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Bench Memorandum, 21 J. Marshall L. Rev. 940 (1988)

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No. 87 L 00111
IN THE SUPREME COURT OF THE STATE OF MARSHALL
OCTOBER TERM, 1987

LAWRENCE A. WILSON d/b/a SENTRY SERVICES
Defendant-Petitioner,

vs.

JOHN SLATER,

Plaintiff-Respondent.

BENCH MEMORANDUM*

I. STATEMENT OF THE CASE

This case comes before the Supreme Court of the State of Marshall on its order granting Defendant, Lawrence Wilson d/b/a Sentry Services, leave to appeal. The Marshall Appellate Court for the First Judicial Circuit reversed the order of the Lincoln County District Court, granting the defendant's motion for summary judgment.

The parties stipulated to the facts which follow. Lawrence Wilson is the sole proprietor of Sentry Services, a private security guard and night watch service. John Slater is a former employee of Sentry. Slater began his employment with Sentry in 1983, working night shifts while pursuing his business degree at the University of Marshall.

To ascertain whether its employees are in adequate physical condition, Sentry provides an annual physical testing program which includes a blood test. In years past, Wilson informed employees that their blood would be tested for cholesterol levels, related to cardiovascular problems, and for hypoglycemia, a disorder associated with diabetes. The test results were recorded in each employee's personnel file. This medical information was always kept confidential. Any employee with a cardiovascular or blood-sugar disorder was given a leave of absence until the company physician informed the employer that the employee could safely return to work. Slater never objected to the company physical.

* This memorandum was prepared by Mark A. Absher, Associate Justice, John Marshall Law School Moot Court Executive Board.

In December of 1986, the Lincoln Medical Laboratory, retained by Sentry for purposes of its testing program, suggested that Wilson include HIV¹ tests in the April, 1987, physical. Wilson decided to order the test; however, he did not notify the employees of this decision. The testing was otherwise completed as usual.

Slater left the company on April 30, 1987, to complete his exams and begin his search for business related employment. On May 1, 1987, Wilson was informed by the laboratory that Slater tested positive for the existence of the HIV (AIDS) antibody. Wilson contacted Slater that same day, informing him of the test and the test results.

Subsequently, on May 6, 1987, Wilson attended the monthly luncheon of the Lincoln County Chamber of Commerce held at a local restaurant. Approximately 75 people attended the luncheon. During lunch, before the start of the business meeting, people at Wilson's table began discussing AIDS. Wilson informed his friends that he had tested his employees for the AIDS antibody and that one, John Slater, tested positive.

Slater's complaint, filed June 12, 1987, alleges that Wilson invaded Slater's privacy in two ways. First, Slater alleges that Wilson intruded into his seclusion when he tested Slater for the AIDS antibody. Second, Slater alleges that Wilson invaded Slater's privacy when Wilson publicly disclosed the private fact that Slater tested positive for the AIDS antibody. Slater and Wilson filed cross motions for summary judgment. In support of his motion, Slater submitted a copy of the *Recommendation for Preventing Transmission*

1. "Human Immunodeficiency Virus (HIV) is the internationally recognized name for the virus that is believed to cause AIDS. The virus has also been called LAV (Lymphadenopathy-Associated Virus type III) and HTLV-III (Human T-Lymphotropic Virus)." Schatz, *The Aids Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782, n. 2 (1987). The HIV test to determine the existence of the antibody is comprised of a series of three tests, known as the ELISA-ELISA-Western Blot series. The ELISA (enzyme-lined immunosorbent assay test, "the most widely used, detects the antibodies which indicate exposure to the disease." Rousseau, *The AIDS Epidemic and the Issues in the Workplace*, 72 MASS. L. REV. 51, 52 (1987). "The second more specific and expensive test for detecting [the HIV] antibodies is the Western Blot test." *Id.* "A person with two positive ELISA tests and positive WB [Western Blot] is a true confirmed positive with 99.9% reliability." Clifford & Luculano, *AIDS and Insurance: The Rationale for AIDS-Related Testing*, 100 HARV. L. REV. 1806, 1812 (1987). It is important to note, however, that "[c]urrent medical testing techniques only indicate whether an individual's blood possesses AIDS antibodies. Presence of AIDS antibodies indicates only that an individual has experienced past exposure to the AIDS virus. It does not conclusively establish that the individual is a carrier of active virus, although the probability that the individual [has AIDS] is substantial. Nor does it conclusively establish that the individual will develop symptoms of AIDS related complex (ARC symptoms) or suffer the full blown disease state itself." Cross & Haney, *Legal Issues Involved in Private Sector Medical Testing of Job Applicants and Employees*, 20 IND. L. REV. 517, 518 n. 9 (1987) (emphasis in original).

of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace prepared by the Center for Disease Control. Wilson submitted no evidence to contravene the report but argued that the report itself was irrelevant to the determination of the issues.

