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THE CASE FOR A BROADER RIGHT OF PRIVACY IN VIRGINIA

Seventy-five years ago, in an article written by Samuel D. Warren and Louis D. Brandeis, the right of privacy was described as the right to be left alone, to live a life of seclusion, or to be free from unwarranted publicity.¹ In the time since this classical appeal for recognition of the right of privacy was made, many refinements of the right have been litigated and decided, but the original plea of universal recognition still remains unfulfilled.

The subject first came before a court of last resort for decision in 1902, when the Court of Appeals of New York rejected the concept of privacy as a legal right in a four to three decision. This case, *Roberson v. Rochester Folding Box Co.*,² held that a person whose likeness was used in connection with an advertisement was without redress. The New York legislature, in 1903, provided a remedy for this wrong mainly because of the strong appeal of the dissent in *Roberson* which was based on the Warren and Brandeis article. The two New York statutes provide both criminal³ and civil⁴ rights of action. The New York legislature was

1. Warren and Brandeis, *Right of Privacy*, 4 HARV. L. REV. 193 (1890).

2. 171 N.Y. 538, 64 N.E. 442, 59 L.R.A. 478 (1902).

3. N.Y. CIVIL RIGHTS LAW Sec. 50.

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait, or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

4. N.Y. CIVIL RIGHTS LAW Sec. 5.

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, at its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography from exhibiting in or about his or its establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced, or dealt in by him which he has sold, or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

followed quickly by Virginia in adopting what was then thought to be a very liberal statute.⁵

The statute was thought to be necessary in Virginia because of the New York decision in the *Roberson* case and on the basis of *Cyrus v. Boston Chemical Co.*⁶ This case was decided by the Law and Equity Court of the City of Richmond and held that in the absence of a statute there is no right of action for the unauthorized use of one's picture for advertising purposes. What weight this unreported case would carry as precedent today is speculative since it is the only known case in Virginia, either at common law or under the statute, on the right of privacy.

AT COMMON LAW

When referring to the common law right of privacy it must be remembered that this right has been developed within the common law only since the turn of the century. It was substantially unknown at English common law.⁷ While New York and Virginia refused to recognize the right at common law and filled the gap with statutes, other states took up the plea of Warren and Brandeis and held that it was a common law right of action. Today, recognition of the right of privacy is split into four camps. It is recognized in some form now in thirty-two states without the aid of statute.⁸ In four other states the courts have at least not said the right does not exist at common law.⁹ Four other

5. VA. CODE ANN., Sec. 8-650 (1950).

Unauthorized use of the name or picture of any person.—A person, firm or corporation that knowingly uses for advertising purposes, or for the purposes of trade, the name, portrait, or picture of any person resident in the State, without having first obtained the written consent of such person; or if dead, of his surviving consort, or if none, his next of kin, or, if a minor, of his or her parent or guardian, as well as that of such minor, shall be deemed guilty of a misdemeanor and be fined not less than fifty dollars nor more than one thousand dollars. Any person whose name, portrait, or picture is used within this State for advertising purposes or for the purposes of trade, without such written consent first obtained, or the surviving consort or next of kin, as the case may be, may maintain a suit in equity against the person, firm or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait, or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.

6. See 11 Va. L. Reg. 938, Citing *Cyrus v. Boston Chemical Co.*, Law and Equity Court of City of Richmond (otherwise unreported).

7. See Davis, *What Do We Mean By Right of Privacy?*, 4 S.D.L. REV. 1 (1959).

8. PROSSER, TORTS, Sec. 112 (3rd ed. 1964).

9. *Fitzsimmons v. Olinger Mortuary Ass'n*, 91 Colo. 544, 17 P.2d 535 (1932); March

states do not recognize the common law right of privacy, nor have they passed any legislation to confer this right.¹⁰ It is recognized in New York, Virginia, Utah and Oklahoma in a limited form because of legislative enactments.

