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Recent Cases

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Expert Witness—Payment of Contingent Fee

Barnes v. Boatmen's National Bank of St. Louis[1]

The respondent Barnes, a psychiatrist, agreed to testify to the insanity of the deceased, Hugh Thomasson, and to assist in securing evidence to establish insanity. His compensation was to be on a contingent fee basis—an agreed sum to be paid him only in the event of a successful termination of the intended litigation, which involved a suit to be brought by the next of kin of Thomasson to set aside mortgages and deeds executed by Thomasson while under the influence of his wife and her associates. The respondent recovered in the lower court for the value of his services on a *quantum meruit* basis. The appellant argued that the entire agreement was void as against public policy, and hence respondent should not be compensated. The Supreme Court of Missouri affirmed the decision of the circuit court that the respondent could recover the reasonable value of his services in preparing the evidence for submission at the trial.[2]

The respondent contracted both to testify and to gather evidence for use in court proceedings. However, under the Missouri law he could not recover for testifying. In *Burnett v. Freeman*[3] the court of appeals decided that a physician, or other expert, could be compelled to testify concerning matters within his professional knowledge without compensation other than the ordinary witness fee. The common law view was that an expert witness was not bound to give testimony concerning his professional opinion. A distinction was drawn between a man seeing a fact and giving an opinion on a matter with which he is peculiarly acquainted in a professional capacity. Also the expert witness had a right to demand before testifying that he be compensated for loss of time.[4] Some strong arguments are offered for the validity of this distinction, especially as to medical experts. The physician is quite often called upon to attend court to give testimony concerning his professional opinion, while such demands are rarely made on most other professions. Also there may be instances of individual hardship, as where an eminent physician or surgeon may have acquired such a wide reputation for professional skill that there is a constant demand for his services as a witness, interfering with the practice of his profession. The court in *Burnett v. Freeman*[5] admitted that there was a valid basis for these contentions but thought the considerations on the other side outweighed them. The court said that the medical expert was simply performing his duty as a citizen in testifying at the usual rate; also he had the privilege of calling on other experts to give evidence if he himself ever became

1. 348 Mo. 1032, 156 S. W. (2d) 597 (1941).
2. *Id.* at 1036, 156 S. W. (2d) at 599-600.
3. 125 Mo. App. 683, 103 S. W. 121 (1907).
4. See cases collected in Note (1895) 27 L. R. A. 673-4.
5. 125 Mo. App. 683, 103 S. W. 121 (1907).

involved in litigation. Consequently the court held that the contract to pay the physician a remuneration additional to the regular witness fees was void as against public policy. In *State v. Bell*[6] the Supreme Court of Missouri approved the doctrine of *Burnett v. Freeman*. Although the trend of the later cases in the United States is in accord with the holding of the Missouri court,[7] there is still considerable authority for the proposition that expert witnesses may be paid additional compensation for testifying as to their opinions as experts.[8]

The precise question involved in the principal case is the effect of the invalidity of the contract to testify on the agreement to gather evidence. In *Klepper v. Klepper*[9] it was held that the expert could recover the reasonable value of his services in examining property and compiling data for use in the litigation, even though he could not recover on the contract itself, which included a provision for his testifying in court. But an Illinois court held that such a contract is entire, and if a part of the consideration is illegal the promise founded upon the contract is void.[10] Consequently that court refused to permit recovery of the agreed sum, though the plaintiff had produced the desired evidence. The courts have generally held void contracts to furnish evidence establishing a given set of facts.[11] Such a contract is void whether it be to secure sufficient evidence to enable the client to win or merely to furnish favorable evidence.[12]

However, the courts have upheld advertisements for rewards for the production of evidence.[13] The distinction is a doubtful one, for the purpose of securing the evidence is to prove a given set of facts, as in the preceding type of case. The only difference would seem to be that the contracts in the reward cases are unilateral, and the person securing the evidence is not bound by any agreement to do so. There might be some additional incentive to stretch a point in the employer's favor where one has entered into a binding contract to produce the evidence. However, the courts in these cases seem to stress the incentive to profit.[14]

The courts have generally held valid contracts to pay expert witnesses for preparatory work, such as making investigations or gathering data.[15] It is also usually held proper to determine such compensation upon a contingent fee basis.[16]

