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Duplication of Damages: Invasion of Privacy and Defamation

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DUPLICATION OF DAMAGES: INVASION OF PRIVACY AND DEFAMATION

Defendant mayor of Medical Lake, Washington, exhibited to at least one person what appeared to be police photographs of the plaintiff, together with what appeared to be an "F.B.I. record" on him. Neither the photographs nor the "F.B.I. record" were what they appeared to be, but defendant indicated they represented criminal convictions of plaintiff. Plaintiff brought suit for defamation and invasion of privacy, and a jury returned favorable verdicts on both counts. However, the trial court granted defendant's motion for judgment notwithstanding the verdict on the invasion of privacy count. Plaintiff appealed, contending right of privacy should be recognized in Washington and damages should be allowed on both counts. *Held:* Damages could not be recovered for both defamation and invasion of privacy, as to do so would permit double recovery for identical elements of damage resulting from a single tortious act. *Brink v. Griffith*, 65 Wn. 2d 253, 396 P.2d 793 (1964).

The Washington Supreme Court has avoided recognizing right of privacy in a series of opinions spanning more than fifty years.[1] However, many injuries compensable in other jurisdictions in an action for invasion of privacy are compensable in Washington in an action for defamation or intentional infliction of mental distress. In jurisdictions recognizing right of privacy, defamation and invasion of privacy are commonly alleged as separate counts in one suit.[2] Until the principal case, however, no court had considered the question of duplication of damages when a plaintiff recovered for both counts.[3]

The court in the principal case noted that, although damages are

[1] Almy v. Kvamme, 63 Wn. 2d 326, 387 P.2d 372 (1963) (any right of privacy had been waived by plaintiff); Lewis v. Physicians & Dentists Credit Bureau, 27 Wn. 2d 267, 117 P.2d 896 (1947) (if right of privacy existed in Washington, defendant's conduct did not constitute an invasion); State *ex rel.* LaFollette v. Hinkle, 131 Wash. 86, 229 Pac. 317 (1924) (court enjoined unauthorized use of a presidential candidate's name without mentioning right of privacy); Hodgeman v. Olsen, 86 Wash. 615, 150 Pac. 1122 (1915) (if right of privacy existed, it had not been invaded); Hillman v. Star Publishing Co., 64 Wash. 691, 117 Pac. 594 (1911) (court alligned itself with jurisdictions denying right of privacy, notably New York in Roberson v. Rochester Folding-Box Co., 171 N.Y. 538, 64 N.E. 442 (1902)).

[2] *E.g.*, Peay v. Curtis Publishing Co., 78 F. Supp. 305 (D.D.C. 1948); Linehan v. Linehan, 134 Cal. App. 2d 250, 285 P.2d 326 (Dist. Ct. App. 1955); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905) (first case allowing recovery for invasion of privacy).

[3] *But see* Binns v. Vitagraph Co., 210 N.Y. 51, 103 N.E. 1108 (1913) (dictum), stating that it would be difficult to avoid duplication of damages if plaintiffs were allowed to bring one action for libel and another for invasion of privacy; no mention of one action consisting of two self-sustaining counts.

awarded primarily for loss of reputation in a defamation action, a plaintiff is also entitled to recover for mental distress. Conversely, although damages are awarded primarily for mental distress in an invasion of privacy action, damages may be recovered for loss of reputation. Since the trial court's instructions permitted general damages on both counts, and the jury awarded damages for each, the court reasoned that each element had been twice compensated. By disposing of the appeal on the issue of duplication of damages, the court again avoided recognizing a right of privacy in Washington.

The court in the principal case quoted Dean Wade's solution to the problem of duplication of damages when both defamation and invasion of privacy are alleged: "A better position is taken by the New York cases which indicate that there is only a single action for the one transaction [tortious conduct] with complete damages being given for it."[4] Wade apparently meant that, when actions lie for both defamation and invasion of privacy, only one of the two should be allowed. Presuming this to be the court's interpretation, the principal case appears to hold incorrectly that defamation and invasion of privacy may not be maintained concurrently under any circumstances.

