



1967

Kentucky's Invasion of Privacy Tort--A Reappraisal

W. Thomas Bunch
Anggelis & Vimont

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [State and Local Government Law Commons](#), and the [Torts Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Bunch, W. Thomas (1967) "Kentucky's Invasion of Privacy Tort--A Reappraisal," *Kentucky Law Journal*: Vol. 56 : Iss. 2 , Article 2.
Available at: <https://uknowledge.uky.edu/klj/vol56/iss2/2>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Kentucky's Invasion of Privacy Tort--A Reappraisal

W. THOMAS BUNCH*

I. INTRODUCTION

The Invasion of Privacy Tort is a unique development in the annals of Anglo-American jurisprudence. In the nineteenth century this country experienced a gigantic population expansion, a growing urbanization, and a rapidly increasing industrialization. With these growths came increasing social interrelationships among individuals. Moreover, these individuals were more refined in culture, morality, mores, and social conduct. Thus, we have sophisticated individuals placed in a situation that makes it difficult to keep their private lives their own.

The common law had no legal concept which could protect an invasion of an individual's privacy, and, most certainly, alleged violations of privacy were not founded upon the recognition of privacy as a legal "right." Early courts, however, did assert some authority over certain violations, but their theory was predicated upon some right of property, breach of trust or confidence, or upon the laws of libel and slander.¹ Hence, a man who violated another's privacy could be held liable for damages as a trespasser, or a man who revealed another's business or family secrets to third persons might be liable for breach of some contract right, or a man who published libelous or slanderous material could be held liable for defamation.²

However, the scope of these remedies was not sufficient to afford adequate protection for the many invasions of privacy which could and did occur. A man could, for example, stand on a public thoroughfare and utter nondefamatory remarks about another's personal life, causing damage to the other, without affording the

* Member of the Kentucky Bar; LL.B., University of Kentucky, 1964; Member of the firm of Angelis & Vimont, Lexington, Kentucky.

¹ See note 14 *infra*, and accompanying text.

² See note 29 *infra*, and accompanying text.

damaged individual a remedy in contract or tort.³ These shortcomings were recognized in 1890 in a law journal article by Warren and Brandeis, wherein they urged that every individual had an enforceable right to live his life without the intrusion of others upon his private affairs and without unwarranted publicity about matters in which the public had no legitimate interest.⁴ This article was treated by many legal scholars as creating a new concept in common law and has been noted by later scholars as the "birth" of the privacy tort as an individual right.⁵

II. EARLY CASES

The Invasion of Privacy Doctrine developed in Kentucky case law before publication of the Warren and Brandeis article. *Grigsby v. Breckinridge*⁶ is perhaps the first example of what is today denominated the Invasion of Privacy Tort. There, a husband sought to prevent the publication of certain letters that had been written to his deceased wife. Although a majority of the Court held that publication could not be prohibited, the opinion intimated that if the petitioner claimed that the publication would affect the memory of his wife or in any way subject him to a loss or annoyance, he might have a remedy. The Court made no attempt to suggest what that remedy might be.

The dissenting judge seemed to approach the modern doctrine as he wrote:

As I regard the sacred, secret privacy of the family relation and its security against the prying eye of the curious, I dissent from the recognition of any legal rule which will expose these sacred relations and private affairs to the gaze of the world or outside communities through the agency of either husband or wife.⁷

³ *Id.* This example was created to exemplify the juxtaposition of a violated privacy right vis-a-vis wrongs recognized at common law, *i.e.*, if a man did not violate a common law right or commit a crime, but did violate another's privacy, the harmed person had no legal redress.

⁴ Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890). For adoption of this article by the courts, *see, e.g.*, *Sidis v. F-R Publishing Co.*, 113 F.2d 806 (2d Cir. 1940); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D.C. Minn. 1948).

⁵ Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 363 (1914).

⁶ 65 Ky. (2 Bush) 480 (1867); *see* Moreland, *The Right of Privacy Today*, 19 Ky. L. J. 101 (1931); Ragland, *The Right of Privacy*, 17 Ky. L. J. 85 (1929). *Contra*, Lisle, *The Right of Privacy (A Contra View)*, 19 Ky. L. J. 137 (1931).

⁷ *Grigsby v. Breckinridge*, 65 Ky. (2 Bush) 480 (1867).

The majority opinion reflected the serious import given to property law during that period and illustrated the paucity of legal protection given to personal rights. However, the dissenting opinion exemplified the trend toward recognition of privacy as a legal right.

In another early Kentucky case reflecting this trend, *Douglas v. Stokes*,⁸ a photographer was employed by the parents of a set of Siamese twins, born dead, to make twelve photographs and no more. The photographer manufactured additional copies and obtained a copyright on them from the Federal Government. The parents filed suit claiming that publication of the photographs caused them humiliation and wounded their feelings and sensibilities. The Court allowed relief on the basis of an English case, followed uniformly in this country,⁹ which assertedly held that the act of selling or exposing extra copies of a photograph was an implied or expressed breach of contract.¹⁰ The photographer had received contractual authority to make the photographs from the parents, but he breached the contract when he exceeded that authority. The Court struck aside any objections to its decision by declaring that a man could recover for injury or indignity to his body, "and it would be a reproach to the law if physical injuries might be recovered for, and not those incorporeal injuries which cause much greater suffering and humiliation."¹¹

Douglas involved two dead bodies, and the law had long held, without cavil, that no property right existed in a dead body. However, the true but hidden issue involved an act which caused injury or harm to the parents' feelings and sensibilities; there was no question of contractual rights. Recovery for harm to feelings and sensibilities, therefore, can be maintained within the context of this case on the grounds of unwarranted invasion of their right of privacy. Although the case can only be rationalized in this manner, there was no mention of privacy as an individual right.

