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TORTS—RIGHT OF PRIVACY IN KENTUCKY

The right of privacy, as a recognized doctrine, is relatively new in the common law. The basic concept of the doctrine was set out sixty years ago in a law review article written by Samuel Warren and Louis Brandeis,1 who thought recognition of the right was needed for the protection of the individual's personality in a growing society. This right has never received a precise definition, but can be thought of as a limited right to be let alone.

Warren and Brandeis declared the right of privacy to be an existing common law principle,2 basing their observation on a study of the use of certain legal fictions and analogous cases. The primary derivative background was the protection of intellectual and artistic property granted by the common law, which protected the right of publication as a property right of the creator.3 At the ancient common law this protection was not extended to items such as personal letters, but in the growth of the law the property right of the author in a literary manuscript was extended to the writer of personal letters and the publication of such materials could be prevented upon the basis of protecting a property right.4 Warren and Brandeis also cited cases protecting what amounted to personal rights upon the basis of a breach of an implied contract, a breach of trust, or a breach of confidence.5 They believed all these theories were being used to protect what was basically a general right of privacy.

It was realized that such a right could be used in practice only for the correction and prevention of the more flagrant abuses of the individual's personality6 and that the norm of the reasonable man would have to be adopted when considering whether or not there has been an invasion of the right.7 Warren and Brandeis also suggested that certain limitations be incorporated into the general doctrine. The principle was not to be used to prevent the publication of material which is of public or general interest, nor should the right be permitted to abridge the scope of a privileged communication under the law of libel and slander. A tentative caveat was placed upon an invasion by oral publication in the absence of special damages. The right expires upon publication by or with the consent of the individual. Truth is not a defense for an invasion of the right of privacy, nor is the absence of malice in the publisher.8

Both a legal and an equitable remedy were suggested for the enforcement of the right.9 The enjoining of an invasion was considered for a limited number of cases, while an action of tort for damages would lie in all cases. In addition, the recovery of substantial compensation could be had without a showing of special damages.

The doctrine was new and was destined not to be readily accepted by all jurisdictions. New York, in a leading case,10 rejected the right of privacy, although a strong dissenting opinion answered the arguments for rejection. This case in the main set out the usual arguments against acceptance. It was a direct denial of the existence of the right of privacy at the common law. Lack of precedent was cited as showing no existence. There was the expression of fear of vastly in-

1 Warren and Brandeis, The Right To Privacy, 4 HARV. L. REV. 193 (1890).
2 Id. at 198, 213.
3 Id. at 198.
5 Warren and Brandeis, supra, note 1 at 207 ff.
6 Id. at 216.
7 41 AM. JUR., PRIVACY, sec. 12.
8 Warren and Brandeis, supra, note 1 at 214-219.
9 Id. at 219-220.
10 Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902).
creased litigation. Right of privacy was looked upon as a possible restriction of freedom of speech and press. The injury was shown to be primarily a hurt to the feelings of the individual. The relief of equitable injunction conflicted with the historical rule that equity protects only property rights. In summary, the court looked upon recognition of the doctrine as pure judicial legislation.

Following New York's rejection, a Georgia case was decided which became the leading one for recognition. The Georgia court recognized the doctrine in a case consisting essentially of the same facts that had resulted in rejection in New York. Georgia accepted the right of privacy as a common law doctrine, but the reasons advanced for acceptance were not primarily those of Warren and Brandes. The Georgia court placed a constitutional basis under the principle. Freedom of speech and press were found to have a complement of silence and seclusion. The natural law was also used as a foundation, privacy being considered as one of the rights of personal liberty and personal security. Unfortunately however, the early cases of recognition were weak in setting out the derivative background of the right of privacy.

The clear statement of Warren and Brandes was the first forthright demand for recognition of the right of privacy as an independent doctrine. Hindsight shows, however, that it was not the first thought on privacy. The dissenting opinion in an early Kentucky case, Grigsby v. Breckenridge, showed a realization of the problem. If the doctrine had been formulated earlier, this case could have been decided upon an invasion of the right of privacy. Actually, the decision was based upon the property right in the writer of letters to prevent the publication of private letters.

In this case, the deceased wife of the plaintiff had saved a great many personal letters. The defendant, a daughter by a first marriage, claimed the letters as a gift from her mother. The plaintiff sought an injunction against the publication of any of the letters and for the surrender of them. On appeal, the plaintiff was said to have the right to prevent the publication of the letters he had written, but the petition as to all else was dismissed. The court recognized the exclusive right of the writer to enjoin the publication of his letters. This right was treated as a property right. The dissenting opinion felt that the majority of the court had failed to give force to the right of the plaintiff in its entirety. The dissent argued on a property right basis, but was making the argument for the protection of the privacy of the family.

