Landmarks

The Case That Started It All: *Roberson v. The Rochester Folding Box Company*

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More than a century ago, New York's highest court, the Court of Appeals, was asked to find a right to privacy in a case brought by a young woman whose portrait had been used, without her prior consent, in an advertisement for a flour company. The court rejected the request — but its ruling was following by public outrage that led the state's legislature to promptly enact a statute creating a right to privacy that exists to this very day.

Abraham Lincoln is famously said to have exclaimed to Harriet Beecher Stowe, the author of "Uncle Tom's Cabin," when he met her in 1862, "So this is the little lady who started our big war!" On some level, it might be said that Abigail M. Roberson is the young girl who started our country's privacy revolution, which began when a case bearing her name, *Roberson v. The Rochester Folding Box Company*,[1] was decided by New York's highest court, the Court of Appeals, more

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than a century ago, in 1902. Although a divided court actually ruled against the plaintiff, the New York State Legislature soon took up the cause, leading to a statutory privacy right in New York that continues to exist to this day.[2]

FLOUR POWER

The complaint filed on behalf of Abigail Roberson alleged that the Franklin Mills Co., which was engaged in the business of milling and in the manufacture and sale of flour, obtained, made, printed, sold and circulated about 25,000 lithographic prints, photographs, and likenesses of Abigail without her prior knowledge or consent. The complaint also alleged that the company had printed on those papers, in large, plain letters, the words, "Flour of the Family," and below Abigail's portrait in large capital letters, "Franklin Mills Flour." In addition, the lower right hand corner, in smaller capital letters, stated, "Rochester Folding Box Co., Rochester, N.Y." According to the complaint, the sheets advertised Franklin Mills' flour, and the 25,000 sheets were "conspicuously posted and displayed in stores, warehouses, saloons and other public places." The complaint further asserted that they had been recognized by friends of the plaintiff and other people with the result that she had been "greatly humiliated by the scoffs and jeers" of people who recognized her face and picture on this advertisement and "her good name" had been attacked, causing her "great distress and suffering both in body and mind." The complaint alleged that this had made Abigail sick and that she had "suffered a severe nervous shock, was confined to her bed and compelled to employ a physician." She sought $15,000 in damages and asked that Franklin Mills and the Rochester Folding Box Co. be enjoined from making, printing, publishing, circulating, or using in any manner any likenesses of her in any form whatever.

The trial court overruled demurrers to the complaint and entered judgment in favor of the plaintiff. The decision of an intermediate appellate court stated, in part, "It may be said in the first place that the theory upon which this action is predicated is new, at least in instance if not in principle, and that few precedents can be found to sustain the claim made

by the plaintiff, if indeed it can be said that there are any authoritative cases establishing her right to recover in this action." That appellate court nevertheless reached the conclusion that the plaintiff had a good cause of action against the defendants, in that the defendants had invaded what the appellate court characterized as the plaintiff's "right of privacy." The case reached the New York Court of Appeals, which reversed, 4-3.

THE COURT OF APPEALS' MAJORITY DECISION

The majority opinion pointed out that the plaintiff did not allege that she had been libeled by the publication of her portrait — the likeness was "said to be a very good one, and one that her friends and acquaintances were able to recognize." Indeed, the court noted, the plaintiff's grievance was that a good portrait of her, and, therefore, one easily recognized, had been used to attract attention toward the paper on which the mill company's advertisements appeared. That publicity was "very distasteful" to the plaintiff, and thus, because of the defendants' use of her picture without her consent for their own business purposes, she had "been caused to suffer mental distress." The Court noted that some people would have found this publicity "agreeable" and "would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes."

The majority continued by declaring that there was "no precedent" for an action by the plaintiff in this situation "to be found in the decisions of this court." It continued by observing that the "right to be let alone" was not a right found "in Blackstone, Kent or any other of the great commentators upon the law." Moreover, the majority stated, its existence did not seem to have been asserted prior to about the year 1890, "when it was presented with attractiveness and no inconsiderable ability in the Harvard Law Review (Vol. IV, page 193) in an article [by Samuel D. Warren and Louis D. Brandeis] entitled, 'The Right of Privacy.'"

According to the court, the "so-called right of privacy" was "founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon" in "handbills, circulars, cata-

logues, periodicals or newspapers," and "that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise." The Court stated that although "most persons" would "much prefer to have a good likeness of themselves appear in a responsible periodical or leading newspaper rather than upon an advertising card or sheet," the doctrine that the plaintiff asked the courts to create for this case "would apply as well to the one publication as to the other," because the principle on which the plaintiff asked the courts to base her recovery in this action was that:

> the right of privacy exists and is enforceable in equity, and that the publication of that which purports to be a portrait of another person, even if obtained upon the street by an impertinent individual with a camera, will be restrained in equity on the ground that an individual has the right to prevent his features from becoming known to those outside of his circle of friends and acquaintances.