*Foster-Milburn v. Chinn*¹² likewise can be rationalized by to-

⁸ 149 Ky. 506, 149 S.W. 849 (1912).

⁹ *Pollard v. Photographing Co.*, 40 Ch. D. 345 (1888).

¹⁰ The Court cited no Kentucky authority for this proposition, but it found support in other jurisdictions. *See, e.g.*, *Press Publishing Co. v. Falk*, 59 F. 324 (S.D.N.Y. 1894); *Corliss v. Waller*, 57 F. 434 (1st Cir. 1893); *Moore v. Rugg*, 44 Minn. 23, 46 N.W. 141 (1890); *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911).

¹¹ *Douglas v. Stokes*, 149 Ky. 506, 509, 149 S.W. 849, 850 (1912).

¹² 134 Ky. 424, 120 S.W. 364 (1909).

day's invasion of privacy doctrine; this case, however, was also decided under a theory that did not recognize privacy as a "right" or a common law cause of action. There the appellant used the appellee's name and recommendation in advertising the appellant's patent medicine. The appellee had never given such a recommendation nor had he authorized the company's use of his name. Damages were recovered at trial for humiliation, and the Court of Appeals affirmed on the grounds that there was an actual defamation involved in the case. Although there is an important difference between verbal slander and a written or printed publication, words which bring a person disgrace, ridicule, odium, or contempt present a question of fact for a jury and require the proof of damages. The Court, however, used words quite unusual for the year in which the opinion was written:

While there is some conflict in the authorities, we concur with those holding that a person is entitled to a right of privacy as to his picture, and that the publication of a picture of a person without his consent, as a part of an advertisement for the purpose of exploiting the publisher's business, is a violation of the right of privacy, and entitles him to recover without proof of special damages.¹³

The Court went on to say that the public is defrauded by the publication of unauthentic endorsements by public figures. Thus, the Court, although on the verge of deciding this case squarely on the issue of the right of privacy, ruled, in effect, that the case was more in the area of defamation or fraud than invasion of privacy.

A later Kentucky decision broadened the "doctrine" of privacy without even using the term in its opinion. In *Thompson v. Adelsburg & Berman, Inc.*,¹⁴ the defendant was a bill collector who left numerous notes at the plaintiff's home, some of which were positioned so that passersby could read them.¹⁵ The notes read: "Please take notice. OUR COLLECTOR. Our collector was here for payment. THE UNION CLOTHING STORE." The plaintiff filed suit for libel. The Court said that, to be libelous per se, written or printed words need not impute moral turpitude, in-

¹³ *Id.* at 432, 120 S.W. at 366.

¹⁴ 181 Ky. 487, 205 S.W. 558 (1918).

¹⁵ These notes were placed in such locations—apertures and crevices of the front door, windows, and on a stick in the front yard—that they could be seen by passersby.

fectious disease, unfitness for office or employment, or be prejudicial to a person in his profession or trade or tend to discredit him. It was sufficient that the words had the natural and reasonable tendency to disgrace or degrade him, or to render him odious, ridiculous, or contemptible in the estimation of the public. Since these notes tended to disgrace the plaintiff in public estimation, they were found to be libelous per se.

Subsequent decisions have also held that advertising that a debt was due was an invasion of privacy and actionable.¹⁶ *Thompson*, however, turned on the Court's holding of libel per se. However, the plaintiff admitted owing the debt, and truth is an absolute defense in a libel action. Hence, the only reasonable rationale of the Court's holding was that they were recognizing privacy as a right *sub silentio*.

Thus, the conclusion can be reached that Kentucky did have a limited recognition of a privacy doctrine prior to the Warren-Brandeis article, under and only under certain conditions: the conduct complained of had to be intolerable or the damages had to be obviously clear. The legal concepts could be earmarked under some historical or common law theory.¹⁷

III. DEVELOPMENT OF THE TORT

In 1927, however, the Court of Appeals decided *Brents v. Morgan*,¹⁸ wherein the Warren-Brandeis article was incorporated

¹⁶ The Kentucky Court reached the same result in a later case with similar facts, *Lucas v. Moskins Stores*, 262 S.W.2d 679 (Ky. 1953). With regard to attempts to collect debts, the law seems to be in accord throughout the various jurisdictions. See, e.g., *Davis v. General Finance & Thrift Corp.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950); *Patton v. Jacobs*, 118 Ind. App. 358, 78 N.E.2d 789 (1948); *Yoder v. Smith*, 253 Iowa 505, 112 N.W.2d 862 (1962); *Pack v. Wise*, 15 So. 2d 909 (La. App. 1963); *Lewis v. Physicians & Dentists Credit Bureau, Inc.*, 27 Wash. 2d 67, 177 P.2d 896 (1947).

¹⁷ *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912), is illustrative of the growing recognition of privacy as a right and a violation thereof as a tort. The decision further developed this trend, but it did not signify recognition of a broad, general, and pure right of privacy.

¹⁸ 221 Ky. 765, 299 S.W. 967 (1927). This case, and later Kentucky cases, have seemingly avoided pinpointing the derivation of the right of privacy. However, courts in other jurisdictions have said that the right had its foundations in, and was derived from, natural law. See, e.g., *Zimmerman v. Wilson*, 81 F.2d 847 (3rd Cir. 1936); *Voelker v. Tyndall*, 226 Ind. 43, 75 N.E.2d 548 (1947). For the proposition that this right is therefore immutable, absolute, and above the power of authority to alter or abolish it, see *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 (1945), noted in *Annot.*, 168 A.L.R. 446, 448 (1947).

virtually *in toto* into case law. Here, Brents placed a placard in his show window, announcing that Dr. Morgan, a veterinarian, owed him money, and that if promises would pay an account, this one would have been settled long ago. The sign went on to say that the debt would be advertised until paid. The placard was five feet by eight feet in dimension and was placed in a conspicuous manner facing the street from Brents' garage business.