The New York and Georgia cases, involving the commercial use of pictures, had already been decided when the problem was presented in Kentucky in a very similar situation in the case of Foster-Milburn Co. v. Chinn. This was an action for damages for using the name and picture of the plaintiff in an advertisement of the defendant's patent medicine. The Kentucky court chose to accept the doctrine while recognizing that there was a split of authority. There was held to be an invasion of the right of privacy through the use of the individual's picture, without his consent, as part of an advertisement to advance the publisher's business. While the plaintiff was entitled to recover without proving special damages, the court did not set out a detailed rationalization for accepting the doctrine.

The next Kentucky decision which considered the right of privacy also involved the unwarranted use of a photograph. Twin children, joined at the body, were born to the plaintiffs. When the children died, the defendant was employed to make a picture of the corpse. Contrary to the agreement, he made copies from

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12 65 Ky. 480 (1867).
the negative and filed for a copyright. Plaintiffs brought an action for damages. While the court mentioned the possibility of an action for breach of contract or breach of confidence, the decision was evidently based on the right of privacy, with the Chinn case cited as authority without being distinguished. The relation of parent and child could possibly be used to explain the decision under the general right, or the act of the defendant in exceeding the authority granted by the parents could have been the invasion of privacy. A later Kentucky opinion considered the Stokes case as based solely upon the right of privacy since there is no property right in a dead body. Contrary to this idea, the right is generally considered a personal right that ceases on the death of the individual. The Michigan court thought an alleged right of privacy in a similar situation gave no right of action after death.  

Brents v. Morgan was the first Kentucky decision to give a detailed consideration of the right of privacy. A garage owner had a large sign posted in his window stating that the plaintiff had not paid his bill. The statement was admitted to be true, and since truth is a complete defense to libel in Kentucky, this decision rests squarely upon an invasion of the plaintiff's privacy. The plaintiff was allowed to recover damages for the humiliation and mental anguish resulting directly from the posting of the sign. The opinion considered the doctrine as set out in the Warren-Brandeis article, and evidently adopted the suggested limitations, at least by dictum.

The principle was extended in this holding to a variant fact situation in which there was an attempt to coerce payment. It can be readily seen that the principle was not used as a substitute remedy because of the recognition of a complete defense to an action of libel. One writer, citing Thompson v. Adelberg & Berman, Inc., has suggested that the Brents case could have been decided upon the use of excessive and unreasonable means to collect a debt. It is doubted that this suggestion is sound for in the Thompson case the language used on the cards in an attempt to collect a bill was libelous per se. While there was no denial of truth in the Thompson case, this complete defense was not raised. Properly, the Thompson case should have been decided under the right of privacy as used in the Brents case, since the two fact situations are the same.

Brents v. Morgan sets out a workable doctrine on the right of privacy in Kentucky. Although the principle is not precisely defined, there is a clearer understanding of the right of privacy expressed in this case. Later cases in general have approved the limitations set forth there. Jones v. Herald Post Co. involved the limitation on matter of public or general interest. A Louisville newspaper published a statement by and a picture of a wife whose husband had been murdered. She claimed an interference with her right of privacy. The court held that since the publication of the picture and the allegedly incorrect statement were involved in a matter of public interest, this limitation on the right must prevail.

The tapping of a telephone wire was held to be an invasion of the right of privacy in Rhodes v. Graham. This decision applied the doctrine to still another variation of facts. The invasion by tapping of a telephone wire was held to be as "evil" as the unwarranted use of a photograph or publicity in a newspaper.

Chinn case cited as authority without being distinguished.
Brents case as based solely upon the right of privacy since there is no property right in a dead body.  

Ky. CODeS, CIV. PRAC. sec. 124 (1948).
181 Ky. 487, 205 S. W. 558 (1918).
230 Ky. 227, 18 S. W. 2d 972 (1929).
Rhodes v. Graham, 238 Ky. 225, 37 S. W. 2d 46 (1931).
Trammell v. Citizen's News Co., Inc.\textsuperscript{23} was another invasion involving a newspaper. The paper published a notice of a debt owed by the plaintiff after being informed that publication was being made to coerce payment. Although this was an invasion by a third party rather than the creditor, Brents v. Morgan was cited as authority. The primary cause of injury was publication by the newspaper. The defendant knew a matter of general interest was not involved and the probable result of the publication. This case could be cited as an example of the lack of malice being no defense to an invasion of the right of privacy.

The limitation as to oral statements was involved in Gregory v. Bryan-Hunt Co.\textsuperscript{24} The plaintiff alleged that the defendants entered his store and asserted that the plaintiff possessed cigarettes stolen from the defendants. They searched the store and took several cartons of cigarettes. Plaintiff brought an action for the invasion of his right of privacy, but the court held that there was no cause of action stated. The right of privacy was shown to protect personal and private matters that could be distinguished from slander and libel for which there exist adequate remedies, the doctrine not being intended as a substitute remedy for this type of violation. If there was an accusation of stealing, the remedy would properly be an action for slander. Invasions of the right of privacy were decided not to include oral publications. Undoubtedly, the caveat of special damages is still attached to the limitation of oral statements, since the plaintiff showed none in this case.

