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Torts—Intentional Torts—Right of Privacy

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Thus, as outlined, the charterer's negligence consisted of nonfeasance, while that of both the employer and the manufacturer-shipper consisted of misfeasance--one an omission, the others a commission; one passive, the others active. The conclusion, therefore, that the tortfeasor passively negligent may be indemnified by the active tortfeasors, and the active tortfeasors may not be indemnified as between themselves, is in harmony with the settled principles of joint torts.

B. *Intentional Torts*

Right of Privacy

The law of torts provides protection to an individual's person and property. The development of the law to afford principles to protect an individual's *intangible* rights in his person is evidence of the growth and flexibility of the common law.[60] The right to be "let alone"[61] or the right to privacy was discussed in a legal periodical before the courts took cognizance of the right.[62] In New York a common law right to privacy is not recognized.[63]. The only remedy in New York is conferred by a statute which confined redress to the appropriation of some element of the plaintiff's personality for commercial use.[64] Even thus limited, the statute has received a narrow construction from the courts in interpreting what is a use for "advertising purposes" or "purposes of trade."[65] The use of a name or picture in a newspaper, magazine, or newsreel in connection with an item of news or of general public interest is not a use for purposes of trade.[66]

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60. *E.g.*, some courts have recognized the intentional causing of mental disturbance as a tort. *Emden v. Vitz*, 88 Cal. App. 2d 313, 198 P. 2d 696 (1948).

61. COOLEY, TORTS 29 (2d ed. 1888).

62. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

63. *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902); *Rhodes v. Sperry Hutchinson Co.*, 193 N. Y. 223, 85 N. E. 1097 (1908).

64. N. Y. CIVIL RIGHTS LAW §§ 50-51: "Any person whose name, portrait or picture is used within this state for *advertising purposes or for purposes of trade* . . . may sue and recover damages . . ." (Italics added)

65. *Maloney v. Boy Comics*, 277 App. Div. 166, 98 N. Y. S. 2d 119 (1st Dep't 1950). see Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526 (1941).

66. *Sidis v. F-R Publication Corp.*, 113 F. 2d 806 (2d Cir. 1940); *Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N. Y. Supp. 752 (1st Dep't 1919); *Coyler v. Fox Publishing Co.*, 162 App. Div. 297, 146 N. Y. Supp. 999 (2d Dep't 1914); *Lahiri v. Daily Mirror*, 162 Misc. 776, 295 N. Y. Supp. 382 (Sup. Ct. 1937). But the right of privacy was held violated where an individual not in public life was unduly singled out in a newsreel, *Blumenthal v. Picture Classics*, 235 App. Div. 570, 257 N. Y. Supp. 800 (1st Dep't 1932), *aff'd*, 261 N. Y. 504, 185 N. E. 713 (1933), and a public figure's news value was used for purely commercialization in *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. Supp. 96 (1st Dep't 1935), *aff'd*, 271 N. Y. 554, 2 N. E. 2d 691 (1936). See 1 BFLO. L. REV. 174 (1951).

The New York Court of Appeals interpreted CIVIL RIGHTS LAW §§50, 51 as applied to television in *Gautier v. Pro-Football, Inc.*[67] Plaintiff performed his animal act between halves at a professional football game pursuant to a contract with defendant which expressly provided that plaintiff's act would not be televised. Nevertheless, the performance was televised without plaintiff's permission. The Court found that there had been advertising before and after plaintiff's act was televised. This was held not to be a use of plaintiff's personality for "advertising purposes" as there was no connection between the "commercials" and the use of plaintiff's name or picture. Also there was no use for "purposes of trade"; plaintiff was a public personage voluntarily participating in a public event. "While not a part of the game proper, he did become part of the spectacle as a whole by appearing between halves, and voluntarily occupying the very center of attraction for several minutes."[68] The Court held (5-2) for defendant; thus plaintiff's right to privacy was limited when his performance became newsworthy as a public event.

