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not free to contract away its employment prerogatives. Any question on this point which may arise from the reading of the new provision is quickly dispelled by reference to the report of the House and Senate Conference Committee on the bill. " . . . Nothing in such provision is intended to restrict the applicability of the hiring hall provisions enunciated in the *Mountain Pacific* case (119 N.L.R.B. 883, 893). . . ."[35] The task of properly implementing the basic objectives of the Act remains the province of the Board. In the hiring hall area, the task cannot be considered complete by simply following the rule of *Mountain Pacific*.

ALEXANDER MANSON

MANNER OF PUBLICATION DETERMINATIVE OF ACTION FOR INVASION OF PRIVACY

It is the accepted procedure, and rightly so, that any discussion of the right of privacy start with a reference to the law review article by Warren and Brandeis which has been widely acknowledged to be the birthplace of the right of privacy.[1] Prior to the publication of the article, no right of privacy was recognized by the common law. It was the purpose of the authors to consider whether the then existing law afforded a principle which could properly be invoked to protect the privacy of the individual, and, if it did, to determine the nature and extent of such protection.[2] They concluded that the law afforded such a principle.[3] New York, the first state to consider the existence of the right, rejected its existence.[4] Shortly thereafter, however, Georgia held such a right existed and,[5] currently, over twenty states recognize and protect the right of privacy, while three states, including New York, have adopted a limited statutory right of privacy.[6]

It is not surprising that the existence of the right received such ready recognition. In 1890, Warren and Brandeis said that "Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency."[7] Those same abuses exist today, and, along with technical advances in the field of communications, and the willingness of the courts to recognize a cause of action for mental disturbance, account for the rapid, and almost inevitable,[8] growth of the right of privacy.

Today the courts are no longer faced with the problem of the existence

35. U.S. Code Congressional and Administrative News, 3186 (1959).

1. Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).
2. Id. at 197.
3. Id. at 206.
4. Roberson v. Rochester Folding Box Company, 171 N.Y. 538, 64 N.E. 442 (1902).
5. Pavesich v. New England Life Insurance Company, 122 Ga. 190, 50 S.E. 68 (1905).
6. Prosser, Torts, 636-637 (2d ed. 1955); see N.Y. Civ. Rights Law § 51.
7. Warren and Brandeis, supra note 1, at 196.
8. 1 Harper and James, Torts, § 683 (1956).

of the right, but with its dimensions. These dimensions should be prescribed by the purpose of the right, which purpose was visualized by Warren and Brandeis as follows:

> "The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever their position or station, from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented."[9]

They defined the right of privacy simply as the right to be let alone.

The right of privacy has a number of different facets. Recovery has generally been granted for (1) the invasion of plaintiff's physical solitude (e.g., wiretapping, eavesdropping), (2) publicity which violates ordinary decencies (e.g., the unwarranted publishing of personal information about the plaintiff), (3) putting plaintiff in a false position (e.g., the unauthorized signing of one's name to a petition), and (4) the appropriation of some element of plaintiff's personality for a "commercial" use (e.g., the use of one's picture in an advertisement).[10] Confusion has arisen from the failure to distinguish this latter category from the property right inherent in one's name or likeness. The right of privacy, however, is a strictly personal right based on the interest one has in living his life out of the public view. When the actor's conduct is such that it can reasonably be expected to interfere with the mental and emotional tranquility of a person of ordinary sensibilities, the plaintiff's right of privacy has been invaded and the showing of special damages is not necessary.[11] Because of the nature of the right, truth is no defense in the case of a publication, nor is the absence of malice or wilfulness on the part of the actor.

The right, however, is not absolute. The principal limitation on the right to be free from undesired publicity is the defendant's privilege to publish matter which is of sufficient public interest.[12] Thus, the right does not exist in the dissemination of news and other information of public interest, nor in the discussion of events in the life of a person in whom the public has a rightful interest, permanent or temporary.

This limitation was carefully examined by the Superior Court of Pennsylvania in the case of *Aquino v. Bulletin Company*.[13] A common law action for the unwarranted invasion of the right of privacy is recognized in Pennsylvania,[14] but, as the Court stated ". . . we have only begun to draw the lines bounding the right."[15] Because of the limited development of this area of the law, the

9. Warren and Brandeis, supra note 1, at 214-215.
10. Prosser, supra note 6, at 637-640.
11. Restatement, Torts, § 867, comment d (1939).
12. Warren and Brandeis, supra note 1, at 214.
13. — Pa. Super. —, 154 A.2d 422 (1959).
14. Hull v. Curtis Publishing Co., 182 Pa. Super. 86, 125 A.2d 644 (1956).
15. Aquino v. Bulletin Company, supra note 13, at 425.

Court considered the status of the right in many of the states which have spoken on the subject, in an effort to "draw the line" judiciously.[16]

The *Aquino* case dealt with the publication of an article in *The American Weekly*, a supplement in defendant's newspaper, *The Sunday Bulletin*.[17] The article was a story about the unfortunate romance, marriage and divorce of Teresa Aquino, plaintiff's daughter. The title of the article was "Marriage for Spite." It told how Teresa's suitor had persuaded her to secretly marry him and then, three days later, revealed that he never had any intention of living with her or accepting her as his wife, but had married her merely to spite the plaintiffs who had tried to turn their daughter against him. Teresa immediately filed for divorce and this was reported in the newspapers, as was the subsequent final decree. The plaintiffs were referred to in an opinion written by a Judge of the Court of Common Pleas on a legal point involved in the divorce case. This opinion was published in the local law reports.[18]

The facts contained in the *Bulletin* were substantially true and the Court acknowledged the basic events involved to be newsworthy, i.e., of legitimate public concern. But the article was in the nature of a story and not a news article. It was published in the Sunday supplement on a page which was dominated by a melodramatic illustration, across which was written the title of the story. The style in which the article was written was not that of a news story, but the facts, although basically correct, were embellished and fictionalized by the author. The article mentioned the parents by name and related their part in, and reactions to, the whole affair. As a result of this publication, the parents brought this action for the unwarranted invasion of their own right of privacy and received a jury verdict of five thousand dollars each.

To state the conflict in its broadest terms, the Court in the *Aquino* case had to reconcile the right of privacy with the freedom of the press—the individual's interest with that of the public. The aspect of the right of privacy involved here is the individual's interest in not having disclosed to the public facts about his personal affairs which would cause him humiliation, embarrassment, or, at least, annoyance. The community's interest is twofold, embracing both the constitutional guaranty of freedom of the press and the right of the public to be informed. It is in this area of attempted reconciliation that the law of privacy is found to be the most confused.[19] This is not surprising considering the difficulty involved in formulating a rule or set of rules which would be applicable to the variant fact situations. This difficulty, in fact, was foreseen in the original work on the subject:

> "Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case—a necessity

16. Compare Leverton v. Curtis Publishing Co., 192 F.2d 974, 975 (3d Cir. 1951).
17. Edition of December 3, 1950, of which 695,423 copies were distributed.
18. Masciocchi v. Masciocchi, 72 Pa. D.&C. 257 (1950).
19. Ludwig, "Peace of Mind" in 48 Pieces v. Uniform Right of Privacy, 32 Minn. L. Rev. 734, 743 (1948).

> which unfortunately renders such a doctrine not only more difficult of application, but also to a certain extent uncertain in its operation and easily rendered abortive."[20]

The *Restatement* recognizes the existence of a right of privacy and states that recovery will be had for an unreasonable and serious interference with the right. It is up to the jury to determine whether the intrusion went beyond the bounds of decency and whether the defendant should have known that the plaintiff would be justified in feeling seriously hurt by the publication.[21] Although a test of reasonableness is suggested, there seems to be no real balancing of interests in the courts once an item has been designated as being of legitimate public concern. Such a designation has the effect of an almost absolute privilege,[22] rather than being a mere factor (concededly an extremely important one) to be considered with a number of others in the balancing of interests.[23] This shortcoming is avoided if a balancing takes place in determining what is of legitimate public concern. This determination, however, is usually a rather one-sided inquiry into whether there exists a general public interest which,[24] in turn, is governed by "the mores of the community."[25] Although the courts sometimes state that the public's interest must be "meritorious"[26] or "rightful",[27] the only real limitation seems to be a prohibition against "outrageous" revelations.[28] While it is true that the courts are not concerned with establishing canons of good taste for the press or public,[29] it is questionable whether the courts should accept, as demonstrative of current mores, what the public *will* read with "interest",[30] rather than inquiring into the community

20. Warren and Brandeis, supra note 1, at 215-216.

21. Restatement, Torts, § 867 (1939).

22. "Contrary to the expectations of Warren and Brandeis, public interest in news has provided a virtually impregnable defense to the right of privacy." Ludwig, supra note 19, at 744.

