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# TORTS-INVASION OF RIGHT OF PRIVACY BY POSTCARD ADVERTISING

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TORTS—INVASION OF RIGHT OF PRIVACY BY POSTCARD ADVERTISING—To promote the sale of merchandise, defendant retail clothing store mailed a series of postcards to prospective customers, one of which was the plaintiff. The cards, in feminine handwriting, read, "Please call WAbash 1943 and ask for Carolyn." Upon reading this the plaintiff's wife, who had intercepted the card, concluded that her husband was having a clandestine love affair with another woman, and when the plaintiff was unable to explain "Carolyn," she left him. Subsequent inquiry revealed that "Carolyn" was one of the defendant's employees and that the card was an advertising stunt. Plaintiff filed suit on the theory that mailing the card to him was an invasion of his right of privacy. Defendant's demurrer to the complaint was sustained. On appeal, *held,* affirmed. The contents of the card could not reasonably be construed as having a salacious meaning and did not constitute an invasion of the plaintiff's right of privacy. *Perry v. Moskins Stores,* (Ky. 1952) 249 S.W. (2d) 812.

Although the right of privacy has been judicially recognized for over fifty years,[1] only the roughest outlines of its nature and extent have as yet been sketched by the courts. Probably the kind of tort first contemplated was the publicizing of some aspect of personality for commercial purpose.[2] However, it

[1] The first case recognizing the right of privacy as an independent right was DeMar v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881), but it was not until after the publication of the Warren and Brandeis article on "The Right of Privacy," 4 HARV. L. REV. 193 (1890) that there was any widespread judicial recognition of the right.

[2] See Warren and Brandeis, "The Right of Privacy," supra note 1. These writers were deeply concerned with the advent of "yellow journalism" and its ruthless exposure

has not been so restricted. An analysis of the authorities suggests that it has been extended to grant protection not only against the unwarranted appropriation or exploitation of one's private personality for commercial purpose,[3] but also to publication of his private affairs in which the public has no legitimate interest,[4] and the wrongful intrusion into his essentially private activities,[5] in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.[6] These authorities indicate that while the right of privacy bears close resemblance to the right to be free from defamation, the fundamental bases of liability are quite different.[7] The law of defamation is concerned with damage to reputation, with injury done to the individual in his external relations with the community, by lowering him in the esteem of his fellows. The effect that the publication may have upon his own feelings is immaterial.[8] On the other hand, the gist of the cause of action for violation of one's right of privacy is the personal affront to his dignity by intrusion into his private activities, and the destruction of his self-esteem by publication of the truth.[9] It is not uncommon for courts to lose sight of this distinction, with a resulting confusion in the cases. It is submitted that the court in the principal case is correct in denying recovery based on the right of privacy, for one's self-esteem is not damaged by the publication of what he knows is false, and there has been no intrusion into his essentially private activities. However, in reaching its decision the court reasoned that while the postcard was in bad taste the

of the intimate details of the lives of individuals with the sole purpose of increasing circulation of newspapers.

[3] Molony v. Boy Comics Publishers, Inc., 188 Misc. 450, 65 N.Y.S. 173 (1946) (use of story of plaintiff's life in comic books commercially distributed); Kerby v. Hal Roach Studios, 53 Cal. App. (2d) 207, 127 P. (2d) 577 (1942) (use of plaintiff's name in advertising a movie).

[4] Barber v. Time, Inc., 348 Mo. 1199, 159 S.W. (2d) 291 (1942) (picture of plaintiff in hospital bed with unusual disease); Sidis v. F-R Publishing Corp., (2d Cir. 1940) 113 F. (2d) 806 (publication of the later life of a famous child prodigy). Note that while these cases could be said to be instances of commercial appropriation of plaintiff's personality, emphasis was placed on the right to have the details of one's private life protected against public disclosure.

