Buffalo Law Review

Volume 7 | Number 2 Article 17

1-1-1958

Invasion of Privacy in Debt Collection

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490 (1949), or assist him to create a monopoly prohibited under the Sherman Antitrust Act, *Bradley v. Local Union,* 325 U.S. 797 (1945). It would seem no less orthodox to say that a labor union may not seek to compel an employer to commit an unlawful act by violating the Interstate Commerce Act. Interstate Commerce Act, §216(d), 54 STAT. 924 (1940), 49 U.S.C. §316(d) (1952).

The change in the law resulting from the NLRB decision in the *Genuine Parts* case affects common carriers and their employees only and will have no impact upon the construction industry or other businesses in which "hot cargo" plays an important part. But it should settle the law in the transportation area, regardless of the Supreme Court decision on the cases presently before it. If the Board's view in *Genuine Parts* is rejected, and "hot cargo" clauses are allowed in the transport industry, common carriers will be in the unenviable position of having to tread a frail tightrope to obey the law. On the one hand, they would be subject to the pressures of unions seeking to have included in employment contracts "hot cargo" clauses, valid under the Taft-Hartley Act. On the other, as the latest decision of the ICC demonstrates, such a clause, if accepted by the carriers, would not protect it from charges before the ICC resulting from refusal, under the provisions of the "hot cargo" clause, by the carrier's employees to perform transportation services.

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Invasion of Privacy in Debt Collection

Plaintiff brought an action for invasion of privacy based upon a letter written by defendant to plaintiff's employer requesting assistance in the collection of a bill which plaintiff claimed she did not owe. The Supreme Court of Georgia, in reversing the decision of the court below and sustaining defendant's demurrer, held that such a letter was a reasonable means of collection and therefore did not constitute an invasion of plaintiff's right of privacy. *Gouldman-Taber Pontiac v. Zerbst,* 100 S.E.2d 881 (Ga. 1957).

Where creditors have sought collection by disclosure of the claim to the debtor's employer with the threat, implicit if not explicit, to initiate garnishment proceedings should it remain unpaid, debtors have brought action against them on three different theories: intentional infliction of mental suffering, *La Salle Extension University v. Fogarty,* 126 Neb. 457, 253 N.W. 424 (1934); libel, *Schieve v. Cincinnati and Suburban Bell Telephone Co.,* 71 Ohio L. Abs. 350, 126 N.E.2d 817 (1955), *Keating v. Conviser,* 246 N.Y. 632, 159 N.E. 680 (1927); and invasion of privacy, *Patton v. Jacobs,* 118 Ind. App. 358, 78 N.E.2d 789 (1948), *Housh v. Peth,* 165 Ohio St. 35, 133 N.E.2d 340 (1956). Since an action based upon intentional infliction of mental suffering would seem to

require more than a single courteous letter of the type involved, PROSSER, LAW OF TORTS §11 (2d ed. 1955), RESTATEMENT, TORTS §46 (1948), and since a remedy in libel would not be available in Georgia, *Estes v. Sterchi Brothers Stores,* 50 Ga. App. 619, 179 S.E. 222 (1935),*Whitley v. Newman,* 9 Ga. App. 89, 70 S.E. 686 (1911), plaintiff's only chance of recovery in the present case was on a privacy theory.

In refusing to recognize a cause of action based upon a right of privacy the court ignored plaintiff's allegation that she did not owe the bill, for it considered the defendant's action a reasonable collection method which must have been expected and "impliedly consented" to by plaintiff when she accepted credit. It further reasoned that such a letter could not constitute a violation of plaintiff's right of privacy because, the employer having a "natural and proper interest in the debts of his employees," the creditor was not giving to the general public information concerning a private matter in which it had no legitimate interest. As pointed out by the court below, *Gouldman-Taber Pontiac v. Zerbst,* 96 Ga. App. 48, 99 S.E.2d 475 (1957), the result reached will have the tendency to deprive the alleged debtor of his day in court. The employer's desire to avoid garnishment proceedings, and the debtor's dependency upon his employer, are such that this means of collection can amount to economic coercion, the employer's fiat, induced by the creditors, being substituted for legal adjudication. See 2 LAW AND CONTEMPORARY PROBLEMS 258 (1935) and 8 LAW AND CONTEMPORARY PROBLEMS 78 (1941). There is nothing in the nature of the right of privacy which should limit it to protection against disclosures to the general public; and the fallacy of the argument that the employer has a "natural and proper interest in the debts of his employees," without consideration of the weight to be accorded to this asserted interest, was cogently pointed out in the dissenting opinion of a similar Michigan case. "The argument proves too much. A love-sick employee, also, is far from efficient. Should we call upon the boss to scotch romance?" *Hawley v. Professional Credit Bureau,* 345 Mich. 500, 76 N.W.2d 835 (1956).

It may be conceded that the interest of the debtor for which protection was sought in this case does not fit the usual pattern of interests protected by the right of privacy. No intrusion into or disclosure of highly personal matter is involved. As we have seen, the main injury is economic; the creditor's conduct endangers the debtor's job, and is intended to pressure him into paying a doubtful claim. Nevertheless, a personality interest containing elements of privacy is clearly involved: an outsider is using and influencing the debtor's relationship to his employer, and the employer is being asked to interfere in affairs of the debtor not closely related to his employment.