Dr. Morgan filed suit, alleging that the sign caused him great mental pain, humiliation, and mortification, that it tended to expose him to public contempt, ridicule, adersion, and disgrace, and caused an evil opinion of him in the minds of the tradesmen and the public generally. Brents demurred on the grounds that all the statements contained in the placard were true, and that since there was no allegation in Morgan's petition that these statements were false, the petition failed to state a cause of action since truth was an absolute defense. The demurrer was overruled, and the case went to trial, resulting in a one thousand dollar verdict for the plaintiff.

On appeal, Morgan admitted that truth was a defense to libel, but he insisted that the cause of action, even if not good in libel, should nevertheless be sustained by the Court. He argued that the publication was an invasion of his rights and constituted a malicious wrong, and that there should be some remedy. The Court considered the Warren-Brandeis article¹⁹ and its suggested rules and exceptions, reviewed *Grisby v. Breckinridge*,²⁰ *Douglas v. Stokes*,²¹ and *Foster-Milburn v. Chinn*.²² It then ruled:

We shall not attempt to bring together in this opinion a citation of the opinions of other Courts on this question. We are content to hold that there is a right of privacy and that the unwarranted invasion of such right may be made the subject of an action in tort to recover damages from such unwarranted invasion. The legal path which is written at the entrance "privacy" or "right of privacy" is new and by no means well trodden, and for that reason, we venture upon it with some hesitancy and with all safeguards.²³

¹⁹ Warren & Brandeis, *supra* note 2.

²⁰ 65 Ky. (2 Bush) 480 (1867).

²¹ 149 Ky. 506, 149 S.W. 849 (1912).

²² 134 Ky. 424, 120 S.W. 364 (1909).

²³ *Brents v. Morgan*, 221 Ky. 765, 774, 299 S.W. 967, 971 (1927).

In general terms, *Brents* declares that the right of privacy is the right to be let alone. It envelopes the right to be free from unwarranted publicity and the right to live without unwarranted interference regarding matters with which the public is not necessarily concerned. A violation of this right is a tort, and the tortfeasor is responsible for damages to the injured party. The tort is, however, subject to certain exceptions: (1) the publication of matter which is in the public or general interest is not prohibited;²⁴ (2) the tort does not prohibit 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 rules of libel and slander;²⁵ (3) there is no violation if the invasion is made orally;²⁶ (4) the right of privacy ceases upon the publication of facts by the individual or with his consent.²⁷ The truth of the matter published or the absence of malice does not afford a defense in dealing with an unwarranted invasion of privacy.²⁸

The right of privacy concerns a person's right to maintain his privacy and to live an individual life. The right protected is analogous to the more strongly protected interest to be free from unwanted intentional physical contacts by others, *e.g.*, assault and battery. In other respects, it is similar to a legal interest in reputation, which is the basis for defamation, since both rights have a definite relation to the opinions of third persons in the injury resulting from humiliation, ridicule, mortification, disgrace, mental pain and suffering, and others.²⁹ Privacy, however, is relative to the customs of the time and place, to the habits and occupation of the injured party, and to the events surrounding his life. One who desires to be a recluse must nevertheless be subject to the incidents of ordinary community life; one who exposes a portion of his

²⁴ See, *e.g.*, *Sellers v. Henry*, 329 S.W.2d 214 (Ky. 1959), wherein the Court of Appeals remanded for a factual determination of whether a photograph, alleged to have been an invasion of the plaintiff's privacy, was a matter of public interest.

²⁵ See the discussion, *infra*, concerning the close relationship of defamation and privacy.

²⁶ See, *e.g.*, *Horstman v. Newman*, 291 S.W.2d 567 (Ky. 1956); *Gregory v. Bryan-Hunt Co.*, 295 Ky. 345, 174 S.W.2d 510 (1943). Both cases were dismissed in the trial court on the grounds that the alleged invasions were oral.

²⁷ There is no Kentucky case involving self-publication or consent.

²⁸ *Brents v. Morgan*, 221 Ky. 765, 770-71, 299 S.W. 967, 969-70 (1927).

²⁹ See, *e.g.*, *Thompson v. Adelburg & Berman, Inc.*, 181 Ky. 487, 205 S.W. 558 (1918).

private life to the public, therefore, cannot complain of publicity,³⁰ for he waives certain rights of privacy. An elected official cannot complain of photographs of himself or his family; a writer cannot complain of critical reviews of his literary works. Defamation and fair comment are the boundaries to the privacy of such persons.³¹

The many interests in privacy may be described as "conventional, that is, cultivated or acquired."³² All are dependent upon standards of decent conduct, and social and aesthetic values. Thus, manners and morals become the bases of refinements in the applications of social interrelationships between members of a civilization. As the civilization becomes more complex, as has America in the last century, new interests emerge and new values evolve, many of which concern privacy.

The evolution of the interest in protecting the right of privacy is best described as follows:

Throughout their growth the courts have recognized the cultivation of the interests in privacy slowly, at first, only by protecting them when they were associated with some other long recognized interest and in so doing, creating a type of parasitic damages.³³

Many early courts, however, were apt to deny the existence of any right of privacy because of the purely mental character of the damages claimed, the lack of explicit common law precedent, the vast amount of litigation that might be expected to result, the problem of distinguishing public and private personages, and the fear of limiting the freedoms of speech and press.³⁴ Other courts simply rejected the entire concept.³⁵ Often, relief was given for intrusion upon a privacy interest, but justification rested on other legal theories. The most common rationalization was the trespass

³⁰ See, e.g., *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948).