In order to understand why Virginia is listed as only partly recognizing this right, we must look at how this cause of action has developed in other states that have the common law right. Dean Prosser, in a recent article,¹¹ outlined four torts as a basis for determining an invasion of privacy:

1. Intrusion into seclusion or solitude or private affairs.
2. Public disclosure of embarrassing private facts.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation for defendant's advantage of plaintiff's name or likeness.¹²

Perhaps the most common intrusion of privacy is a physical intrusion into a person's private life. In *Young v. Western & A. R. Co.*,¹³ the defendant entered the plaintiff's home at night and dragged the plaintiff's husband from their bed at gun point. Among other counts the plaintiff alleged an invasion of her right of privacy. The court, in upholding the allegation, said:

According to the averments, the defendant's agent committed a trespass upon the home in which the plaintiff resided with her husband, and, whether the cause of action for the unlawful search of and trespass upon the home was vested in the husband, the wrongful acts complained of nevertheless included a violation of the plaintiff's right of privacy and of personal security, and constituted a positive, willful tort against her.¹⁴

In a more recent Georgia case, *Ford Motor Co. v. Williams*,¹⁵ the court affirmed a judgment based on invasion of privacy by an agent of

v. Zanal Products Corp., 298 Mass. 1, 9 N.E.2d 393 (1937); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948); *State ex rel. LaFollette v. Hinkle*, 131 Wash. 86, 229 P. 317 (1929).

10. *Henry v. Cherry & Webb*, 30 R.I. 13, 73 A. 97 (1909); *Brunson v. Ranks Army Stores*, 161 Neb. 519, 73 N.W.2d 803 (1955); *McCullagh v. Huston Chronicle Pub. Co.*, 211 F.2d 4 (5th Cir. 1954); *Yoeckel v. Somonig*, 272 Wis. 430, 75 N.E.2d 925 (1956).

11. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

12. *Id.* at 389.

13. 39 Ga. App. 761, 148 S.E. 414 (1929).

14. *Id.*, 148 S.E. at 417.

15. 108 Ga. App. 21, 132 S.E.2d 206 (1963).

Ford Motor Co. The agent entered the plaintiff's home and searched it for stolen property. The court declared this to be an invasion of privacy even though the plaintiff was not home at the time.

In many of the states that recognize the right of privacy at common law, it is a tort to disclose embarrassing private facts about a person. In the case of *Douglas v. Stokes*,¹⁶ the plaintiff's wife gave birth to twin boy children, born together from the shoulders down to the end of their bodies. They died, and after death the plaintiff employed the defendant, a photographer, to take a photograph of the corpse in its nude condition; it being agreed that the defendant was to make for the plaintiff twelve photographs, and no more. Contrary to the agreement, the defendant made several photographs from the negative, one of which he filed in the copyright office of the United States, and a copyright was issued to him on it. The court, in holding for the plaintiff on an invasion of privacy count, said:

If the defendant had wrongfully taken possession of the nude body of the plaintiff's dead children and exposed it to public view in an effort to make money out of it, it would not be doubted that an injury had been done them to recover for which an action might be maintained. When he wrongfully used the photograph of it, a like wrong was done; the injury differing from that supposed in degree, but not in kind.¹⁷

A similar case, *Melvin v. Reid*,¹⁸ arose in California. In this case, the suit was by a reformed prostitute against a defendant who had told of her past life in connection with her real name in a motion picture. In upholding the right of privacy without legislation in California, the court said that they believed that the publication by the defendant of the plaintiff's unsavory past life was not justified by a standard of morals or ethics known to them, and it consisted of a direct invasion of her right to privacy.¹⁹

The third tort that Prosser lists in his outline, putting one in a false light in the public eye, is a little more subtle than the others. Here, the tort consists of making a person seem what he is not. For example, in *Schwartz v. Erington*,²⁰ the plaintiff brought an injunctive action, based

16. 149 Ky. 506, 149 S.W. 849 (1912).

