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SOME NEEDED CHANGES
IN THE TORT LAWS OF VIRGINIA*

DUDLEY WARNER WOODBRIDGE†

I.

Right of Privacy

One of our most modern torts is unprivileged violation of a person's right of privacy. In jurisdictions without a statute on the subject, according to Dean Prosser's analysis,¹ this right encompasses four distinct categories of activity: (1) An intrusion into one's physical solitude; (2) a publishing of that which violates the ordinary decencies; (3) a placing of one in a false but not necessarily defamatory position in the eyes of the public; and (4) an appropriation of part of one's personality for commercial use, i.e., advertising. In 1904, over a half-century ago, Virginia adopted the gist of the New York statute,² which applies to the fourth category only.³ This statute has made it extremely doubtful

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¹Prosser, TORTS, § 97 (2nd ed. 1955).

²N. Y. Civil Rights Law, McKinney, 1916, c. 6 §§ 5-51. The original version of this statute was passed in 1903.

³Va. Code § 8-650 (1957 Repl. vol.). It makes the use of a person's "name, portrait, or picture" for advertising or purposes of trade without written consent a misdemeanor as well as a tort. Surviving consort or kin may also bring an action, and provision is made for exemplary as well as for compensatory damages. The New York statute does not have the survival feature, but Utah, the only other state having such a statute (Utah Code

whether any other violations of the right of privacy are actionable in Virginia today, for since its enactment there has been no reported Virginia litigation on the subject.⁴ The expression of one has apparently excluded the others. If it took a statute to make a violation within the advertising category a tort,⁵ it would seem that another statute would be needed to make the other categories torts. I urge the enactment of such a statute since our present statute is a road-block to the proper development of the law by the courts in this new and increasingly important field.⁶

To take some examples that have come to my attention, should it not be a violation of a young lady's right of privacy for a male to gain entrance to her dormitory building at night through a door inadvertently left ajar, sneak into her room, hide under her bed, and then scare the living nightlights out of her? Or for a Peeping Tom to peep,⁷ or for one to take too candid photographs? Recently

Ann. § 103.4-7 to 9 (1943)) has a survival feature more liberal than Virginia's. It allows the heirs or personal representatives of the deceased to sue where there is a publication which would have invaded the deceased's right of privacy had he been living. Nor has there been any Virginia litigation construing the statute itself. Contrarily, New York has had a plethora of cases interpreting their statute.

⁴Rosen, *The Law of Privacy in New York*, 15 N.Y.U. INTRAMURAL L. REV. 234 (1960) analyzes these cases, pointing up the narrow construction given the term *right of privacy* as distinguished from the kindred tort actions for trespass, assault and battery, slander, and libel.

⁵And it apparently did, for just prior to its enactment a case arose in the Law and Equity Court of the City of Richmond (*Cyrus v. Boston Chemical Co.*, 11 Va. L. Reg. 938 (1905) (otherwise unreported)) which held that no cause of action would be maintained for the unauthorized use of one's picture for advertising purposes.

⁶*State v. Evjue*, 253 Wis. 146, 33 N.W. 2d 305 (1948), concerning publicity over a rape case, upheld Wis. Stat. § 348.412, which might warrant emulation provided a tort provision were added. The statute reads: "Any person who shall publish or cause to be published in any newspaper, magazine, periodical, or circular, except as the same may be necessary in the institution or prosecution of any civil or criminal court proceeding, or in the compilation of the records pertinent thereto, the identity of a female who may have been raped or subjected to any similar criminal assault, shall be punished by imprisonment in the county jail for not more than one year or by a fine not greater than five hundred dollars, or both."

