Invasion of **Privacy** In Washington

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By Nigel S. Malden

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I. Introduction

The rights to privacy in Washington derives from several different sources, including state and federal constitutions, state and federal statutes, and the common law of torts. Although this article discusses a few special privacy statutes, the main focus is on invasion of privacy claims arising under constitutional and state common law.

II. The Constitutional Right to Privacy

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."[1]

The state and federal constitutions protect citizens from governmental actions that invade privacy.[2] Article 1, Section 7 of the Washington State Constitution states that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." The courts have intercepted this provision as conferring two distinct rights of privacy, the right to nondisclosure of intimate personal information and the right to personal autonomy.[3] In the workplace, the right to nondisclosure of intimate personal information may be violated by the improper release of information contained in personnel or other files. The right to personal autonomy may be violated by improper employee drug testing, searched and surveillance.

[1] Louis D. Brandeis, Olmstead v. United States, 277 U.S. 438 (1928)(dissenting)(US Supreme Court reviewed whether the use of wiretapped private telephone conversations, obtained by federal agents without judicial approval and subsequently used as evidence, constituted a violation of the defendant's rights provided by the Fourth and Fifth Amendments. In a 5-4 decision, the Court held that neither the Fourth Amendment nor the Fifth Amendment rights of the defendant were violated. This decision was overturned by Katz v. United States, 387 U.S. 347 (1967).

[2] All governmental or public employers are state actors subject to the constraints and protections of the state and federal constitutions.

[3] The right to personal autonomy includes, for example, "the freedom of choice to refuse electroconvulsive therapy, to d decline medical treatment in certain instances and to oppose blood tests in certain instances." State v. Farmer, 116 Wash.2d 414, 429 (1991).

In Robinson v. City of Seattle, 102 Wn.App. 795 (Div. 1 2000), Division 1 of the Court of Appeal considered whether the City of Seattle's mandatory, city-wide, preemployment drug testing program invaded the right to privacy under the state constitution. The program required all successful external applicants for designated positions to undergo urinalysis. The designated positions were all said to involve (1) public safety responsibilities (2) handing dangerous substances (3) hazardous physical activities (4) routine operation of motor vehicles, heavy equipment, or power tools and (5) routine performance of other safety sensitive activities.

A group of Seattle residents and the ACLE challenged the program on the grounds that such widespread mandatory drug testing violated the rights to privacy guaranteed by Article 1, Section 7 of the Washington State Constitution:

The court explained Article 1, Section 7:

> "breaks down into two basic components: the disturbance of a person's 'private affairs' or the invasion of his or her home, which triggers the protection of the section; and the requirement that 'authority of law' justify the governmental disturbance or invasion. Disturbance of private affairs occurs when the government intrudes upon those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass."

The court concluded that the collection and testing of urine by the City was an intrusive search into private affairs and therefore had be conducted pursuant to a warrant unless a recognized exception applied, such as consent, exigent circumstances, or plain view.[4] This is because in the absence of individualized suspicion of wrongdoing, the general search "is anathema to Fourth Amendment and Const. Ar. 1, Sec. 7 protections and except in the most compelling situations, should not be countenanced." Robinson, 102 Wn.App. at 814.

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[4] The court said "it is difficult to imagine an affair more private than the passing of urine." The U.S. Supreme Court has similarly observed: "most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in pubic is generally prohibited by law as well as social custom." Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602, 617 (1989).

Whether the government has unreasonably intruded upon private affairs in violation of the state constitution involves a "reasonableness inquiry." In this inquiry, the balancing of interest and intrusion is fact-specific:

> "The search must be justified by compelling governmental interests and must be narrowly tailored to meet those interests…that standard is satisfied only as to testing of City applicants whose duties will genuinely, implicate public safety. On this record, we are unable to say which City positions fall within this category, other than sworn police officers and firefighters, and positions requiring an employee to carry a firearm."

Division 1 remanded the case to the trial court, which was directed to issue an order enjoining Seattle's drug testing program as to all other employment positions. The court said that "upon further proceedings, to the extent the City is able to demonstrate that other City positions involve the performance of duties whereby public safety is in jeopardy, the trial court may modify its injunction as appropriate."[5]

In Robinson and in many other cases, Washington courts have emphasized that the right to privacy guaranteed by Article 1, Section 7 of the state constitution is broader than the privacy right protected by the Fourth Amendment in the U.S. Constitution:

> "While the Fourth Amendment operates on a downward ratcheting mechanism of diminishing expectations of privacy, Article 1, Section 7, holds the line by pegging the constitutional standard to 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass absent a warrant.'" Robinson, 102 Wn.App. at 819 (citations omitted).