Neither logic nor the New York cases cited by Wade support the ostensible meaning of the quotation. Although the New York cases declare that a plaintiff whose privacy is invaded and who is simultaneously defamed has only one "action," they manifestly refer to the doctrine of res judicata, requiring plaintiff to recover all damages in one *suit* or be barred from further redress.[5] As general damages for either defamation or invasion of privacy may include the elements of damage of both, it is possible that the concurrent maintenance of both actions in one suit will result in duplicated damages. Affirming judgment notwithstanding the verdict in the principal case, on the invasion of privacy count, was consonant with Wade's conclusion that defamation and invasion of privacy should not lie concurrently. But duplication may be avoided by allocating, in the jury instructions, specific elements of damage to specific counts, as well as by limiting the plaintiff to one of two possible counts. No allocation was attempted in the principal case, indicating a possible duplication of damages and

[4] 65 Wn. 2d at 259, 396 P.2d at 797, quoting Wade, *Defamation And The Right Of Privacy*, 15 VAND. L. REV. 1093, 1124 (1962).

[5] Russell v. Marboro Books, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959); Metzger v. Dell Publishing Co., 207 Misc. 182, 136 N.Y.S.2d 888 (Sup. Ct. 1955). Dicta in *Russell, supra,* indicating that defamation and invasion of privacy will not lie concurrently, are belied by the court's decision that plaintiff could commingle claims for defamation and invasion of privacy.

a correct disposition by the appellate court.[6] If two distinct legal injuries have been inflicted, both should be compensated.[7] The holding in the principal case should be limited to instances in which elements of damage are not allocated.

Invasion of privacy encompasses four separable categories of tortious conduct: placing one in a false light in the public eye, intruding into one's private affairs, publicly disclosing embarrassing private facts, and appropriating one's name or likeness.[8] A majority of the fact patterns of privacy cases are within principles established in Washington in actions for defamation and intentional infliction of mental distress. Although the principles are applicable, few Washington defamation and intentional infliction of mental distress cases duplicate invasion of privacy fact patterns. Therefore, a plaintiff in Washington choosing to allege defamation or intentional infliction of mental distress may have to argue by analogy. If plaintiff chooses to allege invasion of privacy, a favorable verdict at the trial level is certain to be appealed; on appeal, he must overcome the court's reluctance to accept privacy. It is possible to allege invasion of privacy together with defamation or intentional infliction of mental distress, but plaintiff's risks are multiplied. Not only will a favor-

[6] While the trial court's instructions would have permitted the jury to duplicate damages, whether or not they did is conjectural.

[7] In Bennett v. Norbon, 396 Pa. 94, 151 A.2d 476, 479 (1959), the court allocated the number of actions to be brought in accord with the number of injuries suffered, rather than in accord with the number of defendant's overt acts:

> Often no other remedy exists, but if one is concurrent it does not obliterate the right of privacy. If a modest young girl should be set upon by a dozen ruffians who did not touch her but by threats compelled her to undress, give them her clothes, and flee naked through the streets, it could not be doubted that her right of privacy had been invaded as well as her clothes stolen.

[8] Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). Sundry fact patterns within these four categories are covered in an increasing number of privacy cases from other jurisdictions. The court characterized the principal case as a false light case, 65 Wn. 2d at 258, 396 P.2d at 797. Significantly, the characterization was made after independent research by the court. Neither party attempted categorization. Brief for Appellant, pp. 8-14; Brief for Appellee, pp. 20, 21.

In Almy v. Kvamme, 63 Wn. 2d 326, 387 P.2d 372 (1963), the court noted that the alleged invasion of privacy involved disclosure of private affairs. Relying upon the court's willingness to classify privacy cases, a plaintiff may concentrate upon advocating one of the four privacy categories. By thus limiting the issue, plaintiff should be able to present a more concise argument than has been feasible in former advocacies of privacy. See cases cited Annot., 14 A.L.R.2d 750 (1950); Annot., 168 A.L.R. 446 (1947); Annot., 138 A.L.R. 22 (1942).

Since the birth of right of privacy in Warren & Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890), development has been spurred by a wealth of favorable law review articles. *E.g.*, 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); Yankwich, *The Right of Privacy*, 27 NOTRE DAME LAW., 499 (1952). However, for a brief evaluation of the desirability of the four categories, see Prosser, *supra*.

able privacy verdict be appealed, but interpretation of the principal case consonant with Wade's conclusion will have to be avoided. Even if damages were allocated between counts, a refusal by the supreme court to accept right of privacy, or misinterpretation of the principal case, could cost the plaintiff damages previously awarded him. Consequently, in evaluating his choices of action, plaintiff must be cognizant of the possibility of maintaining an action for defamation or intentional infliction of mental distress as an *alternative* to any specific privacy category.