The trial court granted defendant's motion for summary judgment on Count I of the plaintiff's complaint on the grounds that the disease information contained in Slater's blood did not constitute a privacy interest protected by the tort of intrusion into seclusion. It further stated that "even if the plaintiff proved a prima facie case of invasion of privacy, this Court is not persuaded that the plaintiff's privacy interest outweighs the employer's right to acquire the information." The appellate court disagreed, holding that the "physiological biography contained in the blood of an individual is private information which an individual can reasonably expect to be left alone."

The trial court also granted the defendant's motion to dismiss Count II of the plaintiff's complaint. That court concluded that "because (1) AIDS is lethal; (2) research into AIDS is, by virtue of its novelty, incomplete; and (3) the public is terrified of infection regardless of the current evidence as to the transmissibility of AIDS, the public's need to be informed outweighs any privacy interest" that Slater may have. Again, the appellate court disagreed. After discussing the limited transmissibility of the AIDS virus, the court concluded that "only Slater's sexual partners or those people who are likely to have contact with Slater's blood can show a need for results of the HIV tests. The public at large has no need. Moreover, none of the recipients of the information was Slater's sexual partner or likely to be exposed to Slater's blood." The appellate court reversed the decision of the trial court and remanded the case for trial on the question of damages. The Supreme Court of Marshall granted the defendant's petition for leave to appeal.

II. INTRODUCTION

The common law tort, invasion of privacy, is actually the genus of four distinct species. See, Restatement (Second) of Torts, § 652 (1977). The right to privacy is invaded when there is (1) unreasonable intrusion upon the seclusion of another, (2) commercial appropriation of another's name or likeness, (3) unreasonable publicity given to another's private life and (4) unreasonable publicity which places another in a false light. *Hester v. Barnett*, 723 S.W.2d 544, 562 (Mo. Ct. App. 1987), citing Restatement (Second) of Torts, § 652B (1977). In this case the Court is called upon to determine the parameters of the privacy torts, intrusion upon seclusion and public

disclosure of private facts, within the context of the employer-employee relationship. The questions presented by this case have been anticipated by various commentators:

One might imagine a privacy action premised on the theory that requiring an intrusive medical procedure whose results may not lawfully be used is an unjustified invasion of the body, a kind of physical assault, and certainly an insult to the physical integrity of the employee. Furthermore, if the employee tests seropositive and the employer fails to keep the information confidential, one can imagine the potential for defamation and related tort developments.

Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 46 (1986) (footnotes omitted).

Ideally, the integrity of individuals who have access to AIDS-related information and formal procedures established by agencies holding such information would be sufficient to ensure confidentiality. Violations are certain to occur, however, and when they do, criminal sanctions and civil remedies must be available to redress breaches of the confidentiality of AIDS-related information.

Comment, *Protecting Confidentiality in the Effort to Control AIDS*, 24 HARV. J. ON LEGIS. 315 (1986).

Some states have enacted statutes in anticipation of problems related to those presented here. California, for example, recently enacted its "Acquired Immune Deficiency Syndrome Public Health Records Confidentiality Act," which provides a civil penalty of \$1,000 to \$5,000 plus court costs against "[a]ny person who willfully or maliciously discloses the content of any confidential public health record . . . to any third party . . ." CAL. HEALTH & SAFETY CODE, § 199.45(e) (Deering 1986). A Massachusetts statute provides that "no employer shall require HTLV-III antibody or antigen tests as a condition of employment." MASS. GEN. LAWS ANN. ch. 111, § 70F (West 1986). Wisconsin has a similar statute. WIS. STAT. §§ 103.15, 146.025 (1985). There are, however, no applicable Marshall statutes, and there are no cases from any jurisdiction directly on point.

