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## TORTS - RIGHT OF PRIVACY - MATTERS OF GENERAL OR PUBLIC INTEREST

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TORTS — RIGHT OF PRIVACY — MATTERS OF GENERAL OR PUBLIC INTEREST — Plaintiff had been a famous child prodigy in 1910. For twenty-five years he had lived a secluded life. Then in a recent article in the "New Yorker" magazine his private life was completely exposed. Plaintiff sued, alleging a violation of his common-law right of privacy. *Held*, that the complaint should be dismissed on the ground that the public has a legitimate interest in "any person who has achieved, or has had thrust upon him, the questionable and indefinite status of a 'public figure.'" *Sidis v. F-R Publishing Corp.*, (C. C. A. 2d, 1940) 113 F. (2d) 806.<sup>1</sup>

The right of privacy was first advocated by Professors Warren and Brandeis.<sup>2</sup> Since the conception of the right by those authors, it has been widely discussed in legal periodicals<sup>3</sup> and has been the subject of conflicting judicial decisions.<sup>4</sup> It has received its most complete recognition in the courts of Georgia and Kentucky.<sup>5</sup> In recent years there has been a comparative increase in the volume of litigation involving the point.<sup>6</sup> At the present time the protection of the right of privacy can be said to be a doctrine well-established in a number of jurisdic-

<sup>1</sup> Not all jurisdictions recognize the right of privacy. Plaintiff sued in a federal court and under the mandate of *Erie R. R. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817 (1937), the court was bound to determine the case according to the law of the state in which it sat.

<sup>2</sup> Warren and Brandeis, "The Right of Privacy," 4 HARV. L. REV. 193 (1890).

<sup>3</sup> Green, "The Right of Privacy," 27 ILL. L. REV. 237 (1932); Moreland, "The Right of Privacy To-Day," 19 KY. L. J. 101 (1931); Lisle, "The Right of Privacy (A Contra View)," 19 KY. L. J. 137 (1931); Larremore, "The Law of Privacy," 12 COL. L. REV. 693 (1912); Harper and McNeely, "A Re-Examination of the Basis of Liability for Emotional Distress," 1938 WIS. L. REV. 426 at 458; Ragland, "The Right of Privacy," 17 KY. L. J. 85 (1929). The article last cited contains an excellent review of the cases prior to its date of publication.

<sup>4</sup> Green, "The Right of Privacy," 27 ILL. L. REV. 237 (1932).

<sup>5</sup> *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1905); *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S. E. 194 (1930); *Tanner-Brice Co. v. Sims*, 174 Ga. 13, 161 S. E. 819 (1932); *Goodyear Tire & Rubber Co. v. Vandergriff*, 52 Ga. App. 662, 184 S. E. 452 (1936); *Atlanta Coca-Cola Bottling Co. v. McDaniel*, 60 Ga. App. 92, 2 N. E. (2d) 810 (1939); *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364 (1909); *Douglas v. Stokes*, 149 Ky. 506, 149 S. W. 849 (1912); *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967 (1927); *Rhodes v. Graham*, 238 Ky. 225, 37 S. W. (2d) 46 (1931); *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S. W. (2d) 972 (1929). A possible explanation for the whole-hearted acceptance of the doctrine by these two courts is found in the fact that both states provide by statute that truth is a full defense in an action for libel. Ga. Code Ann. (1937), § 105-708; Ky. Civ. Code (Carroll, 1938), § 124. This explanation is deprived of weight, however, by the fact that even without the statute plaintiff in an action for libel would have to prove special damage. 1 SO. CAL. L. REV. 293 (1928).

<sup>6</sup> *Sweenek v. Pathe News, Inc.*, (D. C. N. Y. 1936) 16 F. Supp. 746; *Goodyear Tire & Rubber Co. v. Vandergriff*, 52 Ga. App. 662, 184 S. E. 452 (1936); *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S. E. 55 (1938); *Banks v. King Features Syndicate, Inc.*, (D. C. N. Y. 1939) 30 F. Supp. 352; *Mau v. Rio Grande Oil Co., Inc.*, (D. C. Cal. 1939) 28 F. Supp. 845; *Atlanta Coca-Cola Bottling Co. v. McDaniel*, 60 Ga. App. 92, 2 S. E. (2d) 810 (1939); *Themo v. New England*

tions.<sup>7</sup> The courts show an inclination, however, to grant relief only when there has been an exploitation of plaintiff's personality to the direct economic advantage of the defendant. Admitting the fact that Professors Warren and Brandeis made no mention of such a factor, and that the decided cases do not discuss economic advantage to the defendant as a factor bearing on his liability, yet the decisions seem to lend themselves to a rationalization on this basis.<sup>8</sup> Apparently in only three cases has recovery been allowed in the absence of any economic exploitation of the plaintiff's privacy: where the defendant gave publicity to an overdue account owed to defendant by plaintiff;<sup>9</sup> where defendant tapped a telephone wire and listened to conversations by plaintiff and members of plaintiff's family;<sup>10</sup> and where defendant gathered evidence concerning a pending suit by plaintiff against defendant by planting a microphone in plaintiff's hospital room.<sup>11</sup> In the principal case the court, in refusing to grant relief

Newspaper Publishing Co., (Mass. 1940) 27 N. E. (2d) 753; *Metter v. Los Angeles Examiner*, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939); *Clayman v. Bernstein*, (Phil. Com. Pl. 1939) 102 PHIL. LEG. INTEL. 1:1 (Feb. 7, 1940); *Harlow v. Buno Co., Inc.*, (Pa. Com. Pl. 1939) 36 D. & C. 101. The two cases last cited, although they are lower court decisions, are the first Pennsylvania cases to consider the right of privacy. Both of them admitted the existence of the right. However, the Buno case sets forth a unique requisite for the protection of the right, viz: protection is afforded only against intentional invasions of privacy. Professors Warren and Brandeis failed to advocate such a requisite. Their only reference to this point which could even be considered analogous was a statement that the absence of malice on the part of the defendant should be immaterial. See Warren and Brandeis, "The Right of Privacy," 4 HARV. L. REV. 193 (1890).

<sup>7</sup> *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1905); *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364 (1909); *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S. E. 55 (1938); *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905); *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931). In several other cases which are generally cited as sustaining a right of privacy, the courts actually allowed recovery or an injunction on other grounds: *Kunz v. Allen*, 102 Kan. 883, 172 P. 532 (1918), mental anguish; *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076 (1911), property right in a photograph; *Edison v. Edison Polyform & Mfg. Co.*, 73 N. J. Eq. 136, 67 A. 392 (1907), fraud upon the public. In *Smith v. Suratt*, 7 Alaska 416 (1926), the court did not decide whether the right existed, but merely labeled the subject matter "news."

<sup>8</sup> In New York, where the right of privacy was denied at common law [*Roberson v. Rochester Folding-Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902)], a statute was enacted giving a cause of action where a person's name, picture, or portrait is used for advertising purposes or for purposes of trade. N. Y. Civil Rights Law (McKinney, 1916), §§ 50, 51. It is to be noted that this statute protects the right of privacy against economic exploitation only.

<sup>9</sup> *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967 (1927). The circumstances of the case were such as would have given rise to a cause of action in libel save for the Kentucky statute referred to in note 5, supra.

<sup>10</sup> *Rhodes v. Graham*, 238 Ky. 225, 37 S. W. (2d) 46 (1931).

<sup>11</sup> *Atlanta Coca-Cola Bottling Co. v. McDaniel*, 60 Ga. App. 92, 2 S. E. (2d) 810 (1939). A possible explanation for these three cases is to be found in the fact that the Georgia and Kentucky courts have led in the development of the law of privacy (see note 5, supra), and are, perhaps, one step ahead of their contemporaries.

where the matter published is of public interest as "news," follows a well-recognized exception to the doctrine of protection of the right of privacy.<sup>12</sup> To bring the case within the exception, the court virtually decides that once a person becomes a public figure he remains a public figure for all time. This holding seems to be an unrealistic view. In our modern civilization many persons, such as criminals, stage and screen stars, and others who were in the public eye in past years are entirely forgotten today. If, however, we accept the court's premise, its conclusion is open to criticism. It would seem that any public character should be permitted to withhold from public scrutiny the personal and intimate aspects of his daily life, especially since the only interest which any one has in them is based on idle curiosity.<sup>13</sup>

<sup>12</sup> Warren and Brandeis, "The Right of Privacy," 4 HARV. L. REV. 193 at 214 (1890), said: "The right to privacy does not prohibit any publication of matter which is of public or general interest." Accord: *Themo v. New England Newspaper Publishing Co.*, (Mass. 1940) 27 N. E. (2d) 753; *Metter v. Los Angeles Examiner*, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939); *Sweenek v. Pathe News, Inc.*, (D. C. N. Y. 1936) 16 F. Supp. 746; *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S. W. (2d) 972 (1929); *Corliss v. E. W. Walker Co.*, (C. C. Mass. 1893) 57 F. 434, *affd.* 64 F. 280 (1894); *Smith v. Suratt*, 7 Alaska 416 (1926).

<sup>13</sup> "... the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual . . . and have no legitimate relation to or bearing upon any act done by him in a public or quasi-public capacity." Warren and Brandeis, "The Right of Privacy," 4 HARV. L. REV. 193 at 216 (1890).

The principal case has also been noted in 20 BOST. UNIV. L. REV. 760 (1940); 89 UNIV. PA. L. REV. 251 (1940); 29 CAL. L. REV. 87 (1940); 27 VA. L. REV. 234 (1940).