⁷The original Peeping Tom unchivalrously peeked at Lady Godiva, whereupon, according to legend, he was struck blind. The legend is silent as to any tort action having been brought by either party. Such prurient prying has since been declared a misdemeanor by statute in Virginia (Va. Code Ann. § 18-225.1 (1960 Repl. vol.)), but nothing is said as to whether a tort action will lie.

a fire marshal who legitimately entered a private home to extinguish a small fire shouted, "I've seen some filthy homes in the course of my duties, but this is absolutely the worst I've ever laid eyes on. The people here are living in a garbage can. Is there a photographer in the crowd? If so, I wish he would take some pictures." The occupant was a young mother who had recently received word that her husband was missing in action in Korea. The rotten lettuce, sour milk, and neglected dirty dishes had no bearing on the actual cause of the fire, but pictures were nevertheless taken and published in a newspaper. Is this not a flagrant intrusion on the young mother's privacy?⁸ And what of a person who forges a prominent citizen's name to a glowing letter of recommendation for an office seeker whom the citizen believes to be a scoundrel?

It seems to me inconceivable that such acts should in this enlightened age not be torts.

II.

The Virginia Bastardy Act

And now I urge that one of the most peculiar statutes I have ever read, the equal of the best of Ripley's Believe It or Not cartoons, should be radically changed. Biological parents who give birth to a child born out of wedlock are guilty of a grievous wrong against their innocent offspring. This wrong arises independently of contract and hence can be classified as a tort. The least the father can do is to support the child until he is able to support himself, or until someone else voluntarily takes over as in the case of adoption. It used to be said, "It is the woman who pays" — but some now say it is the taxpayer through Public Welfare under the high-sounding name of aid to dependent children.⁹

⁸The would-be plaintiff in this case declined to bring suit for violation of privacy, not because she was aware of the slim possibility of its succeeding in Virginia, but because she realized, ironically, that in pressing such a claim she would be exacerbating the very evil for which she sought redress. This anomalous situation may partly explain the paucity of reported cases in this area. If our plaintiff had had statutory backing for her cause of action, she might well have obtained a satisfactory out-of-court settlement without undue publicity.

⁹Va. Code Ann., § 63-141-161 (Repl. vol. 1958).

But why should not the father be required to pay in all those cases where there is no reasonable doubt about his paternity? But what does the Code of Virginia as amended in 1958 provide? I quote, "Whenever in proceedings hereafter under this chapter concerning a child whose parents are not married, a man admits before any court having jurisdiction to try and dispose of the same, that he is the father of the child or the court finds that the man has voluntarily admitted paternity in writing, under oath, the court may then enter and enforce judgment for the support, maintenance and education of such child as if the child were born in lawful wedlock."¹⁰

So no matter how clear paternity is the father cannot be forced to support his own offspring unless he will admit the fact of paternity in court, or in writing under oath! Thus in the case of *Distefano v. Commonwealth*,¹¹ the father lived with the mother without benefit of clergy or the equivalent, and bore him children. He claimed these children as exemptions in filing his income tax returns. The Supreme Court of Appeals very properly held that under the above statute the father could not be made to support the children because one does not voluntarily (one is drafted) file an income tax return nor does one make oath that it is true in all respects, even if the penalties of perjury are automatically imposed by statute for intentional misrepresentations.

What would plaintiffs' attorneys think of a similar statute with reference to negligence, to wit: "Whenever in proceedings in negligence cases before courts having jurisdiction therein, the defendant admits that he was negligent, or where the court finds the defendant has voluntarily admitted in writing under oath that he was negligent, then and then only, will an action lie for damages caused by such alleged negligence?"

What possible reason can there be for this fools' bastardy act?¹² The only explanation I have ever heard, is that it is the settled policy of this Commonwealth never to compel the white father of a mullato child to support same, and, naturally since the statute cannot make such an exception in so many words, an easy out

¹⁰Va. Code Ann., § 20-61.1 (Repl. vol. 1960).

¹¹201 Va. 23, 109 S.E. 2d 497 (1959).

¹²No law can in logic or justice exist without a substantiating reason.

has to be given to all fathers of illegitimate children; but why concern for actual race mixing miscegenationists should be allowed to make a travesty of our bastardy laws is entirely beyond my rational comprehension.

III.