³¹ There are no invasion of privacy cases in Kentucky involving persons of public interest and their legally implied incapacity to complain of publicity, but such cases have arisen in other jurisdictions, particularly New York and California. See Annot., 14 A.L.R.2d 750 (1950).

³² I F. HARPER & F. JAMES, *THE LAW OF TORTS* § 9.5 (1956).

³³ *Id.*

³⁴ See, e.g., *Roberson v. Rochester Folding-Box Co.*, 171 N.Y. 538, 64 N.E. 442 (Ct. App. 1902).

³⁵ See, e.g., *Atkinson v. John E. Doherty & Co.*, 121 Mich. 372, 80 N.W. 285 (1899).

to land theory. Thus, where a defendant's conduct affected the plaintiff's property rights in some manner, full redress was allowed despite the fact that the plaintiff's proprietary interest may have been trivial.³⁶ These courts seemed to look for a common law rationalization upon which to predicate recovery for a violation which was actually against the plaintiff's interest in privacy. If a man entered upon another's property and insulted the owner, the latter's recovery for damages was predicated upon a technical trespass,³⁷ whereas the true interest violated was his right to be left alone.

Another theoretical subterfuge which early courts used to justify the protection of privacy interests was assault and battery. Abusive or insulting language, indecent proposals, or behavior causing ridicule and humiliation were redressed by allowing the injured party to recover on a technical theory of assault. If an unreasonable offensive touching or touching in anger occurred, then recovery was permitted under the technical theory of a battery. Here again, it is obvious, at least in retrospect, that the gravamen of the wrong was the insult to one's personal dignity and self-respect, and the damages were ridicule, humiliation, and embarrassment; these are the elements of the privacy interest, not the verbal threat or physical touching.

When the interest of privacy, *vis-à-vis* the courts' treatments of the factual situations presented in these earlier cases, are viewed in retrospect, the inescapable conclusion is that the distended theories were the products of changing times and the needs of the law to adjust with those times. The idea or doctrine of privacy, being a new concept developed during a formative period in the technological, sociological, and jurisprudential areas, was consistently applied and adapted to a great number of varying situations,

which had in common only [an] unwarranted intrusion upon an individual's personal affairs. It became, in a sense, a catch-all for a great number of cases in which mental suffering or other emotional distress was the primary injury sustained and for which no other substantive theory for relief was available.³⁸

³⁶ F. HARPER & F. JAMES, *supra* note 32.

³⁷ *Id.*

³⁸ *Id.* at § 9.6.

The result has solidified today into a tort, broadly denoted as the "right of privacy."³⁹ Prosser classifies the tort as containing four separate, distinct forms based on different elements: 1) "intrusion upon the plaintiff's physical solitude or seclusion";⁴⁰ 2) "public disclosure of private facts";⁴¹ 3) "publicity which places the plaintiff in a false light in the public eye";⁴² 4) "appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness."⁴³ Prosser is careful to point out that the four forms are distinct and contain different elements.

[T]he first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest.⁴⁴

Despite the conflicting theories of justification, the invasion of privacy tort is here to stay. Prosser reports that thirty-one states have judicially adopted some form of recognition with a probability of recognition in four more states and legislative recognition in some form in four states; only four states explicitly reject it.⁴⁵

Early Kentucky courts wrestled with the sham theories noted above in the *Grigsby*, *Douglas*, and *Foster-Milburn* decisions and authorized recovery of damages where the crux of the wrong was insult to dignity and self-respect without explicit recognition of the right of privacy as a valid cause of action. *Douglas* was decided fifteen years prior to the total embodiment of the Warren-Brandeis theory in *Brents*, and it is at least illustrative of the early common law "recognition" of privacy as a right and a violation thereof as a tort. This was accomplished through the hit-or-miss technique of "doing justice" by finding some technical legal peg upon which to predicate liability.

³⁹ Cf. RESTATEMENT OF TORTS § 867 (1939): "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."

⁴⁰ W. PROSSER, LAW OF TORTS 833 (3d ed. 1964).

⁴¹ *Id.* at 834.

⁴² *Id.* at 837.

⁴³ *Id.* at 839.

⁴⁴ *Id.* at 843.

⁴⁵ *Id.* at 831-32.

Brents relied upon these three cases as appropriate evidence that Kentucky law possessed an enforceable right of privacy and then reconciled them into a judicial recognition of that right, rationalizing by adopting the Warren-Brandeis explanation. The latter half of the opinion is a virtual rewrite of the law journal article. However, the article and the opinion were phrased in broad generalities and definitive propositions without explicit justifications of theory. Absent any constructive and explicit theory of the tort, the Kentucky Court has subsequently been forced to apply these generalities to widely varied factual situations. Further, the Court has failed to evolve a detailed, complete, practical working rule to determine whether a violation has occurred.⁴⁶ Rather, it has proceeded on an ad hoc basis, ruling that under the particular circumstances presented, a person's privacy has or has not been invaded. The absence of a clear and definitive statement of the rule temporizes or lessens the trial court's ability, in a given case, to decide the applicable law and render valid, usable instructions when the procedure requires a submission to the jury. Moreover, the Court of Appeals becomes an arbiter of the facts in almost every case presented to it.

IV. THE MODERN RULE

The definitive statements in *Brents v. Morgan* and subsequent decisions should give a reasonable explanation of the justification of the Kentucky Invasion of Privacy Doctrine. In *Trammel v. Citizens News Company, Inc.*,⁴⁷ a notice was printed in the defendant company's newspaper, even though the editor had been requested previously to refuse publication. The notice announced that Reverend Trammel owed a grocery bill and the store suggested that he come in and make arrangements for settlement. Suit was filed against the newspaper alleging violation of the right of privacy. The Court remarked, in allowing the plaintiff relief, that a man's feelings are as much a part of his person as his limbs

⁴⁶ This failure to evolve a working rule as to the tort may be due, in part, to the infrequent and relatively small number of privacy cases brought before the Court of Appeals. New York and California, on the other hand, have had a larger number of cases presented to their highest courts and thus have, through necessity, solidified the theory into a concrete rule. See Annot., 14 A.L.R.2d 750 (1950).

⁴⁷ 285 Ky. 529, 148 S.W.2d 708 (1941).

and that this was an action to protect the former from injury. The contents of the notice were not matters of public interest, and the newspaper company knew that publication would tend to expose the plaintiff to public contempt, ridicule, and disgrace. No explicit statement was made as to the theory upon which relief was granted. The Court merely observed that the fact situation fit squarely under previous Kentucky cases, particularly *Brents v. Morgan*.

In 1931, in *Rhodes v. Graham*,⁴⁸ the defendant allegedly tapped the plaintiff's telephone. The gist of the plaintiff's complaint was that his right of privacy had been damaged by the appellees; he also brought an action of trespass *vi et armis*, asserting a property right in the telephone and equipment which had been trespassed upon by the appellees. The Court of Appeals reviewed the article written by Warren and Brandeis and held that the evil incident to the invasion of privacy of the telephone is as great as that occasioned by the unwarranted publicity of one's private affairs in newspapers. Hence, as a matter of law, wiretapping is akin to eavesdropping, an indictable offense at common law, and, although it was not a punishable offense in the state of Kentucky, the facts alleged did constitute a wrong to the appellant. In effect, the Court recognized that eavesdropping or wiretapping was a violation of the Invasion of Privacy Tort in Kentucky, and that it should be sustained as a valid cause of action.⁴⁹ The Court again relied almost exclusively upon the Warren-Brandeis article and the *Brents* decision.

A different fact situation, however, arose in *Tomlin v. Taylor*.⁵⁰ There, the defendant engaged in a franchise renewal fight with the bus company and published by way of letters to a local newspaper, copies of the company's state income tax reports. The plaintiff, president of the bus company, alleged that these publications deliberately and maliciously injured, damaged, and destroyed his company's business, and in so doing, they violated his right of

⁴⁸ 238 Ky. 225, 37 S.W.2d 46 (1931).

⁴⁹ *Accord*, *McDaniel v. Atlantic Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E.2d 810 (1939), where the defendant's "bugging" of the plaintiff's hospital room to determine the truth or falsity of a claim against it was held to constitute a cause of action; *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958), in which the plaintiff tenant was afforded an action because of a listening device installed in his apartment by the landlord.

⁵⁰ 290 Ky. 619, 162 S.W.2d 210 (1942).

privacy by destroying his good will, esteem, and confidence with the citizenry. The trial court dismissed the complaint and the Kentucky Court of Appeals affirmed; the violation did not reach the principal officer of the bus company, whose right of privacy was not invaded. Applying the *Brents* rule to *Tomlin*, there was the necessary intent to commit an act, there were flagrant circumstances, and there was at least some kind of deliberate attempt to injure or coerce. The Court's holding, however, involved a mere technical limitation of the right: it does not pass through a corporation to its official personnel.⁵¹

In *Jones v. Herald Post Company*,⁵² a wife made certain vehement and excited statements shortly after her husband had been stabbed to death while they were walking along a city street. The defendant newspaper company printed her picture and the statements. The wife filed suit alleging that her privacy had been invaded, and that she had been subjected to unwarranted and undesired publicity. The Court of Appeals affirmed the trial court's dismissal of her complaint, stating that "the publication of the photograph in connection with the language attributed to Mrs. Jones, even though she was incorrectly quoted, was not an invasion of her right of privacy." The Court rationalized that she was an actor in an occurrence which became of public or general interest and there could not be an invasion of the right of privacy when her photograph was published along with an account of the occurrence.

*Sellers v. Henry*⁵³ involved a photograph of a mutilated child killed in an accident, taken by a state police officer in his official capacity at the accident scene and subsequently published by him. The child's parents brought suit for invasion of their privacy by the defendant's publication of the photograph. The Court reversed a judgment for the defendant, stating that the material fact of whether the photograph was of public interest had been left unanswered by the trial court. The Court did review, however, several cases in other jurisdictions which had ruled that photo-

⁵¹ *But see* *Engleman v. Caldwell and Jones*, 243 Ky. 23, 47 S.W.2d 971 (1932), where the defendant's deliberate and persistent attempts to drive trade away from the plaintiff's business was held to be actionable, and to authorize the imposition of punitive damages. It is interesting to note also that the loss of business was occasioned primarily by oral statements.

⁵² 230 Ky. 227, 18 S.W.2d 972 (1929).

⁵³ 329 S.W.2d 214 (Ky. 1959).

graphs taken of dead persons cannot give rise to a cause of action.

