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Torts—Televising of Professional Act Not a Violation of Civil Rights Law

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TORTS—TELEVISING OF PROFESSIONAL ACT NOT A VIOLATION OF CIVIL RGHTS LAW

Plaintiff, while performing with his animal act between the halves of a football game, was televised on a sponsored program without his consent. He brought action alleging that the defendants, without authorization, used his name and picture for advertising purposes and purposes of trade in violation of Section 51 of the Civil Rights Law of New York. Section 51 states: "Any person whose name, portrait or picture is used within this state for advertising purposes or purposes of trade . . . may also sue and recover damages for any injury sustained by reason of such use." *Held*: even though plaintiff protested before his performance, he was not entitled to recover damages under the New York Civil Rights Law. *Gautier v. Pro-Football, Inc.*, 278 App. Div. 431, 106 N. Y. S. 2d 553 (1st Dept. 1951). Motion for leave to appeal to the Court of Appeals granted, 126 N. Y. L. J. 718 (Oct. 3, 1951).

Warren and Brandeis first discussed the concept of the right of privacy in 1890. They felt that there was a social need for the right to be free from unauthorized publicity—the right "to be left alone." Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Before this concept had a chance to be accepted the New York court was squarely faced with the right of privacy in *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902), and decided by a 4-3 decision that there was no common law right of privacy. This has been restated by the court on numerous occasions. See, *Kimmerle v. New York Evening Journal*, 262 N. Y. 99 at 102, 186 N. E. 217 at 218 (1933). *Birmingham v. Daily Mirror*, 175 Misc. 372 at 373, 23 N. Y. S. 2d 549 at 550 (Sup. Ct. 1940), *aff'd.* 261 App. Div. 838, 25 N. Y. S. 2d 998 (2d Dept. 1941).

In response to the public resentment aroused by the *Roberson* case, the Civil Rights Statute was enacted. New York Laws 1903, ch. 132, Sec. 1, 2 as amended in 1911 and 1921; now Civil Rights Law Sec. 50, 51. See, Editorial N. Y. Times, Aug. 23, 1902.

Since its enactment the statute has received a most narrow construction for three reasons. (1) It contains certain penal features. *Binns v. Vitagraph Co.*, 210 N. Y. 51 at 55, 103 N. E. 1108 at 1109 (1913); *Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N. Y. S. 752 (1st Dept. 1919); *Toscani v. Hersey*, 271 App. Div. 445, 65 N. Y. S. 2d 814 (1st Dept. 1946). (2) The statute was enacted for the purpose of overruling the holding of the *Roberson* case and as a result has been largely construed to fit the facts of that case. See, Nizer, *The Right of Privacy*, 39 Mich. L. Rev. 526 at 538 (1941). (3) There is a strong adherence to the policy protecting freedom of speech and press. If the item is one of public interest—which may include items of current news

or of an educational and informative nature—the publication is privileged. *Sweenek v. Pathe News Inc.,* 16 F. Supp. 746 (E. D. N. Y. 1936); *Colyer v. Fox Publishing Co.,* 162 App. Div. 297, 146 N. Y. S. 999 (2d Dept. 1914); *Lahiri v. Daily Mirror,* 162 Misc. 776, 295 N. Y. S. 382 (Sup. Ct. 1937). To the extent that the occupation or chosen profession of a plaintiff makes him a public figure his right to privacy is not absolute but limited and narrow. *Sides v. F-R Publication Corp.,* 34 F. Supp. 19 (S. D. N. Y. 1938), *aff'd.* 113 F. 2d 806 (2d Cir. 1940) *certiorari denied* 311 U. S. 711, 61 S. Ct. 393 (1940). *Koussevitzky v. Allen, Towne and Heath Inc.,* 188 Misc. 479, 68 N. Y. S. 2d 779 (Sup. Ct. 1947), *aff'd.* 272 App. Div. 759, 69 N. Y. S. 2d 432 (1st Dept. 1947).

However, the statute is not always given a narrow construction. It has been stated that since the section is largely remedial, though part penal, it should be broadly construed in the light of its purpose of accommodating law to social needs. *Jackson v. Consumer Publications,* 169 Misc. 1022, 10 N. Y. S. 2d 691 (Sup. Ct. 1939), *aff'd.* 256 App. Div. 965, 10 N. Y. S. 2d 694 (1st Dept. 1939).

The question presented to the court was whether the picture of the plaintiff was used merely for the dissemination of factual information or news events of public interest, or whether it was used for advertising purposes or purposes of trade.

In defining the term "purposes of trade" the courts have drawn certain distinctions. In the following types of cases recovery was denied: The use of plaintiff's name and picture in a motion picture of current events, *Humiston v. Universal Film Mfg. Co., supra;* the use of a name once in a novel of almost 400 pages, *Damron v. Doubleday, Doran & Co.,* 133 Misc. 302, 231 N. Y. S. 444 (Sup. Ct. 1928), *aff'd.* 226 App. Div. 796, 234 N. Y. S. 773 (1st Dept. 1929); *Swacker v. Wright,* 154 Misc. 822, 277 N. Y. S. 296 (Sup. Ct. 1935); the portrayal of plaintiff's factory, on which his firm name clearly appeared, in a motion picture dealing with the white slave traffic, *Merle v. Sociological Research Film Corp.,* 166 App. Div. 376, 152 N. Y. S. 829 (1st Dept. 1915); the use of the name and picture of an alleged strike breaker together with the names and likeness of eight others on the front piece, and the mention of his name four times in 314 pages of a book dealing with strike breaking, *People, on the Complaint of Stern v. Robert R. McBride & Co.,* 159 Misc. 5, 288 N. Y. S. 501 (N. Y. City Ct. 1936); the attributing of the authorship of an absurd adventure story to a well recognized writer, *D'Altomonte v. New York Herald Co.,* 208 N. Y. 596, 102 N. E. 1101 (1913); and the portrayal of the plaintiff in a comic magazine as a hero in a disaster in which plaintiff was a prominent figure, *Maloney v. Boy Comics,* 277 App. Div. 166, 98 N. Y. S. 2d 119 (1st Dept. 1950).