Judge Desmond based his concurring opinion on the absence of a disturbance of plaintiff's privacy: "His grievance here is not the invasion of privacy—privacy is the one thing he did not want, or need, in his occupation."[69] There is much to be said for the proposition that those interests for which the right of privacy was developed were not interfered with here; there was not an encroachment upon plaintiff's right to be left alone; his complaint was that he was not paid for the televising of his show.

A liberal construction of the statute, however, would afford a remedy to plaintiff.[70] Plaintiff was performing publicly, but had not consented to the wider publication of his act via television. If the injury is characterized as an unprivileged telecasting, then plaintiff did suffer an invasion of his right of privacy.[71] Television with its possibility for immediate projection of the subject

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67. 304 N. Y. 354, 107 N. E. 2d 485 (1952).

68. *Gautier v. Pro-Football, Inc.*, 304 N. Y. 354, 360, 107 N. E. 485, 489 (1952).

69. 304 N. Y. at 361, 107 N. E. 2d at 489.

70. CIVIL RIGHTS LAW § 50 contains penal sanctions, another reason for the court's limiting its application. See *Binns v. Vitagraph Co.*, 210 N. Y. 51, 55, 103 N. E. 1108, 1109 (1913).

71. The courts have allowed recovery on a damage to property theory for an unprivileged publishing in *Gee v. Pritchard*, 2 Swans. 402, 36 Eng. Rep. 670 (Ch. 1818) (letters); *International News Service v. Associated Press*, 248 U. S. 215 (1918) (news); *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W. D. Pa. 1938) (baseball game). For a discussion of the measure of damages when plaintiff is only nominally injured but defendant has benefited by his own tortious act, see *Edward v. Lee's Adm'r*, 265 Ky. 418, 96 S. W. 2d 1028 (1936).

televised to a large visual audience presents a situation unknown to the draftsmen of the CIVIL RIGHTS LAW. But the injury is still there, and the New York Court of Appeals should have interpreted the statute consistently with today's means of reproducing an individual's portrait.

Libel

A suit for libel produces a conflict of interests; plaintiff's right to have his reputation free from invasion and defendant's right to freedom of speech and press. Where a newspaper reports a judicial proceeding, although in a defamatory way, it is privileged from suit for libel.[72] The private right of the individual must be subordinated to the public interest in free dissemination of news[73] and "the security which publicity gives for the proper administration of justice."[74] However, if the judicial proceedings are not open to the public, but are private, the reason for the privilege ceases, and so it was held last term in *Danziger v. Hearst Corp.*[75]

In that case an affidavit in support of a motion for alimony by the wife of the plaintiff was published by defendant newspaper. The *affidavit* falsely accused plaintiff of assaulting and physically torturing his wife. Such an affidavit in a matrimonial action was not available for public inspection; moreover, it was barred from examination by anyone other than the parties to the proceeding.[76] The Court of Appeals sustained plaintiff's motion to dismiss the defense of privilege as insufficient in law.

New York CIVIL PRACTICE ACT §337 gives to the one who reports a judicial proceeding a privilege from suit for libel.[77] The privilege extends not only to reports of the proceedings had in open court but also to papers filed in the course of the action, if these papers are accessible to public perusal.[78] CIVIL PRACTICE

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72. *Lee v. Brooklyn Union Co.*, 209 N. Y. 245, 103 N. E. 155 (1913).

73. *Stevenson v. News Syndicate*, 276 App. Div. 614, 96 N. Y. S. 2d 751 (1950), *aff'd on other grounds*, 302 N Y. 81, 96 N. E. 2d 187 (1951).

74. Holmes, J., in *Crowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

75. 304 N. Y. 244, 107 N. E. 2d 62 (1952).

76. RULE OF CIVIL PRACTICE 278: An officer of a court with whom the proceedings in an action to annul a marriage or for a divorce or separation are filed . . . shall not permit a copy of any of the pleadings or testimony, or any examination or perusal thereof, to be taken by any other person than a party . . ."

77. C. P. A. § 337: "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial, legislative or other public and official proceedings . . ."

78. *Campbell v. New York Evening Post*, 245 N. Y. 320, 157 N. E. 153 (1927).