The Attractive Nuisance Doctrine

Whether the attractive nuisance doctrine is law in Virginia at the present time, and if so, to what extent, should definitely be cleared up.¹³ The overwhelming majority of states now recognize the doctrine subject to some reasonable limitations.¹⁴ Both the doctrine and its limitations are admirably set forth in Section 339 of the A.L.I. Restatement of Torts. This section is short and to the point as follows:

A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains on the land, if

(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

(b) the condition is one which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

¹³The most recent definitive statement by the Supreme Court of Appeals on the matter appears in *Washabaugh v. Northern Virginia Const. Co.*, 187 Va. 767, 48 S.E. 2d 276 (1948), where the court expressly denies the existence of the doctrine in Virginia. But compare the cases which permit young children to recover when a "dangerous instrumentality" is involved: *Daugherty v. Hippchen*, 175 Va. 62, 7 S.E. 2d 119 (1940); *Haywood v. South Hill Mfg. Co.*, 142 Va. 761, 128 S.E. 362 (1925). See also, Beatty, *The Attractive Nuisance Doctrine in The Virginias*, 10 WASH. & LEE L. REV. 20 (1953).

¹⁴Dean Prosser indicates the last decisions of eight states still reject the doctrine, but the number is steadily decreasing. Prosser, *TORTS* 439 (2d ed. 1955).

(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.

If our legislature would codify these provisions, then our courts, having gotten off on the wrong foot originally, would no longer feel limited by the old cases and would be free to take a more humanitarian view in the future.

IV.

Comparative Negligence Statutes

For all practical purposes we have only one state comparative negligence statute — the public railway grade crossing statute¹⁵ where failure of the railroad's employees to give the signals required by law prevents plaintiff's action from being barred by the fact that he or his testate or intestate was contributorily negligent, said contributory negligence, however, going in mitigation of damages. This statute has been held to have no application within incorporated cities or towns not having ordinances requiring signals.¹⁶ In such cases the general principles of the common law are applicable and an injured person is barred by his contributory negligence.

It seems to me perfectly absurd to have one rule for a person who is injured in a railroad crossing accident in the country and another for one injured in such an accident in a city or town; or for that matter to have one rule when the railroad's liability is based on an ordinance and another rule when it is based on common law. The natural justice of all these cases is the same.

If the legislature would amend the Code § 56-416 to read, "If the employees in charge of any railroad engine or train fail to give the signals required by statute, ordinance, or *common law*, etc.," this defect could easily be remedied.

But the law of comparative negligence should be extended to protect pedestrians and bicyclists. Suppose that P, a pedestrian,

¹⁵Va. Code Ann. § 56-416 (Repl. vol. 1959).

¹⁶Norfolk and Western Railway Company v. Emmett Graham Hagy, 201 Va. 183, 110 S.E. 2d 177 (1959).

is injured by M, a motorist. Suppose further that each was to blame for the injury and that P has suffered \$20,000 damages but M's car does not even have a dent in the bumper. Why should the entire \$20,000 loss fall on one guilty party and none on the other? We allow contribution between joint wrongdoers in other cases of negligence.¹⁷ Why not in this one, too? Surely a contest between a pedestrian and an automobile or a bicycle and an automobile is just as uneven as one between an automobile and a railroad locomotive.

V.

Death by Wrongful Act Statutes

In my opinion our Death by Wrongful Act statutes¹⁸ need to be overhauled.

First, as to the amount of the recovery. Why have any different rule as to the measure of damages in death cases than in any other cases? The maximum recovery of \$30,000,¹⁹ as a matter of fact, can be grossly inadequate or grossly excessive depending on the circumstances of each case. The \$30,000 limitation is almost an invitation to the jury to award that amount, and when the jury feels sympathetic toward the victim of a tragedy and his next of kin and know that the rich insurance companies, or corporations, won't miss the \$30,000 and when the amount awarded is practically within the sole discretion of the jury,²⁰ no wonder there are excessive verdicts. On the other hand, if a man with an earned income of say \$15,000 a year with a wife and family to support is negligently killed, the \$30,000 (even if net) (and you know it is not net), is only a few years' support — a grossly inadequate sum.

¹⁷Va. Code Ann. § 8-627 (Repl. vol. 1957).

¹⁸Va. Code Ann. § 8-633 et seq. (Repl. vol. 1957).