[5] E.g., *Eavesdropping:* McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E. (2d) 910 (1939) (even though information obtained by eavesdropping be restricted to the immediate transgressor, it is an invasion of privacy). *Intrusions into private quarters:* DeMar v. Roberts, supra note 1 (entry of layman into delivery room during childbirth); Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905 (1924) (passenger aboard vessel enters woman's stateroom at night and attempts to have sexual intercourse).

[6] See generally 41 AM. JUR., Privacy 923 (1942).

[7] Gill v. Hearst Publishing Co., (Cal. App. 1951) 231 P. (2d) 570 (dissenting opinion).

[8] Warren and Brandeis, "The Right of Privacy," 4 HARV. L. REV. 193 (1890).

[9] Gill v. Curtis Publishing Co., (Cal. App. 1951) 231 P. (2d) 565. See also Hasnett and Thornton, "The Truth Hurts," 35 VA. L. REV. 425 at 437 (1949). While the protection given is to one's self-esteem, the relatives of a deceased person may have an action for the invasion of what would have been an invasion of his privacy had he lived. In such cases it is the feelings of the relatives, not those of the deceased that are given protection. E.g. Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930) (publication of pictures of grossly deformed deceased child of the plaintiffs).

words appearing thereon could not reasonably be construed to have a salacious meaning, a fact that would be controlling in an action based on defamation, but which should have no bearing in a privacy action.[10] Thus it appears that the court unconsciously considered the requisites of libel and determined that the words used were not defamatory. In this respect it is interesting to note the recent decision in *Freeman v. Busch Jewelry Co.*,[11] in which the facts were strikingly similar to those presented in the principal case and recovery was allowed. Although the court there refused to label the tort, the rulings of law indicate that the action was treated as one arising from the publication of a libel. The words on the postcard were said to be capable of bearing a defamatory meaning in that it could reasonably convey the impression of infidelity on the part of the husband,[12] it was published,[13] and it caused damage to the plaintiff.[14] It is submitted that this result is sound. However, even if the situation arises in which the words used are not defamatory in nature, liability might be predicated on the theory that any willful harm, without legal justification, is actionable, regardless of whether there is a specific tort category with which to label the action.[15] This theory seems to have had some influence on the court in the *Freeman* case, but there, as in the principal case, there was a specific tort category into which the wrong could fall. It is submitted that while the principal case is correct in denying liability based on the right of privacy, its reasoning contributes to the confusion and misunderstanding already existing as to the fundamental nature of the right of privacy.

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[10] It would seem that the publication would not have to be of a salacious nature in order to disturb the serenity of mind of a man of ordinary sensibilities. Compare Gill v. Hearst Publishing Co., supra note 7 (requiring that the publication be "offensive").

[11] Freeman v. Busch Jewelry Co., (D.C. Ga. 1951), 98 F. Supp. 963. This case is not mentioned in the opinion of the court in the principal case.

[12] In libel actions it is for the court to decide whether the language used could convey a defamatory meaning; the jury decides whether in fact it did. See PROSSER, TORTS 789 (1941).

[13] The mailing of a postcard is generally held to be sufficient publication of a libel. McKeel v. Latham, 202 N.C. 318, 162 S.E. 747 (1932); PROSSER, TORTS 810 (1941).

[14] Special damages were allowed for the loss of consortium and loss of services of plaintiff's wife for the period of separation. It would seem that in order to recover special damages of this nature, the plaintiff should have to show not only that the separation was the natural and probable result of the defamation, but also that it was in fact so caused. Cf. Rosenberg & Sons v. Craft, 182 Va. 512, 29 S.E. (2d) 375 (1944). As pointed out in the principal case however, "it is difficult to believe that a contented wife would have left her husband without any provocation other than the receipt by him of this postcard."

[15] See, e.g., Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E. (2d) 401 (1946). While there is a conflict in the cases as to whether the law of torts embraces this principle, or whether the only harm that is actionable is that which falls within some accepted category of tort liability, the weight of authority supports the former view. See 13 BROOKLYN L. REV. 219 (1947) for collection of authority.