

Liability of an Attorney or Spouse for Torts Committed by a Private Detective

by Laura W. Morgan, March 2003

Private detective, private eye, P.I., dick, gumshoe, peeper, tec, shamus, eavesdropper, delator, sleuth: whatever the name, they are paid to pry. Consequently, in the course of their investigations, private detectives sometimes go too far and commit various torts, such as defamation, invasion of privacy, trespass, and intentional or negligent infliction of emotional distress. This article will discuss the liability of an attorney or spouse who hires a private detective during the course of divorce proceedings for the torts of the private detective.

Background

By way of background, there is general agreement that an “unreasonably intrusive” investigation by a private detective hired by a litigant’s attorney gives rise to tort liability on the part of the detective. *Noble v. Sears Roebuck & Co.*, 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (1973); *Tucker v. American Employers’ Insurance Company*, 171 So. 2d 437 (Fla. DCA 1965); *Pinkerton National Detective Agency, Inc. v. Stevens*, 108 Ga. App. 159, 132 S.E.2d 119 (1963); *Souder v. Pendleton Detectives*, 88 So. 2d 716 (La. Ct. App. 1956); *Miller v. Brooks*, 472 S.E.2d 350 (N.C. App. 1996), discretionary review denied, 483 S.E.2d 172 (N.C. 1997); see Restatement (Second) of Torts § 652B, comment b, illustration 2 (1977) (invasion of privacy would occur if private investigator, seeking evidence for use in a lawsuit, looks into plaintiff’s bedroom window with telescope for two weeks and takes intimate photographs).

One who hires a private detective will be held liable for the torts of the detective if the employer exercises control over the detective, or if the private detective commits an intentional, not negligent, tort within the scope of the employment. This was stated in *United States Shoe Corporation v. Jones, et al.*, 149 Ga. App. 595, 55 S.E.2d 73 (1979):

Casual Corner contends that it was insulated from liability as a matter of law because the guard was acting in the status of an independent contractor. See Code §§ 105-501, 105-502. However, even assuming arguendo that the evidence would authorize the store to claim such a status as a matter of law, this would not afford it a defense to the plaintiff’s claim. “Even though hirers of an independent security or protective agency have generally been held not liable for negligent torts of agency personnel, where the hirer did not exercise control over them, hirers have been held liable for the intentional torts of the agency’s personnel committed, in the scope of the agency’s employment, against the hirer’s invitees.” *Noble v. Sears Roebuck & Co.*, 33 Cal. App. 3d 654 (73 ALR3d 1164) (1973). See Annot., *Liability of One Hiring Private Investigator*, 73 ALR3d 1175. This principle appears to have been followed in *Ellenburg v. Pinkerton’s, Inc.*, 125 Ga. App. 648 (188 S.E.2d 911) (1972), where the employer of a private detective agency was held liable to a third person for an invasion of privacy committed during the course of an investigation by the agency’s personnel, despite the fact that the agency was employed as an independent contractor. Accord, *Greenbaum v. Brooks*, 110 Ga. App. 661 (2) (139 S.E.2d 432) (1964). See also *McLeod v. Dean*, 270 F. Supp. 855 (DCNY 1967). We accordingly hold that the trial court acted properly in refusing to direct a verdict or to grant judgment notwithstanding the verdict to Casual Corner based on the independent-contractor defense.

Accord *Adams v. F.W. Woolworth Co.*, 257 N.Y.S. 776, 781 (N.Y. App. Div. 1932) (“A store owner who places a detective agency on his premises for the purpose of protecting his property by various means, including arrests, should not be immune from responsibility to an innocent victim of a false arrest made by the detective agency, even as an independent contractor.”).

These same principles were applied to an attorney. Thus, whether the attorney who hires the private detective will be held liable for the torts of the private detective generally depends on whether the attorney exercises independent control over the detective. Further, even if the attorney does not exercise independent control over the detective, the attorney will be held liable for the intentional, though not negligent, torts of the detective that are committed in the scope of the detective’s employment. This was stated in *The Committee on Legal Ethics of the West Virginia State Bar v. Dean E. Lewis*, 156 W. Va. 809, 197 S.E.2d 312 (1973):

An attorney, of course, is responsible for the conduct of his investigator in such circumstances when such investigator is conducting his affairs either with the explicit or implicit knowledge of the attorney. In re Mahan, 228 App. Div. 241, 239 N.Y.S. 392; In re Levine, 210 App. Div. 8, 205 N.Y.S. 589. In view of the long-standing relationship and unquestionable control over the working procedures of the investigator by the attorney, and reviewing all the circumstances of this case, there is sufficient inference of agreed agency to hold the attorney responsible for any action on the part of the investigator.

197 S.E.2d at 316.

An attorney may also be liable for the torts of the detective he or she hires on an independent basis of liability: negligent hiring, negligent supervision, or negligent entrustment. Restatement (Second) of Agency § 213 (1958). Noble v. Sears Roebuck & Co., 33 Cal. App. 3d 654, 109 Cal. Rptr. 29 (1973).

