as a separate and distinct legal right.[1] The right has undergone rapid development and the majority of states which have passed on the question have recognized its existence.[2] The earliest and most common assertion of the right was in cases of unauthorized use or publication of a person's name or portrait, but subsequent development has made it available for the redress of other types of wrongs.[3] Though not very descriptive, the most commonly used definition of the right is that it is the "right to be let alone."[4] Publicity which violates ordinary decencies in exposing a person's private affairs is one of the wrongs embraced within the general definition, and it is in this category that a debtor may have a cause of action against his creditor who gives unnecessary publicity to a private debt.

Invasion of the right of privacy is only one of several grounds on which debtors have been granted relief for undue harassment and generally oppressive methods of debt collection. In the older cases, tort liability of creditors was most often based on an action of defamation. The action of defamation affords only limited protection, however, since in the great majority of states truth of the publication is a complete defense regardless of the extent or malice of defendant's publication.[5] This makes the creditor immune when the debt is actually owing. A minority of states permit truth

1 Recognition of the right of privacy was the result of an article by Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 (1890). Prior to 1890, interests essentially the same as the right of privacy were sometimes protected under the guise of property rights or contract rights. See 14 A.L.R. (2d) 750 at 756 (1950). The independent legal existence of the right was first affirmed by a court of last resort in Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1904).

2 For a list of states definitely recognizing the right, see 14 A.L.R. (2d) 750 at 753 (1950). There are only three states which have definitely rejected the right: *Rhode Island,* Henry v. Cherry & Webb, 30 R.I. 13, 73 A. 97 (1909); *Texas,* McCullagh v. Houston Chronicle Publishing Co., (5th Cir. 1954) 211 F. (2d) 4, cert. den. 348 U.S. 827 (1954); *Wisconsin,* Judevine v. Benzies-Montanye Fuel & Warehouse Co., 222 Wis. 512, 269 N.W. 295 (1936). The right is limited by statute in three additional states: *New York,* 8 N.Y. Consol. Laws (McKinney, 1948) §§50-51; *Utah,* Utah Code Ann. (1953) §§76-4-7 to 76-4-9; *Virginia,* Va. Code (1950) §8-650. These statutes permit recovery only where there is unauthorized use of a person's name or portrait for advertising and trade purposes.

3 Prosser states that four distinct wrongs are embraced within the right of privacy: (1) intrusion on plaintiff's solitude or seclusion; (2) publicity violating ordinary decencies given to private information on the plaintiff even though it is true; (3) putting the plaintiff in a false but not necessarily defamatory position in the public eye, and (4) appropriation of some element of plaintiff's personality to commercial use. PROSSER, TORTS, 2d ed., 637-639 (1955).

4 Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 at 195 (1890); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927). Other definitions may be found in 138 A.L.R. 22 at 24, 25 (1942). See Nizer, "The Right of Privacy—A Half Century's Developments," 39 MICH. L. REV. 526 at 526-529 (1941); 4 TORTS RESTATEMENT §867 (1939).

5 PROSSER, TORTS, 2d ed., 630 (1955); Tingle v. Worthington, 215 Ala. 126, 110 S. 143 (1926); Plummer v. Commercial Tribune Publishing Co., 208 Ky. 210, 270 S.W. 793 (1925). See also Ray, "Truth: A Defense to Libel," 16 MINN. L. REV. 43 (1931).

as a defense only where the publication is for a justifiable purpose.[6] But even in these jurisdictions, the debtor is often severely hampered by the necessity of proving special damages to his reputation.[7] A second possible theory of recovery is the intentional infliction of mental anguish in an attempt to coerce payment.[8] But this too has been limited by requiring outrageous conduct before relief is given.[9] Invasion of privacy, therefore, affords the most effective protection against excessive collection methods, since in this type of action truth of the publication is no defense, malice is immaterial, and there is no need to prove special damages.[10] The only generally accepted limitations on the use of the action against creditors are that the publication be such as would offend persons of ordinary sensibilities[11] and that there be communication to a large number of persons.[12] Moreover, courts have recognized that the creditor may take reasonable steps in the attempt to collect the debt without subjecting himself to suit,[13] and that some communications by the creditor are privileged.[14]

While relief in privacy actions has frequently been given in the case of written publications,[15] there has been general approval of the limitation that no recovery be allowed for an invasion of privacy by oral publication without a showing of special damages.[16] This written-oral distinction has

6 The Florida Publishing Co. v. Lee, 76 Fla. 405, 80 S. 245 (1918) (based on Florida Bill of Rights provision); Wertz v. Sprecher, 82 Neb. 834, 118 N.W. 1071 (1908) (based on Nebraska Bill of Rights provision); Hutchins v. Page, 75 N.H. 215, 72 A. 689 (1909). For a criticism of the rule that truth is a defense and a discussion of cases in which courts have avoided the rule, see Ray, "Truth: A Defense to Libel," 16 MINN. L. REV. 43 at 61-69 (1931).

