

Comments

THE RIGHT OF PRIVACY

The 1950-51 session of the Wisconsin State Senate witnessed the introduction of bill 215S, which would have added the right of privacy to Wisconsin substantive tort law. The bill sought to create Section 331.055 to read:

The legal right of privacy is recognized in this state and an invasion thereof shall give rise to an equitable action to prevent and restrain such invasion as well as an action to recover damages for injuries sustained by reason thereof.

The bill was referred to the Judiciary Committee, where it was laid aside for over three months.¹ The newspapers furnished the chief opposition to the bill. They complained that the bill was too vague, too indefinite, that the courts would construe it as they pleased without any limitation, and that it would hinder a free, vigorous press.² The first amendment to the bill was made during committee hearing, and it specified three particular situations that the bill would cover.³ This was a definite concession to newspaper opposition. The bill was amended a second time, and it was further weakened by allowing newspapers more leeway.⁴ The amended bill was passed in

¹ The bill was introduced on February 1, 1951, and the committee hearings did not take place until May.

² See Milwaukee Journal, April 6, 1951, p. 18, col. 1 where it is stated:

It sounds wise to be sure, but it is too intangible, too elusive, to be good law. It leaves the real lawmaking to the courts. It invites endless nuisance lawsuits, with chaos resulting from the lack of rules to go by. And it comes squarely into conflict with the really basic rights—the *right of the public to be informed*. (italics theirs)

³ Substitute amendment No. 1S. to Bill No. 215S. The situations mentioned were commercial appropriation of someone's name, picture, or likeness; public advertising or posting of debts by a creditor or collection agency; and fraudulent use of someone's name or signature.

⁴ Substitute amendment No. 2S. to Bill No. 215S. This amendment sets forth in general the same situations as does the first amendment. It is interesting to note what has been added. To the first situation the amendment would have added, "The incidental use of a name or picture to advertise by sample or example a photographer's work, a newspaper's or other periodical's columns, features or advertisements, and like matters, shall not constitute an invasion of any right."

Added to the debt-collecting section was, "The making, recording, exchanging and reporting of credit information or of court house or other public records and the advertisement of accounts for sale in judicial or administrative proceedings or pursuant to a pledge of such accounts as collateral security shall not constitute a violation of any right hereunder."

Another addition was, "No creditor shall be responsible for the acts of its collecting agent . . . nor shall any medium of advertising or communication be

the senate but was killed in the assembly.⁵

Naturally the question arose as to what this "right of privacy" meant. Even though the original bill was diluted and weakened, and still failed to become law, there are definite indications that it will be introduced again. The purpose of this note is to:

- (1) examine briefly the history of the doctrine,
- (2) give a brief analysis of what the law is in other jurisdictions on the subject,
- (3) examine Wisconsin case law to see what the courts have thought of it and see whether they have recognized it under other titles.

I. HISTORY OF THE DOCTRINE

The right of privacy is a relatively new concept, having been advocated in a *Harvard Law Review* article by Brandeis and Warren in 1890.⁶ Probably one of the main forces that pushed the right into existence in a well-defined form was the muck-raking periodicals that flourished in the latter part of the Nineteenth Century. The article states:

If we are correct in this conclusion, the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any modern device for the recording or reproducing scenes or sounds.⁷

As the quotation indicates, the increasing progress of communications also contributed substantially to the need for the doctrine. Newspapers now had more ability to exploit the private lives of the people in order to produce the sensational journalism that was so prominent in this era.⁸ Also, as the article points out, a great stress began to be placed upon the human being as an individual who deserved to be let alone.⁹

responsible for the acts of advertisers or other users of such medium contrary to this section."

⁵ FINAL BULL. OF PROC., Part I, p. 182 (1951).

⁶ Brandeis and Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁷ *Id.* at 206.

⁸ See *id.* at 196 where the authors state,

The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.

⁹ For an article refuting these ideas, see Lisle, *The Right of Privacy (A Contra View)*, 19 KY. L. J. 137 (1931). His main arguments are that it is not needed, that it is already protected by other doctrines, and that if needed it can be recognized by statute. He also states that if it were needed more states would have recognized it.

The authors believed that the common law must grow to meet the exigencies of a changing society. The article further states:

Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judge to afford the requisite protection, without the interposition of the legislature.¹⁰

Brandeis and Warren specified certain rules with regard to the right. The more significant features are:

1. The right to privacy does not prohibit
 - a. Any publication of matter which is of public or general interest.¹¹
 - b. The communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the laws of libel and slander.
2. The right to privacy ceases upon the publication of the facts by the individual or with his consent.
3. The truth does not afford a defense.
4. It is not for injury to the plaintiff's character, but for an injury to the right of privacy.
5. Absence of malice in the publisher does not afford a defense.¹²

Up to this time relief had been granted on defamation, invasion of some property right, or breach of trust or confidence, or of an implied contract.