Nonetheless, the protections of the Fourth Amendment are often raised in workplace privacy disputes involving public employers who are by definition, "state actors."[6]

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

[5] The city categorized 50% of all jobs as "safety sensitive." The City could not articulate, however, the duties implicating public safety performed by accountants, ushers, administrative assistants, librarians, golf course technicians, and others (except that librarians may carry up to 25 pounds of books). Robinson v. City of Seattle, 102 Wn.App. 795, 824 (Div. 1 2000).

[6] City of Ontario, California v. Quon, 560 U.S. 746 (2010).

seizures." The Fourth Amendment's protection from unreasonable searches extends beyond the sphere of criminal investigations. The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by government without regard to whether the governmental agent or actor is investigating crime or performing some other function. See City of Ontario, California v. Quon, 560 U.S. 746 (2010).

Although the Washington State constitution gives broader protection to the right of privacy than the federal constitution, the city of Seattle's former drug testing program may still have violated the Fourth Amendment because federal courts have ruled that the process of collecting and testing employee urine implicates "expectations of privacy that society has long recognized as reasonable" under the federal constitution. Borse v. Pierce Goods Shop, Inc., 963 F.2d 611 (3rd Cir. 1992). Citing Skinner v. Railway Labor Executives Association, 489 U.S. 602, 617 (1989).

III. Invasion of Privacy Claims Under State Common Law

The courts in Washington recognize four different kinds of common law tort claims for invasion of privacy: (1) **public disclosure of private facts** (2) **intrusion upon seclusion** (3) **appropriation of name or likeness** and (4) **false light portrayal**. Each one has its own requirements.

IV. Invasion Of Privacy--Public Disclosure of Private Facts

The Washington Supreme Court recognized the right to assert a tort claim for Invasion of Privacy-Public Disclosure of Private Facts in Reid v. Pierce County, 136 Wash. 2d 195 (1998). The plaintiffs in Reid claimed that the Pierce County Coroner's Office invaded their privacy by

showing autopsy photographs of their deceased relatives at social events for entertainment purposes.[7]

The Washington Supreme Court adopted Restatement (Second) of Torts Sec. 652D:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
> (a) would be highly offensive to a reasonable person, and
> (b) is not of legitimate concern to the public.

"Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal matters, most details of a man's life in his home, and some of his past history that he would rather forget. Within these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of privacy, unless the matter is one of legitimate public interest." Cowles Publishing Co. v. State Patrol, 109 Wash. 2d 712, 721 (1988), *quoting* Restatement (Second) of Torts, Sec. 652D.

A. Publicity

"Publicity means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public. Thus it is not an invasion of the right of privacy…to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons (but)

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[7] The autopsy photographs were of deceased public figures including Tacoma mayor Jack Hyde and Washington Governor, Dixie Lee Ray.

any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section. The distinction, in other words, is one between private and public communication."[8]

B. Highly Offensive

In general, the common law right to privacy only protects "the intimate details of one's personal and private life." Dawson v. Dailey, 120 Wash.2d 782, 796 (1993).[9] Whether a particular disclosure is highly offensive is judged from the perspective of a reasonable person of ordinary sensibilities and is usually a question of fact for the jury, not a matter of law for the court.[10]

One bright line rule is there is no liability for publicizing information which is already public.[11] In Cox Broadcasting v. Cohen, 420 U.S. 469 (1975), the U.S. Supreme Court held that the First Amendment right to free speech (in the United States Constitution) restricts states from imposing penalties on the press for publishing accurate information obtained from a public court record. [12]

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[8] Restatement (Second) of Torts, Sec. 652D, comment a (1977).

[9] "Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal matters, most details of a man's life in his home, and some of his past history that he would rather forget. Within these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of privacy, unless the matter is one of legitimate public interest." Cowles Publishing Co. v. State Patrol, 109 Wash. 2d 712, 721 (1988), *quoting* Restatement (Second) of Torts, Sec. 652D.

[10] See e.g., Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580, 588 (D.C. 1985).

[11] See e.g., Cowles Publ'g Co. v. State Patrol, 44 Wash. App. 882 (1986), rev'd on other grounds, 109 Wash.2d 712 (1988).

[12] The case involved a state law prohibiting the publication of the name of a rape victim.

Courts have also held that when someone posts information about themselves on social media, it can be freely republished by a third party without liability.

Sandler v. Calcagni, 565 F. Supp. D 184 (D. Me. 2008), is a good example. The case involved two high school friends and cheerleaders whose argument over a boyfriend went ballistic. The two teenagers accused each other of bullying and harassment and both got a restraining order against the other. Calcagni blogged on the internet about Sandler's Jewish ancestry and made anti-semitic remarks. Calcagni was later convicted of criminal mischief for driving through Sandler's neighborhood and spray painting Nazi swastikas on road signs.

Calcagni published a book, Help Us Get Mia.[13] The book re-argued Calcagni's defense to criminal charges and accused Sandler of fabricating evidence. Help Us Get Mia also revealed personal information about Sandler's cosmetic surgery and history of psychological treatment which Sandler had previously shared with Calcagni in confidence.