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6. 212 Mo. 111, 111 S. W. 24 (1908).
7. See cases in Note (1910) 25 L. R. A. (N. S.) 1040.
8. 6 WILLISTON, CONTRACTS (1938) § 1716.
9. 199 Mo. App. 294, 202 S. W. 593 (1918).
10. Boehmer v. Foval, 55 Ill. App. 71 (1893).
11. Neece v. Joseph, 95 Ark. 552 (1910).
12. See cases collected in (1911) 30 L. R. A. (N. S.) 278.
13. Plating Co. v. Farquharson, 17 Ch. Div. 49 (1881).
14. Neece v. Joseph, 95 Ark. 552 (1910).
15. 6 WILLISTON, CONTRACTS (1938) § 1716; 12 Am. Jur. § 188; RESTATEMENT, CONTRACTS (1932) § 553, (1). *Contra*: Manufacturers and Merchants Inspection Bureau v. Everwear Hosiery Co., 152 Wisc. 73 (1913); Gillett v. Logan County, 67 Ill. 256 (1873).
16. 12 Am. Jur. § 188. However, the courts condemn an agreement by an attorney to divide his contingent fee with one who is to secure evidence. 6 WILLISTON, CONTRACTS (1938) § 1716. *Contra*: Parker v. Fryberger, 171 Minn. 384, 214 N. W. 276 (1927).

The instant case, therefore, is in accord with the great weight of authority in upholding an agreement to pay the witness a fixed sum in the event of the successful termination of the litigation. However, the expert must have acted in the capacity of an expert in preparing the evidence for trial, and not for some unrelated purpose.[17] One of the arguments used in these cases is that the expert witness, while engaged in the activity of gathering evidence to be used in court proceedings, is in a position similar to that occupied by an attorney who is employed under a contingent fee contract.[18] The identical social problem is present in both instances. There are numerous plaintiffs who are financially unable to employ a capable attorney on a regular fee basis. Their only hope of securing any recovery is to find an attorney willing to take their case on a contingent fee. Often such recovery is impossible without having available the services of an expert witness, who is also paid a contingent fee. If such contracts were not permitted the wealthy and financially secure would have a great advantage over those less fortunately situated. There is, however, greater likelihood of abuse by expert witnesses than by attorneys, for the latter are subject to more control by the court and to the influence of professional ethics and are more limited in the direct influence of their chicanery.

In so far as the possible effect on the veracity of testimony is concerned, there would seem to be as much objection to the type of contract involved in the principal case as to agreements to pay witnesses compensation in addition to the fee allowed by law. Since the expert recovers nothing unless his efforts result in a termination of the litigation favorable to his employer, and since it is intended that the evidence gathered by him be submitted in the form of testimony at the trial, his testimony will likely be presented in a form favorable to his employer. However, in holding invalid contracts to pay additional compensation for testifying the courts stress the tendency of the contracts to cause perjury and fabrication of evidence, while in sustaining contracts under which the expert is to do preparatory work before testifying the courts say that the possibility of abuse is no reason for declaring a contract void if there has in fact been no abuse.[19]

The courts do not face the realities of the situation when they distinguish the type of contract in the instant case from an agreement to secure evidence proving the employer's case. Neither of the parties to such a contract has any ideal purpose to ascertain the truth; the intent is to find evidence that will support a recovery. The expert is well aware of the fact that he will not be paid if he does not procure evidence which will effectively establish his client's case.

Although there does not seem to be any logical basis for the distinctions made by the courts, contracts for the payment of contingent fees will undoubtedly be upheld so long as there is no satisfactory alternative method by which the poor man can secure the services of an expert witness.

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17. Burnett v. Freeman, 134 Mo. App. 709, 115 S. W. 488 (1909).
18. Haley v. Hollenback, 53 Mont. 494, 165 Pac. 459 (1917).
19. Compare Neece v. Joseph, 95 Ark. 552 (1910), with Lincoln Mountain Gold Mining Co. v. Williams, 37 Colo. 193, 85 Pac. 844 (1906).

LIABILITY OF EMPLOYER FOR INJURY CAUSED BY HORSEPLAY OF EMPLOYEE

Osment v. Pitcairn[1]

Plaintiff, member of an interstate switching crew, while standing in railroad's freight house was seized from behind by a messenger boy employed by railroad and held so as to lose consciousness, resulting in a fractured skull from falling to the floor. There was evidence to show that the railroad had knowledge that the boy habitually engaged in such rough horseplay. Plaintiff sought recovery under the Federal Employers' Liability Act on two theories—the negligence of the railroad in knowingly retaining a servant who habitually engaged in dangerous misconduct, and the failure of a special policeman nearby to prevent the injury. The issue upon which the court disposes of the case is whether the acts of horseplay must be within the scope of the messenger's employment in order to allow a recovery under the Act, the court finding that such is necessary.