New York came to grips with the problem in 1902 in the celebrated *Roberson* case.¹³ Two lower courts had recognized the doctrine, but the Court of Appeals denied its existence. In a four to three decision it would not recognize the right because of the lack of precedent, the purely mental character of the injury, the difficulty of ascertaining who is a public character, the huge number of absurd cases which might follow and the possibility of hampering a free press. Later however, the legislature passed a law that covered the facts of the case.¹⁴

The leading case recognizing the doctrine was decided three years later by the Georgia Supreme Court. This was the *Pavesich* case.¹⁵ The court accepted the arguments of Brandeis and Warren and gave

¹⁰ Brandeis and Warren, *supra* note 6, at 195.

¹¹ For an excellent appraisal of this limitation and how it has worked in reality see Ludwig, "Peace of Mind" in *Forty-Eight Pieces v. Uniform Right of Privacy*, 32 MINN. L. REV. 734, 743 (1948).

¹² Brandeis and Warren, *supra* note 6, at 214-218.

¹³ *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

¹⁴ New York Laws 1903, c. 132, §§ 1, 2, as amended in 1911 and 1921, now N.Y. CIVIL RIGHTS LAW, §§ 50, 51.

¹⁵ *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

the doctrine its broadest recognition. The doctrine has won approval in the great share of states that have come into contact with it. At present it is recognized at common law either by the highest courts or by inferior courts in Alabama, Arizona, California, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, North Carolina, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, and the District of Columbia.¹⁶ Three states recognize the right at least partially by statute. They are New York,¹⁷ Utah,¹⁸ and Virginia.¹⁹ Section 50 of the New York statute makes the use of any living person's name, portrait, or picture for advertising or trade purposes without first having obtained his written consent, a misdemeanor. Section 51 gives a civil remedy of damages or an injunction. Only the commercial aspects are recognized, not the broader, emotional factors. The statutes in Utah and Virginia have had very little influence on the right in other states. They are also limited to commercial cases. Virginia extends protection only to residents; while Utah, unlike the others, protects public institutions and public officials. Statutes have concerned themselves only with a limited area.²⁰

II. COMMON LAW RIGHT OF PRIVACY

The *Restatement* gives the following definition:

A person who unreasonably and seriously interferes with another's interest in not having his affair known to others or his likeness exhibited to the public is liable to the other.²¹

Another definition is given by Prosser as follows:

The majority of courts which have considered the question have recognized the existence of a right of "privacy," which will be protected against interferences which are serious and outrageous, or beyond the limits of ideas of decent conduct. The right has been held to cover the intrusion upon the plaintiff's solitude, publicity given to his name or likeness, or to private information about him, and the commercial appropriation of elements of his personality. The right is subject to a privilege to publish matters of news value, or of a public interest of a legitimate nature.²²

¹⁶ See Notes 138 A.L.R. 22, 168 A.L.R. 446, and 14 A.L.R.2d 750.

¹⁷ N.Y. CIVIL RIGHTS LAW §§ 50, 51.

¹⁸ UTAH CODE ANN. §§ 103-4-7, 103-4-8, 103-4-9 (1943).

¹⁹ 2 VA. CODE § 8-650 (Mitchie 1950).

²⁰ For a proposed uniform law see Ludwig, *supra* note 11, at 764.

²¹ RESTATEMENT, TORTS § 867 (1939). Reed v. Real Detective Pub. Co., 63 ARIZ. 294, 306, 162 P.2d 133, 137 (1945) recognized the doctrine in Arizona. It follows the RESTATEMENT if not bound by precedent but must still consider the merits. Then it fully recognized the doctrine not as a property right but a personal right that does not survive the injured party.

²² PROSSER, HANDBOOK OF THE LAW OF TORTS 1050 (1941).

Considering these basic definitions, let us examine case law to ascertain what rights will be protected, what limitations exist, and how the courts have construed the doctrine.