Calcagni's actions seemed a vicious betrayal, but the federal court dismissed claims for invasion of privacy because Sandler herself disclosed her psychological treatment on social media and cosmetic surgery to the face is by its nature exposed to the public eye. The court cited comments from the Restatement (Second) of Torts:

"Complete privacy does not exist in this world except in a desert and anyone who is not a hermit must expect the more or less casual observance of his neighbors and the passing public as to what he is and does, and some reporting of his daily activities. Thus he must expect the more or less casual observation of his neighbors as to what he does, and that his comings and goings and his ordinary daily activities, will be described in the press as a matter of casual interest to others. The ordinary reasonable man does not take offense at a report in a newspaper that he has returned from a visit, gone camping in the woods or given a party at his house for his friends. Even minor and moderate annoyance, as for example through public disclosure of the fact that the plaintiff has clumsily fallen downstairs and broken his ankle, is not sufficient to give him a cause of action under the rule stated in this Section. It is only when the publicity given to him is

[13] Calcagni's parents bought 760 copies of the book which they distributed to friends, family and various third parties.

such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises."[14]

Some examples of activities found to be highly offensive invasions of privacy in state court cases include:

- Miller v. National Broadcasting Co., 187 Cal. App. 3d 1463 (1986), a television crew barged into a private home with paramedics and filmed a man dying of a heart attack without gaining the wife's permission.
- Catsouras v. Department of the California Highway Patrol, 181 Cal. App. 4th 856 (2010), CHP officers sent death scene photos to third parties on Halloween "for pure shock value." The photos went viral and were sent to the victim's parents accompanied by ugly taunts and messages.
- Jeffery H. v. Imai, Tadlock & Keeny, 85 Cal. App. 4th 345 (2000), a law firm disclosed the HIV status of a litigant in an automobile accident case for no legitimate reason.
- Egan v. Schmock, 93 F.Supp 2d 1090 (N.D. Cal.2000), defendants stalked and filmed their neighbors.

C. What is of Legitimate Public Concern?

In addition to proving the disclosure of information was "highly offensive," the plaintiff must prove it was of no legitimate concern to the public.[15]

There is no single, bright line test to determine whether something is "newsworthy," or of legitimate concern to the public. The comments to Restatement (Second) of Torts § 263D suggest that "newsworthy" stories and "disclosures" include those:

"concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, a rare disease,

[14] Restatement (Second) of Torts § 263D cmt. c.

[15] The "newsworthiness" privelage is necessary to protect the First Amendment right to report or opine on matters of public concern. *See* Shulman v. Group W Productions, Inc., 18 Cal.4th 200 (1998).

the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal."

The public has a legitimate interest in the private lives of prominent figures including movie stars, politicians, and professional athletes as well as "interesting phases of human activity," or information which may help individuals "cope with the exigencies of the period." Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980). The public also has a legitimate interest in information which may educate, amuse or enlighten. The scope of what is newsworthy can be huge, but there are limits:

"The line to be drawn is when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern." Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118 (Cal. Ct. App. 1983).[16]

In Shulman v. Group W. Productions, Inc., 18 Cal.4th 200 (1998), the California Supreme Court reviewed video taken at an auto accident scene which showed the victim trapped in her car, begging to die. Surprisingly, the court held that broadcasting the video on television was not so invasive of privacy as to out-weigh the public's legitimate interest in seeing the response to medical emergencies occurring on public streets.

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[16] *See also:* Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975); *See e.g.* Michaels v. Internet Entertainment Group, Inc., 5 F.Supp.2d 823, 841-842 (C.D. Cal. 1998) (video of Brett Michaels having sexual intercourse with Pamela Anderson is not newsworthy or matter of legitimate public concern); Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118 (Cal. Ct. App. 1983) (a political leader's transgender status is irrelevant to her qualifications for office and not of legitimate concern to the public).

In Gilbert v. Medical Economics Co., 665 F.2d 305 (10th Cir. 1981), a federal appellate court ruled that information about a physician's psychiatric history and marital life was relevant to the newsworthy topic of policing failures in the medical profession. In Strutner v. Dispatch Printing Co., 442 N.E.2d 129 (Ohio Ct. App. 1982), the court approved the publication of the name and address of the father of suspected rapist.

In White v Town of Winthrop, 128 Wn. App. 588 (Div. 3 2005), a former town marshall resigned after having a seizure at work and being transported to hospital by ambulance. White had epilepsy since childhood but reliably controlled his seizures with medication. He did not openly discuss his medical condition because he did not want to be ridiculed or stigmatized.

White resigned in a private meeting with the town mayor. He explained what happened and why he felt resignation was best even though he liked his job. White expected the mayor to keep everything private and confidential. He was therefore mortified when he read about his resignation in the local paper a few days later:

> "Winthrop Mayor Don Johnson said that White, who has been taking medications regularly to control his seizures, suffered a seizure July 21 after a bout with food poisoning made it difficult for him to keep his medications down."