17. *Id.*, 149 S.W. at 850.

18. 112 Cal. App. 285, 297 P. 91 (1931).

19. *Id.*, 297 P. at 93.

20. 133 La. 235, 62 So. 660 (1913).

on a right of privacy, to make a newspaper stop publishing a certain petition the plaintiff had signed. The defendant asserted his right of free speech and claimed freedom of the press. The court found that what the defendants were enjoined from doing was the publication of a petition which the plaintiff had signed under a misapprehension. The court held that this was not an exercise by the defendants of their privilege to publish their sentiments, but was an unauthorized use by them of a composition purporting to represent the sentiments of the signers and could not be published without the permission of the plaintiffs, who were the signers.

In another case of this type, *Peay v. Curtis Publishing Co.*,²¹ a District of Columbia taxicab driver sued the Curtis Publishing Co. on a theory of libel and invasion of privacy. The publishing company had published an article in the "Saturday Evening Post" entitled "Never Give a Passenger a Break." In the illustrations supporting the article, which was detrimental to taxicab drivers, the plaintiff's picture appeared. The court held that the libel count was not supported since the class was too large, but it upheld the right of privacy action. The court's reasoning was that the article, in connection with the plaintiff's picture, gave the public the idea that she was one of the unscrupulous taxicab drivers mentioned in the article.

The last class of recognized right of privacy actions is probably the most litigated. The original New York case, the *Roberson* case, dealt with this problem of the appropriation of a person's name or image for commercial use. The *Roberson* case of course denied a common law remedy, but many other jurisdictions allowed the remedy. California, for example, in the case of *Fairfield v. American Photocopy Equipment Co.*²² decided that where a defendant, without the plaintiff's consent, advertised that the plaintiff was a satisfied user of defendant's machine, a right of action was established on the theory of an invasion of privacy.

In an Alabama case, *Birmingham Broadcasting Co. v. Bell*,²³ the court held that the plaintiff did not have a cause of action based on unjust enrichment, but his sole remedy was to sue for invasion of his right of privacy. In this case, the defendant used the plaintiff's name for advertising their radio station without consent of the plaintiff or any agreement with him. The plaintiff was a famous local sports broadcaster.

21. 78 F. Supp. 305 (D.D.C. 1948).

22. 138 Cal. App.2d 82, 291 P.2d 194 (1955).

23. 259 Ala. 656, 68 So.2d 314 (1953).

UNDER THE STATUTES

The right of privacy provided for by the New York civil statute and the Virginia statute, which is patterned after it, would seem to be unfortunately limited to the last class of torts that Prosser gives in his outline: appropriation for defendant's advantage of plaintiff's name or likeness. In fact, the statutes even further limit the remedy for this tort by making the "plaintiff's advantage" to be measured only in pecuniary terms. Thus, what appeared at the time to be a highly liberal grant of a right of action has turned into an ultra-conservative point of view. The truth is, that the common law had developed in other jurisdictions to such a point that these "liberal" statutes have been left far behind.

Virginia has never had a case decided under its statute, so we must turn to the New York decisions for an inkling of what may lie ahead for Virginia. The New York courts have time after time declared that there is no common law right of privacy in New York,²⁴ and what is probably more important, that no right of privacy exists in New York except for the rights conferred under the statutes.²⁵ For example, in *Levy v. Warner Brothers Pictures*,²⁶ the plaintiff sued the defendant under the statute (Sec. 51) for violating plaintiff's right of privacy by the production and exhibition of a motion picture in which the plaintiff's name was used in connection with a fictionalized character of her. The court, refusing to allow the plaintiff's action, stated that, "The right of privacy in New York exists only to the extent that it has been granted by this article [Sec. 51]." ²⁷

The statutes have been strictly construed in New York since part of the legislative scheme (Sec. 50) is penal, plus the fact that at common law, so the New York courts have held, there is no protection that an individual can claim against a legal, nonlibelous, nonfraudulent mention of his name.²⁸

Perhaps the limitations of the New York statutes can best be shown by the case of *Sarat Lahiri v. Daily Mirror*.²⁹ In this case, a photograph of a Hindu musician was used to illustrate a semi-educational news-

24. *Sidis v. F-R Pub. Corp.*, 34 F. Supp. 19 (S.D.N.Y.), *aff'd*, 113 F.2d 806 (2nd Cir.), 138 A.L.R. 15, *cert. denied*, 61 Sup. Ct. 393 (1940).