Generally, the right of privacy is a personal one, and the wife of a deceased person cannot use the right.²³ Also, in this connection, corporations have no such right.²⁴ In a New York case the court held that the owner of a theatre, the name of which was used in a motion picture, had no cause of action under the New York statute.²⁵

Of basic importance is the rule that the standard used is that of the man of reasonable sensitivity.²⁶ Truth is not a defense to the action.²⁷ As for malice, it is often a factor in determining damages²⁸ but is immaterial in the determination of the existence of the right.²⁹

One of the most hazy areas of the doctrine relates to the limitation dealing with public personages and items of legitimate public interest. The right was denied where the plaintiff had sued his wife for divorce, and the defendant newspaper had taken his picture in the courtroom.³⁰ The court stressed that he had made public all the scandalous details of his domestic life and had become a quasi-public figure in his own community. A New Jersey case³¹ denied the right in a case involving a statute providing for fingerprinting and photographing of accused persons. Here the court upheld its decision on public interest. But where a well-known writer wrote her autobiography and included a sketch of the plaintiff, although not giving her name, the court held it was a violation of the plaintiff's right of privacy.³² The court said that even if the writer's life was a matter of public interest,

²³ Lunceford v. Wilcox, 88 N.Y.S. 2d 225 (N.Y. City Ct. 1949) involved the widow of an orchestra leader who allowed her husband's name to be used after his death. The court held she had no cause of action under the New York statute because the name of a deceased person is not protected. *But see* Smith v. Doss, 251 Ala. 250, 253, 37 So.2d 118, 121 (1948).

²⁴ Shubert v. Columbia Pictures Corp., 139 Misc. 734, 72 N.Y.S.2d 851 (Sup. Ct., Special Term 1947), *aff'd without op.* 274 App. Div. 751, 80 N.Y.S.2d 724 (1947). *Cf.* Maysville Transit Co. v. Ort, 296 Ky. 524, 177 S.W.2d 369 (1943).

²⁵ Shubert v. Columbia Pictures Corp., *supra* note 24.

²⁶ Reed v. Real Detective Pub. Co., *supra* note 21. *Cf.* Davis v. General Finance and Thrift Corp., 80 Ga. App. 708, 711, 57 S.E.2d 225, 227 (1950), where the court said, ". . . the right of privacy must be restricted to 'ordinary sensibilities' and not to supersensitiveness or agoraphobia."

²⁷ Cason v. Baskin, 155 Fla. 198, 20 So.2d 243, (1944); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942).

²⁸ Cason v. Baskin, *supra* note 27.

²⁹ Berg v. Minneapolis Star and Tribune Co., 79 F. Supp. 957 (D. Minn. 1948). *Cf.* Davis v. General Finance and Thrift Corp., *supra* note 26 at 710, 57 S.E.2d at 227, where the court states, ". . . the truth . . . will not constitute a defense and the bad faith of the actor will not constitute the offense if the communication is not otherwise a violation of the right of privacy."

³⁰ Berg v. Minneapolis Star and Tribune Co., *supra* note 29.

³¹ McGovern v. Van Riper, 140 N.J. Eq. 341, 54 A.2d 460 (1947).

³² Cason v. Baskin, *supra* note 27.

that did not allow her to invade the right of privacy of the plaintiff, whose personality was not a matter of public interest.

The right was also denied where a radio commentator was sued for broadcasting that the plaintiff worked as a bartender, where he could hear secret conversation, because the plaintiff had become a public personage due to a sedition trial in which he had been a defendant.³³ In another famous case³⁴ the right was also denied where a professional and former college All-American football player who had posed for photographs for public distribution brought action to recover from the defendant, a brewing company, for the use of his name and picture in its advertising. The court stated he had ceased to be a private person and that the use of the material furnished by the publicity department of the defendant's former college was with his actual or apparent authority.

Another case involving an athlete was *Cohen v. Marx*.³⁵ Here a former prizefighter who had been known as "Canvasback" Cohen brought action against Groucho Marx, the radio comedian, who mentioned his name as the butt of a joke. The court denied recovery on the grounds that the plaintiff, having sought publicity and the public's admiration, had to relinquish his privacy on matters pertaining to boxing, that he could not retire to the seclusion of private life any time he pleased.

This area still remains cloudy, but the decisions handed down seem to make this limitation a strong barrier to many would-be litigants who would assert the right.

In a Nevada case,³⁶ the court in commenting upon the right of privacy said it was not immutable or absolute, but was subject to the exercise of police power. Since it is a personal right, it may be lost by express or implied consent of the person whose right is being in-

³³ *Elmhurst v. Pearson*, 153 F.2d 467 (D.C. Cir. 1946).

³⁴ *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, (5th Cir. 1941), *cert. denied*, 315 U.S. 823 (1942).

³⁵ 94 Cal. App.2d 704, 211 P.2d 320 (1949).

³⁶ *Norman v. Las Vegas*, 64 Nev. 38, 177 P.2d 442 (1947). The court upheld a statute requiring employees of retail liquor stores to submit to fingerprinting and photographing, the results of which were submitted to other law enforcement agencies.