Commentators speculate "that the dearth of common law invasion of privacy suits involving the employee-employer relationship may be because conflicts over the issue arise and are settled in" arbitration. Menard & Morrill, *The Employer and the Law of Privacy in the Workplace—the U.S. Model to Date*, 9 N.C.J. INT'L & COM. REG. 93, 109 (1983).

The parties' interests in this matter are complicated by the nature of the AIDS disease. The employee's interest in keeping his condition private is augmented by the fact that the disease is largely transmitted by socially unacceptable conduct.² His interest in pri-

2. "The CDC has identified six at risk groups prone to infection: (1) gay and

vacy, however, is set against the interests of his employer and the general public in identifying carriers of the deadly disease.³

While the trial court found the employer's interests to be greater, the appellate court held that the balance tips in favor of the employee's right to privacy on both counts. This Court must, therefore, decide (1) whether Wilson invaded Slater's privacy when Wilson, without informing Slater, tested Slater for the AIDS antibody, and (2) whether Wilson invaded Slater's privacy when Wilson disclosed to members of the general public the fact that Slater tested positive for the AIDS antibody.

III. ANALYSIS

A. INTRUSION INTO SECLUSION

The first issue presented by this appeal is whether Wilson invaded Slater's privacy when Wilson, without informing Slater, tested Slater for the AIDS antibody. The Restatement (Second) of Torts provides that

[o]ne 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.

Restatement (Second) of Torts § 652B (1977).⁴

To establish his prima facie case for this species of privacy invasion, the plaintiff must show (1) a matter which plaintiff has a right to keep private, (2) that the defendant intruded into that private

bisexual men (2) intravenous drug users (3) prostitutes (4) persons transfused with contaminated blood (5) any sexual partners of people in at risk groups and (6) children born to mothers at risk." Rousseau, *The Aids Epidemic and the Issues in the Workplace*, 72 MASS. L. REV. 51, 51-52 (1987). Of these six groups, "[o]ver 70% of the reported AIDS cases occur in homosexual and bisexual males . . ." Closen, et al, *AIDS: Testing Democracy-Irrational Responses to the Public Health Crises and the Need for Privacy in Serologic Testing*, 19 J. MARSHALL L. REV. 835, 865 (1986).

3. "As of June 9, 1986, there had been 21,517 cases of AIDS reported to the C.D.C. Of these cases, there have been 11,713 deaths attributed to AIDS in the United States alone." Closen, et al., *AIDS: Testing Democracy-Irrational Responses to the Public Health Crises and the Need for Privacy in Serologic Testing*, 19 J. MARSHALL L. REV. 835, 850 (1986).

4. Many courts look primarily to the Restatement (Second) of Torts for an authoritative definition of actionable conduct in cases of invasion of privacy. See, e.g., *Humphers v. First Interstate Bank*, 68 Or. App. 573, 684 P.2d 581, 588 (1984) ("In nearly all of the Oregon opinions discussing invasion of privacy, the court has cited with approval the definitions of invasion of privacy given in the Restatement,"); *Harris v. Harris v. Easton Publishing Co.*, 483 A.2d 1377, 1383 (Pa. Super. 1984) (stating that the Pennsylvania state courts have "cited with approval the Restatement (Second) of Torts, §§ 652B-E for support regarding invasion of privacy matters). The Restatement's analysis of the privacy torts is largely attributed to "Dean Prosser's influence as the first reporter for the Second Restatement of Torts . . ." 1 *Privacy Law and Practice*, ¶ 1.01 at 1-6 (G. Trubow ed. 1987). Prosser's presentation of the privacy torts in *Privacy*, 48 CAL. L. REV. (1960), parallels that of the Restatement.

matter, and (3) that the defendant's intrusion was objectionable to the reasonable person. *Earp v. Detroit*, 16 Mich. App. 271, 276-277, 167 N.W.2d 841, 845 (1969).

1. *Protected Interest: A Physiological Biography*

The first subordinate issue in this count is whether the disease information contained within Slater's blood is a seclusion which he could reasonably expect to have been left alone. The Restatement provides that the protected interest extends to any "seclusion that the plaintiff has thrown about his person or affairs," or otherwise to anything "not exhibited to the public gaze." Restatement (Second) of Torts § 652B comment c (1977). Other comments and illustrations suggest that a plaintiff's interest is expansive, protecting the privacy of information in several categories, including (1) his actions in non-public locations, such as his home, his room in a hotel, or even his hospital room; (2) information which may be communicated through his mail or his telephone; (3) information which he has stored in places, such as his wallet, his safe, or his personal files, and (4) information which others may have about him on record, such as a bank account.