In refusing to protect these interests of the debtor the court, as already noted, failed to distinguish the present case from the situation where the debt is not

disputed. It is suggested that this distinction must be made to protect adequately the interests of the parties involved. If the debt is admitted the creditor's conduct would appear to be a suitable method of collection, both to save the parties (creditor, debtor, and empoyer) the expense and trouble of garnishment proceedings, and to furnish creditors with a practical device to enforce claims too small to justify litigation. In that situation, it seems less strained to speak of the debtor's "consent" to the creditor's action, and the debtor has much less ground to complain. The debtor's interest in non-disclosure would not seem substantial enough, as opposed to the interests of the creditor and employer, to provide a remedy for such disclosure of and presure to pay a true debt. Garnishment proceedings would result in a similar encroachment upon his interests of a strict privacy nature. But for the reasons already discussed, the debtor should not be deprived of access to the courts when he denies the validity of the debt.

There would seem to be little difficulty in allowing recovery in a privacy action if it were made to depend upon the lack of a reasonable belief by the creditor that his claim was valid, i.e., on lack of justification for his conduct. Truth is not a defense to a privacy action. PROSSER, LAW OF TORTS §97 (2d ed. 1955); RESTATEMENT, TORTS §867 (1939). But whether or not the debtor reasonably disputed the claim and whether or not the creditor reasonably believed it to be valid would be relevant in determining whether the latter's conduct was justified. This approach, however, would lead to unsatisfactory results when the creditor was reasonable in pressing his claim and the debtor reasonable in disputing it. Merely because he reasonably believes it to be valid, the creditor should not be enabled to deprive the debtor of his day in court and coerce payment of a debt which is not actually owed. On the other hand, he should not be held liable merely because the debtor was reasonable in disputing an actual debt. It would therefore seem more desirable to make recovery dependent, not upon lack of reasonableness in the conduct of the creditor, but upon lack of validity of the asserted claim. In such an action the validity of the debt would have to be determined; the plaintiff would recover if the claim were held to be not valid, but could not recover merely because he was reasonable in disputing it. In other words he would bear the risk that he was mistaken in disputing the debt, while the creditor would bear the risk that he was mistaken in charging the debtor with an unpaid debt. The debtor's right of privacy would thus consist of a right against disclosure to his employer of *false* claims.

This result is achieved in New York on a defamation theory. A charge of failure to pay a debt is considered libel per se, but truth, of course, is a defense. *Keating v. Conviser,* 246 N.Y. 632, 159 N.E. 680 (1927); *Cyran v. Strauss,* 302 N.Y. 486, 99 N.E.2d 298 (1951). But the Georgia courts deny recovery on this theory. *Estes v. Sterchi Brothers Stores,* 50 Ga. App. 619 179 S.E. 222 (1935); *Whitley v. Newman,* 9 Ga. App. 89, 70 S.E. 686 (1911). As recovery on a

privacy theory would require the theoretical complications discussed above and would involve extension of the right of privacy to areas not within its usual scope, PROSSER, LAW OF TORTS §97 (2d ed. 1955); RESTATEMENT, TORTS §867 (1939). Warren and Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890), the New York defamation theory would seem a more desirable basis for relief. But either approach is to be preferred to the Georgia court's flat rejection of recovery without regard to the validity of the asserted claim, or even the reasonableness of the creditor's belief in its validity.

James Magavern

Meaning of the Concept of Exclusive Control In Res Ipsa Loquitur Cases

The decedent, while attending the New York State School for the Blind, died of burns received while attempting to take a bath. There were no witnesses present when the accident occurred and the cause of the accident was not established at the trial. The Court held that this was a proper case of the application of *res ipsa loquitur. Minotti v. The State of New York,* 166 N.Y.S.2d 396 (Ct. Cl. 1957).

When *res ipsa loquitur* is applicable, the specific acts of negligence do not have to be proven for the doctrine establishes an inference which permits the jury to find negligence. *Foltis v. City of New York,* 287 N.Y. 108, 38 N.E.2d 455 (1951). New York accepts the view that *res ipsa loquitur* is nothing more than a rule of circumstantial evidence. *Galbraith v. Busch,* 267 N.Y. 230, 196 N.E. 36 (1935). But for the theory that *res ipsa loquitur* is something more, that is, to allow the jury to find negligence where there is some probability, even though the probability is 50-50, or less; see: Jaffe, *Res Ipsa Loquitur Vindicated,* 1 BUFFALO L. REV. 1 (1951).

Even when used as a rule of circumstantial evidence what requirements must be met before the doctrine may be invoked? The general view is that damage must be of a kind which does not ordinarily occur in the absence of negligence and that it must be caused by an agency or instrumentality within the exclusive control of the defendant. WIGMORE, EVIDENCE §2509 (3d ed. 1940) New York claims to follow this view and verbally, at least, requires exclusive control by the defendant in order to apply the *res ipsa* doctrine. *Silverberg v. Schweig,* 288 N.Y. 217, 42 N.E.2d (1942).

However this writer questions whether the court has not relaxed in application the stringent requirement of *exclusive control.* It is suggested that an example of this relaxation may be seen by comparing the following cases: In *Sasso v. Randforce Amusement Corporation,* 243 App. Div. 552, 275 N.Y. Supp. 891 (2d Dep't 1934) the plaintiff was injured when the theater seat on