McGovern v. Van Riper, 137 N.J.Eq. 24, 43 A.2d 514 (1945) *aff'd*, 137 N.J.Eq. 548, 45 A.2d 842 (1946), *rev'd, complaint dismissed*, 140 N.J.Eq. 341, 54 A.2d 469 (1947) is an important case showing the trend in this field. The 1946 decision said that privacy was protected by the state constitution and unless the person is a fugitive from justice, there can be no publication or dissemination of his fingerprints, photographs, etc., until he is convicted. But upon rehearing in 1947 the court changed its mind and permitted publication because the right of privacy had limitations and had to be construed in the proper relationship of the individual to the community.

invaded.³⁷ The right can be waived and a waiver can be implied from the conduct of the parties and the surrounding circumstances.³⁸ The waiver cannot be rescinded at the whim of the one waiving the right.³⁹

Generally, the spoken word is not actionable.⁴⁰ And, as in libel or slander, communications which are privileged are not actionable.⁴¹ In *McDaniel v. Atlanta Coca-Cola Bottling Co.*,⁴² the court held the right was not to be denied merely because there was no publication. In this case the defendant violated the right of the plaintiff by wire-tapping. The court said that the fact that there was no communication to a third person was no defense.

Unauthorized use of a plaintiff's name or likeness for advertising still constitutes a great share of the privacy cases. Under the New York statute⁴³ covering this, a use by the defendant of the plaintiff's family coat of arms was a sufficient allegation to state a cause of action.⁴⁴ However, more than incidental identification is necessary.⁴⁵ A typical case of the unauthorized commercial appropriation of a person's name or likeness is *Continental Optical Co. v. Reed*,⁴⁶ where the court said that a cause of action existed where the defendant company used the plaintiff's photograph as a part of its advertising material. A cause of action can arise from the publication of an autobiog-

³⁷ *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949), rehearing den., 119 Ind. App. 643, 88 N.E.2d 55 (1949).

³⁸ *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 199, 50 S.E. 68, 72 (1905). The court in a dictum stated:

. . . the existence of the waiver carries with it the right to an invasion of privacy only to such an extent as may be legitimately necessary and proper in dealing with the matter which has brought about the waiver. It may be waived for one purpose and still asserted for another; it may be waived in behalf of one class, and retained as against another class; it may be waived as to one individual, and retained as against all other persons. . . . Any person who engages in any pursuit or occupation or calling which calls for the approval or patronage of the public submits his private life to examination by those to whom he addresses his call, to any extent that may be necessary to determine whether it is wise and proper and expedient to accord to him the approval or patronage which he seeks.

³⁹ *Cohen v. Marx*, 94 Cal. App.2d 704, 211 P.2d 320 (1949).

⁴⁰ *Lewis v. Physicians' and Dentists' Credit Bureau, Inc.*, 27 Wash.2d 267, 177 P.2d 896 (1947) (telephone call threatening garnishee action). Cf. *Martin v. F.I.Y. Theatre Co.*, 10 Ohio Ops. 338, 26 Ohio L. Abs. 67 (1938); *Cason v. Baskin*, 155 Fla. 198, 216, 20 So.2d 243, 252 (1944).

⁴¹ *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927).

⁴² 60 Ga. App. 92, 2 S.E.2d 810 (1939).

⁴³ N.Y. CIVIL RIGHTS LAW, §§ 50, 51.

⁴⁴ *Orsini v. Eastern Wine Corp.*, 190 Misc. 235, 73 N.Y.S.2d 426 (Sup. Ct., Special Term 1947), *aff'd*, 273 App. Div. 947, 78 N.Y.S.2d 224 (1948), *leave to app. den.* 273 App. Div. 996, 79 N.Y.S.2d 870 (1948).

⁴⁵ *Shubert v. Columbia Pictures Corp.*, 189 Misc. 734, 72 N.Y.S.2d 851 (Sup. Ct., Special Term 1947), *aff'd without op.* 274 App. Div. 751, 80 N.Y.S.2d 724 (1948). Here the defendant used the name of the plaintiff in the press book synopsis of a picture, but not in the picture. The plaintiff had no cause of action.