A "false light" invasion of privacy consists of publicly casting the plaintiff in a false image. Publications in the "false light" category need not be defamatory,[9] but they usually are.[10] In Washington, defamation extends to a publication which "exposes a person to hatred, contempt, ridicule, or obloquy, or deprives him of public confidence or social intercourse,"[11] or which tends to "injure him in his standing in his profession."[12] This liberal definition of defamation includes the majority of cases within the "false light" category. The principal case presents a typical "false light" fact pattern; exhibiting the photographs and "F.B.I. record" simultaneously defamed Brink and evoked a false image of him.[13] A "false light" action in jurisdictions recognizing right of privacy has the advantage of avoiding defamation distinctions between libel and slander, per se and per quod, and publications actionable with and without proof of special damages.[14] Recent Wash-

[9] Leverton v. Curtis Publishing Co., 192 F.2d 974 (3d Cir. 1951) (picture of injured child published with article on pedestrian carelessness when child was not shown to have been careless; held not defamatory, but an invasion of privacy).

[10] Prosser, *supra* note 8, at 400. See cases cited Annot., 14 A.L.R.2d 750 (1950); Annot., 168 A.L.R. 446 (1947); Annot., 138 A.L.R. 22 (1942).

[11] Purvis v. Bremer's, Inc., 54 Wn. 2d 743, 752, 344 P.2d 705, 711 (1959). *Accord,* RESTATEMENT, TORTS § 559, comment *b* (1938): "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

[12] Purvis v. Bremer's, Inc., *supra* note 11, at 754, 344 P.2d at 712. *Accord,* RESTATEMENT, TORTS § 559, comment *b* (1938): defamation "may consist of imputations which, while not affecting another's personal reputation, tend to discredit his financial standing in the community."

[13] The defamation count was successful in the principal case. In addition, the court noted that "the import of defendant's conduct was to cast the plaintiff in a false light." 65 Wn. 2d at 258, 396 P.2d at 797.

[14] Libel is defined at common law as defamation through written publication, and slander as defamation through spoken publication. Averments vary according to classification of a publication as libelous or slanderous, which is troublesome in the radio, television, and movie cases. Wyse, *The Complaint In Libel And Slander: A Dilemma For Plaintiff,* 33 CHI.-KENT L. REV. 313, 314 (1955). See Remington v. Bentley, 88 F. Supp. 166 (S.D.N.Y. 1949) (publication by panelist on television as slander); Brown v. Paramount Publix Corp., 240 App. Div. 520, 270 N.Y.S. 544 (1934) (publication by movie as libel). With few exceptions, slander is not actionable without proof of special damages. The exceptions are classified as slander per se. Libel per quod also requires proof of special damages, while libel per se does

ington decisions, however, indicate that these distinctions are no longer significant.[15] Therefore, in those "false light" cases for which an action for defamation could be maintained, plaintiff is not prejudiced by the unavailability of a right of privacy action in Washington.

A second category of right of privacy cases focuses on intrusion. Recovery has been allowed for physical intrusions, such as breaking into plaintiff's house,[16] and more subtle intrusions such as eavesdropping,[17] shadowing,[18] and unauthorized examination of private papers.[19] If remedy is sought in Washington for the more subtle intrusions, an action for intentional infliction of mental distress is often appropriate. Until recently, liability for intentional infliction of mental distress depended entirely upon whether or not defendant's conduct could be characterized as "wrongful."[20] This test has been interpreted as requiring that defendant's actions be "outrageous and contrary to public standards of acceptable conduct."[21] In *Christensen v. Swedish Hospital*,[22] the court approved an additional form of intentional infliction of mental distress, holding that a usually acceptable act (effort to collect a just debt) is tortious if defendant's sole motive is to cause the plaintiff mental distress. Apparently, liability may now be established under either the wrongful conduct or motive test. The resulting inclusiveness of intentional infliction of mental distress in Washington

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not. But the courts have not been able to agree upon a definition for libel per se; some hold that it is any libel sufficiently serious that injury may be inferred, while others hold that it is any libel susceptible of proof without resort to extrinsic facts. See POLLOCK, TORTS 177-202 (14th ed. 1939). Other complexities peculiar to defamation include averments of inducement (statement of extrinsic facts to establish the defamatory tendencies of an otherwise equivocal publication), colloquium (averment connecting plaintiff, extrinsic facts, and publication), and innuendo (averment of publication's meaning). See People v. Spielman, 318 Ill. 482, 149 N.E. 466 (1925).