Of course, the rights of the plaintiff and obligations of the defendant will depend upon the Federal Employers' Liability Act and the applicable principles of common law as interpreted by the federal courts.[2] The common law doctrine which is basic to the instant case is that advanced by the plaintiff, *i.e.*, that a master owes to his servants the duty of hiring and retaining fellow workers who are "of sufficient care, skill, prudence and good habits to make it probable that they will not cause injury to each other."[3] Although this theory of liability is a tort theory based solely on the negligence of the employer himself, the tendency of the courts has been to transplant the principles of the law of agency which are applicable to a master's liability for his servant's torts, and thus to restrict recovery to those instances where the act causing the injury was committed within the scope of the wrongdoer's employment.[4] In view of this it is not strange that the general rule postulated by the majority of the courts is that an employer is not liable for injuries inflicted on an employee by the horseplay of a coemployee, since horseplay is seldom considered within the scope of the employment.[5]

Before being led too far astray of the original theory by this misapplication, however, the courts seem to have realigned themselves by making certain exceptions to their general rule, one of which is that the employer will be liable for acts outside the scope of the wrongdoer's employment if he knows, or ought to know,

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1. 159 S. W. (2d) 666 (Mo. 1941).
2. Chicago, M. & St. P. Ry. v. Coogan, 271 U. S. 472 (1926); King v. Schumacher, 32 Cal. App. (2d) 172, 89 P. (2d) 466 (1939; Weiand v. Southern Pac. Co., 34 Cal. App. (2d) 500, 93 P. (2d) 1023 (1939).
3. 2 SHEARMAN AND REDFIELD, NEGLIGENCE (rev. ed. 1941) 456. Also see, Allen v. Quercus Lumber Co., 171 Mo. App. 492, 157 S. W. 661 (1913); 3 LABATT, MASTER AND SERVANT (1913) 2860.
4. Medlin Milling Co. v. Boutwell, 104 Tex. 87, 133 S. W. 1042, 34 L. R. A. (N. S.) 109 (1911); 35 AM. JUR., MASTER AND SERVANT § 201.
5. Emphatically so stated in Federal Rubber Mfg. Co. v. Havolic, 162 Wis. 341, 156 N. W. 143, L. R. A. 1916D 968 (1916).

of the propensity of the employee to commit those harmful acts.[6] In this manner the final result approaches that which is achieved by holding strictly to the tort theory, as is done by the Restatement of Torts,[7] which says that the master has a duty to use reasonable care to control those acts of his servants which are outside the course of the employment, so long as the servant is on the master's premises and the master knows or should know of the need to control the acts to prevent harm. Thus, recovery for injury from acts of dangerous or harmful horseplay, by persons who habitually engage in such to the knowledge of the employer, may be had from that employer under the common law principles applicable to the instant case.[8] The fact that the injured pliantiff happens to be another employee should make no difference.

This trend of the courts, as shown in the common law, is further illustrated by similar cases arising under the various state workmen's compensation acts.[9] The great majority of these acts expressly state that to merit recovery the injury must be one "arising out of and in the course of the employment,"[10] thus giving the same result with regard to acts of horseplay as does the "scope of employment" requirement at common law. Many of the courts have likewise managed to give some relief in these cases, though, by reasoning which is just the opposite of that used in the common law cases, that is, instead of making an exception to the general rule in cases where the employer knows or ought to know of the frequent

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6. The court in Hogle v. H. H. Franklin Mfg. Co., 199 N. Y. 388, 92 N. E. 794, 32 L. R. A. (N. S.) 1038 (1910), affirmed a case sent to the jury on these instructions: "I do not intend to talk to you about negligence, or about a nuisance, or about any other subject with a technical name. I want you to consider simply, in the light of common sense, what is due from one man to another, from one neighbor to another. . . . If my servant repeatedly, with my knowledge, even if he is not engaged in my business, throws stones at you and injures you, I should do what I reasonably can to prevent that act on his part. In the first place, the servant is subject to my control. In the second place, he is occupying my land and from it he is committing a trespass upon yours; he is using my personal property to help along in that trespass, and he is where he is and is able to commit that trespass because of my act in putting him there and keeping him there." And in Barrentine v. Henry Wrape Co., 105 Ark. 485, 152 S. W. 158 (1912), the plaintiff bases recovery on the neglect of the master in failing to restrain the dangerous acts. The decision states, "In order to bring the case within the operation of this rule, it is not always essential that the particular act of negligence should have been committed by the servant while he is strictly performing the master's service. . . . The master owes to his servants, while on his premises to perform service, and also to strangers who rightfully come upon the premises, the duty of exercising ordinary care to free the premises from known dangers, all dangers of which the master is informed." RESTATEMENT, TORTS (Proposed Final Draft No. 2, 1934) Explanatory Notes § 194C.