25. *Ross v. MacFadden Publications*, 174 Misc. 1019, 22 N.Y.S.2d 519 (Sup. Ct. 1940); *Birmingham v. Daily Mirror*, 175 Misc. 372, 23 N.Y.S.2d 549 (Sup. Ct.), *aff'd*, 25 N.Y.S.2d 998 (App. Div. 1940).

26. 57 F. Supp. 40 (S.D.N.Y. 1944).

27. *Id.* at 42.

28. *Wilson v. Brown*, 189 Misc. 79, 73 N.Y.S.2d 587 (Sup. Ct. 1947).

29. 162 Misc. 776, 295 N.Y.S. 382 (App. Div. 1937).

paper article on "The Famous Hindu Rope Trick." The musician sued the publisher for using his picture in connection with this article without his permission. In its decision, the court laid down four rules applicable to the unauthorized publication of photographs in a single issue of a newspaper.

1. Recovery may be had under the statute if the photograph is published in or as part of an advertisement, or for advertising purposes.
2. The statute is violated if the photograph is used in connection with an article of fiction in any part of the newspaper.
3. There may be no recovery under the statute for publication of a photograph in connection with an article of current news or immediate public interest.
4. Newspapers publish articles which are neither strictly news items nor strictly fictional in character. They are not the responses to an event of peculiarly immediate interest but, though based on fact, are used to satisfy an ever-present educational need. Such articles include, among others, travel stories, stories of distant places, tales of historic personages and events, the reproduction of items of past news, and surveys of social conditions. These are articles educational and informative in character. As a general rule, such cases are not within the purview of the statute.³⁰

The court went on to say that there was nothing to warrant a finding that it was used to increase the commercial value of the newspaper. "The history of the enactment of the 'right of privacy' statute and the judicial interpretations thereof, preclude a determination that a statutory cause of action exists in this case. I find that the use of the photograph was not for trade purposes and that the plaintiff has failed to bring himself within the provisions of the statute."³¹

This idea of "trade purposes" is further demonstrated by the holding in *Chaplin v. National Broadcasting Co.*³² In this New York case, the defendants called Charlie Chaplin on the telephone and recorded the conversation without Mr. Chaplin's permission. Later on in the week, the defendant played the tape over the air as an interview with the plaintiff. The court held that the tape could not be made by analogy to be a photograph of the plaintiff's voice, and even if it could be so considered, the invasion of his privacy was not protected by the statute

30. *Id.*, 295 N.Y.S. at 388.

31. *Id.*, 295 N.Y.S. at 389.

32. 15 F.R.D. 134 (S.D.N.Y. 1953).

since it was not for "trade purposes." The court said that this was a news type program and not an advertisement or fictional production.

WHAT ABOUT VIRGINIA?

What will be the Virginia Court's answer when a case does arise? The most logical answer would be that Virginia would follow the New York authorities since its statute is based directly on that of New York. This would be an unfortunate solution, but there is a possibility that it could be avoided. The only authority in Virginia that the common law right of privacy does not exist is the unreported, lower court decision of *Cyrus v. Boston Chemical Co.*³³ How much weight would be given to this case today might be at least questionable in the face of a good strong right of privacy action based on one of the common law torts.