⁴⁶ *Supra* note 37.

raphy as well as commercial publications.⁴⁷ A cause of action also can arise when the publication is used with a news event as shown in *Barber v. Time, Inc.*⁴⁸ Here the defendant magazine wrote an article about the plaintiff's unusual disease together with a close-up of the patient in the hospital, all without her consent. Even comic books can violate a person's right of privacy.⁴⁹ But where the plaintiff's husband was stabbed to death while walking with his wife, the court held that the picture of the plaintiff and her husband did not violate her right of privacy because unwillingly the plaintiff had become an actor in an event of general or public interest.⁵⁰ Also, in this respect, the husband of a woman who had committed suicide by leaping from a public building, could not recover from a newspaper who had printed her picture, because she had become a figure of public interest.⁵¹

As to the mode of communication, radio has been held to be an actionable medium.⁵² Motion pictures are an ideal medium for the invasion of the right of privacy.⁵³ The famous *Melvin v. Reid*⁵⁴ case involved a woman who had been a prostitute and had been tried and acquitted of murder. She had reformed and was leading a decent life when the defendant produced a picture based on the plaintiff's life and using her real name. The court granted relief on the basis of the California Constitution, which guaranteed citizens the right of "procuring or obtaining safety and happiness."

It would seem reasonable to apply the same rules to newsreels as those applied to newspapers or periodicals. However, the trend seems to be in the other direction under the New York statute.⁵⁵ Although

⁴⁷ *Cason v. Baskin*, 159 Fla. 31, 30 So.2d 635 (1947).

⁴⁸ 348 Mo. 1199, 159 S.W.2d 291 (1942).

⁴⁹ *Molony v. Boys Comics Publishers*, 65 N.Y.S.2d 173 (Sup. Ct., Special Term, 1946). This case came up on the motion by the defendant to dismiss the complaint. After denial of his motion, the defendant appealed. Then in 277 App. Div. 166, 98 N.Y.S.2d 119 (1950), the court dismissed the complaint on the grounds that the burden was on the plaintiff to show the articles were based on fiction rather than fact. Minor errors in the portrayal of the plaintiff as a hero in disaster were not grounds for damages under the New York statute.

⁵⁰ *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W.2d 972 (1929).

⁵¹ *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (1939).

⁵² *Cohen v. Marx*, 94 Cal. App.2d 704, 211 P.2d 320 (1949) (denied on other grounds); *Elmhurst v. Pearson*, 153 F.2d 467 (D.C. Cir. 1946) (denied on other grounds); *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 194 Atl. 631 (1937) (the court granted an injunction restraining a radio station from using the plaintiff's records without permission).

⁵³ *Wright v. R.K.O. Radio Pictures*, 55 F. Supp. 639 (D. Mass. 1944).

⁵⁴ 112 Cal. App. 285, 297 Pac. 91 (1931).

⁵⁵ In *Humiston v. Universal Film Mfg. Co.* 189 App. Div. 467, 178 N.Y. Supp. 752 (1919), the court held a newsreel depicting a murder mystery was not an invasion of the plaintiff's right of privacy because such an application of the statute was not within the contemplation of the legislature. The court also stressed the impracticability of applying the law here, since the consent of every person whose likeness is distinguishable would be practically impossible to obtain. *Cf. Swcenek v. Pathe News*, 16 F. Supp. 746 (E.D.N.Y. 1936) (involving

it is generally conceded that a creditor can take reasonable steps to pursue his debtor and collect the debt, placing a large sign on a window fronting the main street of the town stating that the plaintiff owed a debt of long standing and the sign would remain until the debt were paid, was held to violate the plaintiff's right of privacy.⁵⁶ But where the collection agency sent the debtor a telegram threatening legal action unless the debt were paid, the court would not grant relief.⁵⁷ Wire-tapping, unless authorized, seems clearly to be an invasion of the right of privacy.⁵⁸ The commercialization or publication of the information obtained is not essential to maintain action.⁵⁹ The unauthorized use of a person's signature in a letter publicly circulated to advertise a motion picture was an invasion of the plaintiff's right of privacy.⁶⁰

It often has been stated that the Fourth Amendment to the Federal Constitution against unreasonable searches and seizures is an implied recognition of the right of privacy.⁶¹ In an interesting case the Louisiana court held that a teacher's right of privacy was not violated when she was asked to fill out a questionnaire regarding war work and outside activities.⁶² The court said that the purpose of the questionnaire was not to pry into her personal affairs but to shed light upon a controversy regarding the lengthening of school hours and intensification of the school program for the war effort.

With regard to procedure it has been held that the issue of whether the matter is of public or general interest is for the court.⁶³ Then the court decides whether there is substantial evidence that the act is a "serious, unreasonable, unwarranted and offensive interference with

the New York statute). *Contra*: *Blumenthal v. Picture Classic*, 235 App. Div. 570, 257 N.Y. Supp. 800 (1932), *aff'd without op.*, 261 N.Y. 504, 185 N.E. 713 (1933).