Defamation

The courts have generally held that a private investigator in the employ of an attorney cannot be liable for defamation in the course of his/her investigation of a litigant. The courts have reasoned that because the employer/attorney is immune from a defamation suit brought by a litigant on the basis of the litigation privilege, the attorney's employee/agent is also immune. Conversely, if the employee/agent is immune, then the attorney is immune for the defamatory statements of the employee/agent. The attorney's liability, if any, will stem not from vicarious liability for the defamation, but for negligent supervision.

This principle was stated in Hawkins v. Harris, 141 N.J. 207, 661 A.2d 284 (1995). In this case, the court noted that the litigation privilege extends to those who aide an attorney in the course of legal proceedings. See, e.g., Silberg v. Anderson, 50 Cal. 3d 205, 786 P.2d 365, 266 Cal. Rptr. 638 (1990). Thus, the court held, the privilege should extend to the relevant statements an investigator has made in the course of pretrial discovery. To protect from investigator abuse, the courts may impose sanctions on parties for an abuse of the discovery process, and the detective will be subject to state licensure procedures. Finally, an attorney may be held professionally responsible for a lack of supervision of such investigators.

Other courts have not gone as far as the New Jersey court. For example, long ago, the New York court in Youmans v. Smith, 47 N.E. 265, 267 (N.Y. 1897), acknowledged that that "the privilege that protected [the attorney] also protected his agents and employees in whatever they did at his request that he could have lawfully done himself." However, the fact that investigators may aid attorneys in preparing a case does not justify extending an unqualified and absolute privilege to investigators for statements made in the course of investigations. Rather, the court must examine whether the investigator's statements were reasonable in light of the circumstances of the case.

Another point that should be stressed is that these two cases clearly discuss defamatory statements made by an investigator during the court of legal proceedings. In the divorce context, this may pose a problem. It is possible that a husband or wife might hire a private detective in order to determine if his or her spouse is committing adultery before any action for divorce is filed. It is the investigation itself that will give rise to the legal proceedings. In this event, it is possible that a spouse or attorney who hires an investigator before the divorce is filed may face liability.

Invasion of Privacy

Restatement (Second) of Torts § 652B, comment b, illustration 2 (1977), notes that an invasion of privacy would occur if a private investigator, seeking evidence for use in a lawsuit, looked into the plaintiff's bedroom window with telescope for two weeks and took intimate photographs. See Sharp v. Sharp, 209 So.2d 245 (Fla. 2d DCA 1968).

While this statement seems obvious, doubt has been cast on its continued vitality in light of the recent case *Plaxico v. Michael*, 735 So. 2d 1036 (Miss. 1999). In this case, a woman's ex-husband, seeking evidence for modification of child custody, hid in the bushes and took pictures of his ex-wife, clothed, and his ex-wife's lesbian partner, semi-nude, through the bedroom window with a telephoto lens. The majority held that because the husband was motivated by a belief that it was not in his daughter's best interests to live in his ex-wife's home with a (gasp!) lesbian partner, and that "most reasonable" people would agree with the husband that his actions were warranted, the ex-wife's tort claim lacked an essential element: outrageous behavior:

Three pictures were actually developed which were of Plaxico [the ex-wife's partner] in a naked state from her waist up in her bed. Michael believed that he took these pictures for the sole purpose to protect his minor child. Although these actions were done without Plaxico's consent, this conduct is not highly offensive to the ordinary person which would cause the reasonable person to object. In fact, most people would feel Michael's actions were justified in order to protect the welfare of his minor child.

735 So. 2d at 1040. It is apparently the law in Mississippi that no reasonable person could believe that the ends do not justify the means, no matter how intrusive, when child custody is at stake.

Consequently, if a person litigating a child custody case can not be held liable for invasion of privacy or intrusion into the seclusion of another, then his or her agent, an attorney or private detective, cannot also be held liable. At least in Mississippi.

Trespass

One hiring a detective can be held liable for trespass by a detective. This was the case in *King v. Loessin*, 572 S.W.2d 87 (Tex. Civ. App. 1978). In that case, Delcer King contracted with Smith Detective Services to investigate his competitors. Smith's employee, Thompson, along with another employee, burglarized the offices of Lawrence Loessin. Of significance to the trial court was that when King hired Smith, he said that he didn't particularly care how he went about his investigation and that money was no object in getting the evidence; King implied that he would support criminal activity. This led the court to conclude that a person who contracts with another to perform a service that is unlawful in itself, even as an independent contractor, is liable for damages for the unlawful act. 572 S.W.2d at 90.

Thus, if an attorney or spouse hires a private detective with the instructions, "Get the goods on my spouse, and I don't care how you do it," the attorney or spouse may well be liable for the torts committed by the detective.