7. RESTATEMENT, TORTS (1934) § 317.

8. 35 AM. JUR., MASTER AND SERVANT § 201.

9. These cases are collected in a series of notes in (1921) 13 A. L. R. 540; (1922) 20 A. L. R. 882; (1925) 36 A. L. R. 1469; (1926) 43 A. L. R. 492; (1927) 46 A. L. R. 1150.

10. Indiana Workmen's Compensation Act of 1929 § 16378; Kentucky Workmen's Compensation Act § 4880.

occurrence of dangerous acts of horseplay, injuries caused by such acts are regarded as arising out of and in the course of the employment.[11]

The decisions arising under the Federal Employers' Liability Act, as the one under discussion here, seem to have followed this same circuitous detour which was blazed by the common law and the workmen's compensation cases, but they have failed to make the last bend which returned the others to the main road again,[12] and thus an employee injured by a coemployee's horseplay is refused recovery from the employer because the act was not within the actor's scope of employment.[13] The case most relied upon as establishing this rule as to the interpretation of the Federal Employers' Liability Act is that of *Davis v. Green*,[14] in which Mr. Justice Holmes led the court in refusing recovery to a deceased employee's widow because the act causing the death was not in furtherance of the employer's business. There would seem to be, however, a clear distinction between that case and the horseplay cases in that the injury there was due to a wanton and wilful act on the part of the coemployee.[15] The paragraph quoted in the principal case from *Jamison v. Encarnacion*[16] indicates the discrepancy in such reasoning. It states that if the employer is liable when mere inadvertence causes the plaintiff's injuries, then it is unreasonable to hold that an assault, which is a much graver breach of duty, will not also be called negligence within the federal act. Surely, then, it is not logical to reverse the statement and say that because the graver offense will not make the employer liable, the lesser offense will likewise give no recovery. There is a sufficient difference between holding a master liable for the habitual acts of horseplay of a servant, and holding him liable for a wanton and wilful killing by a servant to allow a different decision in the present case. Query, then: is the court in the principal case justified in resting its decision on the ground that the question

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11. Stuart v. Kansas City, 102 Kan. 307, 171 Pac. 913 (1918); Glenn v. Reynolds Spring Co., 225 Mich. 693, 196 N. W. 617 (1924), 36 A. L. R. 1469 (1925); State *ex rel.* H. S. Johnson Sash & Door Co. v. District Court, Hennepin County, 140 Minn. 75, 167 N. W. 283, L. R. A. 1918E 504 (1918); Socha v. Cudahy Packing Co., 105 Neb. 691, 181 N. W. 706 (1921); Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 128 N. E. 711 (1920); Brown, *"Arising Out of and in the Course of the Employment" in Workmen's Compensation Laws* (1933) 8 WIS. L. REV. 217, 229; Note (1929) 5 WIS. L. REV. 169.

12. This interpretation of the Federal Employers' Liability Act is very clearly enunciated in the case of Roebuck v. Atchison, T. & S. F. Ry., 99 Kan. 544, 162 Pac. 1153, L. R. A. 1917E 741 (1917); 72 L. ed. 157, 164. See Griffin v. Baltimore & O. R. R., 98 W. Va. 168, 126 S E. 571 (1925), 40 A. L. R. 1333 (1926), in which the court seems to recognize that the knowledge of the employer of the habitual acts will make a difference as to the decision under the federal act.

13. Jackson v. Chicago, R. I. & P. Ry., 178 Fed. 432 (C. C. A. 8th, 1910); Bocian v. Union Pac. R. R., 137 Neb. 318, 289 N. W. 372 (1939); Popadines v. Davis, 213 App. Div. 9, 209 N. Y Supp. 689 (1st Dept. 1925); 1 ROBERTS, FEDERAL LIABILITIES OF CARRIERS (1918) 936.