White sued for invasion of privacy. The defense argued that many townsfolk already heard about White's medical condition through gossip at the local coffee shop. The blurb in the paper was meant as a tribute to White for his public service, not to embarrass him in any way.

The trial court dismissed the case on summary judgment but the appellate court reversed. The public has a legitimate interest in the resignation of public employees but not necessarily the details of underlying medical issues. The mayor's good intentions were no defense to White's invasion of privacy claim and the court remanded the case for trial to determine whether the mayor's disclosures to the newspaper were highly offensive and of no legitimate concern to the public.

D. Recoverable Damages

The plaintiff may recover general damages for "mental distress proved to have been suffered if it is of a kind that normally results from such an invasion." White v. Town of Winthrop, 128 Wn. App. 588 (2005). In Washington, there is no right to punitive damages for common law invasions of privacy.

V. Invasion Of Privacy--Intrusion Upon Seclusion

The elements of the claim for **Invasion of Privacy--Intrusion Upon Seclusion** are set forth in the **Restatement of Torts Sec. 652B**:

"One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[17]

"The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined."[18]

[17] Washington courts look to the Restatement of Torts for the "guiding principles" of the causes of action for invasion of privacy. Reid v. Pierce County, 136 Wash.2d at 206; Peters v. Vinatieri, 102 Wn.App.641 (2000), review denied, 143 Wn.2d 1022 (Div. 2, 2000)

[18] Restatement (Second) of Torts, Sec. 652B, comment b (1977).

A. The Intrusion Must Violate A Reasonable Expectation of Privacy

In order to be actionable, the defendant's intrusion must invade a place, conversation, matter, or data source in which the plaintiff had "an objectively reasonable expectation of privacy, seclusion or solitude." Shulman v. Group W Productions, Inc., 18 Cal.4th 200 (1998). Whether the plaintiff had a reasonable expectation of privacy depends on several factors including "the identity of the intruder, the extent to which other persons had access to the subject place and could see or hear the plaintiff, and the means by which the intrusion occurred." Sanders v. American Broadcasting Companies, 20 Cal.4th 907, 923 (1999).

Generally, there can be no reasonable expectation of privacy in a place open to the public. Mark v. Seattle Times, 96 Wash. 2d 473 (1981); Peters v. Vinatieri, 102 Wn.App.641 (Div.2 2000), review denied, 143 Wn.2d 1022 (2001). This includes places where work or business is conducted in an open and accessible space within the sight and hearing of coworkers, customers, visitors or the general public.[19]

B. The Intrusion Must Be Highly Offensive to A Person of Ordinary Sensibilities

In order to be actionable, the defendant's intrusion must not only invade a reasonable expectation of privacy, but must also be "highly offensive" to an ordinary person.[20] Whether an intrusion would be highly offensive to a reasonable person is usually an issue of fact for the jury. However, certain intrusions that violate criminal law, such as the voyeurism, eavesdropping and stalking statutes, could be deemed "highly offensive" as a matter of law.[21]

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[19] See e.g., Wilkins v. National Broadcasting Co., 71 Cal. App. 4th 1066, 1072-1073,1078 (1999)(for purpose of common law intrusion claim, plaintiffs lacked privacy in lunch meeting secretly videotaped by disgruntled employee on crowded outdoor patio of public restaurant).

[20] The law does not protect the "hypersensitive."

[21] RCW 9A.44.115, the "voyeurism" statute, makes it a felony to photograph people in places where they have a reasonable expectation of privacy or in intimate areas of the body without consent if for purposes of arousing or gratifying sexual desire. RCW Chapter 9.73, the "eavesdropping" statute, makes it illegal to record certain

Whether intrusive conduct that falls short of a crime is sufficiently offensive to give rise to a civil claim often depends on the degree and setting of the intrusion and the intruder's motives and objectives. In Hernandez v. Hillsides, Inc., 18 Cal.4th 200 (1998), the California Supreme Court considered whether a home for abused children violated its employees' right to privacy by installing a hidden office camera. The employer installed the camera to try and catch someone who was using office computers to access pornography after normal working hours. This continued even after the employer warned all employees not to view pornography on its premises at any time and not to expect privacy on any office computer.

The hidden camera was wired so it could be operated remotely at any time. However, it was never actually used to record anything during normal work hours. The camera was only switched on three times in thirty days and only after normal hours when no one should have been present.[22]

The California Supreme Court began by stating that most employees must have a "significantly diminished" expectation of privacy while at the workplace.[23] Of course, this does not include "restricted areas with limited view or places reserved for personal bodily functions or other inherently personal acts."[24]

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communications without consent of all parties. RCW 9A.46.110 , the "stalking" statute, makes it illegal to attempt to "contact or follow" another person for purposes of harassment and intimidation.