Kidnapping

The Restatement (Second) of Torts § 700 provides that a parent who intentionally interferes with the parental rights of the other parent is liable in tort. See generally Leonard Karp & Cheryl Karp, Domestic Torts §§ 5.03-5.04 (1989 & Supp. 1999). Thus, one who assists a parent in taking exclusive possession of a child in contravention of the rights of the other parent may be criminally or civilly liable. See generally Annotation, Kidnapping or Related Offense by Taking or Removing of Child by or Under Authority of Parent or One in Loco Parentis, 20 A.L.R.4th 823 (1983 & Supp. 1999).

An attorney or spouse may be liable for the acts of a private detective who assists a parent kidnapping his or her own child when the private detective is hired by the attorney or spouse. For example, in *State v. Stocksdale*, 138 N.J. Super. 312, 350 A.2d 539 (1975), the mother brought the child to her parents' home. The father hired a private investigator who then acted as a decoy at the front door of the maternal grandparents while he, the father, slipped in the back and took the child. The court held in light of the prosecution's unwillingness to proceed with kidnapping charges, it could go no further. The court further opined, however, that the private investigator and

the father could together be charged with conspiracy to kidnap, and public policy mandated against a holding which would encourage or support the movement across state lines of people engaged in the business of resolving custody disputes by child snatching.

Similarly, in *Armes v. Campbell*, 603 S.W.2d 249 (Tex. App.-El Paso 1980, no writ), the paternal grandmother filed an action for assault and false imprisonment against a private investigator hired by the child's mother to locate the child and return him to her. The grandmother had been given custody of the child by the child's father, who had obtained custody under the divorce decree. After the mother remarried, she wished to regain custody of her son, and hired Jay J. Armes to find the child and bring him back to her. The private investigator's conduct constituted assault and battery, and consequently, both the investigator and mother were held liable.

A fascinating examination of an attorney's liability is found in *Offenhartz v. Cohen*, 144 Misc. 2d 130, 543 N.Y.S.2d 867 (1989), affirmed 168 A.D.2d 268, 562 N.Y.S.2d 500 (1st Dep't 1990), it was alleged that when Sara Offenhartz was 12 years old, after her parents were separated, Sara was with her father in New Jersey when her mother and a private investigator hired by her mother's attorney Jeffrey Cohen "attempted forcibly to place Sara in a car against the girl's will. The investigator, it is asserted, restrained Sara's father during this episode. It is this event which forms the nucleus of Sara's complaint against her mother's lawyer — that he was behind this "assault" and attempted "abduction" and accordingly should pay damages in the amount of \$10 million." The court determined that because Sara's mother had the right to custody, she had the right, through her agents, to go get Sara and have her placed in a car to be brought back to New York. The court further concluded, "New York law does not recognize any liability on the part of an attorney to a non-client third party for injuries sustained as a result of any attorney's actions in representing his client absent fraud, collusion, or a malicious or tortious act" (see *Michalic v. Klat*, 128 A.D.2d 505, 506). As I concluded above, the allegations fail to state any tort claim, and while the now-adult plaintiff still clearly believes that the claimed "abduction" was malicious, it is clear that the facts do not objectively state any cause of action as against the attorney based upon advice he allegedly gave his client."

In essence, the claim of kidnapping against the private investigator, and therefore against the attorney or spouse, will rise or fall on whether the parent has a right to the custody of the child.

Intentional Infliction of Emotional Distress

The very act of hiring a private investigator was found to be part of a pattern of intentional infliction of emotion distress in *Behringer v. Behringer*, 884 S.W.2d 839, 844 (Tex. App.—Fort Worth 1994, writ denied). In that case, the wife admitted to hiring two or three private investigators on her own accord and another through a former attorney. The court noted that while the hiring of a private investigator may not be uncommon during a period of marital discord, the husband's experience of being trailed by strangers "must be viewed in context with Margaret's repeated death threats." The court ultimately held the wife liable for intentional infliction of emotional distress.

Negligent Hiring or Supervision

The previous sections have considered the vicarious liability of the attorney or spouse who hires the private detective. As noted in the introduction, however, an attorney can be held independently liable for the negligent hiring or supervision of a private detective. *Noble v. Sears Roebuck & Co.*, 33 Cal. App. 3d 654, 109 Cal. Rptr. 29 (1973). See generally 1 Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* § 5.10 (4th ed. 1996). Thus, if an attorney hires a private investigator with a known record for illegal or tortious activity, liability can be imposed on the attorney for negligent hiring or supervision.

Conclusion

Most private detectives go about their business in a professional manner. Gone are the days

when a private detective who engaged in "matrimonial work" was held in low esteem. Even Spenser and V.I. Warshavsky have seen fit to engage in divorce work these days. Nonetheless, the possibility exists that a private detective will pursue the investigation too zealously, resulting in tort liability. So long as the attorney has diligently supervised the case and made the objective clear, including that the investigation be done in a lawful manner, liability on the part of the attorney appears to be a slim possibility.