¹⁹Va. Code Ann. § 8-636 (Repl. vol. 1957).

²⁰A jury verdict assessing damages for wrongful death has been held to be final, and the Supreme Court has no authority to disturb it. *Highway Express Lines v. Fleming*, 185 Va. 666, 40 S.E. 2d 294 (1946), *Chick Transit Corp. v. Edenton*, 170 Va. 361, 196 S.E. 648 (1938), *Harris v. Razer*, 165 Va. 461, 182 S.E. 276 (1935), *Ratcliffe v. McDonald*, 123 Va. 781, 97 S.E. 307 (1918).

Second, as to the beneficiaries: Instead of dividing them into what is in effect three classes, they should be divided into two classes, and not on arbitrary lines of relationship, but according to dependency, or no dependency. In the case of actual and legal dependency the dependents should take free from the claims of creditors, as at present,²¹ but where there is no legal or actual dependency, the recovery should belong to the estate and be subject to the claims of creditors.²²

To illustrate, if X is killed outright as the result of Y's negligence, and X owes his landlady for room and board, G for gasoline, D for doctor's bills, not growing out of the accident, etc., and X's estate's only asset is the cause of action for his wrongful death, and X's only relative is B, a brother in California who is contemptuous of his less fortunate Virginia brother, why should the California brother who has not been injured a nickel be allowed say \$20,000 while X's creditors who have befriended him in his hours of need, get nothing?²³ And as near as I can tell from the statutes, X would be buried at public expense if his brother who has received the \$20,000 did not see fit to pay his

²¹Va. Code § 8-638 allows only for "... payment of costs and reasonable attorney's fees ..." by the personal representative in cases in which there are representatives of a class, and the rest "... shall be free from all debts and liabilities of the deceased; ...".

This therefore implies, and it has been so held, that hospital, medical and funeral expenses are not recoverable and are not proper elements of damages. *Conrad v. Thompson*, 195 Va. 714, 80 S.E. 2d 561 (1954). The court states, "We have frequently held that an action for wrongful death is not for the benefit of the decedent's estate, but for certain near relatives." *Patterson v. Anderson*, 194 Va. 557, 74 S.E. 2d (1953); *Porter v. Va. Elec. & Power Co.*, 183 Va. 108, 31 S.E. 2d 337 (1944).

²²This is the view today but only to prevent abatement of the action due to lack of class beneficiaries. This gives our death by wrongful act statute, in very limited cases, the attributes of a survival statute.

²³The court has admitted this result in *Wolfe v. Lockhart*, 195 Va. 479, 78 S.E. 2d 654 (1953): "Instruction erroneously emphasized the idea that the purpose and object of the statute is to allow damages solely to those who might reasonably look to decedent for support. That is a matter to be considered by the jury, but it is not the sole basis of recovery on which the statutory beneficiaries may rely or the only element of damage to be considered by the jury. There are other matters and elements such as the loss of decedent's care, attention and society, and the sorrow, suffering and mental anguish occasioned the beneficiaries by reason of his death, which may be considered and taken into account by the jury and are elements for which damages may be given to the statutory beneficiaries even though they may have had no reasonable expectancy of support from the decedent had he not been killed." 195 Va. at pp. 487-488.

funeral expenses. In passing, I note that lawyers, doctors, hospitals and nurses have a limited lien for expenses connected with the negligent death and the recovery of damages therefor, but no one seems to love or remember the undertaker.²⁴

Then, there is at least one uncertainty that should be cleared up. Suppose there is only one beneficiary in the present class 1, and that he is a joint tortfeasor in causing the death of deceased who is survived by a brother who is in class 2. The statute provides that no one in class 2 shall take as long as there is any one in class 1. Does this mean, then, that since the class 1 beneficiary is barred by his negligence, no one takes, or does the statute mean that as long as there is no one in class 1 *capable of taking*, then no one in class 2 can take?²⁵

In the case of descent and distribution, in the case of dower,²⁶ and in cases of Workmen's Compensation,²⁷ a spouse who has deserted loses his or her rights to take, but not so in the case of death by wrongful act. But why not? Probably just an oversight but an oversight that should be remedied. In *Matthews v.*

²⁴A list of miscellaneous liens arising from a tort resulting in a wrongful death action could include: Hospital, medical and nursing services, Va. Code §§ 32-138 to 32-146; ambulances, Va. Code § 43-63.1; Hotels and boarding houses, Va. Code §§ 43-31 to 43-40.