The Court stated that if such a principle were to be incorporated into the law through 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." The Court said that was because the right of privacy, once established as a legal doctrine, could not be confined "to the restraint of the publication of a likeness but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations or habits." Were the right of privacy 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 absolutely let alone." An "insult," the court stated, would certainly be in violation of such a right, and many persons would more seriously object to that than to the publication of their picture. Pointing out that there were many things that were "spoken and done day by day" that "seriously offend the sensibilities of good people," the court declared that "the vast field of litigation" would "necessarily be opened up" should it hold that privacy exists "as a legal right enforceable in equity by injunction, and by damages where they seem necessary to

give complete relief."

It recognized that the intermediate appellate court had stated that it was not the rule that the absence of a precedent was "a sufficient reason for turning the plaintiff out of court." The court added, however, that that was so only if "there can be found a clear and unequivocal principle of the common law which either directly or mediately governs it or which by analogy or parity of reasoning ought to govern it."

The court then examined whether the right of privacy as a legal doctrine enforceable in equity had been established by prior court opinions. Examining a variety of decisions, it concluded that the "so-called 'right of privacy'" had not as of then found a place in its jurisprudence, and therefore the doctrine could not be incorporated "without doing violence to settled principles of law by which the profession and the public have long been guided."

The court concluded by stating that it was not declaring that a party whose likeness was circulated against his or her will was without remedy in every case. It noted that under then-Section 245 of the Penal Code, any malicious publication (meaning simply "intentional and willful") by picture, effigy or sign that exposed a person to "contempt, ridicule or obloquy" was a libel, and would constitute such at common law. It noted that there were many products, especially medical products, whose character was such that using the picture of a person, "particularly that of a woman," in connection with the advertisement of those items "might justly be found by a jury to cast ridicule or obloquy on the person whose picture was thus published." Moreover, the "manner or posture" in which a person was portrayed might readily have a like effect. "In such cases both a civil action and a criminal prosecution could be maintained," the court stated. It then reversed the judgment of the intermediate appellate court.

THE DISSENT

Three members of the court dissented, declaring in part that permitting a portrait to be put to "commercial, or other, uses for gain, by the publication of prints therefrom" was an act of invasion of the individual's privacy, "possibly more formidable and more painful in its consequences,

than an actual bodily assault might be." The minority stated that the security of a person was "as necessary as the security of property" and that for complete personal security, "which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society, there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain." Simply put, the dissent concluded that the plaintiff had the right "to be protected against the use of her face for defendant's commercial purposes," and that that right did not depend upon the existence of property.

A STATUTORY RIGHT

Interestingly, the court's majority observed that the legislature "could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent." That's what the New York State Legislature did when it enacted Section 50 and Section 51 of the state's Civil Rights Law following a public uproar after the court's decision. Section 50 essentially incorporates the dissent's view of the plaintiff's lawsuit and the majority's observation about a statute that the legislature could enact. Section 50 now states:

> Right of privacy. 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.

Thus, the use of a living person's "name, portrait or picture" for commercial purposes without prior written consent is a crime in New York. Section 51 grants an individual in such a situation the right to obtain an injunction and damages — including in appropriate circumstances, punitive damages. It currently states:

Action for injunction and for damages. Any person whose name, portrait, picture or voice 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, picture or voice, 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, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. But nothing contained in this article shall be so construed as to prevent any person, firm or corporation from selling or otherwise transferring any material containing such name, portrait, picture or voice in whatever medium to any user of such name, portrait, picture or voice, or to any third party for sale or transfer directly or indirectly to such a user, for use in a manner lawful under this article; nothing contained in this article 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 specimens of the work of such 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 article shall be so construed as to prevent any person, firm or corporation from using the name, portrait, picture or voice 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, picture or voice used in connection therewith; or from using the name, portrait, picture or voice 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, picture or voice used in connection therewith. Nothing contained in this section shall be construed to prohibit the copyright owner of a sound recording from disposing of, dealing in, licensing or selling that sound recording to any party, if the right to dispose of,

> deal in, license or sell such sound recording has been conferred by contract or other written document by such living person or the holder of such right. Nothing contained in the foregoing sentence shall be deemed to abrogate or otherwise limit any rights or remedies otherwise conferred by federal law or state law.

The New York Court of Appeals has had further opportunities to find in favor of a common law right to privacy in the state, but, following *Roberson*, has refused to do so. Nonetheless, Section 50 and 51 have been relied on by individuals, frequently, to protect their privacy rights. It of course is not clear when, if at all, the statutes would have been adopted had *Roberson* not reached the court and had the court's ruling not generated such a fierce public response. But privacy, under Sections 50 and 51, is well established in New York. And it all derives from an advertisement for flour that used a young girl's picture, without her consent.

NOTES

[1] 171 N.Y. 538 (1902).
[2] *See* New York Civil Rights Law Sections 50 and 51.