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RIGHT OF PRIVACY-STATUS OF THE LAW IN MICHIGAN-LIABILITY FOR COMMERCIAL USE OF PHOTOGRAPH

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RIGHT OF PRIVACY—STATUS OF THE LAW IN MICHIGAN—LIABILITY FOR COMMERCIAL USE OF PHOTOGRAPH—Defendant published plaintiff's photograph in connection with a cosmetics advertisement in a Detroit newspaper. Plaintiff sought damages, alleging that she neither knew of nor assented to the publication of the photograph, that the publication constituted an invasion of her right to be free from offensive publicity, and that she had suffered consequential damages. The trial court sustained defendant's motion to dismiss on the ground that the complaint stated no cause of action. On appeal, *held*, reversed and remanded. Plaintiff stated a cause of action for invasion of her right of privacy. *Pallas v. Crowley, Milner & Co.*, 322 Mich. 411, 33 N.W. (2d) 911 (1948).

In the early case of *DeMay v. Roberts*,[1] where plaintiff sought damages for defendant's intrusion into her home while she was in childbirth, the court indicated support of a right of privacy, although recovery was allowed on other grounds. Later, however, this dictum was ignored in *Atkinson v. John E. Doherty & Co.*,[2] where the Michigan court clearly denied the existence of such a right in a suit to enjoin commercial use of the name and likeness of plaintiff's deceased husband.[3] In *Miller v. Gillespie*,[4] the next Michigan case to consider the question, injunctive relief for the protection of a right of privacy was denied, but the court seemed to recognize that such relief would be available in a proper case;[5] the *Atkinson* case was mentioned but not discussed. The principal case appears to be

[1] 46 Mich. 160 at 165, 9 N.W. 146 (1881). In speaking of plaintiff's right of privacy the court stated, "The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation."

[2] 121 Mich. 372, 80 N.W. 285 (1899).

[3] The court expressly refused to limit its decision to narrower ground than a complete repudiation of the privacy doctrine. The following distinctions were rejected: (1) that if the deceased did have a right of privacy, it was a personal right which terminated with his death; (2) that the deceased had surrendered an existing right of privacy by his admitted prominence in public life; (3) that injunctive relief was not a proper remedy for invasion of the right of privacy if it existed.

[4] 196 Mich. 423, 163 N.W. 22 (1917).

[5] Id. at 428; ". . . without denying the jurisdiction of a court of equity to afford a remedy for wrongful invasion of privacy, [I] conclude that the plaintiff is not entitled to the relief asked for."

the only other Michigan decision considering the right of privacy, and the court here accepts without reluctance the existence of the right. The court gives qualified approval to the general rule proposed by the *Torts Restatement*,[6] and overrules the *Atkinson* case "to the extent that it is inconsistent with the conclusion reached herein;"[7] it would appear that the *Atkinson* case, resting on the broad ground that no right of privacy exists, is utterly inconsistent with the principal case. Recognition of the right in Michigan seems limited to the following: the principal case recognizes a right to recover damages for unauthorized commercial exploitation of one's likeness; the *Miller* case recognizes a carefully limited right to injunction against disclosures of one's likeness and identity under circumstances which will expose him to undeserved disgrace and ridicule; *DeMay v. Roberts* acknowledges by dictum a right to be free from actual intrusion into intimate events in one's life. These Michigan cases have all involved intentional action by the defendant, though the decisions have not stressed this fact. The principal case indicates that consent is a good defense, and also seems to affirm that freedom of speech and press and legitimate public interest in news constitute limitations on the right. Since the court in the principal case seems to recognize privacy as an independent common law right, application of the doctrine will probably be free of limitations placed upon it in some jurisdictions which derive the right from statutory and other bases.[8] To this extent, the Michigan doctrine seems progressive. On the other hand, all jurisdictions which recognize the right of privacy seem willing to go at least as far as the holding in the principal case.[9] The Michigan court has yet to deal with cases involving disclosure of private affairs by newspapers and the like, where the personal right of privacy conflicts with the public interest in news and with freedom of speech and press;[10] nor has the criterion been settled for distinguishing actionable disclosures and exploitations of private affairs from those which are too trivial for liability.[11] If the future development of the Michigan privacy doctrine parallels the current trend in other jurisdictions, however, a broader recognition of the right than that of the principal case seems probable.[12]

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[6] 4 TORTS RESTATEMENT §867 (1939); "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."

[7] Principal case at 417.

[8] See 138 A.L.R. 30-35 (1942).

[9] Nizer, "The Right of Privacy, A Half Century's Developments," 39 MICH. L. REV. 526 at 547 (1941).

[10] Id. at 528-29.

[11] In 138 A.L.R. 46-47 (1942), it is suggested that the criterion of actionable injury is the reasonableness of the interference with plaintiff's right; since the TORTS RESTATEMENT, supra, note 6, indorses this view, it would seem that the Michigan court has accepted this standard.

[12] Feinberg, "Recent Developments in the Law of Privacy," 48 COL. L. REV. 713 at 713-16 (1948). This article, together with those cited in notes 8 and 9 supra, offers a good discussion of privacy law in general.