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TORTS—CIVIL RIGHTS—THE RIGHT OF PRIVACY UNDER THE NEW YORK STATUTE.—The statutory "right of privacy" has been defined as the right to live one's life in seclusion without being subjected to unwarranted interference by people in matters with which they are not concerned, or the right to live one's life in seclusion without being subjected to unwarranted and undesired publicity.[1]

As the vehicles for advertising have grown, so have the number of cases dealing with the right of privacy. The types of cases in which the right of privacy has been recognized vary so widely that it can be suggested that this alleged right is nothing more than a catch-all to take care of the outer fringes of tort and contractual liability, and that it is not the product of any underlying general principle. On the surface, the cases may seem to involve entirely different principles and considerations; yet, there is a prevailing element, common to all the cases, of outraging one's feelings by depriving him of the privacy which most normal persons desire and have a right to demand.

HISTORICAL BACKGROUND

ALTHOUGH courts have long recognized and given effect to the individual right of privacy, under the guise of property and contract rights, it was not until the publication in 1890 of a law review article by Warren and Brandeis,[2] that the right was officially introduced and defined as an independent right. This article, a landmark in the field of treatise law, bemoaned the fact that the press was "overstepping in every direction the obvious bounds of propriety and of decency."[3] The article stated:

"Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread and broadcast in the columns of the daily papers . . . The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man under the refining influences of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprises and invention have, through invasions upon his privacy, subjected him to a mental pain and distress, far greater than could be inflicted by mere bodily injury. . . . It is believed that the Common Law provides him with one (remedy), forged in the slow fires of the centuries, and today fitly tempered to his hand. . . ."

This article complained of the abuses that man had suffered at the hands of the newspapers and other similar media, and suggests that a remedy against such abuses be formulated by the courts. This remedy, independent of the common rights of property, contract, reputation, and physical integrity,

[1] People on Complaint of Stern v. Robert R. McBride & Co., 159 Misc. 5, 288 N. Y. Supp. 501 (City Ct. Manhattan 1936).

[2] Warren and Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

[3] *Id.* at 196.

is a legal right called the right of privacy, the invasion of which gives rise to a cause of action.

New York was the first state to consider this suggested aid to privacy. In the case of *Schuyler v. Curtis*,[4] an injunction was granted restraining the making and exhibition of a statue of a deceased woman on the theory that the woman was not a public figure. In deciding the case the court alluded to the right of privacy. Two lower court New York decisions also apparently recognized the right.[5] Then, in 1902, the developing right of privacy suffered a strong setback. In *Roberson v. Rochester Folding Box Company*,[6] by a four to three decision, the New York Court of Appeals held that no common law right of privacy exists in New York State. In this case, the defendants had printed a great number of photographs of the plaintiff, and without her consent had prominently displayed such photographs in saloons and warehouses in an effort to advertise their product. The plaintiff contended that she had been humiliated, and that her good name was put in question, and that she suffered mental and physical injury due to the defendant's act. The court found for the defendant. The majority of the court refused to follow the reasoning of Warren and Brandeis or the dictum in the *Schuyler* case. The court stated there was no action for right of privacy existing in New York. Speaking for the majority of the court, Chief Justice Parker wrote:

"If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result not only in a vast amount of litigation, but in litigation bordering upon the absurd . . . were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be left alone. . . . And so we might add to the list of things that are spoken and done day by day which seriously offend the sensibilities of good people to which the principle which the plaintiff seeks to have imbedded in the doctrine of the law would seem to apply."

The immediate reaction to this decision was the wrath of an irate public in the form of comment and criticism. The result of the unfavorable reception of this decision was echoed by the state legislature less than a year after the *Roberson* case decision. In 1903, the state legislature enacted the first American right of privacy statute.[7] This act is still in effect as sections 50 and 51 of the New York Civil Rights Law.[8]

[4] Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22 (1891).

[5] Mackenzie v. Soden Mineral Springs Co., 27 Abb. N. C. 402, 18 N. Y. Supp. 240 (N. Y. Sup. Ct. 5th Dist. 1891), Marks v. Jaffa, 6 Misc. 290, 26 N. Y. Supp. 908 (Superior Ct. N. Y. Co. 1893).