⁵⁶ *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); *accord*, *Muetze v. Tuteur*, 77 Wis. 236, 46 N.W. 123 (1890) (granted relief on ground of libel.) See *infra* p. 516.

⁵⁷ *Davis v. General Finance and Thrift Corp.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950).

⁵⁸ *People v. Trieber*, 163 P.2d 492 (Cal. App. 1945), *rev'd on other grounds in* 28 Cal.2d 657, 171 P.2d 1 (1946); *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931).

⁵⁹ *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E.2d 810 (1939).

⁶⁰ *Kerby v. Hal Roach Studios Inc.*, 53 Cal. App.2d 207, 127 P.2d 577 (1942).

⁶¹ *United States v. Alabama Highway Express Inc.*, 46 F. Supp. 450 (N.D. Ala. 1942). But here the court held the search of certain accounts was in derogation of the protection afforded under the amendment because of the public interest. *Cf. People v. Jakira*, 118 Misc. 303, 193 N.Y. Supp. 306 (Ct. of Gen. Sessions of the Peace, 1922). See 3 JOHN MARSHALL L.Q. 265, 266 (1938).

⁶² *Reed v. Orleans Parish School Bd.*, 21 So.2d 895 (La. App. 1945).

⁶³ *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942).

another's private affairs."⁶⁴ If it does so decide, then the case is sent to the jury.⁶⁵

There is no need to prove special damages.⁶⁶ The damages suffered may only be mental anguish.⁶⁷ The fact that damages are difficult to ascertain is not grounds for denying the recovery.⁶⁸ An injunction can be obtained to protect the plaintiff from a threatened invasion.⁶⁹ This seems to be the general rule, but an Ohio court refused to issue an injunction on the grounds that freedom of speech would stop its issuance in advance when the injunction is to prevent the publication of names of those who had signed Communist nomination papers.⁷⁰

III. AN ANALYSIS OF WISCONSIN CASES ON THE SUBJECT

Now we will examine the few Wisconsin cases which deal with the right of privacy directly or indirectly in order to ascertain the court's attitude on the question and to determine whether cases have arisen in which relief was granted on some other ground.

In *Muetze v. Tuteur*,⁷¹ the court gave a remedy of damages on the grounds of libel in a case that was clearly an invasion of the right of privacy. The case involved a collection agency that sent notices to the debtor plaintiff threatening to publish his name in its book of bad risks if he did not pay up. The notices were sent in envelopes which had on them in large red letters "for collecting bad debts." The court stated that it imputed to him a bad credit and that it implied that he was a cheat and a swindler. Therefore, if the defendant could have proved that the plaintiff was such a person, the plaintiff should not have been able to recover because of the defense of truth. But the trial court refused to hear evidence by the defendant relating to whether the plaintiff paid his other debts, a ruling which was affirmed by the Supreme Court. *Brents v. Morgan*,⁷² a leading Kentucky case, also involved publicity of bad debts, but in it the court specifically recognized the right of privacy. We must consider the fact that the Wisconsin case was decided in 1890, the year that Brandeis and Warren expounded the doctrine,⁷³ while the Kentucky case was de-

⁶⁴ *Barber v. Time, Inc.*, 348 Mo. 1207, 159 S.W.2d at 295.

⁶⁵ By this decision it would seem that the court holds the upper hand in such litigation and would probably act as a check upon absurd cases.

⁶⁶ *Smith v. Doss*, 251 Ala. 250, 253, 37 So.2d 118, 120 (1948).

⁶⁷ *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P.2d 133 (1945). Cf. *Brents v. Morgan*, *supra* note 56.

⁶⁸ *Hinish v. Meier*, 166 Ore. 482, 113 P.2d 438 (1941).

⁶⁹ *Patton v. Jacobs*, 118 Ind. App. 358, 78 N.E.2d 789 (1948).

⁷⁰ *Johnson v. Scripps Pub. Co.*, 18 Ohio Ops. 372, 32 Ohio L.Abs. 423 (1940).

⁷¹ 77 Wis. 236, 46 N.W. 123 (1890).

⁷² 221 Ky. 765, 299 S.W. 967 (1927).