[15] Any remaining distinction between libel and slander appears to have been abolished in Grein v. LaPoma, 54 Wn. 2d 844, 340 P.2d 766 (1959), 33 So. CAL. L. REV. 104, 11 SYRACUSE L. REV. 119, 35 WASH. L. REV. 253 (1960). In *Grein*, the court held that, unless a publication is utterly incapable of defamatory meaning, whether or not it is libel per se is a question for the jury. Sending the issue to the jury and defining libel per se as the equivalent of defamation obviate the need for proof of special damages.

[16] Ford Motor Co. v. Williams, 108 Ga. App. 21, 132 S.E.2d 206 (1963).

[17] La Crone v. Ohio Bell Tel. Co., 114 Ohio App. 299, 182 N.E.2d 15 (1961).

[18] Pinkerton Nat'l Detective Agency, Inc. v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119 (1963).

[19] Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936) (dictum); Brex v. Smith, 104 N.J. Eq. 386, 146 Atl. 34 (1929).

[20] Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925).

[21] Note, 38 WASH. L. REV. 360, 366 (1963). See Browning v. Slenderella Systems, 54 Wn. 2d 440, 341 P.2d 859 (1959), 35 WASH. L. REV. 245 (1960) (act of racial discrimination wrongful by nature); Gadbury v. Blietz, *supra* note 20 (holding body of plaintiff's son as security for the obligation of a third person); Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 Pac. 209 (1904) (directing plaintiff to leave amusement park under mistaken impression that she was a prostitute).

[22] 59 Wn. 2d 545, 368 P.2d 897 (1962), 38 WASH. L. REV. 360 (1963).

appears to provide an adequate remedy for the more subtle invasions of privacy by intrusion.

The majority of right of privacy cases fall within the third category, appropriation of plaintiff's name or likeness for defendant's advantage.[23] Cases include the use of another's name in advertising,[24] as a contestant in a popularity contest,[25] and as signatory to a telegram sent to the governor of Oregon.[26] The only Washington case considering unauthorized use of another's name is *State* ex rel. *LaFollette v. Hinkle*,[27] in which the court enjoined use of a presidential candidate's name by the self-styled "LaFollette State Party." *LaFollette* establishes the principle that one is entitled to govern the use of his name, and indicates that unauthorized appropriation is actionable in Washington.[28] In order to provide a remedy in tort commensurate with invasion of privacy by appropriation, the holding in *LaFollette* must be extended to permit compensation in damages as well as enjoinder, and include appropriation by means of photographs and word portraits. These extensions should be readily achieved on the basis of *LaFollette*.

The fourth category, public disclosure of embarrassing private facts, involves publicizing the truth. The truthfulness of publications within this category distinguishes them from those within the "false light" category, and operates as the defense of truth in a defamation action. Public disclosure cases have been limited to "relatively extreme" situations,[29] such as a movie about the unsavory life of a reformed prostitute,[30] extensive publicizing of overdue debts,[31] and public enumeration of a woman's embarrassing masculine characteristics.[32] Aside

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[23] Prosser, *supra* note 8, at 401. See cases cited Annot., 14 A.L.R.2d 750 (1950); Annot., 168 A.L.R. 446 (1947); Annot., 138 A.L.R. 22 (1942).

[24] Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W.2d 911 (1948).

[25] Marks v. Jaffa, 6 Misc. 290, 26 N.Y. Supp. 908 (Super. Ct. 1893).

[26] Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438 (1941).

[27] 131 Wash. 86, 229 Pac. 317 (1924). *La Follette* has been inaccurately discussed as a privacy case. Annot., 138 A.L.R. 22, 27 (1942); Prosser, *supra* note 8, at 388 n.50. Sitting as a court of original jurisdiction, the Washington Supreme Court decided *La Follette* within three days of hearing. Neither court nor counsel mentioned right of privacy. The decision appears to rest upon an implied property interest in one's name, rather than the right to avoid publicity upon which invasion of privacy by appropriation rests.