Courts have further expanded the protected interest. *See, e.g., Harkey v. Abate*, 131 Mich. App. 177, 346 N.W.2d 74 (1983) (plaintiff found to have a right to privacy in a public rest room); *Phillips v. Smalley Maintenance Services*, 435 So.2d 705, 708-09 (Ala. 1983) (plaintiff found to have a privacy interest in her "emotional sanctum," which includes her right to be free from lurid propositions); *DeMay v. Roberts*, 46 Mich. 160, 9 N.W. 76 (1881) (plaintiff found to have a privacy interest in the area around the room from which her childbirth was viewable and audible); *but see, Lewis v. Dayton Hudson Corporation*, 128 Mich. App. 165, 339 N.W.2d 857 (1983) (no reasonable expectation of privacy in retailer's fitting room where sign indicated that the room was under surveillance); *Eddy v. Brown*, 715 P.2d 74 (Okla. 1986) (employee has no reasonable expectation of privacy vis-a-vis his employer in his employment medical records).

While there are no common law tort cases suggesting that the privacy interest includes a plaintiff's physiological biography, such an interest has been acknowledged as protected under the Fourth Amendment from an unreasonable search.⁵ *See, e.g., McDonnell v.*

5. As a legal concept, privacy finds expression in three areas: constitutional, statutory and common law. *Department of Mental Health v. Texas State Employees Union*, 798 S.W.2d 498 (Tex. App. 1986). One journalist notes, however, that "it is anticipated that the same [constitutional] principles will be applied in the private sector to form the basis for privacy claims" as are used in the public sector. Harstein, *Drug Testing in the Work Place: A Primer for Employers*, 12 EMPL. REL. L.J. 577, 589 (1987).

Hunter, 612 F. Supp. 1122 (D.C. Iowa 1985). In *McDonnell*, the plaintiffs brought an action challenging the policy of the Department of Corrections which permitted urinalysis and blood tests of employees upon the request of department officials. After noting that "both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom its came," the District Court stated that "[o]ne clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids." 612 F. Supp. at 1127. Slater should argue that the disease information contained in his blood is a seclusion within the scope of the protected interest. He should argue that his interest in being free from intrusion into his physiological biography is at least as great as his interest in being free from intrusion into his actions at his home or intrusion into his personal documents. He should further argue that since his physiological biography is not open for public inspection or casual observation, it is information which should be protected from intrusion. Finally, he should argue that, because information about his condition has been recognized to be "highly sensitive and personal," Comment, *Protecting Confidentiality in the Effort to Control AIDS*, 24 HARV. J. ON LEGIS, 315, 318 (1986), he has a right to keep such information private.

Wilson on the other hand, should argue that Slater's claim that a "physiological biography" constitutes a seclusion is at best tenuous, considering that it has never been held to be a seclusion by any court, any statute, or the Restatement (Second) of Torts.

2. *Prohibited Conduct: The Intrusion*

The second subordinate issue is whether Wilson's testing of Slater's blood for the AIDS antibody amounts to an intrusion. The Restatement provides that an invasion may be by (1) physical intrusion into a place where the plaintiff has secluded himself, (2) use of the defendant's senses to oversee or overhear the plaintiff's private affairs, or (3) some other form of investigation or examination into plaintiff's private concerns. Restatement (Second) of Torts, § 652B, comment b.

An intrusion is not actionable unless it is unreasonable. *Pemberton v. Bethlehem Steel Corp.*, 66 Md. App. 133, 502 A.2d 1101, 1117 (1986), cert. denied, 107 S. Ct. 571 (1987) (shadowing surveillance not actionable); accord, *McLain v. Boise Cascade Corporation*, 271 Or. 549, 533 P.2d 343 (1975). There is no liability unless the intrusion is substantial and highly offensive. *Sofka v. Thal*, 662 S.W.2d 502, 511 (Mo. 1983) (six to eight polite phone calls by a collection agency over a period of several months not substantial enough to be actionable); *Ellenberg v. Pinkerton's, Inc.*, 130 Ga. App. 254, 202 S.E.2d 701 (1973) (surveillance of plaintiffs actions

around home and while driving not substantially intrusive); see also *McCormick v. Haley*, 37 Ohio App. 2d 73, 307 N.E.2d 34, 38 (1973) (negligent intrusion not actionable).