Perhaps the most illuminating case applicable to the discussion herein is *Voneye v. Turner*.⁵⁴ There, the defendant, an agent of a finance company, signed and mailed a letter to the plaintiff's employer seeking aid in the collection of a debt owed by the plaintiff to the finance company. The letter explained only the details of the business transaction with the finance company and the plea that "anything you can do for us in this matter will certainly be appreciated."⁵⁵ Suit was filed claiming an invasion of privacy; the action, however, was dismissed at the trial level. The Court's reasoning is not nearly as important here as the discussion of the applicable law. The Court began its discussion of the tort by quoting from *Brents*: "[A person has a right] to be free from *unwarranted* publicity, or the right to live without *unwarranted* interference by the public about matters with which the public is not necessarily concerned."⁵⁶ The notable point is the Court's emphasis of "unwarranted." The Court continued and again used the word "unwarranted" when quoting from *American Jurisprudence*.⁵⁷ Applying the test of "unwarranted" publicity or interference, the Court distinguished the factual situation in *Voneye* from *Brents* and *Thompson*⁵⁸ and was able to rule as a matter of law that the letter in *Voneye* was not an unwarranted invasion of privacy. The Court noted that the letter did not contain any words of contempt, ridicule, aversion, or disgrace. Further, it pointed out that an employer is interested in the ability and reputation of his employee as to the payment of debts. The payment of debts affects the employee's efficiency and saves the employer the annoyance and expense of answering garnishments and other letters. With this reasoning, the Court indicated that the action of the defendant finance company in this particular case, although it may well have

⁵⁴ 240 S.W.2d 588 (Ky. 1951).

⁵⁵ *Id.* at 589.

⁵⁶ *Id.* at 590.

⁵⁷ *Id.* The Court points out:

[The right of privacy is] defined in 41 Am. Jur. "Privacy" § 2, p. 925 as: "The right of a person to be free from unwarranted publicity, and as a right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned." Section 12, p. 934 of the same text says: "The right of privacy is relative to the customs of the time and place, and it is determined by the norm of ordinary man."

⁵⁸ 181 Ky. 487, 205 S.W. 558 (1918).

been an invasion of privacy, was not an *unwarranted* invasion of privacy.

Voneye appears to hold that the test for defining the extent of the right of privacy is based upon the standard of conduct or action of the ordinary, reasonably prudent man. This is consistent with the reasonably prudent man test applied in other tort cases,⁵⁹ and it indicates that the Court simply asks whether the defendant was negligent. In an invasion of privacy case, a negligence standard means that the basic question presented to the court or jury is whether the act committed by the defendant was an unwarranted invasion of privacy. Courts do not hesitate to remind one that this is a world where one cannot live without expecting some interference from other members of society. The problem involved in these types of cases, however, is whether the involvement or interference with the individual was unwarranted. Hence, it would be logical to ask whether the act committed was an act which a reasonable man would consider unwarranted. At least this would be a valid explanation of the theory of the Kentucky Invasion of Privacy Tort.

The *Voneye* rationalization was thereafter applied in *Perry v. Moskins Stores*⁶⁰ under a dichotomous situation. The defendant mailed a post card containing the statement: "Please call Wabash 1492 and ask for Carolyn." The post card, delivered to the plaintiff's home, was received by his wife who, believing the note to be from her husband's paramour, left him. The post card, however, was merely an advertising stunt conducted by the defendant's store. Suit was filed on the grounds that the plaintiff lost his wife because of the defendant's invasion of his privacy. The Court of Appeals affirmed dismissal, stating that the modern-day advertising techniques are in effect a limitation on an individual's right of privacy and are not actionable unless unreasonable. By this statement and its mention of *Voneye*, the Court applied and reaffirmed the reasonable man test. Here, the test resulted in the ruling, as

⁵⁹ See RESTATEMENT OF TORTS § 867 (1939). See also *Daily Times Democrat v. Graham*, 276 Ala. 380, 162 So. 2d 474 (1964); *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P.2d 441 (1953); *Korn v. Rennison*, 21 Conn. Supp. 400, 156 A.2d 476 (1959); *Harms v. Miami Daily News*, 127 So. 2d 715 (Fla. 1961); *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953); *Truxes v. Kenco Enterprises, Inc.*, 80 S.D. 104, 119 N.W.2d 914 (1963).

⁶⁰ 249 S.W.2d 812 (Ky. 1952).

a matter of law, that reasonable men would not consider the defendant's acts unwarranted. The Court said:

the rule defining the extent of the right is based on the premise that the standard by which the act is judged is that of a reasonable man. . . . Since there is no hard and fast definition of the right each must turn on its own facts. . . . Such a rule necessitates a balancing of the interests of the two parties in the litigation, as well as those of the public.⁶¹

The Court then said that since there was no Kentucky case directly in point, foreign decisions would be considered. However, the Court eventually reached the conclusion that "under the rule laid down in the Voneye case, the mailing of the post card did not constitute an invasion of the appellant's right of privacy."⁶² Viewing *Voneye* and *Perry*, Kentucky has developed what might be loosely denominated as a negligent invasion of privacy tort.

Basically, torts are divided into two categories: intentional and unintentional. The former requires an intentional or deliberate act that violates a legally protected interest. The unintentional tort is an act which, through the actor's negligence, also violates an interest. There is negligence on the actor's behalf because he failed to adhere to the standard required of a reasonable man under the circumstances. To come under the doctrine of the invasion of privacy tort, the act may be of the latter group; it need not be intentional or deliberate.⁶³ This theory finds support in Kentucky case law.⁶⁴

Three relatively recent cases reaffirmed the rule that an action for invasion of privacy will not lie where the offensive statements were oral. In each of these cases, but for the oral nature of the statements, there would have been an invasion of privacy within the meaning and requirements of the intentional invasion theory. In *Gregory v. Bryan-Hunt Company*,⁶⁵ the defendant's manager,

⁶¹ *Id.* at 813.

⁶² *Id.* at 814.

⁶³ Credence is lent to this statement by the Court's language in the most recent privacy case, *Wheeler v. P. Sorenson Mfg. Co.*, 415 S.W.2d 582 (Ky. 1967), where the Court held: "The rule defining the extent of the right [of privacy] is based on the premise that the standards by which the act is judged are that [sic] of a reasonable man." *Id.* at 585.