The Workmen's Compensation Act throws a rather meatless bone to the undertaker by allowing a recovery for burial expenses if the deceased employee leaves no dependents. Va. Code § 65-67.

²⁵Virginia has held that where the sole beneficiary under the Death by Wrongful Act statute was himself guilty of contributory negligence, the action is barred in toto. *Ratcliffe v. McDonald*, 123 Va. 781, 97 S.E. 307 (1918).

In *Danville v. Howard*, 156 Va. 32, 157 S.E. 733 (1931), the Virginia court accepted the opinion of the American Law Institute, Restatement of Torts, vol. 2, Comment A to § 493, and held that where mother and father were the beneficiaries, and a verdict was granted separately for each, the part of the verdict allotted to the contributorily negligent father should be set aside, and the remainder left intact to the mother. The question presented here in the text was not answered as both mother and father were in the same class. There seems to be no law dealing with this specific point. But see, generally, Anno. 2 A.L.R. 2d 785 (1948). Contributory negligence of beneficiaries as affecting action under death or survival statute.

²⁶As to desertion, Va. Code § 64-35 and § 64-24. As to adultery, Va. Code § 64-19.

²⁷Va. Code § 65-63(1) (Repl. vol. 1958).

Hicks,²⁸ the surviving consort had not only deserted but was living in adultery. Yet, since she was the only one in class 1, she took. The damages, of course, were very little,²⁹ but why should a wrongdoer be in a better position because the deceased's wife is a deserting adulteress? The sensible solution to the problem would be to deprive such a person of any right to recover, and go on to the next eligible person. One who is not good enough to inherit, or to take dower or curtesy, or workmen's compensation is surely not worthy of taking under a death by wrongful act statute.

VI.

Liability of Charities

Let us suppose that X needs medical attention unexpectedly. There is no room for him at hospital A, but finally a bed is found in hospital C. Unknown to X, hospital C qualifies as a charity although it attempts to collect from all who can pay.³⁰ X can pay and expects to pay. He is injured or killed as the result of the negligent act of an employee, but the employee's supervisor had no reason to suppose that the employee would act negligently.³¹ It appears to be the law in Virginia that X has no recourse against the hospital.³² But there is no reason why a

²⁸197 Va. 112, 87 S.E. 2d 629 (1955), also see *Porter v. Virginia Elec. & Power Co.*, 183 Va. 108, 31 S.E. 2d 337 (1944), where the surviving spouse lived apart from deceased for about fifteen years prior to his death. Also, *Mitchell v. Kennedy*, 166 Va. 346, 186 S.E. 40 (1936).

²⁹Although she was not barred, evidence of her misconduct was admissible to help jury to ascertain damages recoverable.

³⁰"A hospital which is chartered to the care for sick and disabled persons and which has no capital stock and is not conducted for dividends or profits is a charity hospital and the fact that it receives compensation from patients who are able to pay for the accommodations received does not render it any less a charitable institution in the eyes of the law." *Hospital of St. Vincent v. Thompson*, 116 Va. 101, 81 S.E. 13 (1914).

³¹"... the only duty which a charitable hospital owed to its patients was the exercise of due care in the selection and retention of its servants." *Weston v. Hospital of St. Vincent*, 131 Va. 587, 107 S.E. 785 (1921).

³²Cases holding a public hospital not liable for its torts to patients: *Fry v. Albemarle County*, 86 Va. 195, 9 S.E. 1004 (1890); *Maia v. Eastern State Hospital*, 97 Va. 507, 34 S.E. 617 (1899); *Weston v. Hospital of St. Vincent*, 131 Va. 587, 107 S.E. 785 (1921).