An intrusion will be actionable, however, when it is offensive to reasonable people. *Hester v. Barnett*, 723 S.W.2d 544, 563 (Mo. App. 1987). In *Hester* the Missouri Appellate Court concluded that acquiring private information through subterfuge constitutes an actionable intrusion. 723 S.W. 2d at 563. In that case the plaintiffs alleged that the defendant pastor had entered their home under the pretense of providing family counseling while his true motive was to harm them with information that he acquired. *Id.* at 562. The trial court dismissed that count of the plaintiffs' complaint. *Id.* at 549. The appellate court reversed, noting that the allegations "describe a substantial interference with seclusion and of the kind decidedly offensive to reasonable persons." *Id.* at 563.

Additionally, a court has found an actionable intrusion where the press gained entrance by subterfuge into the home of the plaintiff and photographed him there. *Dietemann v. TIME, Inc.*, 449 F.2d 245 (9th Cir. 1971). A similar result occurred where a news photographer published a picture taken surreptitiously of a patient in her hospital bed. *Barber v. TIME, Inc.*, 348 Mo. 1199, 159 S.W. 2d 291 (1942).

Slater should argue that Wilson's actions are no different from the actions of the pastor in *Hester* or the photographs in *Dietemann* and *Barber*. Slater should emphasize that in this case Wilson tested Slater for the AIDS antibody under the guise of conducting the usual annual physical, and argue that such actions amount to an unreasonable intrusion.

It is difficult for Wilson to argue that there was no intrusion. He can, however, argue that the intrusion was not surreptitious in any way. Wilson took no affirmative steps to deceive Slater. He should further argue that the intrusion was reasonable considering that it was done for the benefit of the employee (not to mention those with whom Slater may have sexual contact). Finally, Wilson should dismiss the matter simply by arguing either (1) that because there is no seclusion, it follows that there can be no intrusion, or (2) that the intrusion was justified.

3. Justification For Conduct: Wilson's Defense⁶

Assuming that Wilson's testing of Slater for the AIDS antibody amounted to an intrusion into Slater's seclusion, Slater could lose this count if Wilson's actions were justified. See, *Lunch v. Johnston*,

6. While Wilson's justification is not part of Slater's prima facie case, Slater must be able to show that Wilson's action was unpermitted.

76 Pa. Commw. 8, 463 A.2d 87, 89 (1983) (“ . . .to be actionable, the alleged invasion of that right must be unlawful or unjustifiable.”) Thus, the third subordinate issue is whether the intrusion, if it occurred, was otherwise justified.

Wilson may attempt to justify his actions on the basis of privilege. Privileges “may be divided into two general categories: (1) consent, and (2) privileges created by law irrespective of consent. In general, the latter arise where there is some important and overriding social value in sanctioning defendant’s conduct, despite the fact that it causes plaintiff harm.” BLACK’S LAW DICTIONARY, 1078 (5th ed. 1979);⁷ see also *Leggett v. First Interstate Bank of Oregon*, 86 Or. App. 523, 739 P.2d 1083 (1987) (discussing both defenses in its analysis of an employer’s alleged intrusion into an employee’s seclusion).

a. Consent

Consent vitiates the tort of intrusion. *Leggett v. First Interstate Bank of Oregon*, 86 Or. App. 523, 739 P.2d 1083, 1086 (1987). “[T]here is no actionable invasion of privacy if the plaintiff has consented, the consent has not been revoked, and the defendant has acted within the scope of the consent.” *Id.* To be effective, however, consent must be informed. See, e.g., *Perin v. Hayne*, 210 N.W.2d 609, 617-18 (Iowa 1973) (doctor held liable for battery where he obtained consent from his patient for a specific medical procedure and intentionally deviated from the consent and performed a substantially different treatment).