23. A balancing of interests should include a consideration of the following questions: Is the newsworthy event presented as a mere vulgar curiosity or is there some public benefit in its dissemination? How current is the news? Is plaintiff the primary subject of the publication? If not, what is the relationship of the plaintiff to the subject? Is the plaintiff a public personage or an unknown? What is the effect of the publication on plaintiff, subjectively, and in his relations with others? How foreseeable was this effect? Did the publication use plaintiff's name or picture, and how extensive was the use? What was the medium of publication, its surroundings, and the necessity of using a manner of publication more offensive than others? Did the publication deviate from the true facts, even if only by inference? Was the publisher's motive to inform or educate, or purely to make a profit, or to intentionally damage plaintiff? What effect will a denial of the privilege have on freedom of the press?

24. "For present purposes news need be defined as comprehending no more than relatively current events such as in common experience are likely to be of public interest." Jenkins v. Dell Publishing Company, 251 F.2d 447, 451 (3d Cir. 1958).

25. "The courts must determine in view of the mores of our culture what are permissible inroads upon the privacy of the individual." 1 Harper and James, supra note 8, at 686. See Sidis v. F-R Publishing Corporation, 113 F.2d 806, 809 (2d Cir. 1940).

26. Jenkins v. Dell Publishing Company, supra note 24, at 450.

27. Melvin v. Reid, 112 Cal. App. 285, 297 P. 91, 93 (1931).

28. Sidis v. F-R Publishing Corporation, supra note 25, at 809; Prosser, supra note 6, at 643-644.

29. Aquino v. Bulletin Company, supra note 13, at 425.

30. "The increased circulation of magazines such as 'Confidential' is mute testimony

feeling towards what *ought* to be privileged. The curious,[31] the vulgar, the distorted mind will want "news" of their neighbors' private lives,[32] even if it means an "exposé". But should this type of public interest which is of little or no social value, and may be in fact harmful to society,[33] be covered by the same near absolute privilege designed to protect the publication of news and information from which the public benefits? This is the question with which the Court in the *Aquino* case had to struggle. It is a question of great difficulty because of the real danger that any limitation is likely to result in an enfringement of this essential public interest,[34] especially when the line of demarcation between what should and should not be permitted is so vague. This difficulty, and danger, was recognized by Warren and Brandeis,[35] as well as the Pennsylvania Court which stated "Without well defined limitations the right of privacy might dangerously encroach upon freedom of speech and freedom of the press."[36]

Despite these pitfalls, the *Aquino* case held that if the purpose of the publication was not the legitimate one of disseminating news but was to amuse and astonish its readers, the privilege would not automatically attach even though the basic events involved were newsworthy. This result is an important step in the direction of limiting the publication of matters of public "interest". It exposes a feeling that there exist instances, the number of which are limited to a large extent only by the good taste and charitableness of the publisher, where some protection should be given private persons involved in news events. The *Aquino* case, apparently, was such an instance. As mentioned before, the events which formed the basis of this article were of legitimate public concern. The public could be, and in this case was, informed of the basic events by an ordinary news item. The subsequent publication, in a form which emphasized the bizarre aspects of the affair, and also delved into the surrounding personal circumstances, went far beyond the unavoidable invasion of privacy which the plaintiffs must accept from mere disclosure. This added embarrassment and humiliation flowed from the manner of publication which was neither necessary

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that the public is interested in the kind of news those magazines purvey." Goelet v. Confidential, Inc., 5 A.D.2d 226, 230, 171 N.Y.S.2d 223, 226-227 (1st Dep't 1958).

31. One court has said that public interest is not to be confused with mere curiosity. See Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P.2d 491 (1939).