⁶⁴ See *Tomlin v. Taylor*, 290 Ky. 619, 162 S.W.2d 210 (1942); *Trammel v. Citizens News Co.*, 285 Ky. 529, 148 S.W.2d 708 (1941); *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927); *Foster-Milburn v. Chim*, 134 Ky. 424, 120 S.W. 364 (1909).

⁶⁵ 295 Ky. 345, 174 S.W.2d 510 (1943).

while in the plaintiff's business establishment, made an oral accusation that certain cigarettes in the plaintiff's possession were stolen. In *Horstman v. Newman*,⁶⁶ there was an oral demand by a landlord that the plaintiff pay his rent. In *Pangallo v. Murphy*,⁶⁷ a landlord, in the presence of others, told the plaintiff, a lady confined in a hospital bed due to pregnancy, that he had removed her belongings from her house and locked them up, and that she and her family were not fit persons to live in his house because they were filthy and dirty.⁶⁸ In each situation, there were the intentional and deliberate acts that are necessary for intentional torts.

In some cases, however, the intentional tort theory does not apply. In *Sellers v. Henry*,⁶⁹ publishing the picture of a mutilated child was not an intentional violation since it was used in a safety film, to teach children to be more careful when walking upon the highway. There was no deliberate effort to invade anyone's privacy. Although the case was remanded on other grounds, the Court inferred that the plaintiff had a cause of action, even though there was no attempt to injure or coerce him or any wantonness or recklessness in publishing the photograph, unless there was a public interest involved. This case is reminiscent of *Douglas v. Stokes*.⁷⁰ In *Douglas* the photographer certainly did not intend to coerce or injure the plaintiffs in any manner. His reason for making additional photographs of the Siamese twins was obviously mercenary, but the injury resulted notwithstanding his intent or deliberateness. The ratio decidendi in *Douglas* cannot square with the intentional tort theory.

To the same effect is *Jones v. Herald Post Company*,⁷¹ where there was merely the publication of a picture and statements actually made by the plaintiff at the scene of the killing of her husband. There were no deliberate or intentional efforts to coerce or injure the plaintiff, or any wantonness or recklessness involved, as required by the intentional tort theory. The Court of Appeals seems to ask simply whether there was an invasion of the plain-

⁶⁶ 291 S.W.2d 567 (Ky. 1956).

⁶⁷ 243 S.W.2d 496 (Ky. 1951).

⁶⁸ This case is an appropriate illustration of the closeness of the invasion of privacy tort to defamation.

⁶⁹ *Sellers v. Henry*, 329 S.W.2d 214 (Ky. 1959).

⁷⁰ *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 349 (1912).

⁷¹ *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W.2d 972 (1929).

tiff's privacy: did the defendant intentionally and deliberately do an act which, irrespective of his subjective intent, invaded the plaintiff's privacy?⁷² If the answer to this question is in the affirmative, the Court next seeks to find whether that act was unwarranted. Questions of law and fact permeate both these approaches, but obviously the first is a question of law and the second a question of fact. In any event, a violation of the invasion of privacy tort does not necessarily have to be intentional.

Kentucky is still perhaps quite a few years behind the times because it has no definitive rule to determine if an invasion occurred or if the action of invasion was unwarranted. Since the invasion of privacy is a tort, the adequate criterion as in all tort cases, consistent with the *Voneye* and *Perry* cases, would obviously be the reasonably prudent man test. The rule could be phrased:

In order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence situated in like circumstances as the plaintiff.⁷³

As stated, the rule should sufficiently clear away any problems that might arise due to closeness of the invasion of privacy tort and the tort of defamation. In *Pangallo v. Murphy*,⁷⁴ the words uttered may well have been defamatory except that the complaint, slanted in terms of an invasion of privacy tort, sought to recover damages for physical harm and mental anguish suffered by the plaintiff. The Court cited *Brents* as authority for the proposition that the invasion of privacy cannot be an oral publication, but it went on to say: "Under certain conditions, slanderous words are actionable per se."⁷⁵ This is clearly defamation. "In other instances, certain words are actionable per quod."⁷⁶ In the latter case, such words are not actionable alone, but, should extrinsic facts show

⁷² In *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948), the court reasoned that the protection afforded by the right of privacy was restricted to ordinary sensibilities and not supersensitiveness, and that there are some shocks, inconveniences, and annoyances which members of society must absorb without any right of redress. Thus, despite the allegation that the defendant's act was willful and malicious, there exists no cause of action if the plaintiff's privacy has not been invaded. *Accord*, *Werner v. Times Mirror Co.*, 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961).

⁷³ *Accord*, 41 Am. Jur. *Privacy* § 12 (1941).

⁷⁴ 243 S.W.2d 496 (Ky. 1951).

⁷⁵ *Id.* at 497.

⁷⁶ *Id.*

that damage resulted to the plaintiff, an action would lie. The basis for the invasion tort is unwarranted conduct which invades another person's privacy. Thus, if a statement such as that made in *Elkins v. Roberts*,⁷⁷ that the plaintiff "told a lie and I will have him indicted for it," is published and results in special damages, suit may be prosecuted under the defamation or invasion of privacy theory.

A unique situation arose in *Thomas v. General Electric Company*⁷⁸ where the defendant employer took certain photographs of the plaintiff employee contrary to the latter's request. The employer maintained that the pictures were taken in order to increase the efficiency of the plant's operation and to promote the safety of the employees in the discharge of their duties. The employee filed suit in state court seeking damages of one dollar and an injunction against the employer's showing, processing, or publishing of the pictures, and prohibiting the future taking of photographs without the employee's express permission. The cause of action was based upon the Kentucky right of privacy tort.

The case was removed to federal court⁷⁹ where the complaint was dismissed. The rationale was two-fold: 1) if the rule was that the right of an employer to photograph is inferior to the employee's right when such photographs would affect the latter's health, welfare, domestic situation, make him nervous, or subject him to an undue or unfair criticism by fellow employees, then the plaintiff had failed in his burden of proof; but, 2) if this were not the rule, there must be an unwarranted and improper use of the photographs in connection with a defamatory or libelous statement about the plaintiff. The first rationale was an inaccurate application of the Kentucky invasion of privacy rule because the court's primary function is to determine, (1) whether the plaintiff's privacy has been invaded, and (2) whether the invasion was unwarranted. This would certainly have been a question of law for the court to decide prior to ruling upon the evidence.⁸⁰ On the

⁷⁷ 242 S.W.2d 994 (Ky. 1951).

⁷⁸ 207 F. Supp. 792 (W.D. Ky. 1962).

⁷⁹ Perhaps the most important aspect of this decision was the court's treatment of the asserted amount in controversy vis-à-vis the injunction in determining whether the federal court had jurisdiction.

⁸⁰ In one case, this determination was made, as a matter of law, prior to ruling on the evidence. *Wheeler v. P. Sorenson Mfg. Co.*, 415 S.W.2d 582 (Ky. 1967).

second point, the court approached the theory of defamation by ruling that had the photograph been taken and used in a defamatory manner or with defamatory or libelous words, the cause of action would have been for defamation and not privacy.

Perhaps one surprising sideline to the general application of the doctrine can be found in *Wheeler v. P. Sorenson Manufacturing Company*.⁸¹ There, the plaintiff's employer disseminated information sheets to other employees in a unionizing campaign, showing the plaintiff's paycheck with her hours worked, gross wages, deductions and "take home" pay. She also alleged that the sheet stated: "In 1 year, 4 months and 1 week [the plaintiff] received an increase of 20¢ per hour or \$8.00 per week."⁸² She claimed she had taken no part in the union campaign, but because of the sheet, her fellow employees believed she was working on behalf of the company, making her work uncomfortable and unpleasant. She further alleged that she was later discharged, and was blacklisted by other employers in the locality.

The Court of Appeals affirmed dismissal of the case. After reviewing the usual invasion cases, the Court stated that the tort "is determined by the norm of the ordinary man,"⁸³ and that the invasion of privacy, if any, "was reasonable and warranted under the circumstances."⁸⁴ Determination of whether the invasion, if any, was warranted is consistent with the general procedure followed in Kentucky cases.

The unique aspect of the case is a small paragraph, immediately preceding the Court's affirmation of the trial judge's action,⁸⁵ which indicates that the act of invasion is unwarranted, except in a small number of cases, when humiliating collection methods are used or publications, names, or pictures are used to promote various enterprises. If the Court's language is indicative of the future use of invasion of privacy, the practicing attorney must seek some tactic, act, or conduct by the defendant that is violent, humiliating, intentional, or designed to be any of these,

⁸¹ 415 S.W.2d 582 (Ky. 1967).

⁸² *Id.*

⁸³ *Id.* at 585.

⁸⁴ *Id.*

⁸⁵ "Many of the invasions of the right of privacy for which recovery has been sought are the result of unwarranted and humiliating methods put in motion by creditors to collect debts, or the unwarranted publications or use of the names or pictures to promote various enterprises." *Id.*

before he can avail himself of the cause. Such a requirement certainly cannot be intended by the Court since it would be contrary to the express language generally used to explain the privacy rule.

Thus, the invasion of privacy tort cannot contain an oral statement; but if the words are written, the invasion tort becomes a less stringent libel rule which merges into the invasion of privacy tort. This is the way the cases are practiced in Kentucky, and this is the strategy which a trial attorney must consider prior to filing suit. The Kentucky tort is and can only involve a negligent invasion of privacy. The criterion of conduct is the reasonably prudent man test, and the jury determines what the reasonably prudent man really does and who he really is.

KENTUCKY LAW JOURNAL

Volume 56

Winter, 1967-68

Number 2

EDITORIAL BOARD

1967-1968

THOMAS L. HINDES

Editor-in-Chief

CHARLES R. SIMONS

Associate Editor

Assistant Editors

Articles CARL TIMOTHY CONE

Business C. DAVID EMERSON

Court of Appeals JOE B. CAMPBELL

Notes STEVEN L. BESHEAR

WILLIAM T. CAIN

GARY CONN

MICHAEL COX

KATHLEEN M. FITZGERALD

J. RONALD HENSON

J. ALAN LIPS

JOHN T. MANDT

CHARLES MARSHALL

JOHN D. McCANN

M. W. SCHRYVER

NATALIE S. WILSON

ROBERT K. WOOD

KENNETH P. ALEXANDER

KAY K. ALLEY

WILLIAM T. BISHOP III

DOUGLAS M. BRICKER

JAMES N. BRICKEY

RUTHEFORD B. CAMPBELL, JR.

BILL CUNNINGHAM

JOHN S. ELDRID

ROBERT L. FEARS

WOODFORD L. GARDNER, JR.

ED GLASSCOCK

GARY L. HERFEL

LARRY G. KELLEY

JOSEPH H. MILLER

JOHN P. REISZ

LESLIE E. RENKEY

JOHN SMITH

LEONARD SMITH

JAMES WHITLOW

RONALD L. STYN

Faculty Editor

FACULTY OF THE COLLEGE OF LAW

ex officio

The 1967-68 Kentucky Court of
Appeals Review