Same as to private, but charitable hospitals: *Stuart Circle Hospital v. Curry*, 173 Va. 136, 3 S.E. 2d 153 (1939); *Danville Community Hos-*

charity cannot carry liability insurance. To punish X by denying him damages so that the C Hospital may help others is in effect forcing X to be charitable to persons he does not even know. Why should not the C Hospital be just to X before being generous to others? I believe that our legislature should pass a statute putting charities on the same basis as any other legal person, as they now are in many jurisdictions.³³

VII.

State Torts Claims Act

And finally I suggest that the State of Virginia pass a State Torts Claims Act very much like that of the Federal Torts Claims Act.³⁴ Private corporations once attempted to get out of tort

pital v. Thompson, 186 Va. 746, 43 S.E. 2d 882 (1947); Jefferson Hospital, Inc. v. Van Lear, 186 Va. 74, 41 S.E. 2d 441 (1947).

³³Some jurisdictions permitting recovery against charitable institutions: Arizona — Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P. 2d 220 (1951); California — Silva v. Providence Hospital of Oakland, 14 Cal. 2d 762, 97 P. 2d 798 (1939); Delaware — Durney v. St. Francis Hospital, 46 Del. 350, 83 A. 2d 753 (1947); District of Columbia — President and Directors of Georgetown College v. Hughes, 76 U.S. App. D.C. 123, 130 F. 2d 810 (1942); Kansas — Noel v. Minninger Foundation, 175 Kan. 751, 267 P. 2d 934 (1954); Michigan — Parker v. Port Huron Hospital, 361 Mich. 1, 105 N.W. 2d 1 (1960); Mississippi — Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951); New York — Bing v. St. John's Episcopal Hospital, 2 N.Y. 2d 656, 143 N.E. 2d 3 (1957); North Dakota — Rickbeil v. Grafton Deaconess Hospital, 74 N.D. 525, 23 N.W. 2d 247 (1946); Ohio — Klema Adm'r. v. St. Elizabeth's Hospital of Youngstown, 170 Ohio St. 519, 166 N.E. 2d 765 (1960); Vermont — Foster v. Roman Catholic Diocese of Vermont, 116 Vt. 124, 70 A. 2d 230 (1950); Washington — Pierce v. Yakima Valley Memorial Hospital Association, 43 Wash. 2d 162, 260 P. 2d 765 (1953). In the *Pierce* case the court said in abandoning the doctrine of tort immunity as applied to charitable institutions: "Ordinarily, when a court decides to modify or abandon a court-made rule of long standing, it starts out by saying that 'the reason for the rule no longer exists.' In this case, it is correct to say that the 'reasons' originally given for the rule of immunity never did exist. . . ." Wisconsin — Kojis v. Doctors Hospital, . . . Wis. . . . , 107 N.W. 2d 131 (1961). Many writers and commentators agree that the rule of respondeat superior should render a charitable institution liable for its torts and those of its employees. See: 2A BOGERT ON TRUSTS AND TRUSTEES (1953), #401, pp. 241-254; Prosser, TORTS (2nd ed. 1955), #109, p. 786 et seq.; 2 Harper and James, TORTS (1956), p. 1397, note 9. Freezer, *The Tort Liability of Charities*, 77 U. OF PA. L. REV. 191.

³⁴Federal Tort Claim Act, U. S. Code, Title 28, §§ 2671 et seq. The substantive provisions of the statutes state in part: "The United States shall be

liability on the ground that they were not authorized by their charters to commit torts, and hence only their employees could be liable. The obvious answer was, of course, that while they were no more privileged than anyone else to commit torts, they had the power to commit them, and when they wrongfully exercised that power through their servants or agents, they were liable.

I submit that the same reasoning is equally applicable to public corporations. The maxim that the King can do no wrong has no place in modern American law. The right to recover for torts committed by State employees within what would be the scope of their authority if they were employed by private corporations, should not depend upon the injured person's ability to get reimbursement by a private act of the legislature, but on the justice of his case under the general law of torts as determined by the State's own courts. Surely the State should not ask for favored treatment as against one who has been injured by its negligence. Justice becometh a Sovereign as well as her subjects.

liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages . . .”