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Torts - Nuisance - Personal Annoyance as Sole Injury

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TORTS—NUISANCE—PERSONAL ANNOYANCE AS SOLE INJURY—Several thousand sales slips, mistakenly printed to bear plaintiff's telephone number, were supplied to the defendant store and were circulated widely by the latter's employees incident to normal sales transactions. Calls from defendant's customers soon burdened plaintiff's telephone, and despite numerous complaints by plaintiff over a two-year period, defendant refused or neglected to terminate use of the incorrect slips. On appeal from judgment for plaintiff in a suit for damages, *held*, affirmed. Defendant's acts resulted in an actual invasion of plaintiff's right to enjoy her property without unreasonable interference. Damages for personal annoyance and inconvenience alone are allowable in a nuisance action. *Brillhardt v. Ben Tipp, Inc.*, (Wash. 1956) 297 P. (2d) 232.

The recognition of telephone annoyance as a nuisance in the principal case is demonstrative of the extent to which this elusive tort has been expanded since its inception as an action involving continuing physical

invasion of land.¹ Today annoyance and inconvenience are widely recognized as proper elements of damage in a nuisance action and frequently emerge as the sole basis upon which a damage recovery is predicated.² Seldom do courts distinguish those causes in which discomfort alone is alleged as injury, as in the principal case, and those in which it merely accompanies such traditional nuisance harms as physical injury to land and fixtures, depreciation of property value, or creation of conditions deleterious to health.³ Such a tendency exists in the area of nuisance in sharp contrast with contemporary general tort doctrines rigidly restricting suits for emotional disturbance recovery as an independent cause of action.⁴ That annoyance and inconvenience may be the sole elements of damage is perhaps explained by the peculiar nature of the private nuisance theory. Once having defined the essence of nuisance as "interference with use and enjoyment of land,"⁵ the courts apparently felt that it would be antithetical to bar a plaintiff who shows only annoyance caused by such interference. It is significant that annoyance and inconvenience are often scrupulously distinguished from other forms of emotional distress⁶ as perhaps importing more of a physical, as distinct from mental, characteristic than pure mental disturbance,⁷ thereby appearing less susceptible of counterfeit by the super-sensitive or avaricious plaintiff. Thus unpleasant odors,⁸ sights,⁹ and noises¹⁰ have provided grounds for nuisance recovery solely upon a showing of substantial¹¹ annoyance, harassment, inconvenience, or discomfort. Yet whatever justification for these decisions is to be found in the atypic

¹ A comprehensive discussion of the history and suggested limitations of the nuisance doctrine is found in PROSSER, *TORTS*, 2d ed., 389 et seq. (1955).

² E.g., *Baltimore & Potomac R. Co. v. Fifth Baptist Church*, 108 U.S. 317 (1883); *Judson v. Los Angeles Suburban Gas Co.*, 157 Cal. 168, 106 P. 581 (1910); *Chandler v. City of Olney*, 126 Tex. 230, 87 S.W. (2d) 250 (1935).

³ E.g., *Phillips Petroleum Co. v. Ruble*, 191 Okla. 37, 126 P. (2d) 526 (1942). See also 4 *TORTS RESTATEMENT* §929, comment *g* (1939); 142 A.L.R. 1316 (1943).

⁴ "One who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . ." [Tentative Draft of §46(1), *SECOND TORTS RESTATEMENT*] cited in Prosser, "Insult and Outrage," 44 CALIF. L. REV. 40 at 43 (1956) as representative of the current tenor of American decisions. Cf. *TORTS RESTATEMENT* (Supp. 1948) §46.

⁵ PROSSER, *TORTS*, 2d ed., 405 (1955).

⁶ "This interest in freedom from annoyance and discomfort in the use of land is to be distinguished from the interest in freedom from emotional distress. . . . The latter is purely an interest of personality and receives very limited legal protection, whereas the former is essentially an interest in the usability of land and, although it involves an element of personal tastes and sensibilities, it receives much greater legal protection." 4 *TORTS RESTATEMENT* §822, comment *e* (1939).

⁷ *Chicago, Indianapolis and Louisville R. Co. v. Ader*, 184 Ind. 235, 110 N.E. 67 (1915).

⁸ E.g., *Judson v. Los Angeles Suburban Gas Co.*, note 2 *supra*; *Holdenville v. Kiser*, 195 Okla. 189, 156 P. (2d) 363 (1945).

⁹ *Brough v. Ute Stampede Assn.*, 105 Utah 446, 142 P. (2d) 670 (1943). *Contra*, *Houston, E. & W.T. Ry. Co. v. Reasonover*, 36 Tex. Civ. App. 274, 81 S.W. 329 (1904).