32. 1 Harper and James, supra note 8, at 686.

33. See Warren and Brandeis, supra note 1, at 196.

34. "The public policy involved in leaving unhampered the channels for the circulation of news and information is considered of primary importance . . . . A free press is so intimately bound up with fundamental democratic institutions that if the right of privacy is to be extended to cover news items and articles of general public interest, educational and informative in character, it should be the result of a clear expression of legislative policy." Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 781-782, 295 N.Y. Supp. 382, 388 (Sup. Ct. 1937).

35. ". . . . it is only the more flagrant breeches of decency and propriety that could in practice be reached, and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn." Warren and Brandeis, supra note 1, at 216.

36. Aquino v. Bulletin Company, supra note 13, at 425.

nor of any social value, except insofar as it helped to keep the newspaper in business and amused its readers.[37] A balancing of the interests involved might well result in an actionable invasion of privacy, but in order to apply the *Restatement*'s test, the Court had to devise a way of side-stepping the freedom of press privilege.

This it did by adopting a "purpose" test as New York had done in *Sutton v. Hearst Corp.*[38] The article involved there was also a Sunday supplement account of a basically newsworthy event. It was necessary for the Court to inquire into the purpose with which the article was published since in New York an action for the invasion of the right of privacy exists only under a statute which requires a person's name or likeness to be used for advertising purposes or for purposes of trade.[39] In determining what uses are "for purposes of trade", the New York courts have found liability in cases which correspond, in general, with those in common law jurisdictions.[40] The test set forth by the Appellate Division was as follows:

> "It is for the triers of the facts to determine whether the article and its surrounding illustrations were limited to reporting fairly past or current events, whether it is educational or informative, or whether the primary purpose, as the complaint alleges, was to amuse and astonish the reading public, not for the legitimate purpose of disseminating news, but for 'purposes of trade'."[41]

The actual holding in *Sutton,* however, was that a motion to dismiss should be denied because it could be found that the offending article was so fictionalized as to create a false impression. The dissent in *Sutton* makes it clear that the "test" announced by the majority is contrary to New York law if it was meant to include essentially truthful accounts.[42] The *Aquino* article was "fictionalized" in the sense that the author used his imagination to embellish and garnish the basic facts. It does not appear from the opinion, however, that the Court relied on finding the article as a whole to be fictional or misleading in order to conclude that its purpose was not privileged. Although this approach has occasionally received favorable mention,[43] the prevailing common law view seems to be in accord with New York law.

One of the leading cases in this area is *Sidis v. F-R Publishing Corp.*[44] The

37. "Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another." Jenkins v. Dell Publishing Company, supra note 24, at 451.

38. 277 App. Div. 155, 98 N.Y.S.2d 233 (1st Dep't 1950).

39. N.Y. Civil Rights Law §§ 50, 51.

40. Prosser, supra note 6, at 641.

41. Sutton v. Hearst Corporation, supra note 37, at 156-157, 98 N.Y.S.2d 233, 234, 235.

42. See Lahiri v. Daily Mirror, Inc., supra note 34.

43. ". . . the right to invade a person's privacy to disseminate public information does not extend to a fictional or novelized representation of a person . . . ." Garner v. Triangle Publications, 97 F. Supp. 546, 549 (S.D.N.Y. 1951). See Hazlitt v. Fawcitt Publications, Inc., 116 F. Supp. 538 (D. Conn. 1953).