In this case Wilson should argue that Slater either expressly or impliedly consented to taking the HIV test when he willingly participated in the medical testing program. Slater, on the other hand, should argue that his consent, being general and not being informed, was insufficient to justify Wilson’s actions.

b. Employer’s Privilege

Under the tort of intrusion, a qualified privilege exists to protect employers under certain narrow circumstances. See, e.g., *Eddy v. Brown*, 715 P.2d 74 (Okla. 1986); *McLain v. Boise Cascade Corp.*, 271 Ore. 549, 533 P.2d 343 (1975); *Hoesel v. United States*, 451 F. Supp. 1170 (N.D. Cal. 1978), *aff’d*, 629 F. 2d 586 (9th Cir. 1980). The Oklahoma Supreme Court in *Eddy* found that a work supervisor has a legitimate interest in examining his employee’s medical records. 715 P.2d 74. In *McLain* an employer was held not liable for

7. “Although courts have not expressly adopted common law privileges and defenses in intrusion into seclusion actions, defendants should be conscious of such justification when fashioning arguments to excuse conduct that has been alleged to be objectionably intrusive.” 1 *Privacy Law and Practice*, ¶ 1.06 at 1-80 (G. Trubow ed. 1987).

its investigation of an employee's workman's compensation claim. 271 Ore. 549, 533 P.2d 343. While the employee had a right to be free from intrusion, his right was subordinate to his employer's privilege to assess the veracity of that employee's claim. *Id.*

In *Hoese*, the plaintiff sued his employer's staff psychiatrist for libel. The court stated that employers "obviously have a legitimate need and even a duty to determine whether or not their employees are professionally, physically and psychologically capable of performing their duties." 451 F. Supp. at 1176.

Similarly, in *Leggett v. First Interstate Bank of Oregon*, 86 Or. App. 523, 739 P.2d 1083 (1987), the plaintiff sued her employer for, *inter alia*, invasion of privacy in discussing her condition with her clinical psychologist. The employer claimed that it had a legitimate interest in determining her condition and was, therefore, not liable. 739 P.2d at 1086. The court agreed that "an employer does have a legitimate interest in determining an [employee's] condition to the extent that it relates to employment. That interest must be balanced against the nature and extent of the intrusion in deciding if an intrusion has occurred." *Id.*

Wilson could also cite to *McDonnell* for support. 612 F. Supp. 1122. In discussing an employee's expectation of privacy in body fluids, that court noted that the "Fourth Amendment does not preclude taking a body fluid specimen as part of . . . any routine periodic physical examination that may be required of employee, . . ." *Id.* at 1130 n. 6. Moreover, Wilson could argue that if the United States Constitution allows government employers to examine employees' body fluids, a private employer, such as Wilson, should have a privilege to conduct such tests as well.

Slater's counter-argument is twofold. First, he should argue that even if Wilson had a legitimate interest in determining Slater's condition, Wilson's interest weighs slight when balanced against the unreasonable intrusiveness of its action. *See, Leggett*, 86 Or. App. 523, 739 P.2d 1083, 1086 (suggesting that employer's interest must be weighed against the nature and extent of the intrusion). Second, Slater should argue that while an employer may have a need to test for some information, it has no need to test for the AIDS antibody because AIDS is not transmissible in the workplace. Slater has support for this argument in the CDC recommendations; "Because AIDS is a bloodborne, sexually transmitted disease that is not spread by casual contact, this document does not recommend routine HTLV-III/LAS antibody screening for" most workers. *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 MORBIDITY AND MORTALITY WEEKLY REP. 682-83 (1985). The CDC recommendations further state that "[n]o

known risk of transmission to co-workers, clients, or consumers exists from HTLV-III/LAV-infected workers in . . . settings [such as] offices, schools, factories, construction sites, etc." *Id.* at 694.

Finally, Slater could argue that Wilson has no need to test for the AIDS antibody because it would be against public policy to dismiss an employee with AIDS. For this argument Slater has support by analogy to cases construing the Vocational Rehabilitation Act of 1973. 29 U.S.C. § 701-796. Section 504 of the Act provides that no "otherwise qualified handicapped individual" shall, solely by reason of his handicap, be excluded from participation in any program receiving federal financial assistance. 29 U.S.C. § 701-796. In *School Board of Nassau County, Florida v. Arline*, 107 S. Ct. 1123, 1132 (1987), the United States Supreme Court found a woman with tuberculosis to be handicapped within the meaning of Section 504 of the Rehabilitation Act. The Court noted that *Arline* does not reach the "questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act." 107 S. Ct. at 1128 n. 7.

Attempting to fill the gap left in footnote 7 of *Arline*, the Justice Department has taken the position that an employer who discriminates on the basis of the disabling effects of AIDS violates Section 504 of the Act. Cross and Haney, *Legal Issues Involved in Private Sector Medical Testing of Job Applicants and Employees*, 20 IND. L. REV. 517, 527 (1987). Thus, Slater should argue that these decisions suggest that AIDS testing by an employer is not only unnecessary but also highly disfavored. Moreover, he should argue that while Wilson may have an interest in testing for some highly contagious disease, it has little, if any, interest in testing for a disease that is not casually transmitted.

