LAKE V. WAL-MART: THE LAW OF PRIVACY REVEALED

Alan C. Roline[*] and Randall K. Skalberg[**]

INTRODUCTION

What is needed to engage the legal environment students of today? Well, one thing that would certainly make the "Top Ten" list would be a sex scandal of TV soap proportions that, at the same time, could have taken place in their hometown or college campus. The Minnesota case of *Elli Lake, et al. vs. Wal-Mart Stores, Inc.*[1] contains just the right mixture to make today's students sit up and take notice (and maybe even take a few notes).

Have you ever approached the teaching of the torts of invasion of privacy with some trepidation? How does an instructor best explain the difference among "intrusion upon seclusion," "misappropriation," "publication of private facts," and "false light" publicity? How can students be made to understand that false light is different than defamation? How about just keeping students awake? After teaching this case for more than two years, *Lake v. Wal-Mart* has become part of the standard repertoire of cases, replacing for the most part, any individual cases previously needed to "reveal" the law of privacy to our students.

The story of Elli Lake begins with a spring break vacation to Mexico in March of 1995. Elli Lake and Melissa Weber two Moorhead State University women students took a spring break vacation in Mexico along with Weber's sister. Like most spring breakers, taking vacation photos to capture the memories of the vacation were part and parcel of the experience. Upon their return home to Dilworth, Minnesota, Lake and Weber brought in five rolls of film to be developed at their local Wal-Mart. When the two picked up their photos, they received a notice from the photo lab that one or more of the photos had not been printed because of their "nature."

It was one of these photographs, snapped by Weber's sister while they were in Mexico that serves as the catalyst for the impending lawsuit. While on spring break, Lake and Weber had been captured on film, for posterity, while taking a shower together in their hotel room. Although the photo apparently had not been printed for them, a few months later, a friend of Lake and Weber alluded to the photograph in conversation, questioning their sexual orientation. In December of 1995, Lake and Weber had discovered that a Wal-Mart employee had been showing a copy of the photograph to others, and by February, at least one copy of the photo had been circulating through the

[*] Chair and Associate Professor of Business Law, Department of Accounting, Labovitz School of Business & Economics, University of Minnesota Duluth. B.S., Bemidji State University; MBA and J.D., University of Minnesota.

[**] Assistant Professor of Taxation, Department of Accounting, Labovitz School of Business & Economics, University of Minnesota Duluth. B.S. and J.D., University of Minnesota; L.L.M., Case Western Reserve University.

[1] Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (1998).

small Minnesota farm town. Thus, the photo that had apparently been too risqué to be printed for the customers had, in fact, been printed and then distributed by someone who worked at the Wal-Mart photo lab.

On February 23, 1996, Lake and Weber filed suit in Minnesota District Court[2] alleging that Wal-Mart Stores, Inc. and one or more unidentified Wal-Mart employees had committed invasion of privacy, alleging intrusion upon seclusion, appropriation, publication of private facts, and false light publicity. Wal-Mart filed a motion to dismiss, which was granted by the District Court, since at the time, Minnesota courts had not yet recognized invasion of privacy as a cause of action under the common law of Minnesota. In 1997, the Court of Appeals affirmed the District Court's ruling, and an appeal was taken to the Minnesota Supreme Court. [3]

THE FOUR PRIVACY TORTS

Although the tort of Invasion of Privacy was relatively unknown prior to the publication of a law review article on the subject in 1890 by Samuel Warren and Louis Brandeis,[4] it gained steady acceptance among the states since its first recognition by Georgia in 1905. The Restatement (Second) of Torts now specifically outlines four distinct causes of action that can be said to make up the tort of invasion of privacy. The four torts include: intrusion upon seclusion, misappropriation, publication of private facts, and false light publicity.

While most Legal Environment textbooks relegate the discussion of these torts to one or two paragraphs, they present a rich opportunity to discuss the development of the common law, the distinction between precedent and persuasive argument, and the balancing of interests that must necessarily take place in nearly any sort of tort analysis. Specifically, in *Lake v. Wal-Mart*, the Minnesota Supreme Court adopted three of the four privacy torts mentioned above. However, as will be described later, the court declined to recognize the tort of false light publicity based on its balancing of the issues involved.

DEVELOPMENT OF THE COMMON LAW

Although the tort of invasion of privacy had been previously rejected by Minnesota Courts[5], the Lake court cited with approval another Minnesota case commonly described in many legal environment texts: *Tuttle v. Buck*.[6] In that case, the court noted:

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[2] Clay County (Minnesota) Dist. Ct., File No. C2961324 (1996)
[3] Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 1998 WL 429904 (Minn. July 30, 1998).
[4] Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).
[5] Hendry v. Connor, 303 Minn 317, 319, 226 N.W. 2d 921, 923 (1975), Richie v. Paramount Pictures Corp. 544 N.W. 2d 21, 28 (1996).
[6] Tuttle v. Buck, 119 N.W. 2d 946 (1909).