44. Supra note 25.

plaintiff there was a former child prodigy turned recluse who was the subject of an intimate biographical sketch some thirty years after his withdrawal from public life. The Second Circuit Court had to determine the position, under the common law, of five states which recognized the existence of the right of privacy,[45] but had not spoken on the specific problem. A survey of the cases indicated that "None . . . goes so far as to prevent a newspaper or magazine from publishing the truth about a person, however intimate, revealing, or harmful the truth may be. Nor are there any decided cases that confer such a privilege upon the press."[46] In holding that there was no liability since the plaintiff was a public figure because of the legitimate public concern in whether he fulfilled his early promise, the Court stated that it regarded the precise motives of the press as unimportant, and intimated that newsworthiness would constitute a complete defense unless the community's notions of decency were outraged. The year before the *Aquino* decision, in *Jenkins v. Dell Publishing Co.*,[47] the Third Circuit Court was asked to decide whether the publisher's "purpose" affected the privilege of publication,[48] and, applying what it felt to be the law of Pennsylvania, reached a different result, *viz.*, that once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged.[49] The Court had given the conflict of interests careful consideration and felt that any other rule would dangerously and undesirably obstruct the publisher by compelling him to speculate as to the value judgments of a judge or a jury with reference to the kind of reader appeal the item offers.[50] The result was that plaintiffs, the family of a victim in a current murder case, could not recover for the publication of their photograph in connection with an account of the murder in a detective magazine which, as characterized by the dissent, could be found to cater to the palates of those who seek morbidity and sensationalism. The *Aquino* opinion distinguishes the *Jenkins* case on the grounds that it dealt with the publication of a picture and not a fictionalized story. This seems to be a questionable basis for distinction. A photograph is usually given the same characterization as the article it illustrates. Thus, the inquiry in both cases concerned the nature of the article published and the relevance of the publisher's "purpose"[51].

45. Plaintiff alleged an invasion of his right of privacy in seven of the states in which the offensive article was published. The determination of liability had to be made in accordance with the law of each state in which there was a publication. For a discussion of this problem, see Prosser, Interstate Publications, 51 Mich. L. Rev. 959 (1953).

46. Sidis v. F-R Publishing Company, supra note 25, at 808.

47. Supra note 24.

48. "Indeed, it seems to be the appellants' principal contention that this publication is not entitled to the privileged status of ordinary news items because its actual or intended appeal is to satisfy a public craving for 'entertainment' rather than to provide 'information.'" Jenkins v. Dell Publishing Company, supra note 24, at 451.

49. Ibid.

50. Id. at 452.

51. Supra note 24.

In concluding its opinion in the *Aquino* case, the Court said: "We realize that it is extremely difficult to develop a precise and comprehensive rule which can be applied to a case *where liability is based upon the manner in which an event is presented and not upon publication of the event itself.*"[52] This principle, that the form rather than the matter of a publication might render it unprivileged by revealing an unprotected purpose, appears to be a new limitation on the freedom of the press and, consequently, a further protection for the developing right of privacy. This is especially clear when the decision is considered in light of the facts. The article did not attempt to ridicule or degrade the plaintiffs and, although the facts were embellished, the events were not distorted. Nor did it appear in a publication devoted solely to reader amusement, but rather in a newspaper, albeit in the supplement, where the privilege of publication is given its greatest recognition.[53]

The "purpose" test was used in *Aquino* as a technique to remove the publication from the category of legitimate public concern. The decision, however, in effect, brings the law closer to a simple balancing of interests as a test of liability. This would seem to be a desirable result since it avoids giving every published item which now considered of legitimate public concern the full privilege of newsworthiness despite its own particular social value, or lack of social value. That is, "degrees" of legitimate public concern could be recognized corresponding with the public benefit of each publication, to be balanced against the individual's interest. Of course this would put an increased burden on the courts to avoid the danger of infringing on freedom of the press. However, the courts have previously handled such situations successfully and should not avoid the problem because their task is difficult.

The full acceptance and development of the *Aquino* approach, and its effect on the privilege and determination of newsworthiness, remain to be seen. The greatest potential application would seem to be in cases where the plaintiff has lost his traditional cause of action for the invasion of privacy by becoming a public figure or by being involved in the public records. While such persons are undoubtedly newsworthy subjects, this doctrine could be invoked as a check on the treatment they are accorded by unscrupulous publishers, as exemplified by magazines which thrive on gossip and sensationalism. One can also speculate whether any court would be willing to extend this "manner of presentation" test to the dramatic headlines of tabloids whose main source of "news" is personalities and their personal affairs.

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52. Aquino v. Bulletin Company, supra note 13, at 430 (emphasis mine).

53. "The almost absolute privilege conferred on news because of great public concern in current events and the impossibility of obtaining consent in advance extends almost to the entire contents of a newspaper. In this atmosphere of immediate public interest, the privilege of the front page bulletin is frequently carried over to the weird story in the Sunday supplement." Ludwig, supra note 19, at 748.