[28] *Cf.* Brillhardt v. Ben Tipp, Inc., 48 Wn. 2d 722, 297 P.2d 232 (1956), which protects a property interest in plaintiff's telephone number.

[29] Note, 50 CALIF. L. REV. 357, 358 (1962).

[30] Melvin v. Reed, 112 Cal. App. 285, 297 Pac. 91 (1931).

[31] Trammell v. Citizens News Co., 285 Ky. 529, 148 S.W.2d 708 (1941); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

[32] Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944), *rev'd*, 159 Fla. 31, 30 So. 2d 635 (1947).

from a few statutory provisions,[33] the only apparent remedy in Washington for this type of invasion is an action alleging intentional infliction of mental distress. Public disclosure cases require that the facts revealed be formerly private,[34] and that defendant publicize rather than simply disclose.[35] In effect, these two requirements limit public disclosure liability to defendant's intentional acts, and make the remedy of intentional infliction of mental distress particularly appropriate in Washington. Cases involving publicity of the plaintiff's debts may be actionable under the wrongful motive test established in *Christensen v. Swedish Hospital*.[36] But the usual public disclosure case is brought against a news medium whose motive is increasing circulation rather than exposing plaintiff.[37] The absence of a plaintiff-directed motive will usually leave only the wrongful conduct form of intentional infliction of mental distress. Dean Prosser's synthesis of right of privacy cases involving public disclosure, however, reveals a test whereby there will be liability only for disclosures "which the customs and ordinary views of the community will not tolerate."[38] Liability under this test would seem commensurate with liability under the wrongful conduct test in Washington.

Thus, principles established in the actions of defamation and intentional infliction of mental distress provide a basis upon which injuries within the four privacy categories may be redressed in Washington without accepting right of privacy. Possibly only right of privacy will suffice to redress subtle intrusions and disclosure of true but embarrassing facts by news media when neither defendant's conduct nor motive is sufficiently objectionable to sustain an action for intentional infliction of mental distress. But the majority of privacy cases require a finding of defendant's misconduct closely analogous

[33] Several Washington statutes make disclosure of private communications a criminal offense. WASH. REV. CODE §§ 9.73.020 (1956) (telegrams and sealed letters); 74.04.060 (1959) (public assistance recipient's records). These statutes may provide a basis for tort actions to redress any injury arising out of their violation, as the violation of a statute is a legal wrong. A legal wrong coupled with damage will sustain a tort action. Christensen v. Swedish Hospital, 59 Wn. 2d 545, 368 P.2d 897 (1962), 38 WASH. L. REV. 360 (1963).

[34] Reed v. Orleans Parish School Board, 21 So. 2d 895 (La. App. 1945); Prosser, *supra* note 8, at 394.

[35] Patton v. Jacobs, 118 Ind. App. 358, 78 N.E.2d 798 (1948); Lewis v. Physicians & Dentists Credit Bureau, 27 Wn. 2d 267, 177 P.2d 896 (1947) (without holding that right of privacy existed in Washington, the court held that disclosure of overdue debts not amounting to publicity was not actionable as an invasion of privacy).

[36] 59 Wn. 2d 545, 368 P.2d 897 (1962), 38 WASH. L. REV. 360 (1963).

[37] *E.g.*, Banks v. King Features Syndicate, 30 F. Supp. 352 (S.D.N.Y. 1939); Griffin v. Medical Society, 7 Misc. 2d 549, 11 N.Y.S.2d 109 (Sup. Ct. 1939) (medical journal).

[38] Prosser, *supra* note 8, at 397.

to the findings required in Washington cases of defamation and intentional infliction of mental distress.

Present confusion in the right of privacy field is largely attributable to judicial acceptance of the doctrine as though it composed a unit rather than four distinct categories. In light of the variety of interests protected, meaningful precedent can only be established by determining which categories are desirable, on the basis of cases presenting fact patterns applicable to the category under consideration. The Washington Supreme Court, indicating in the principal case that each category may be considered separately, appears to be following the most rational approach to a consideration of privacy.