> "It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for determination, protection, and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions."[7]

This statement captures, we believe, the essence of the common law process. Once again, the case at hand can provide the context within which the class can discuss (and debate) the benefits of such a system of laws.

PRECEDENT VS. PERSUASION

At the time of the *Lake v. Wal-Mart* case, Minnesota, North Dakota and Wyoming were the only states which had not yet judicially recognized a common law right of privacy.[8] The Minnesota court was persuaded by the "weight of authority" recognizing the tort of invasion of privacy generally. However, because the issue was constitutional one, based on the language of the constitution of the State of Minnesota, there was in fact no "precedent" that had to be followed. In its decision, the court noted "The right to privacy is inherent in the English protections of individual property and contract rights and the "right to be let alone" is recognized as part of the common law across this country. Thus, it is within the province of the judiciary to establish privacy torts in this jurisdiction."[9]

The decision to adopt invasion of privacy in Minnesota was not made without debate. Justice Esther Tomljanovich argued strenuously in dissent that an action for invasion of privacy has no Constitutional basis. Recognizing that our society has become even more litigious since 1975 (the last time a Minnesota court addressed this issue), she suggested that it was not an appropriate role for the court to recognize a new tort. [10]

This is a good "jumping off" point for a discussion of the role of the judiciary in making law, the role of the state supreme courts in interpreting their state constitution, as well as the difference between binding precedent and merely persuasive evidence. While it is obvious that Minnesota was "out of the mainstream" of privacy law at that time (given nearly all other states had recognized such a common law right of privacy), no precedent existed that required such recognition.

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[7] Id. at 947.
[8] Lake. at 234.
[9] Id.
[10] Id at 236.

INTRUSION UPON SECLUSION

The first of the three causes of action recognized by the Minnesota Supreme Court was that of intrusion upon seclusion.[11] This is found where one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns. . . if the intrusion would be highly offensive to a reasonable person."[12] In the instant case, the court noted that "One's naked body is a very private part of one's person and generally known to others only by choice. This is a type of privacy interest worthy of protection."[13]

This area is a particularly fruitful ground for discussing privacy law in the context of the workplace. For example, one might ask the students if an employer "intentionally intrudes" into your private desk or locker at work, does that mean they are liable for the tort of intrusion upon seclusion? What if the intrusion is more subtle, such as intercepting and reading employee emails? What about hidden cameras? All such questions can arise from this small seed.

APPROPRIATION

The second cause of action is that of appropriation, which is intended to protect an individual's identity. It is generally understood to be committed where one "appropriates to his own use the name or likeness of another."[14] In *Lake*, the court undoubtedly felt the likeness of the two women (in the form of the picture) may have been "appropriated" for the use of the discloser. However, in most states, the appropriation must be for the **benefit** of the user in order for the conduct to be actionable. Under these circumstances, how can one say the discloser (whom I also often refer to as the "invadee") has been benefited?

Unlike the typical case of appropriation of the likeness of another for commercial purposes (putting a photo on a product package or website), there is not an obvious monetary benefit. Could there be other types of benefits in *Lake*? Perhaps, but because they would likely be "reputational" rather than monetary in nature, the *Lake* case is not a good "fit" for a claim of appropriation.

PUBLICATION OF PRIVATE FACTS

The third, and last, form of privacy tort recognized by the Minnesota Supreme Court was that of publication of private facts. The Restatement (Second) of Torts defines that claim when another "gives publicity to a matter concerning the private life of another. . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."[15]

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[11] Id. at 233.
[12] Restatement (Second) of Torts § 652B (1977).
[13] Lake at 235.
[14] Restatement (Second) of Torts §652C (1977).
[15] Restatement (Second) of Torts §652D (1977).

When students are presented with the *Lake* scenario, they are most likely to focus on this privacy tort (along with intrusion into seclusion) and rightly so. As indicated previously, the court found "one's naked body is a very private part of one's person and generally known to others only by choice." Even the modern student would recognize the display of a nude photo in such a case to be both highly offensive and of no legitimate concern to the public.

FALSE LIGHT PUBLICITY

The Minnesota court refused to recognize the claim of "false light publicity," often referred to as giving "publicity to a matter concerning another that places the other before the public in a false light. . . if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other party would be placed."[16]

The court felt that false light publicity claims were very similar to claims of defamation, and that the elements of false light were easier to establish than those for defamation. As a result, the court felt that, "the tension between this tort (false light publicity) and the First Amendment is increased," and did not recognize any right to claims of false light publicity under the common law of Minnesota. The similarity between false light publicity and defamation creates an opportunity for class discussion or an essay assignment analyzing the tension between defamation, false light publicity and the First Amendment's protection of freedom of speech. As the standards for civil liability are reduced, a chilling effect on freedom of speech is inevitable, and this material gives the student the opportunity to express and learn about that effect.