[6] 171 N. Y. 538, 64 N. E. 442 (1902).

[7] N. Y. CIV. RIGHTS LAW §§ 50, 51.

[8] N. Y. CIV. RIGHTS LAW:

§ 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.

§ 51 . . . may maintain an equitable action . . . against the person, firm or the corpora-

The act had a narrowly confined scope. It was not the object of the legislature to create an absolute right of privacy, but rather the statute gave limited protection against unauthorized use of a person's name, portrait or picture within the state "for advertising purposes" or "for purposes of trade." The existing New York Statute has been the subject of extensive litigation; in its application, the courts have come to recognize the legitimate purposes of publications of matters of public interest.

The constitutionality of this statute was upheld in 1908[9] against the contention that the act in question deprived persons of liberty and property without due process of law, and impaired the obligation of contracts. The court stated that the public at large does not have an inherent right to use the names and portraits of others for advertising or trade purposes without their consent.

INTERPRETATION OF THE STATUTE

THE restriction of the New York statute—to use for "advertising purposes"—has been interpreted to mean any solicitation of patronage. And in the *Humiston* case,[10] the word "trade" has been construed to mean continuous rather than occasional use. The New York courts have followed the legislative intent and have generally limited the rights of plaintiffs to a greater degree than in states recognizing the existence of a common law right. The courts, by their strict interpretation of the phrases "for advertising purposes" and "for purposes of trade," and by holding that "the statute is in part, at least, penal, and should be construed accordingly"[11] have limited the right.

The reason for such a strict interpretation is essentially that the statute was not intended to create an absolute right, but rather a right limited to the very statute itself. It seems clear that the legislature did not intend the right to be all-encompassing; for example, the right of privacy does not prohibit publication and broadcasting of matters of public interest.[12] News may be made known if newsworthy, and pictures printed even though the subject came unwillingly into the limelight.[13] It is plausible that a newborn right could possibly become a Frankenstein if it were to be used to deter either publication or broadcasting of material which should be known to the public. Thus, the courts have generally limited the construction of the statute by considering the circumstances and the extent, degree, or character of the use of the act complained of.[14]

tion so using his name, picture or portrait, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by the reason of such use . . . [T]he jury, in its discretion, may award exemplary damages. . . .

[9] Rhodes v. Sperry & H. Co., 220 U. S. 502, 31 S. Ct. 490, 55 L. Ed. 561 (1911).

[10] Humiston v. Universal Film Mfg. Co., 189 App. Div. 463, 178 N.Y. Supp. 752 (1st Dep't 1919).

[11] Gautier v. Pro-Football, Inc., 304 N. Y. 354, 107 N. E. 2d 485 (1952).

[12] Sarat Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 295 N. Y. Supp. 388 (Sup. Ct. N. Y. Co. 1937).

[13] Sidis v. F-R Pub. Corp., 113 F. 2d 806, 809-10 (2d Cir. 1940).

[14] See note 1, *supra*.

NATURE AND EXTENT OF THE RIGHT

THE right of privacy in New York is regarded as purely personal. The right was born of the need to protect the individual from commercial exploitation of his personality, and, therefore, the courts construe the right to be of a personal nature. On the theory that the right is purely personal, it has often been held that the right may be enforced only by the person whose right has been infringed, and that this individual right of privacy which any person has during his lifetime dies with the person.[15]

The right, while being personal, is not an absolute right and is subject to many limitations. A proper limitation of the right of privacy consists in balancing conflicting interests; the interests of the individual in privacy, on the one hand, against the interest of the public, or trade, or business, on the other. In each case involving the right of privacy, the court must resolve a conflict between individual and public or business rights. Thus, due to conflicting interests among radio, televsion, motion pictures, publications, politics, books, news broadcasts, photography, and wire tapping, which are but a few of the many varied fields into which the law of privacy has burgeoned, litigation has been great, and problems confronting the courts perhaps even greater.

