Right of Privacy

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Right of Privacy—Plaintiff was photographed in the ladies rest room of defendant's business establishment. The defendant utilized a camera and flash camera equipment while making this intrusion. The plaintiff subsequently demanded the photograph the defendant had taken of her but he refused to do so. The plaintiff observed the defendant, in the dining room area of the establishment, displaying to other patrons pictures he had taken of ladies in the ladies rest room. The plaintiff did not know whether or not the picture taken of her was so demonstrated and shown to other patrons, both men and women. Plaintiff brought an action for the invasion of her right of privacy. She alleged she had suffered great mental anguish, embarrassment and humiliation. Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a case of action. The demurrer was sustained and the complaint dismissed. Held: Judgment affirmed. The right of privacy does not exist in this state. Yoeckel v. Samonig, 272 Wis. 430, 75 N.W. 2d 925 (1956).

The court based its decision on the law as enunciated in Judevine v. Bensies-Montayne Fuel and Warehouse Co. and State ex rel. Distenfeld v. Neelen. In the Judevine case the court stated:

"We are of opinion, especially in view of the fact that truth is held no defense to the action where it has been recognized as it is to actions for injury to reputation through libel and slander, 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 the right."

The Court in the featured case supplemented the previous decision:

"In view of what we said and held in the two cases referred to with respect to our lack of power to create a right for the violation of which recovery was there sought, as it is in this case, and particularly because of the refusal of the legislature at two sessions to recognize even a limited right to protection against invasion of the right of privacy, we are compelled to hold again that the right does not exist in this State."

In light of this recent Wisconsin decision it is interesting to examine two contemporaneous decisions from the jurisdictions of Ohio and Iowa.

In the Ohio case, decided March 14, 1956, the plaintiff was being heckled by recurrent phone calls at short intervals concerning the

1 222 Wis. 512, 269 N.W. 295, at 527 (1936).
2 255 Wis. 214, 38 N.W. 2d 703 (1949).
3 272 Wis. 450, 75 N.W. 2d 925 (1956).
4 Housh v. Peth, 133 N.E.2d 340, 165 Ohio St. 35 (1956).
payment of plaintiff's valid debt. The calls were made nine times a day and as late as 11:45 P.M. The Supreme Court held that a right of privacy did exist in Ohio. The court followed the pilot in this field, Paevisch v. New England Life Insurance Co. The court in the Georgia opinion declared:

"A right of privacy is derived from natural law, recognized by municipal law, and its existence can be inferred from expressions used by commentators and writers on the law as well as judges in decided cases."

A study of the current Iowa case, Bremmer v. Journal Tribune Publishing Co., reveals a promulgation by the Supreme Court of Iowa on May 9, 1956 upholding a cause of action grounded on the invasion of the right of privacy. In that case a picture of a mutilated and decomposed body of a boy was published in the defendant's newspaper after the boy had been missing for a month. The parents of the deceased boy brought a cause of action against the Journal Tribune Publishing Co. for the invasion of their right of privacy. The case was dismissed on the grounds that the plaintiff failed to state a cause of action. On appeal, the court held that a right of privacy did exist in the State of Iowa. The court adopted the view expressed in the Restatement of Torts:

"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."

A closer analysis of the Iowa case reveals that the court did not fail to consider privacy's antithetic right, namely, the right of freedom of the press. The decision indicated that freedom of the press would be jealously guarded notwithstanding the fact that a right of privacy existed within the jurisdiction.

"The only security of all is in a free press. The force of public opinion cannot be resisted, when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary to keep the waters pure. No government ought to be without censors: and where the press is free no one ever will."

These two cases illustrate the two views being adopted by courts as the foundation for the recognition of the right of privacy, that is, the natural law and the Restatement of Torts. The Iowa decision would seem to allay the fears of the factions representing the press who are concerned with the unwarranted infringement of freedom of

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5 122 Ga. 190, 50 S.E. 68 (1905).
6 76 N.W. 2d 762, --Iowa (1956).
7 Restatement, Torts §867 (1932).
8 See note 6 supra, at 767.
the press and the possible flood of litigation directed against the publishing industry.