⁷³ Brandeis and Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

cided in 1927. The court gave relief on libel although it had to stretch the concept by practically ruling out truth as a defense and by imputing a defamatory meaning to a statement. Yet the case fell clearly into the category of right of privacy.⁷⁴

In another early Wisconsin case⁷⁵ the court considers the doctrine carefully. Here the plaintiff was an artist who contracted to paint the portrait of the defendant's deceased wife. The defendant gave the artist two pictures by which he was to make his painting. The artist made one and sold it to the defendant. Then, without authority, he painted another and delivered it to the defendant. The defendant accepted it but did not pay for it. The high court affirmed the lower court's dismissal on the grounds that the artist breached the trust and could get no property right in the painting. The court discussed at length the new, at that time,⁷⁶ right of privacy. They quote from the famous New York case⁷⁷ denying the right, yet they also quote at length from the leading case recognizing the doctrine,⁷⁸ and state it is, "a very able and exhaustive opinion."⁷⁹ The court says the case does not turn on privacy, but on contractual relations. Actually privacy was not the focal point of the action.⁸⁰ If the artist had sold the painting to someone else, and the defendant had brought action to prevent the sale or ask for damages, then privacy would have been the pivotal issue. But such was not the case. But the case is important because it illustrates that the Wisconsin court was well aware of the doctrine and its ramifications; and if it did not expressly sanction it, it not being the issue anyway, it gave it at least tacit approval. Justice Dodge, in his dissent, indicates that he realized this and is afraid of it by stating, ". . . the marked prominence given to quotation . . . [advocating the doctrine] may suggest approval of the views

⁷⁴ The trial court judge used some interesting language when he charged the jury. He said:

. . . but there is a possibility that he may transcend the legal limits in the use of means to induce the payment of a debt . . . if he should go up and post notices on the corners of the streets in the vicinity of the residence of his debtor that he owed him a debt and didn't pay it . . . he would transcend his legal right. . . . He would not have a right to print circulars and mail them to all the neighbors around, notifying them that this man was his debtor and would not pay. The law would not recognize a right to do such a thing as that.

The Judevine case, *infra* page 519 involves just such a situation as is mentioned here, but the court would grant no relief.

⁷⁵ Klug v. Sheriffs, 129 Wis. 468, 109 N.W. 656 (1906).

⁷⁶ The Pavesich case, *infra* note 78, was decided in 1905.

⁷⁷ Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

⁷⁸ Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 68 (1905).

⁷⁹ Klug v. Sheriffs, 129 Wis. 468, 471, 109 N.W. 656, 657 (1906).

⁸⁰ What rights the artist may have had to the fruits of his artistic efforts within the doctrine were lost when he gave the portrait to the defendant since that was a waiver of the right on his part.

quoted as to existence of any legal right of privacy."⁸¹ He then states that the court did not approve it, nor would he concur if it had. Yet the implication in the decision remains. There is no clear-cut repudiation of the doctrine.

In the famous *Schultz* case⁸² the plaintiff was a witness in a case involving the defendant insurance company. The company hired a detective agency to "rough shadow" the plaintiff for the alleged purpose of making him stay in town. The court says, "Rough shadowing means that those engaged in so doing are not obliged to conceal the fact that the subject of surveillance is being shadowed or followed, but it is done so openly that the subject or the general public or both may know of it."⁸³ The detectives followed him closely and made it appear to the public that he was a criminal or a suspicious person. In the brief for the plaintiff the right of privacy is mentioned, but the court does not base its decision upon that ground. Instead the court seems to justify its holding for the plaintiff on the grounds of libel, stating:

It must be conceded that to publicly proclaim one suspect, to publicly charge that he deserves watching and that he is being followed and watched, does subject him to public disrepute, ridicule, and contempt. If so, the acts here complained of are the analogue of libel except the writing, printing, and passing around. But these elements are supplied by the public, notorious, and continued character of surveillance.⁸⁴

So the court holds that what the detectives did was a tortious act, and it appears that they believe the act was libel. One text authority⁸⁵ places the case with those involving the right of privacy. One major difference between libel and right of privacy is that truth is a defense in the former⁸⁶ but not the latter. Therefore, if the court bases its decision upon libel, one should be able to assume that truth would be a defense. Admittedly, *Schultz* had a bad reputation already, having been convicted of larceny, and having been known to be a heavy drinker; so if the shadowing held him up to disrepute, his character, to those who knew him, substantiated it. Therefore, truth would be no defense if we accept the court's analogy of the case as a kind of picture, and that picture standing in lieu of publication, since the "picture" was a true one. Again, a case can be made out using libel if we use the concept liberally, but the real legal right invaded is that of privacy.

⁸¹ Klug v. Sheriffs, 129 Wis. 468, 476, 109 N.W. 656, 659 (1906).

⁸² *Schultz v. Frankfort M. and A. and P. G. Ins. Co.*, 151 Wis. 537, 139 N.W. 386 (1913).

⁸³ *Id.* at 540, 139 N.W. at 388.