It was held in *Sutton v. Hearst Corp.,* 277 App. Div. 155, 98 N. Y. S. 2d 233 (1st Dept. 1950), that it was a question for the jury whether the use of a name

and picture was informative or whether the primary purpose was to amuse the public; that is, was it for the legitimate purpose of disseminating news or for purposes of trade?

Humiston v. Universal Film Mfg. Co., supra, established the rule that immunity is granted to fact as distinguished from fiction regardless of the medium by which it is conveyed; however, all the factual situations that have been privileged have been "human interest" subjects such as, scenes in a women's reducing gymnasium, *Sweenek v. Pathe News Inc., supra,* expositions of Babe Ruth's homerun technique, *Ruth v. Educational Films,* 194 App. Div. 893, 184 N. Y. S. 948 (1st Dept. 1920).

There are of course limits to the immunity accorded the mediums of news dissemination. The use of a name or photograph must have some relevance to the reporting of the news, *Thompson v. Close-Up Inc.,* 277 App. Div. 848, 98 N. Y. S. 2d 300 (1st Dept. 1950). Where the subject matter is solely for entertainment purposes and particularly, where it appears in a medium not identified in the main with the dissemination of news, recovery will be permitted. *Redmond v. Columbia Pictures Corp.,* 277 N. Y. 707, 14 N. E. 2d 636 (1938); *Franklin v. Columbia Pictures Corp.,* 246 App. Div. 35, 284 N. Y.S. 96 (1st Dept. 1935), *aff'd.* 271 N. Y. 554, 2 N. E. 2d 691 (1936).

The facts of the principal case disclose that the plaintiff's act was not televised because of its news value or because the defendants wanted to report plaintiff's performance as a matter of public interest, but rather, that the act was televised as a part of and in conjunction with the advertising of defendant's product.

It is assumed that a football game is an event of public interest; but the plaintiff's performance of his act between the halves of the game can not be considered an event of public interest that can be characterized as *news.* An examination of the cases, where recovery was denied because of the policy of protecting the wide dissemination of news, indicates that in each of the cases, plaintiff's name or picture was used, not for the purpose of advertising, but as a factual presentation in connection with matters of news in which the public had an interest.

Another line of reasoning that could be followed is that used in *Pittsburgh Athletic Co. v. KQV Broadcasting Co.,* 24 F. Supp. 490 (W. D. Pa. 1938), although not dealing with the right of privacy. The court made the distinction between *public* news and *private* news. All are free to partake of the former, while in the latter the participant has a property right. Certainly a legitimate stage performance could not be televised without authorization, for by the telecast the performance would lose its commercial value. The same is true of the perform-

ance in the principal case. It would seem that the participant should be able to control the publicity at least until the completion of the performance when it would become a subject for news, for example, in a newspaper in a reportorial fashion.

The television station and network as well as the sponsor did obtain some benefit from the telecast. If the act had not been televised the time would have had to have been filled with some other subject. The court stressed in *Witmark v. Bamberger,* 291 F. 776 (D. N. J. 1923) that a radio station is not an eleemosynary institution, but is conducted for profit, and the defendant must pay for the use of copyrighted music, even though it broadcast its slogan only at the beginning and at the end of the program as was done in the principal case. Television is not different from radio in this respect. Is it not true, therefore, that the television station used the performance for the purpose of trade? See, *Herbert v. Shanley,* 242 U. S. 591, 37 S. Ct. 232 (1917). *Associated Music v. Memorial Radio Fund,* 141 F. 2d 852 (2d Cir. 1944), *certiorari denied* 323 U. S. 766, 65 S. Ct. 120 (1944).

It may be contended that public policy supports the principal decision. If the contrary were held, any spectator at a sporting event would have a cause of action if televised. However, this would not necessarily be true. Only a performer whose act did not constitute *news* would have an action. The spectators are only incidental to the reporting of the event. The performance in itself is an entity and not merely incidental; and plaintiff is an independent contractor, not an employee of the football club that authorized the television of the game. Certainly, no harm can be done to extend the New York Civil Rights Law, if there need be an extension, to cover the situation in the principal case.

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TORTS—OVERTHROW OF THE CHARITIES' IMMUNITY DOCTRINE—JUDICIAL COGNIZANCE OF CHANGING PUBLIC POLICY CONSIDERATIONS

Plaintiff was injured when the wheel-stretcher upon which she was riding escaped the grasp of a nurse's aide employed by the defendant, and overturned. The complaint charged defendant charity hospital with failure to exercise due care in the selection of its employees. At trial, a directed verdict was given to the defendant, and plaintiff's motion for retrial denied. Plaintiff appealed. The Supreme Court of Arizona held that the question of negligence should have gone to the jury, and, upon the plaintiff's request, reviewed the doctrine of Charities' Tort Immunity, and declared the policy overruled. *Ray et ux. v. Tuscon Medical Center,* 72 Ariz. 22, 230 P. 2nd 220 (1951).