[22] No one was caught on camera. The employer was about to remove the camera when it was discovered by employees who were grossly offended and immediately filed suit for invasion of privacy.

[23] See also, Marrs v. Marriott Corp., 830 F. Supp. 274 (D. Md. 1992)(holding that where an employee was videotaped picking a lock on a desk drawer, the employee had no reasonable expectation of privacy in an "open office."

[24] See e.g., Kirk Robinson v. City of Seattle, 102 Wn. App. 795 (Div. 1 2000)(a person has an objectively reasonable expectation of privacy in an enclosed toilet stall); Trujillo v. City of Ontario, 428 F. Supp. 2d 1094 (C.D. Cal. 2006)(holding that employees have common law and constitutional privacy interests while using locker room in basement of police station, and can reasonably expect the employer will not intrude by secretly videotaping them as they undress); Speer v. Department of Rehabilitation and Correction, 646 N.E. 2d 273 (Ohio Ct. Cl. 1994)(monitoring employee in area within workplace generally considered private, such as a bathroom, would constitute actionable invasion of privacy); Doe by Doe v. B.P.S. Guard Services, Inc. 945 F.2d 1422 (8th Cir.

The camera at issue in the case was hidden inside an office workspace, not inside a restroom. But, the employees often worked with the office door closed and sometimes changed their clothes in the office at the end of the day. The court concluded whether the plaintiffs had a reasonable expectation of privacy in their office under the circumstances could not be decided as a matter of law but was a question of fact for the jury. One important factor that swayed the court was the employees were given no warning that the camera would be installed or used. However, the court ordered the case dismissed anyway because no reasonable person could find the hidden camera intrusion "highly offensive" under the circumstances. The camera was only used three times after hours to investigate a serious problem which was neither "excessive or egregious" as a matter of law.[25]

In Mark v. King Broadcasting Co., 27 Wn. App. 344 (1980), a pharmacist filed an action for defamation and invasion of privacy against a television station for reporting he was charged with a $200,000 Medicaid fraud.[26] The broadcast included a film clip taken outside the plaintiff's pharmacy. The clip included limited views of the interior of the pharmacy filmed through the front window.

The court said that for filming to constitute actionable intrusion upon seclusion, it must be of something the public is not free to view. The film in Mark was shot from a public sidewalk and showed nothing a passerby could not have seen through the front window. Consequently, the

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1991)(security guards who secretly videotaped models while they were changing in dressing rooms at a fashion show were liable for invasion of privacy).

[25] Cf. Wolfson v. Lewis 924 F. Supp. 1413, 1420 (E.D. Pa. 1996)(electronic surveillance that is persistent and pervasive may constitute a tortious intrusion on privacy even when conducted in a public or semi-public place); Acuff v. IBP, Inc., 77 F.Supp. 914 (C.D. Ill. 1999)(employer who filmed employees undergoing medical exams liable for invasion of privacy even if intent was not to watch employees undress but to catch a thief).

[26] The plaintiff was in fact charged with Medicaid fraud but the state eventually proved fraudulent billing of only $2500.00.

filming would not be “highly offensive” to someone of ordinary sensibilities and the plaintiff could not recover for intrusion upon seclusion as a matter of law.[27]

In Peters v. Vinatieri,102 Wn. App. 641 (Div. 2 2000), Lewis County Health Department agents drove into an RV park and took video of two illegal RV hookups. The RV park owner sued the county for invasion of privacy under Article 1, section 7 of the Washington state constitution and for violating his Fourth Amendment rights under the federal constitution.[28]

The Washington appellate court said that:

> The Fourth Amendment protects against governmental intrusion upon a legitimate expectation of privacy…a legitimate expectation of privacy has both a subjective and an objective requirement. A person must demonstrate an actual subjective expectation of privacy by seeking to preserve something as private, and society must recognize that expectation as reasonable…the Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of the Fourth Amendment protection.”

The plaintiff may have subjectively believed the county agents trespassed on private property but his belief was unreasonable given the facts and circumstances. The RV park was advertised as open to the public so the county employees filmed from a lawful vantage point. Just as in Mark, the court dismissed the plaintiff’s intrusion upon seclusion claim because defendants filming would not be “highly offensive” to a person of ordinary sensibilities.

In Isabel Forster v. Michael Manchester, 189 A.2d 148 (Pa. 1963), an insurance company hired a private detective to conduct *subrosa* surveillance of the plaintiff who was making a personal injury claim over an accident. The plaintiff saw the detective following and filming her

[27] In contrast, in Miller v. National Broadcasting Co. 187 Cal. App. 3d 1463 (1986), the plaintiff’s intrusion claim was upheld by a California appellate court against a television crew that barged into a private residence with paramedics and filmed a man dying of a heart attack without his wife’s permission.