DEFINING FEATURES MATRIX

In order to help students "flesh out" the nature of privacy law, we have borrowed a well-known classroom assessment technique known as the "Defining Features Matrix."[17] This matrix is especially helpful as a way to assess student's skills at categorizing concepts (such as the four privacy torts) according to the presence or absence of important defining features of those concepts. It allows students to identify and make explicit the critical distinction between the four privacy torts, and permits faculty to quickly (and easily) assess how well they are doing.

First, the students are given a short hypothetical case, roughly based upon the *Lake v. Wal-Mart Stores* fact scenario. (See Appendix) Although students have already covered the invasion of privacy material in their textbooks, the students are intentionally not given the case to read prior to the class period. After giving the students a few minutes to read through the case, they are asked to determine whether the situation would

[16] Restatement (Second) of Torts §652E (1977).
[17] Thomas A. Angelo and K. Patricia Cross, Classroom Assessment Techniques: A Handbook for College Teachers, 2d ed., 1993, at 164.

most likely involve intentional, negligent, or strict liability torts (hopefully just a reinforcement question).

Thereafter, the students are asked to individually determine which of the four privacy torts previously discussed in class would be most likely to apply to the situation at hand. They are provided the defining features matrix to assist in this process. The matrix itself is very simple—listing the four privacy torts across the top, with the "defining features" of the various torts (arranged in a random order) along the vertical axis. Students are asked to place a check mark in the related cell to the privacy tort to indicate the existence of that defining feature in that tort. We have also thrown in a "red herring" of sorts in that we include under defining features "invadee is NOT a public figure." This reference to defamation law (rather than the law of privacy) routinely catches the unprepared, or unthinking student.

After students have all completed their individual assessments, we then ask them to pair up with the person sitting next to them and share their views. Finally, when students have had time to finish discussing the assignment in pairs, we begin a class discussion of their results.

CONCLUSION

In sum, *Lake v. Wal-Mart* is an engaging case, both relevant and interesting to today's student. It provides an opportunity to "reveal" the law of privacy that goes beyond many of the current textbook coverage. Finally, by combining the defining features matrix and think-pair-share, it can allow you as an instructor to quickly and easily assess students' general understanding of the topic in an open, but not intimidating, process.

Appendix

BLAW 2001, The Legal Environment

The Law of Privacy Revealed

Imagine that you go to Cancun over Spring Break this year. You have a great time with your friends and, of course, shoot plenty of photos to commemorate the occasion. Unfortunately, the facilities at the hotel are not as "plush" as had been advertised, and rather than typical hotel rooms, you spent the week in something much more akin to a dorm room (which didn't really bother you since you are used to it.) However, one of the results was that rather than having your own private bathroom and shower facilities, there was one "communal" shower and bathroom for each floor.

One day, while taking your morning shower, a snap-happy friend bursts in, using your camera to capture a candid (and of course somewhat risqué) photo of you and a couple of buddies in that communal shower. At the time, you didn't think anything of it, and anyway, after you got back home to Minnesota, most of the trip (including the shower incident) was not much more than a blur.

When you get the photos developed at your local Wal-Mart store, included in the envelope is a notice stating that some of the photos had not been printed because of their "nature." A month or two later, some of your friends begin to talk, and allude to the "shower scene," question your sexual orientation, and finally admit to having seen a copy of the photo which Wal-Mart had formerly declined to print. In fact, a Wal-Mart employee had printed the photo, and had circulated it around town.

1. Needless to say, you are upset! You want to sue someone, anyone, but the identity of the Wal-Mart employee is unknown. Who do you sue, and under what theory. Is this an intentional tort, negligence or strict liability? Why?

2. This is certainly an invasion of privacy—after all, its your partially naked body that's been circulating around the community. Of the four types of invasion of privacy we have discussed in class, which do you think applies to this situation? To help you analyze the four types of invasion of privacy torts, we have constructed a matrix with the four privacy torts at the top, and a list of defining features running down the right-hand side. Please put a check (√) in the cell where such defining features are present.

	Intrusion Upon Seclusion	Appropriation	Publication of Private Facts	False Light Publicity
Use of another's name and/or likeness				
Intentional Intrusion into "Invadee's" Privacy				
Without permission of "Invadee"				
Highly Offensive to Reasonable Person				
For benefit of the "Invader"				
Information not of Public Concern				
Knowledge or Reckless Disregard of Falsity				
"Invadee" not a Public Figure				