B. PUBLIC DISCLOSURE OF PRIVATE FACTS

The second issue presented by this appeal is whether Wilson invaded Slater's privacy when he disclosed to members of the general public the fact that Slater tested positive for the AIDS antibody. The Restatement (Second) of Torts provides that

[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for the 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.

Restatement (Second) of Torts, § 652D (1977).

To establish his *prima facie* case for public disclosure of private facts, the plaintiff must show (1) the existence of private matters in which the public has no legitimate concern (2) which the defendant disclosed to others (3) absent any waiver of privilege (4) such as to bring humiliation or shame to a person of ordinary sensibilities. *Buller v. Pulitzer Publishing Co.*, 648 S.W.2d 473, 482 (Mo. App. 1984).

1. *The Protected Interest: Private Facts*

The first subordinate issue in this count is whether Slater's condition is a private matter that is not of legitimate concern to the public. The Restatement (Second) of Torts provides that the interest protected by this cause of action includes private facts, the disclosure of which would be highly offensive. Restatement (Second) of Torts § 652D comment c. The Restatement further provides that "many unpleasant or disgraceful or humiliating diseases" are "normally entirely private matters." *Id.* at comment b. Considering the nature of AIDS, it would appear that it is an unpleasant disease and, therefore, a private matter within the Restatement's definition.

Wilson may argue that he discussed only the fact that Slater tested positive for the HIV antibody and did not say whether Slater had AIDS. Such an argument, however, may be tenuous since the public generally views testing positive for the HIV antibody as tantamount to having AIDS. Rather than posing a challenge to the existence of private facts, then, Wilson will likely argue (1) that there was no disclosure or (2) that he was privileged in making the disclosure.

2. *The Prohibited Conduct: A Disclosure*

The second subordinate issue is whether Wilson's discussing Slater's conditions with his friends at the business luncheon amounts to an actionable disclosure. The Restatement provides that it is not an invasion of privacy "to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of person." Restatement (Second) of Torts § 652D comment a. It must be a "communication that reaches, or is sure to reach, the public." *Id.* The rule of publication as an element of this privacy tort differs from

the rule in defamation, wherein disclosure to one other than the plaintiff constitutes actionable publication. Here, it is the general rule that the disclosure must be widespread, as to the public at large, in order for it to be actionable. However, it has been held that the publicity requirement may be satisfied 'by proof of disclosure to a very limited number of people when a special relationship exists between the plaintiff and the "public" to whom the information has been disclosed.'

1 *Privacy Law and Practice*, ¶ 1.05[1] at 1-50 (G. Trubow ed. 1987)

(citations and footnotes omitted).

Discussing the issue of publicity in privacy cases, Justice Smith stated that "[t]he wrong depends not upon . . . an arithmetical measure of the numbers who witnessed the exposure . . ." *Hawley v. Professional Credit Bureau*, 345 Mich. 500, 76 N.W.2d 835, 841 (1956) (Smith, J., dissenting from majority ruling that credit bureau's sending a letter to employer concerning employee's financial status not an actionable intrusion).

In accord with Justice Smith's analysis, the Supreme Court of Michigan stated that

[a]n invasion of a plaintiff's right to privacy is important if it exposes private facts to a public whose knowledge of those facts would be embarrassing to the plaintiff. Such a public might be the general public, if the person were a public figure, or a particular public such as fellow employees, club members, church members, family, or neighbors, if the person were not a public figure.

Here we have developed the criterion of a particular public, whose knowledge of the private facts would be embarrassing to the plaintiff . . . As Justice Smith said, we do not engage in a numbers game and therefore we leave the criterion here announced to be illustrated by this and future cases.

Beaumont v. Brown, 401 Mich. 80, 257 N.W.2d 522 (1977).

In this case the facts suggest the existence of a publication. Wilson disclosed the results of Slater's HIV tests to a table of individuals at a meeting, attended by approximately 75 people. However, the actual number of people to whom the information was disclosed and whether those recipients are members of Slater's particular public are probably questions of fact. Slater could argue, however, (1) that Wilson's disclosure to several of Wilson's friends, regardless of how many there were or who they were, amounts to actionable disclosure as a matter of law or (2) that the applicable rule of publication should parallel that of defamation in this case, making Wilson's public disclosure of Slater's condition actionable as a matter of law. Even if the Court agrees with Slater, however, Wilson could defeat Slater's claim if he can show that the disclosure was privileged.