⁸⁴ *Id.* at 545, 139 N.W. at 390.

⁸⁵ PROSSER, *HANDBOOK OF THE LAW OF TORTS* 1055 (1941).

⁸⁶ *Id.* at 853.

The *Judevine* case⁸⁷ is the most important case in Wisconsin on the right of privacy. The facts of the case are relatively simple; they involved debt collecting as in *Muetze v. Tuteur*.⁸⁸ The defendant sent out handbills announcing that the plaintiff's account of \$4.32 was for sale to the highest bidder. Among other grounds, including several statutes, plaintiff sought to get relief on the right of privacy. In very plain language the court denied such a right exists in Wisconsin.⁸⁹ They discuss the history of the doctrine, cite the leading cases, then state:

We are of opinion, especially in view of the fact that truth is held no defense to the action where it has been recognized. . . , that if a right of action for violation of the right of privacy by such acts as are here involved is to be created, it is more fitting that it be created by the legislature by declaring unlawful such acts as it deems an unwarranted infringement of that right.⁹⁰

Another method the plaintiff attempted to use in order to make the defendant liable involved two statutes. He quoted Sections 340.45 and 343.681.⁹¹ The former is not a basis for liability because, ". . . reference to the statute discloses that the injury covered is to 'the person, property, business, profession, calling or trade.'"⁹² They say that injury to reputation does not come under the statute. The court goes on to say, "Injury to credit would be if it were in connec-

⁸⁷ *Judevine v. Benzies-Montanye Fuel and Warehouse Co.*, 222 Wis. 512, 269 N.W. 295 (1936).

⁸⁸ *Supra* p. 516.

⁸⁹ The decision was followed in *State ex rel. Distenfeld v. Neelen*, 255 Wis. 214, 38 N.W.2d 703 (1949). The case held that a witness who had testified in a John Doe hearing on the promise of secrecy had no right of action for invasion of the right of privacy against parties presenting, in a liquor license hearing before the common council of a city, evidence taken in the John Doe hearing.

⁹⁰ *Judevine v. Benzies-Montanye Fuel and Warehouse Co.*, 222 Wis. 512, 269 N.W. 295, 302 (1936).

⁹¹ Wis. STAT. § 340.45 (1935):

Any person who shall, either verbally or by any written or printed communication, maliciously threaten to accuse another of any crime or offense, or to do any injury to the person, property, business, profession, calling or trade, or the profits and income of any business, profession, calling or trade of another, with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will or omit to do any lawful act, shall be punished by imprisonment in the state prison not more than two years nor less than one year or by fine not exceeding five hundred dollars nor less than one hundred dollars. Wis. STAT. § 343.681 (1935):

Any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another/in his reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by a fine not exceeding five hundred dollars.

⁹² *Judevine v. Benzies-Montanye Fuel and Warehouse Co.*, 222 Wis. 512, 269 N.W. 295, 300 (1936).

tion with one's business, but injury to the plaintiff's business as a contractor or his trade as a carpenter is not alleged."⁹³ The implication is that if he did allege it, he might have recovered.

With regard to the second statute cited, Section 345.681, the court states that a conspiracy is essential. The court then goes on to say that since it was not alleged, the act did not impose liability for a tort. In other words, if the plaintiff had alleged and proved a conspiracy, which would not have been difficult to do,⁹⁴ he could have recovered. Therefore, a technicality possibly denied plaintiff recovery.

Thus Wisconsin recognizes no right of privacy at all, except in those few cases where the right can be disguised effectively as libel.

IV. CONCLUSION

It is obvious that the text writers and courts that have faced the problem overwhelmingly have approved the right of privacy. The law, while relatively new, is beginning to be molded into a distinct shape that is as well-defined as tort law can be. No matter how explicit a statute on the subject might be, there will always be those shady areas where the court will have to use interpretation. Using the device of public interest and public personages, the courts have given relief sparingly, thus eliminating many of the absurd cases that have arisen. There are rights that need protection, and we must trust the courts to use judgment and foresight in applying the doctrine.

If Wisconsin is to retain its tradition of progress in the field of law, it cannot allow its tort law to become static. In order to prevent tort law from being stagnant in a complex, changing society that is more and more impersonal, that often forgets the element of human emotion, feeling and dignity, the right of privacy is necessary. It is recommended that Wisconsin recognize the right of privacy.

JUSTIN SWEET

⁹³ *Judevine v. Benzies-Montanye Fuel and Warehouse Co.*, 222 Wis. 512, 523, 269 N.W. at 300, 301.

⁹⁴ Powers Service, a collection agency, undertook with the defendant to get the money from the plaintiff.