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Torts—Use of News Article for Advertising Purposes as Violative of Right of Privacy

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mission by its regulations can create statutory liability. For this reason, the violation of the Building Code was only held to be some evidence of negligence.[43]

USE OF NEWS ARTICLE FOR ADVERTISING PURPOSES AS VIOLATIVE OF RIGHT OF PRIVACY

The Mosler Safe Company, for the purpose of promoting the sale of its safes, distributed handbills by mail to prospective customers. In order to dramatize the danger in not being equipped with one of these safes, a newspaper account of a destructive fire, including a newsphoto of the flaming building, was reproduced in the handbill. Also included, but separate from the reprinted article, were a few lines of advertising. The description of the fire mentioned the plaintiff by name three times, along with his address and occupation. It was implied that the fire was started through the carelessness of plaintiff and his companion. Because of this unauthorized use of his name, Flores brought an action in libel and for an invasion of his right of privacy under Section 51 of the New York Civil Rights Law. The defendant's motion to dismiss the latter cause of action was overruled in the trial court and this was affirmed by the Appellate Division.[44] The Court of Appeals, in *Flores v. Mosler Safe Company*,[45] also affirmed, holding that the complaint did not, as a matter of law, fail to set forth a use of plaintiff's name which was violative of his statutory right of privacy.

The development of the right of privacy is usually traced back to a law review article written in 1890.[46] The right is based on a person's privilege "to be let alone," and grants recovery for the embarrassment and indignation experienced by one whose private affairs are revealed to the public. The first case in which this right was contended for was *Roberson v. Rochester Folding Box Co.*[47] The New York Court of Appeals therein held, in a decision still controlling, that there exists no common law right of privacy in New York. Chief Justice Parker wrote in the opinion: "The legislative body 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."[48] The Legislature in its very next session passed what are now Sections 50 and 51 of the New York Civil Rights Law. Section 50 provides that "A person . . . that uses for advertising or for the purposes of trade, the name . . . of any living person without having first obtained the written permission of such person . . . is guilty of a misdemeanor." Section 51 provides for injunctive relief and damages. It should be noted that the right

43. Ibid.
44. Flores v. Mosler Safe Company, 7 A.D.2d 226, 182 N.Y.S.2d 126 (3d Dep't 1959).
45. 7 N.Y.2d 276, 196 N.Y.S.2d 975 (1959).
46. Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).
47. 171 N.Y. 538, 64 N.E. 442 (1902).
48. Id. at 545, 64 N.E. 443.

thereby created is narrower than the common law right existing in many states, being limited by the purpose of the user.[49]

There is no doubt but what in the present case the circular itself was used for advertising purposes; nor was it disputed that the use of plaintiff's name by the newspaper was privileged since he had played a part in a newsworthy event. It was not necessary, as defendant contended, that the use of plaintiff's name be in the form of an endorsement or that it tend by itself to draw trade for defendant.[50]

Defendant also claimed that since plaintiff's name played no part in advertising the product and appeared only in the news article and not in the advertising material, its use was only "incidental" and thus not violative of the statute. Five cases were relied on to support this proposition and all were distinguished by the Court.[51] They differed from the instant case in that they involved persons who had voluntarily become public personages,[52] and persons in whom the public had a current interest,[53] and included publications which had no connection with the advertising,[54] and were merely incidental to the purpose of the user.[55]

The Court took the view that it made no difference that plaintiff's name did not appear in the advertising copy and said ". . . the fact remains that defendant freely and deliberately chose to adopt and reprint the entire original photograph, captions, and the news account which contained plaintiff's name in its circular."[56] This concept of "unnecessariness" moves the Court to overlook any quibbles concerning whether the use of plaintiff's name was for advertising purposes or was merely incidental to defendant's purpose. Even granting the dissent's point that it was legitimate for defendant to refer to descriptions of specific fires, it was not necessary that the account appear without plaintiff's name being deleted.