The more important principles may be briefly summarized. This statutory right, the common law right not being recognized in New York,[16] is an incident of persons and not of property,[17] and, being such, it does not survive the person.[18] It does not lie where the plaintiff has previously published the matter complained of, or has consented to it,[19] nor where the person has become so prominent as to be dedicated to the public eye,[20] nor where newsworthy events are recounted,[21] nor where the information would be of public benefit.[22] The action does lie only in cases involving writings, pictures or other permanent publications or reproductions used for trade or advertising purposes.[23] The defense of truth, so important in defamation, is not available[24] nor is the motive or presence of malice material.[25]

WAIVER OR LOSS OF THE RIGHT

THE right of privacy, like other rights that rest in an individual, may be waived by him. A waiver may be implied from the conduct of the parties

[15] Schumann v. Loew's, Inc., 199 Misc. 38, 102 N. Y. S. 2d 572 (Sup. Ct. N. Y. Co. 1951).

[16] *In re* Harts Estate, 193 Misc. 884, 83 N. Y. S. 2d 635 (Surr. Ct. N. Y. Co. 1948); Kline v. Robert R. McBride & Co., 170 Misc. 974, 11 N. Y. S. 2d 674 (Sup. Ct. N. Y. Co. 1939); see note 11, *supra.*

[17] Bowman v. Topps, Chewing Gum, Inc., 103 F. Supp. 944 (E. D. N. Y. 1952).

[18] See note 4, *supra.*

[19] Sherwood v. McGowan, 3 Misc. 2d 234, 152 N. Y. S. 2d 658 (Sup. Ct. N. Y. Co. 1956).

[20] See note 11, *supra.*

[21] Wilson v. Brown, 189 Misc. 79, 37 N. Y. S. 2d 587 (Sup. Ct. Kings Co. 1947).

[22] See note 11, *supra.*

[23] Thompson v. Tillford, 152 App. Div. 928, 137 N. Y. Supp. 523 (2d Dep't 1912).

[24] See note 13, *supra.*

[25] *Ibid.*

and the surrounding circumstances.[26] Thus, a person seeking public office is deemed to have renounced his right to live his life in total seclusion.[27] A person who forms a corporation under his own name is deemed to waive the benefits of the New York Privacy Statute, as by his own act he gave the business his name and the right to use it.[28]

One of the most difficult problems concerning the right of privacy is that of the privilege to publish. The complex problem of how far to limit the activities of the press and enlarge the individual's right to be let alone is not easily resolved. On one hand there exists the Constitutionally guaranteed right of freedom of the press, which justifies the publication of news and all other matters of legitimate public interest. On the other hand, you have the individual's right of privacy which is protected by statute. The courts seem to apply a test based on a reasonable standard of conduct. It appears that the court will protect the individual's right of privacy when the publication outrages the common decencies and goes beyond what the public *mores* will tolerate, and that which the plaintiff must be expected to endure.[29]

CONCLUSION

CASES construing the New York Statute have followed a general pattern of strictly interpreting the comparatively new "right of privacy." The over-all picture within the confines of New York State has limited the protective scope of this right to commercial abuses. It is not the purpose of the courts, as decisions indicate, to change the law in order to afford greater or less protection to individuals. This duty remains with the legislature.

If the right of privacy is to increase in scope, the duty to do so falls heavily on the legislative body of the state; but, it would be a dangerous legislative step to indiscriminately expand the right of privacy at the expense of some equally important right such as freedom of the press. Upon the creation or expansion of one right, another right diminishes. It is within this context that we must attack the problem of further expansion of this or any other right.

[26] Wendell v. Conduit Mach. Co., 74 Misc. 201, 133 N. Y. Supp. 758 (Sup. Ct. Kings Co. 1911).

[27] Wilson v. Brown, 189 Misc. 79, 73 N. Y. S. 2d 587 (Sup. Ct. Kings Co. 1947).

[28] White v. William White, Inc., 160 App. Div. 709, 145 N. Y. Supp. 743 (1st Dep't 1914).

[29] See note 13, *supra*.