14. 260 U. S. 349 (1922).

15. The cases dealing with wanton acts of assault, as distinguished from mere acts of horseplay, are discussed in an annotation in 72 L. ed. 157.

16. 281 U. S. 635 (1930).

has been passed upon by the federal courts in determining liability under the Federal Employers' Liability Act?

The second point advanced by the plaintiff will, of course, rest on the decision on the first point, since, as the court indicates, if the defendant has no duty as to the injurious act, the mere furnishing of a special policeman to give some measure of protection to the employees will not place such a duty upon him.

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TORTS—RIGHT OF PRIVACY—LIMITING DEFENSE OF "PUBLIC INTEREST"

Barber v. Time, Inc.[1]

The defendant, in its weekly news magazine, published an article with plaintiff's picture concerning a physical ailment for which she was being treated in a hospital. The plaintiff had gone to the hospital complaining of an "insatiable appetite" which could only be appeased by a generous helping of food "every ten minutes." The plaintiff had protested against reporters taking her picture while she lay in bed and, upon publication, brought this action for damages on the theory that her right of privacy had been violated. The court, in affirming a judgment for the plaintiff, held that the matter was outside the scope of public interest and that there was substantial evidence tending to show a serious, unreasonable, unwarranted, and offensive interference with the private affairs of another.

The right of privacy, or the right to be let alone, was first recognized in Missouri in 1911 in the case of *Munden v. Harris*.[2] Invasion of the right has been held to be actionable, in the absence of statute, in only eleven other states (and Alaska and the District of Columbia).[3] Where the right has been recognized, the courts have been inclined to limit recovery to cases where the plaintiff's personality had been exploited to the direct advantage of the defendant.[4] Only infrequently has a court granted relief in the absence of the "commercial exploitation" element,[5] as was done in the *Barber* case. The courts have, however, followed

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1. 348 Mo. 1199, 159 S. W. (2d) 291 (1942).
2. 153 Mo. App. 652, 134 S. W. 1076 (1911).
3. California, Colorado, Georgia, Illinois, Kansas, Kentucky, Louisiana, New Jersey, North Carolina, Pennsylvania, and South Carolina. Two states have adopted the right by statute: New York Civil Rights Law (McKinney, 1916) §§ 50, 51; UTAH REV. STAT. (1933) §§ 103-4-7 to 103-4-9. Six states have refused to accept the doctrine: Massachusetts, Michigan, Ohio, Rhode Island, Washington, and Wisconsin. The remaining states are still non-committal.
4. The plaintiff has been granted recovery where his picture or name has been used for advertising or commercial purposes in the following cases: Flake v. Greensboro News Co., 212 N. Car. 780, 195 S. E. 55 (1938); Kunz v. Allen, 102 Kans. 883, 172 Pac. 532, L. R. A. 1918D, 1152 (1918); Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911); Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364, 135 Am. St. Rep. 417 (1909); Edison v. Edison Polyform & Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392 (1907); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 106 Am. St. Rep. 104 (1905).
5. Rhodes v. Graham, 238 Ky. 225, 37 S. W. (2d) 46 (1931); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); Brex v. Smith, 104 N. J. Eq. 386,

a well-recognized exception to the doctrine of protection of the right of privacy where the matter published is of public interest as "news."[6]

The court in the *Barber* case found that the matter involved was outside the scope of public interest. In so holding, the court used the analogy of the physician-patient privilege in evidence.[7] The court said that if there is any right of privacy at all, it included the right to obtain medical treatment without personal publicity. By using the phrase "personal publicity," the court indicated that if the ailment was of some medical or public interest, it could be successfully publicized provided the name and picture of the plaintiff were omitted. This view appears to have a certain sense of conservative soundness about it, particularly if the identity or picture of the patient conveyed no additional information to the public.[8] And yet, where the matter is of public concern, how heavily should this consideration weigh? Where the article is intended to be read and understood by lay readers, would not the identity of the person be somewhat necessary to add realism. If so, would not the fact that the article possesses a genuine amount of public appeal outweigh any such impropriety upon the part of the publisher?

Whether or not the right to seclude one's self from the public gaze tends to encroach and abridge the right of free speech and free press appears to be a false issue.[9] The cases, for the most part, are well agreed that only where the latter rights are so abused as to make the result inharmonious with community and social interests shall the former predominate.[10] Abuse here is synonymous with so-

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146 Atl. 34 (1929); Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927); Candler v. Byfield, 160 Ga. 732, 125 S. E. 905 (1924); Pritchett v. Board of Commissioners of Knox County, 42 Ind. App. 3, 85 N. E. 32 (1908).