[28] The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations. The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government, without regard to whether the government actor is investigating crime or performing another function. The Fourth Amendment applies as well when the Government acts in its capacity as an employer. City of Ontario, California v. Quon, 560 U.S. 746 (2010) (citations omitted).

as she drove around in her car on public streets. The experience made the plaintiff nervous and upset causing her to have frequent nightmares and hallucinations which required medical treatment.

The Pennsylvania Supreme Court dismissed the case outright reasoning that its common for defendants to employ investigators to verify plaintiffs' claims. Any claimant must therefore expect to be investigated and "to this extent (their) interest in privacy is circumscribed."

Furthermore, the surveillance took place in daylight hours on public streets where plaintiff's activities could be observed by passerby. There was no trespassing and "no spying through windows." If the surveillance "disclosed inconsistencies in (plaintiff's) claim then any embarrassment would be justified."

The agents in Peters v.Vinatieri and the detective in Forster v. Manchester used regular cameras to film in public areas in broad daylight. The cases get more complicated when high tech devices like miniature cameras, night vision scopes and goggles, GPS trackers, phone trackers, telescopes, and now drones are thrown into the mix.[29] These high tech devices may eventually transform what is considered "open to public view" in both criminal and civil cases.[30]

C. Is Monitoring Employee Email an Actionable Intrusion Upon Seclusion?

Employers often monitor employee use of email in the workplace. Whether such monitoring constitutes tortious intrusion depends on whether the employee has a reasonable

[29] The Federal Aviation Administration now allows recreational but not commercial drone flights. The FAA is expected to propose rules for commercial drones by the end of 2014.

[30] Washington courts have outlined how far law enforcement officers can go conducting surveillance without a search warrant. If the officer can detect something through his own senses from a lawful vantage point, then there is no "search" that requires a warrant. State v. Seagull, 95 Wash.2d 898, 901 (1981). The officer may use various sense-enhancing devices like flashlights and binoculars which merely allow him to see better "what is already open to public view." The Washington Supreme Court drew the line at using infrared thermal imaging devices without a search warrant, however, because heat distribution patterns within a home are not detectable by the naked eye or other senses making such surveillance "a particularly intrusive means of observation." State v. Young, 123 Wash.2d 173 (1994).

expectation of privacy, which in turn hinges on "the operational realities of the workplace." City of Ontario v. Quon, 560 U.S. 746 (2010). Relevant factors to consider include:

> (1) who owns the computer or electronic device in use (2) who owns the computer network in use (3) whether the employee is using a private webmail account or an employer provided email account (4) whether the employer has a comprehensive written policy that gives proper warnings to all employees that electronic communications are owned by the employer and are not private and (5) whether any third party has access to the same emails.

One court held that employees cannot have a reasonable expectation of privacy in any email communications sent through an employer owned email system. Michael Smyth v Pillsbury Co., 914 F.Supp.97 (E.D. Pa. 1996). Another court held that any reasonable expectation of privacy as to email can be erased by timely distribution of written warnings to all employees. Holmes v. Petrovich Development Co., 191 Cal. App.4th 1047 (2011).

However, some courts have distinguished between work and private web based email accounts, and given significantly more privacy protection to email that is not connected to the employer's network. *See e.g.* Stengart v. Loving Care Agency, Inc., 990 A.2d 650 (N.J. 2010) (despite employer's express written policy, employee retained privacy expectation in emailing her attorney on laptop owned by employer because plaintiff used a personal, password protected email account instead of her company email account).

D. Is Searching Employee Property an Invasion of Privacy?

A private employer's involuntary search of an employee's person or property may constitute actionable intrusion under the common law if the employer violates a reasonable expectation of privacy and the search is conducted in an unreasonable and offensive manner. *See e.g.,* K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex.App.1984) (search of employee's purse in padlocked locker); Bodewig v. K-Mart, Inc., 54 Or.App. 480 (1981) (strip search of store cashier accused of stealing).

E. A Quaint Historical Interlude

Harper's Bazaar magazine published a photograph of a young married couple kissing in their ice cream store in the Farmers Market in Los Angeles, California in 1947. An article accompanying the photograph described "the poet's conviction that the world could not revolve without love, despite vulgarization of the sentiment by some, and that ballads may still be written about everyday people in love."

The plaintiffs were offended their photograph was taken and published without their consent and they filed suit against the publisher for invasion of privacy. The case went all the way to the California Supreme Court which said its very difficult to prove invasion of privacy for a photograph taken in a public place.[31] The right "to be let alone" and to be protected from undesired publicity "is not absolute but must be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press." Gill v. Hearst Publishing Co. Inc., 40 Cal.2d 224 (1953).