7 Urban v. Hartford Gas Co., 139 Conn. 301, 93 A. (2d) 292 (1952); PROSSER, TORTS, 2d ed., 587-588 (1955). A few courts have said that a publication charging that a person is unwilling to pay his debts or that a person is a poor credit risk is defamatory per se, and special damages need not be alleged or proved. Sheppard v. Dun & Bradstreet, (S.D. N.Y. 1947) 71 F. Supp. 942; Turner v. Brien, 184 Iowa 320, 167 N.W. 584 (1918) (these two cases involved written publications). But see Patton v. Jacobs, 118 Ind. App. 358, 78 N.E. (2d) 789 (1948) (written publication); Liebel v. Montgomery Ward, 103 Mont. 370, 62 P. (2d) 667 (1936) (oral publication).

8 Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932); LaSalle Extension University v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934).

9 Prosser, "Intentional Infliction of Mental Suffering: A New Tort," 37 MICH. L. REV. 874 at 887-889 (1939).

10 See annotations in 138 A.L.R. 22 at 47, 48-49, 106 (1942); 168 A.L.R. 446 at 452, 465-466 (1947); 14 A.L.R. (2d) 750 at 758, 773-774, 758-759 (1950).

11 4 TORTS RESTATEMENT §867 (1939); Cason v. Baskin, 155 Fla. 198, 20 S. (2d) 243 (1944); Davis v. General Finance & Thrift Corp., 80 Ga. App. 708, 57 S.E. (2d) 225 (1950).

12 PROSSER, TORTS, 2d ed., 641 (1955).

13 Lewis v. Physicians & Dentists Credit Bureau, 27 Wash. (2d) 267, 177 P. (2d) 896 (1947). See also 15 A.L.R. (2d) 108 at 158, 161-163 (1951).

14 Thus, it is generally recognized that a creditor has the right to inform the debtor's employer of the debt, since an employer has a legitimate interest in his employee's debts. Patton v. Jacobs, note 7 supra; Gouldman-Taber Pontiac v. Zerbst, 213 Ga. 682, 100 S.E. (2d) 881 (1957); Voneye v. Turner, (Ky. 1951) 240 S.W. (2d) 588.

15 E.g., Brents v. Morgan, note 4 supra; Trammell v. Citizens News Co., 285 Ky. 529, 148 S.W. (2d) 708 (1941); Quina v. Roberts, (La. App. 1944) 16 S. (2d) 558.

16 Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 at 217 (1890); Cason v. Baskin, note 11 supra; Gregory v. Bryan-Hunt Co., 295 Ky. 345, 174 S.W. (2d) 510 (1943); Lewis v. Physicians & Dentists Credit Bureau, note 13 supra.

been widely criticized with regard to defamation actions,[17] and the same objections are applicable with regard to the right of privacy action.[18] The present case is significant in taking a definite stand against adherence to this limitation. If the action for the invasion of privacy is to be a meaningful remedy for debtors it must be eliminated. The written-oral distinction obscures the basic question, which should be the sufficiency of the publication, whether written or oral. The principal case seems to be representative of the trend toward a greater use of the action for invasion of privacy as a means of redressing the debtor for unnecessary harassment by his creditors. The court was able to rely on the previous recognition of the right in Missouri[19] and seems to be on solid ground in extending it to oral publications. Extension of the right can be justified on the basis that creditors have ample and satisfactory collection methods at their disposal and the right of privacy seems to provide the best framework for the redress of wrongs committed by the over-zealous creditor.

Russell A. McNair, Jr.

[17] PROSSER, TORTS, 2d ed., 585, 595 (1955).

[18] The application of the distinction to privacy actions is not endorsed by Prosser or the *Restatement*. See PROSSER, TORTS, 2d ed., 641-644 (1955); 4 TORTS RESTATEMENT §867 (1939). The distinction is criticized in dictum in Bowden v. Spiegel, 96 Cal. App. (2d) 793, 216 P. (2d) 571 (1950). A recent Ohio case allowed recovery on the basis of oral statements alone, without discussion of the distinction. Housh v. Peth, 165 Ohio St. 35, 133 N.E. (2d) 340 (1956).

[19] Barber v. Time, Inc., 348 Mo. 1199, 159 S.W. (2d) 291 (1942); Munden v. Harris, 153 Mo App. 652, 134 S.W. 1076 (1911).