¹⁰ E.g., *Baltimore and Potomac R. Co. v. Fifth Baptist Church*, note 2 *supra*.

¹¹ A trifling annoyance is not sufficient. *Reynolds v. Community Fuel Co.*, 309 Ky. 716, 218 S.W. (2d) 950 (1949). Cf. *People v. Northum*, 41 Cal. App. (2d) 284, 106 P. (2d) 433 (1940).

nature of nuisance as a tort concept concerning itself with the effect of conduct rather than with the conduct itself,¹² their consequence has been to divorce from the traditional injury to property, a form of mental distress for which an independent damage action will lie, albeit within the nuisance framework. Such a separation poses the rather fundamental question, Does defendant, by inducing annoyance, invade a proprietary or personal interest? The court's opinion in the principal case is indicative of the hopeless confusion and conflict on this issue—damages are awarded for "personal" annoyance upon an invasion of plaintiff's "right to enjoy her property."¹³ If such injury is personal, no perceptible reason exists for limiting the nuisance action to cases involving the use of realty. The basis of the tort would, in fact, assume remarkable similarity to a substantial body of right of privacy decisions in which mental suffering caused by intentional invasion of plaintiff's solitude has been held compensable.¹⁴ Although evolved to cope with unwarranted publicity of private affairs,¹⁵ the privacy action has often been successfully litigated where no act of publication is alleged.¹⁶ A recent Ohio decision upon facts fundamentally analogous to those in the principal case, awarded substantial damages for an invasion of privacy through "a deliberately initiated systematic campaign to harass" by telephone.¹⁷ Recovery on a nuisance theory would appear to have been equally plausible, as indeed it might in a number of the privacy cases cited, and conversely, the requirement of intent is the only aspect of the privacy concept preventing assimilation of the entire

¹² VI-A AMERICAN LAW OF PROPERTY §28.24 (1954).

¹³ 297 P. (2d) 232 at 235 (1956) (emphasis added). The editors of the TORTS RESTATEMENT clearly indicate preference for the "proprietary" position, note 6 supra. But see Birmingham Waterworks Co. v. Martini, 2 Ala. App. 652 at 661, 56 S. 830 (1911): "Any condition which created annoyance and inconvenience to appellee while in his home was an offense against his *person—a personal injury.*" Supporting the latter view, see Phillips Petroleum Co. v. Ruble, note 3 supra.

¹⁴ Exhaustive annotations of the history and nature of the action appear in 138 A.L.R. 22 (1942) and 168 A.L.R. 446 (1947).

¹⁵ See generally Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 at 195 et seq. (1890). Compare Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), with Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), on the question of the need for creating such a right.

¹⁶ "An invasion of the right of privacy may result without the matter being brought to the attention of the general public." Housh v. Peth, (Ohio App. 1955) 135 N.E. (2d) 440 at 448. See also PROSSER, TORTS, 2d ed., 637 (1955). In the following cases, an invasion of privacy was recognized in absence of the usual element of publicization: Welsh v. Roehm, 125 Mont. 517, 241 P. (2d) 816 (1952) (oppressive conduct by landlord); Walker v. Whittle, 83 Ga. App. 445, 64 S.E. (2d) 87 (1951) (unlawful search and seizure); State ex rel. Clemens v. Witthaus, 360 Mo. 274, 228 S.W. (2d) 4 (1950) (unjustifiably broad judicial order to produce papers).

¹⁷ Housh v. Peth, note 16 supra, at 442, in which a creditor made numerous telephone calls to plaintiff for a three-week period in an effort to coerce payment of a debt. An element of publication to plaintiff's employer was present but the court was specific that its decision did not turn on this factor. See cases cited note 16 supra.

body of nuisance cases involving annoyance.¹⁸ The similarity between the two theories shows how artificial rigid tort classifications may be in the realm of mental suffering, and suggests the irrelevance of denominating an interest as either personal or proprietary where emotional disturbance is involved. More significantly, it indicates that the presently accepted requisites of recovery for independent emotional disturbance—intentional and outrageous conduct by defendant and extreme shock in plaintiff¹⁹—may eventually be destroyed by the more realistic approach of the nuisance theory, to the extent that any unreasonable infliction of substantial emotional disturbance will be actionable.

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¹⁸ The right of privacy "appears in reality to be a complex of four distinct wrongs, which have little in common One of these torts consists of intrusion upon the plaintiff's physical solitude or seclusion. . . ." PROSSER, *TORTS*, 2d ed., 637 (1955). Ironically, the privacy concept was in its inception one involving proprietary interests. See *Prince Albert v. Strange*, 1 Mac. & G. 25, 41 Eng. Rep. 1171 (1849). See 29 *TEX. L. REV.* 976 (1951), for a recent discussion of the roots of the right.

¹⁹ Note 4 *supra*.