The photograph of the affectionate young couple had no news value. But, it had entertainment value which is protected by the constitutional right to free speech just the same as traditional news. There was nothing indecent or offensive about the photograph even by the more conservative standards of the 1950s. The photo was not obtained by subterfuge or taken

[31] In State v. Glas, 147 Wn.2d 410 (2002), the Washington State Supreme Court shocked the world by ruling that person shooting "up the skirt" videos of women at the Seattle Center, committed no crime. The problem was the language in the "voyeurism" statute (RCW 9A.44.115) which only prohibited secret filming of a person without their consent, "in a place where he or she would have a reasonable expectation of privacy." Since no one can have a reasonable expectation of privacy in a public place like the Seattle Center, the defendant committed no crime. After State v. Glas was published, the state legislature quickly amended the voyeurism statute to also prohibit secret filming of "intimate areas of another person."

surreptitiously on private property.[32] It merely showed the plaintiffs in a pose voluntarily assumed in a public market place. Consequently, the plaintiffs' case was dismissed.

F. The Risk of Posting Photographs On the Internet

In Four Navy SEALs v. Associated Press, 413 F.Supp.2d 1136 (S.D. Cal. 2005), a group of Navy SEALs filed suit for invasion of privacy against a news agency which published photographs showing them in uniform subduing prisoners in Iraq. In some of the photos, the plaintiffs appeared to be "mugging or grinning" for the camera.

A journalist discovered the photos on an internet website called *smugmug*. The photographs had been uploaded onto the site by one of the plaintiff's wives who mistakenly believed the site was private.

The federal district court dismissed the privacy claims because the plaintiffs were active duty military conducting war time operations in full uniform and they chose to allow their activities to be photographed and placed on the internet. "In this context, it would not be reasonable for anyone to expect their images to remain private."

VI. Invasion of Privacy – Appropriation of Name or Likeness

Everyone's right to the exclusive use of their own name and likeness is protected in Washington under state common law as well as special statute. The common law tort claim may be asserted against someone who appropriates for their own use or benefit the name or likeness of another without authorization. Restatement (Second) of Torts Secs. 652A-E (1977); Aronson v. Dog Eat Dog Films, Inc., 738 F.Supp.2d 1104 (W.D.Wash. 2010); Eastwood v. Cascade Broadcasting, 106 Wash. 2d 466 (1986).

[32] C.f Dietmann v Time, Inc., 449 F.2d 245 (9th Cir. 1971)(court found actionable intrusion by journalists who used subterfuge to get inside a private residence where they photographed the plaintiff without consent).

The classic case for misappropriation of name or likeness arises from the use of someone's photograph for advertising or other commercial purposes. *See e.g.* Lewis v. Physicians and Dentists Credit Bureau, 27 Wash. 2d 276 (1997); Downing v. Abercrombie & Fitch, 265 F.3d 994, 1001 (9th Cir. 2001). Damages are measured to some degree based on the plaintiff's public stature. If the plaintiff is a public figure, he can likely recover more damages for the value of the use of his name or likeness. However, appropriation is an intentional tort so a Plaintiff may recover general damages for emotional distress.

In addition to the common law cause of action, Washington residents have a statutory remedy for misappropriation of identity under RCW 63.60. The statute provides that everybody has a property right in the use of his or her own name, voice, signature, photograph, or likeness. RCW 63.60.010. The unauthorized use of these property rights subjects infringer to liability for statutory or actual damages. RCW 63.60.050 and .060. Courts may grant injunctive relief and order the destruction of infringing products and elements of their creation process, such as molds or negatives. Damages are calculated as the greater of $1500.00 or the actual damages suffered by the plaintiff, plus the infringer's profits. [33]

A. Newsworthiness Defense

Under RCW 63.60 and the common law, there is no cause of action for the publication of matters in the public interest. RCW 63.60.070(1) provides that:

"For purposes of RCW 63.60.050, the use of a name, voice, signature, photograph, or likeness in connection with matters of cultural, historical, political, religious, educational, newsworthy, or

[33] To calculate profits, plaintiff must prove defendant's revenues and defendants must prove their deductible expenses. Each infringing work constitutes a single instance of infringement, regardless of how many copies were made.

public interest, including, without limitation, comment, criticism, satire, and parody relating thereto, shall not constitute a use for which consent is required under this chapter."

Furthermore, the statute does not apply to the use of an individual's or personality's name, voice, signature, photograph, or likeness, in any film "when the use does not inaccurately claim or state an endorsement by the individual or personality." RCW 63.60.070(2)(b).

The federal district court in Tacoma explained the newsworthiness or public interest defense in Aronson v. Dog Eat Dog Films, Inc.,738 F.Supp.2d 1104 (W.D.Wash.2010):

> Under the First Amendment, a cause of action for misappropriation of another's name and likeness may not be maintained against expressive works, whether factual or fictional. The use of a plaintiff's identity is not actionable where the publication relates to matters of the public interest, which rests on the right of the public to know and the freedom of the press to tell it. It is only when plaintiff's identity is used without consent to promote an unrelated product of defendant that the defense becomes unavailable. Where the use of a plaintiff's identity in an advertisement is merely illustrative of a commercial theme or product and does not contribute significantly to a matter of public interest, a defendant cannot avail itself of the First Amendment defense. The appropriate focus is on the use of the likeness itself. If the purpose is informative or cultural, the use is immune; if it serves no such function but merely exploits the individual portrayed, immunity will not be granted.