The dissent characterized the question as ". . . whether a news event can be utilized in conjunction with advertising . . . if to do so involves mention of persons whose names have already been published as having participated

49. "Within the limitations of the statute to commercial uses, the New York courts seem to have arrived at very much the same conclusions concerning the right of privacy that other courts have reached at common law." Prosser, Torts 641 (2d ed. 1955).

50. The interest protected is not any property interest in the subject's personality, but the effect of the use on his feelings.

51. Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.2d 485 (1952); Stillman v. Paramount Pictures Corporation, 1 Misc. 2d 108, 147 N.Y.S.2d 504 (Sup. Ct. 1956), modified, 2 A.D.2d 18, 153 N.Y.S.2d 190 (1st Dep't 1956), aff'd, 5 N.Y.2d 994, 184 N.Y.S.2d 856 (1959); Wallach v. Bacharach, 192 Misc. 79, 80 N.Y.S.2d 37 (Sup. Ct. 1948), aff'd 274 App. Div. 919, 84 N.Y.S.2d 894 (1st Dep't 1948); Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 295 N.Y. Supp. 382 (Sup. Ct. 1937); Damron v. Doubleday, Doran & Co., 133 Misc. 302, 231 N.Y. Supp. 444 (Sup. Ct. 1928).

52. The Gautier and Lahiri cases, supra note 51.

53. The Gautier, Lahiri and Wallach cases, supra note 51.

54. The Gautier and Wallach cases, supra note 51.

55. The Damron and Stillman cases, supra note 51.

56. Supra note 45 at 284, 196 N.Y.S.2d 981 (1959).

in the event."[57] This points up a basic conflict between the majority and the dissent. The majority feels that plaintiff's name here appears in "a stale or outdated news item that was no longer a matter of general public interest or concern."[58] The dissent, on the other hand, took the position that since all these facts were in the public domain, plaintiff's right of privacy was not infringed by republishing the same facts at a later date. However whether the fire is still a newsworthy event, and thus privileged (in common law states), or not, seems beside the point, the relevant inquiry being the purpose behind the publication. The purpose here is not that of disseminating information; at least not to the exclusion of the advertising intent. The fact that it is the article that is used for advertising rather than plaintiff's name as such, does not make the mention of the name "incidental."

This decision is consistent with the interpretation of the statute as protecting the sentiments, thoughts and feelings of an individual.[59] If the interest protected was commercial exploitation from the subject's viewpoint, i.e., some advantage gained by the user because of the use of this particular subject's name,[60] there would be greater merit in the dissent's stand. But where it is the plaintiff's feelings that are protected, and the commercial context is merely the nature of the use by the publisher that is required by the statute, the courts should be liberal in applying the statute. It does not seem that this prohibition will be as readily applied to names appearing in novels, short stories, and on stage and screen, as the dissent fears, because the purpose of such publications is not as flagrantly commercial as that in the present case. This case suggests that the Court is willing to protect the individual as far as possible, but the interplay of interests, privileges, and statutory requirements makes it difficult to perceive a rule that can be applied with confidence from one case to another. For example, it is hard to foretell what the result would be in a case where the news article was of very recent origin, or where it had no relation to the user's business, or where it is difficult to avoid use of plaintiff's name.

WORKMEN'S COMPENSATION

EFFECT OF COMMON LAW RECOVERY AGAINST EMPLOYER ON EMPLOYEE'S CLAIM FOR WORKMEN'S COMPENSATION

In *Martin v. C. A. Production Company*,[1] claimant, an employee of defendant company, was assaulted and struck in the face by an intoxicated visitor at a closing night cast party. Claimant attended the party at the invitation of Ray Bolger (star of the show) and his wife Gwen Rickard (a

57. Id. at 285, 196 N.Y.S.2d 982.
58. Id. at 282, 196 N.Y.S.2d 979.
59. Hofstadter, The Development of the Right of Privacy in New York (1954).
60. See supra note 50.

1. 8 N.Y.2d 226, 203 N.Y.S.2d 845 (1960).