6. Where the matter is newsworthy, the right of privacy does not exist. Themo v. New England News Publishing Co., 306 Mass. 54, 27 N. E. (2d) 753 (1940); Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939); Thayer v. Worcester Post Co., 284 Mass. 160, 187 N. E. 292 (1933); Jones v. Herald Post Co., 230 Ky. 227, 18 S. W. (2d) 972 (1929). See *Ex parte* Sturm, 152 Md. 114, 136 Atl. 312, 51 A. L. R. 364 (1927).

7. 21 R. C. L. 377, § 24. See Simonsen v. Swenson, 104 Neb. 224, 177 N. W. 831, 9 A. L. R. 1254 (1920). The patient is given further protection by statute in Missouri (Mo. Rev. Stat. (1939) § 1895), which even prevents disclosure of such matters in court.

8. "Names and pictures are legitimately used in connection with items of news, with matters of public men and events, and with matters which are submitted to the public in a way which invites public comment . . . and where the apparent use is to convey information of interest and not mere advertising." Martin v. New Metropolitan Fiction, Inc., 139 Misc. 290, 248 N. Y. Supp. 359 (1931). See Griffin v. Medical Society, 11 N. Y. S. (2d) 109 (1939).

9. Grosjean v. American Press Co., 297 U. S. 233 (1936).

10. Sidis v. F-R Publishing Corp., 113 F. (2d) 806 (C. C. A. 2d, 1940), 138 A. L. R. 22 (1940); Themo v. New England News Publishing Co., 306 Mass. 54, 27 N. E. (2d) 753 (1940); Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); Jones v. Herald Post Co., 230 Ky. 227, 18 S. W. (2d) 972 (1929); Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927); Pavesich v. New England Life Ins. Co., 12 Ga. 190, 50 S. E. 68, 106 Am. St. Rep. 104 (1905).

called unwarranted and undesirable publicity, and where the question of abuse arises, the courts are oftentimes put to delicately balancing the interests of the individual against the broader interests of society.[11] The wisdom and integrity of the judiciary is the only guide—not rules of law.[12]

What is meant by unwarranted and undesirable publicity? The Restatement of Torts[13] has said that publicity is unwarranted only when it would be offensive to persons of ordinary sensibilities—where the intrusion goes beyond the bounds of decency. Courts have said that publicity is unwarranted and undesirable when it disturbs another's feelings and causes him mental suffering,[14] which appears to be a more subjective view. Indeed the phrase is difficult of accurate and at the same time concise definition. The most common example has been the publication of another's name or picture for selfish purposes or for purposes of trade.[15] The courts have broadened the scope of the term by holding as unwarranted the advertising of a debt to coerce payment,[16] the tapping of the plaintiff's telephone wires,[17] and the public investigation of bank accounts.[18]

When the interest of the public to receive "news" enters in, the right of privacy acquires a new aspect. Frequently the public does have an interest in an individual which overcomes his right to be let alone. The public must be informed of matters relating to its education and to its protection.[19] Thus the right of privacy does not prohibit the publication of any matter which is of general or public concern.[20] But where the question has arisen as to the nature of "public interest," the courts have used a vague approach. This approach has consisted of defining newsworthy matter as being "that indefinable quality of interest which attracts attention,"[21] but not to be confused with mere curiousity. How frequently would not a delicate appreciation of intangible psychological factors be necessary in determining the question? Probably in the majority of cases, and certainly in the *Barber* case.

Since the recent recognition of the existence of the right of privacy, the courts have used a number of tests in determining whether the right had been invaded.