3. Employer's Privilege

Wilson, as Slater's employer, has a conditional privilege⁸ to disclose information concerning Slater's condition. See *Bratt v. Inter-*

8. "Such a privilege is conditioned upon reasonable and proper exercise, and is abused and lost if the communication is knowingly false or for an improper or illegal purpose, or made to a recipient who is not reasonably able to carry out the purpose of the privileged occasion." 1 *Privacy Law and Practice*, ¶ 1.04[6][a] at 1-31 thru 1-32 (G. Trubow, ed. 1987).

national Business Machines, 392 Mass. 508, 467 N.E.2d 126, 133 (1984). In *Bratt* the plaintiff sued his employer for, *inter alia*, public disclosure of private facts. The plaintiff alleged that there was improper disclosure of a company physician's description of him as being paranoid. The court concluded that under the Massachusetts right of privacy statute only unreasonable disclosure is proscribed and that an employer may have countervailing interests which may make the disclosure reasonable. *Id.*

Wilson should argue that his disclosure was not unreasonable since it was made during an employment-related activity and only to those who had been discussing the disease. He should also argue that the information was completely true and not disclosed with any intention other than to inform his fellow businessmen that such tests are both available and informative.

Slater, on the other hand, should argue that unlike the disclosure in *Bratt* which was made to other employees, Wilson's disclosure was made to members of the general public. Moreover, he should argue that since a common interest does not exist outside the sphere of employment, Wilson was not justified in his disclosure to members of the general public.

4. *Privilege To Disclose To Those Who Need The Information*

The privilege to disclose is governed by a reasonableness standard. *Levias v. United Airlines*, 27 Ohio App. 2d 222, 500 N.E.2d 340 (1985). Publication is limited to those who the disclosure believes have a "real need to know, not mere curiosity." 500 N.E.2d at 374. In *Levias* a flight attendant sued her employer for the disclosure by its medical examiner to both her supervisor and her husband her excessive menstruation and need for gynecological surgery. 500 N.E.2d at 373. The court found the employer in error since neither the attendant's supervisor nor her husband had a "real need to know." Thus, existence of the privilege turns upon whether Wilson, in disclosing Slater's condition to the public, gave the information to those who had a real need to know.

Slater should argue that, considering (1) the modes of transmission of the disease and (2) the absence of any evidence that those to whom Wilson disclosed information about Slater's condition were Slater's sexual partners or otherwise likely to be exposed to Slater's blood, Wilson exceeded his privilege since he disclosed Slater's condition to members of the general public. The people who attended the luncheon were merely curious and did not have a "real need to know." *Levias*, 27 Ohio App. 3d 222, 500 N.E.2d at 374.

Wilson, on the other hand, should argue that insofar as the public fears AIDS virus as a very novel and lethal disease, members of the public have more than just "mere curiosity" in identifying those

that have been exposed to the disease. *Id.*

Slater could rebut Wilson's arguments by arguing, first, that even though information concerning AIDS transmissibility is not complete, there is no reliable information (indeed, Wilson has offered no information to rebut that which was offered by Slater) to suggest that the AIDS virus may be transmitted by causal contact. Second, he could argue that even though the public may have fears about the transmissibility of AIDS, their fears, being unfounded, are not sufficient to affect Slater's right to privacy.⁹

Wilson should respond by arguing that AIDS is a recently discovered disease. The medical research is only a few years old. Since there may be flaws in the research and considering the mortality rate of those who have contracted AIDS, the public's fears are justified.

9. Slater has support by analogy to cases construing the Rehabilitation Act of 1973. 29 U.S.C. §§ 701-796. See, e.g., *Arline*, 107 S. Ct. 1123. The Court in *Arline* stated that Section 504 of the Rehabilitation Act proscribes the denial of jobs or other benefits to those having contagious diseases "because of the prejudiced attitudes or the ignorance of others." 107 S. Ct. at 1129. It further stated that the "Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments . . ." *Id.* Thus, Slater could argue that employers making decisions respecting employees with contagious diseases are to find guidance in medical evidence and not in society's unfounded fears.