The Supreme Court of Michigan has recognized the right of privacy. It based its decision of the authority of the Restatement of Torts, in a case involving the publication of a photograph of the plaintiff without her consent, for commercial advertising purposes. The plaintiff was photographed while engaged in the employment of a retail department store. This negative was transferred to the defendant who caused the photograph to be published as an advertisement for cosmetics. The court differentiated this species of publication from legitimate news items.

"We recognize a fundamental difference between the use of a person's photographic likeness in connection with or as part of a legitimate news item in a newspaper, and its commercial use in an advertisement for the pecuniary gain of the user. In the case at bar there is no involvement of freedom of speech or freedom of the press."

These three recent decisions exemplify the efficacy of appellate courts in announcing a right of privacy, nevertheless the Wisconsin Court seems adamant in its refusal to recognize a right of privacy by judicial fiat contradistinguished from its neighboring jurisdictions whose courts have deemed fit to recognize the right which was first propounded in 1890.

Many unsuccessful attempts have been made to pass a bill enacting a statutory right of privacy in Wisconsin. One bill proposed by Senator Warren Knowles, as originally drafted, was heavily assailed by the Wisconsin press. A substitute bill was attacked in committee hearings and numerous amendments were proposed by the Wisconsin Daily Newspaper League. These amendments defined the violations more closely and excluded certain common practices of newspapers which all parties agreed should not come within the scope of the bill. The author was evidently dissatisfied with these modifications and told the group,

10 Brandeis and Warren, 4 HARV. L. REV. 193 (1890).
11 No 215 S (1951)—A Bill.
To create 331.055 of the statutes, relating to right of privacy and redress for invasion thereof.
The People of the state of Wisconsin, represented in senate and assembly, do enact as follows: 331.055 of the statutes is created to read:
2 331.055 ACTIONS FOR INVASION OF RIGHT OF PRIVACY.
3 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
4 such invasion as well as an action to recover damages for injuries
5 sustained by reason thereof.
12 Milwaukee Journal, May 9, 1951.
"You're seeing windmills that don't exist. Rather than add all of those amendments, I'd rather let the whole thing go. Then the courts will adopt a common law right of privacy."\(^{13}\)

The legislative efforts in establishing a statutory right of privacy as recommended by the Wisconsin Supreme Court in the Judevine case and affirmed in the Distenfeld decision were summarily stalemated. Subsequent attempts to introduce such bills were also stymied by press opposition. Despite this apparent inability on the part of the Legislature to create a statutory right of privacy the court has refused to recognize a common law right of privacy. The transcending question is patent: With an awareness of the apparent inability of the Wisconsin Legislature to enact suitable legal safeguards for such situations as presented in the instant case, will the Supreme Court of Wisconsin continue to be bound by stare decisis or will they follow the lead of the majority in creating and recognizing the right of privacy by judicial decision? Recognition of this right appears to be the modern trend. In one form or another, the right of privacy is presently recognized in all states except Wisconsin, Rhode Island, and Texas.\(^{14}\)

Two courses are open to establish a right of privacy, namely, legislative action or judicial decision. The 1957 Legislature should clearly define the right or the court will have to overrule its prior decisions. The latter course appears hopeless. A middle ground might be open to our court if the situation presented itself. Upon being confronted with an invasion of a citizen's privacy, through the medium of commercial advertising, our court could follow the Michigan decision and adopt a limited right of privacy. The Court could find that this type of invasion is at variance with the invasions ruled upon in the Judevine, Distenfeld and the instant case.

Considering our media of modern communication, especially with the advent of television, the dilemma is brought into sharp focus. As of this date, discounting legislative success in obtaining statutory recognition of the right, Wisconsin remains remediless for violations of a right which inheres in every one of us.

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Emergency Vehicles—Standard of Care—The accident giving rise to this litigation occurred when two girls, ten and eight years old, were struck by an ambulance which was conveying a patient to the hospital. The ambulance was preceded by a motorcycle escort. Both vehicles had red lights and sirens in operation and were traveling west at a speed estimated at forty to fifty miles per hour. Traffic at the intersection had stopped and the driver of the ambulance had

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\(^{13}\) Senator Warren Knowles, Milwaukee Journal, May 17, 1951, p.11.  
\(^{14}\) PROSSER, HORNBrook On TORTS 636 (2d ed. 1955).