Let us consider two cases from two different jurisdictions, one that recognizes the common law right of privacy (West Virginia), and one that does not recognize the right either at common law or by statute (Wisconsin). In the West Virginia case,³⁴ the defendant placed some sort of a receiving or listening device in the plaintiff's apartment. The device was connected to a speaker in the defendant's office, and by means of this speaker, he repeatedly invaded the privacy of the plaintiff by listening to her private conversations. The court upheld the right of privacy at common law for the first time in West Virginia with this case and said that the right of privacy included the right of an individual to be left alone and to keep secret his private communications. What if this case arose in Virginia? If we follow the New York precedents, there would be no recovery here since the statute makes the invasion not actionable unless it is for "trade purposes."

In the Wisconsin case,³⁵ the facts were that the defendant was a tavern keeper and owner, and that he owned a place called "Sad Sam's Tavern." The plaintiff was a customer of the defendant and she entered the ladies rest room of the tavern. While she was in the rest room, the defendant entered with a camera and flash equipment and took a picture of the plaintiff. She asked the defendant for the photograph, but he refused and when she returned to the dining area of the establishment, the defendant was displaying the photograph to the other patrons in the tavern. The Supreme Court of Wisconsin affirmed the

33. *Cyrus v. Boston Chemical Co.*, *supra* note 6.

34. *Roach v. Harper*, 143 W.Va. 869, 105 S.E.2d 564 (1958).

35. *Yoeckel v. Somonig*, *supra* note 10.

decision of the trial court in sustaining the defendant's demurrer on the basis that there is no right of privacy in Wisconsin and that it is up to the legislature to provide the right. What if this case arose in Virginia? Again, the court would probably have to hold that there was not protection afforded by our statute because the invasion was not commercially beneficial to the defendant.

At common law, both of the above-mentioned cases would have stated a cause of action based on the invasion of the plaintiffs' right of privacy. Whether Virginia will ever recognize the common law right of privacy is highly speculative and rather doubtful, but the language of the District of Columbia District Court should be kept in mind:

It has been said that the right of privacy was originally unknown at common law. This may well be true. It is a mistake to assume, however, that the common law became petrified and static and is no longer subject to modification except at the hands of the legislature. An examination of the course of judicial decisions on numerous topics will demonstrate the contrary. The common law is always in a state of flux and is constantly molded and adjusted to meet changing conditions. This is the glory of the common law. The life of the law is found in its capacity to grow.³⁶

The other possible way to broaden Virginia's right of privacy, and probably the most realistic, would be by new legislative action. The best approach would be the repeal of Sec. 8-650 and the enactment of an entirely new statute that would be broad enough to be interpreted to include remedy for all of the recognized common law torts. Fredrick J. Ludwig, in an article entitled "Peace of Mind in 48 Pieces v. Uniform Right of Privacy,"³⁷ proposes an uniform act on right of privacy. His definition of the right of privacy is especially pertinent to our consideration of a statutory change:

Sec. 1.0—Definition. Any person, firm or corporation that interferes with any living person, or with a deceased's memory, by intruding, in an unreasonable and serious manner upon the private activities of the living, or by making known in like manner the private affairs of any one, living or deceased, or by exposing such person to the public by substantial use of his name, portrait, picture, likeness or by other means

36. *Peay v. Curtis Pub. Co.*, *supra* note 21, at 309.

37. Ludwig, *Peace of Mind in 48 Pieces v. Uniform Right of Privacy*, 32 MINN. L. REV. 734 (1948).

sufficient to identify him, shall be liable for invasion of his privacy, except as hereinafter provided.³⁸

Although this proposed statute has not been adopted by any state so far, it, or one of its type, should be given careful consideration. Attention should be paid to the fact that this statute must be interpreted, if read within the light of its intent, to include the common law protections of the right of privacy, and could be just as effective as a common law recognition of the right.

Thus, it appears that Virginia possibly has two avenues of approach to the solution of her problem of a narrowly construed right of privacy. The avenue of comprehensive legislative action would seem to be the most judicially sound method to permit this Commonwealth to catch up with her sister states in this dynamic field of personal rights.

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38. *Id.* at 764.