The personal nature of the right of privacy was shown in Tomlin v. Taylor.\textsuperscript{25} Publication in a newspaper of information filed in a confidential tax return of a bus company involved in a franchise dispute was held not to be an invasion of the right of privacy of the president of the bus company since the subject was not personal to him and was involved in a matter of public interest. This holding was followed in a series of cases.\textsuperscript{26}

In Maysville Transit v. Ort,\textsuperscript{27} a corporation alleged an invasion of its right of privacy for the use made of its tax reports filed with the State Department of Revenue. The returns were incorporated into a report made to the city commissioners and published in a newspaper. The court by way of dictum stated the right of privacy was recognized for the protection of the feelings of human beings rather than pecuniary or business interests.

The doctrine as recognized in Kentucky offers a reasonably effective remedy for the protection of the sensibilities of the individual. The course of development has advanced from a basic recognition of the concept through a delineation of various limitations attached to the right of privacy. The growth has shaped a right similar to that recognized by most states giving a common law background to the doctrine.

The delineation of the right has not resulted in an advantageous use of or a concerted effort to extend the right by the Kentucky Bar. Such a statement may be made in view of the limited amount of litigation involving the doctrine. It may be that the principle is one that results in less litigation than the similar action of libel, for generally the states have had few privacy case decisions handed down by appellate courts. Another possibility is that the doctrine, although used in several different fact situations, has become associated with stereotyped facts, such as the commercial use of a photograph. Related actions, libel, breach of

\textsuperscript{23} 285 Ky. 529, 148 S. W. 2d 708 (1941).
\textsuperscript{24} 295 Ky. 345, 174 S. W. 2d 510 (1943).
\textsuperscript{25} 290 Ky. 619, 162 S. W. 2d 210 (1942).
\textsuperscript{26} Tomlin v. Ort, 296 Ky. 528, 177 S. W. 2d 371 (1943); Maysville Transit Co. v. Taylor, 296 Ky. 527, 177 S. W. 2d 371 (1943).
\textsuperscript{27} 296 Ky. 524, 177 S. W. 2d 369 (1943).
confidence, breach of implied contract, have to some extent been used in situations that could have extended the right of privacy. The superficial resemblance to libel has also caused some confusion concerning the right. Kentucky has at least in one case used libel when the privacy doctrine should have been applied.\(^5\) A late North Carolina case has a recovery under a privacy count in an action where a libel count was dismissed.\(^6\) It is doubted that this confusion with libel should exist in Kentucky, since truth is a complete defense to libel but not to the invasion of privacy. It has been stated that the right of privacy in Kentucky is to be used to protect matters that can be distinguished from libel and slander. The doctrine is not intended as a substitute remedy for violations for which there are adequate remedies.\(^7\) No matter what explanation is given for the limited litigation, the fact remains that there have been but few cases on the subject.

There exist at least two excellent possibilities for using the concept of a right of privacy which have not been the subject of action in Kentucky: (1) the non-commercial use of name, picture, and personality and (2) radio. Kentucky has not handed down a positive decision on the first point, but the decisions concerning publications have indicated that the court is going to give a reasonable latitude to publishers in considering printed material. They also indicate that Kentucky could find an invasion of privacy in a non-commercial use of name, picture, or personality.\(^8\) There are non-commercial publications, not amounting to libel, which, nevertheless, constitute invasions of privacy.\(^9\) It is believed that this is a situation that can be met by the existing doctrine in Kentucky.

Invasion of privacy by radio is a possible and plausible extension for Kentucky's concept. The law of libel and slander may be involved in this situation. The question of whether a publication by radio is a libel or slander has not been determinatively settled,\(^10\) and Kentucky has no decisions on the question. The best solution is to consider such a broadcast as an invasion of privacy rather than libel or slander, since there is authority for such a view.\(^11\) However, this solution may not be adopted. If the broadcast should be classified as libel, the "right of privacy or libel" problem would be extended to another matter. If it is classified as slander another question would arise involving the caveat on oral invasion in Kentucky. There might be a recovery in Kentucky for an oral invasion if special damages were shown. Normally, special damages are not essential for recovery in an action for the invasion of the right of privacy. It is recommended that such an allegation should not be necessary to show a cause of action for a broadcast invasion of privacy, even if the broadcast is considered oral. The action is to protect the sensibilities of the individual. The publication by radio is as great if not greater than that received by most printed material, thus showing that the basic concept of the oral statement limitation is invalid in this particular type of case. Such invasions require control through the right of privacy action without complete denial through a limitation refusing redress for an oral invasion or an extreme hindrance by a requirement to show special damages.

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\(^10\) Prosser, Torts, sec. 92, p. 796 (1941).