VII. Invasion of Privacy – False Light Portrayal

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if: the false light in which the other was placed would be highly offensive to a reasonable person and the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. See Restatement (Second) of Torts § 652E (1977); Eastwood v. Cascade Broadcasting, 106 Wn.2d 466 (1986).

"False light" invasion of privacy claims are very similar to claims for defamation and the two claims are often alleged together.[34] As with defamation claims, false light claims require a showing of falsity and knowledge of, or reckless disregard, for that falsity. Corey v. Pierce County., 154 W.App. 752 (Div.1 2010).

A plaintiff need not be defamed to bring a false light claim: It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position. When this is the case and the matter attributed to the plaintiff is not defamatory, the rule here stated affords a different remedy, not available in an action for defamation. See Restatement (Second) of Torts 652E, comment B. Both defamation and false light claims are governed by the same two year statute of limitation. Eastwood v Casacade Broadcasting, 106 Wn.2d 466 (1986).

VIII. Special Washington Privacy Statutes

RCW Chapter 9.73 prohibits recording telephone or other electronic communications without the express consent of all parties.[35] Anyone who records communications in violation of the RCW risks significant civil and criminal penalties.[36]

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[34] "The theoretical difference between the two torts is that a defamation action is primarily concerned with compensating the injured party for damage to reputation, while an invasion of privacy action is primarily concerned with compensating for injured feelings or mental suffering. The two torts overlap, however, when the statement complained of is both false and defamatory. In such a case the plaintiff may proceed under either theory, or both, although he can have but one recovery for a single instance of publicity." Eastwood v. Cascade Broadcasting, 106 Wn.2d 466 (1986).

[35] There are specific exemptions for law enforcement conducting authorized criminal investigations.

[36] RCW 9.73.060 provides:
Any person who, directly or by means of a detective agency or any other agent, violates the provisions of this chapter shall be subject to legal action for damages, to be brought by any other person claiming that a violation of this statute has injured his or her business, his or her person, or his or her reputation. A person so injured shall be entitled to actual damages, including mental pain and suffering endured by him or her on account of violation of the provisions of this chapter, or liquidated damages computed at the rate of one hundred dollars a day for each day of violation, not to exceed one thousand dollars, and a reasonable attorney's fee and other costs of litigation.

In State v. Christensen, 153 Wn.2d 186 (1986), a mother listened in on her teenage daughter's telephone conversation with her boyfriend. The girl used a remote handset in her bedroom behind closed doors while her mother listened on a speaker phone downstairs. The mother did not record the conversation but took written notes after the boyfriend mentioned a robbery. He did not admit direct involvement but said he knew where evidence was located.

The mother reported the conversation to the police and was later called to testify for the prosecution at the boyfriend's robbery trial. The defense moved to exclude her testimony on the grounds that she illegally intercepted a telephone communication in violation of the RCW. The trial court denied the defense motion and admitted the mother's testimony. The boyfriend was convicted of robbery and appealed his conviction to the Washington Supreme Court.

The court listed the four elements that must be proven under RCW 9.73.030. There must be (1) a private communication (2) transmitted by a device, which is (3) intercepted by use of a device designed to record and/or transmit (4) without the consent of all parties.

In State v. Christensen, the prosecution conceded that the mother's listening to the conversation on the speakerphone was an "intercept" and that no consent was obtained. The disputed issue was whether the conversation was "private."

A communication is private:

"(1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable. Factors bearing on the reasonableness of the privacy expectation include the duration and subject matter of the communication, the location of the communication and the potential presence of third parties, and the role of the non-consenting party and his or her relationship to the consenting party." State v. Christensen, 153 Wn. 2d 186, 193 (1986).

The state asked the court to recognize an implied exception to the law in the case of minor children. The state's argument was that children have a reduced expectation of privacy because parents have an absolute right to monitor all telephone calls coming into the family home. Plus, the federal wiretapping statute allows interception of communications when just one party consents. This has been interpreted by some courts to mean that parents may give vicarious consent to record their children's calls.

The Washington Supreme Court declined to recognize any such exception. The court said the two minors subjectively intended to have a private conversation. This was demonstrated by the boyfriend asking the mother to speak to the daughter and the daughter taking the phone from her mother and going upstairs to her room and shutting the door. The conviction was reversed and the case remanded for a new trial.

IX. Miscellaneous Washington Privacy Statutes

- RCW 4.24.790 – Electronic Impersonation – Action for Invasion of Privacy
- RCW 9.73 – Violating Right of Privacy – Eavesdropping and Wiretapping
- RCW 9A.44.115-Voyeurism
- RCW 9A.46.110 – Stalking
- RCW 42.56.050 – Public Records Act – Invasion of Privacy