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11. Sweenek v. Pathe News, Inc., 16 F. Supp. 746, (D. C. N. Y. 1936).
12. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 106 Am. St. Rep. 104 (1905).
13. RESTATEMENT, TORTS (Proposed Final Draft No. 9, 1939) § 33.
14. Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364 (1909); Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902) (dissenting opinion); Atkinson v. Doherty & Co., 121 Mich. 372, 80 N. W. 285 (1899) (stated but not followed); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 106 Am. St. Rep. 104 (1905); Henry v. Cherry, 30 R. I. 13, 73 Atl. 97, 136 Am. St. Rep. 928 (1909) (stated but not followed).
15. See Note 4 *supra.*
16. Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927).
17. Rhodes v. Graham, 238 Ky. 225, 37 S. W. (2d) 46 (1931).
18. Brex v. Smith, 104 N. J. Eq. 386, 146 Atl. 34 (1929).
19. Note (1941) 39 MICH. L. REV. 526, at 528; Sweenek v. Pathe News, Inc., 16 F. Supp. 746 (D. C. N. Y. 1936).
20. Warren and Brandeis, *The Right of Privacy* (1890) 4 HARV. L. REV. 193.
21. Associated Press v. International News Service, 245 Fed. 244 (1917); Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939).

The early "property right" test[22] was used interchangeably with the "breach of contract, confidence, and trust" tests.[23] The scope of the right was extended through the "public figure" test[24] which lessened the chance for recovery on the theory that a public figure held himself out to the public in such a way as to limit his right of seclusion. Of recent origin is the *"mores"* test[25] which is but a variation of the "public interest" test. This latter-named test has been recently adopted by a number of courts, though suggested as early as 1893 by Warren and Brandeis in conjunction with the "public figure" test.[26] Its recent adoption has introduced a maze of factors for the courts to weigh and consider. Social benefit derived from the publication, individual sensitivity, public scorn, and other factors involving individual happiness are but a few.[27] Decision of the case here, as in the better charted field of defamation, is largely a matter of balancing these interests.[28]

In the instant case the plaintiff objected strenuously to her picture being taken as she lay in bed. Although, in the absence of a theory of consent, her protests are not material to a basic determination of whether or not her interest was of such a nature that the law should recognize and protect, they do enhance the extent of the violation, once the court finds the interest an object of protection.

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22. Early English courts found that a "property interest" had been invaded by the appropriation of a personality and gave relief. Gee v. Pritchard, 2 Swan. 402, 36 Eng. Rep. 670 (1818); Albert v. Strange, 1 Mac. & G. 25, 41 Eng. Rep. 1171 (1849). American courts have also used this test. Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911); Edison v. Edison Polyform & Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392 (1907); (1940) 40 COL. L. REV. 1283.

23. Pollard v. Photographic Co., 40 Ch. D. 345 (1888). A federal court in a recent case referred to these and the "property right" approach as fictions. See Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845, 846 (1939).

24. The term "public figure" was limited to those persons who were public officers or candidates for office by Warren & Brandeis, *loc. cit.*, note 20. Courts have expanded the term to those who ask for and desire public recognition and have thus surrendered this right to the public. Sweenek v. Pathe News, Inc., 16 F. Supp. 746 (D. C. N. Y. 1936); Bartletta v. McFeeley, 107 N. J. Eq. 141, 152 Atl. 17 (1930); Jeffries v. N. Y. Evening Journal Pub. Co., 67 Misc. 570, 124 N. Y. Supp. 780 (1910); Corliss v. Walker Co., 57 Fed. 434 (1893).

25. Martin v. New Metropolitan Fiction, Inc., 139 Misc. 290, 248 N. Y. Supp. 359 (1931). Under German law, it was unlawful to injure another *contra bonos mores,* which is defined as an act repugnant to the general conscience. For a discussion of the problem of "privacy" under the Civil Law, see Gutteridge and Walton, *The Comparative Law of the Right of Privacy* (1931) 47 L. Q. REV. 203.

26. Warren and Brandeis, cited *supra* note 20, at 214. See also Ragland, *The Right of Privacy* (1929) 17 KY. L. J. 85.

27. It is generally explained that the law does not discriminate between those who are sensitive and those who are not. Yet, this rule is not always followed. Stern v. Robert R. McBride & Co., 159 Misc. 5, 288 N. Y. S. 501 (1936); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931); Jones v. Herald Post Co., 230 Ky. 227, 18 S. W. (2d) 972 (1929).

28. Sidis v. F-R Publishing Corp., 113 F. (2d) 806, (C. C. A. 2d, 1940), 138 A. L. R. 22; Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 27 N. E. (2d) 753 (1940); Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927); Corelli v. Wall, 22 T. L. R. 532 (1906).

The decision places the court among the forward looking courts in recognizing and protecting the interest in privacy. What is perhaps of greater significance is the articulate fashion in which the court sets forth the individual and social interests involved and then weighs and balances these considerations. If all important doctrines could be reexamined constantly by this process, law would be kept more closely abreast changing social values.

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