

THE STATUTORY RIGHT OF PRIVACY IN THE STATE OF NEW YORK AND ITS IMPORTANCE FOR NEW ZEALAND

INTRODUCTION

Although the current interest which is being generated in many jurisdictions in the protection by law of the privacy of the individual relates more commonly to the prohibition or curtailment of wire-tapping and electronic eavesdropping, there is also some discussion of what may be done about what Prosser classifies as the "appropriation for the defendant's advantage, of the plaintiff's name or likeness".¹ As, since 1903, there have been New York statutory provisions dealing with this particular subject, it may be interesting to those in New Zealand who are concerned about the commercial appropriation of name or likeness to canvass briefly the New York experience with a view to forecasting the developments which might take place should such a statute be enacted in New Zealand.²

Section 50 of the New York Civil Rights Law³ provides as follows:

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

Likewise the important part of section 51 provides:

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. . . .

1. Prosser, *Privacy*, 48 Calif. L. Rev. 385 (1960).

2. It is assumed for present purposes that common law developments in this area are highly unlikely (see Yang, "Privacy: A Comparative Study of English and American Law" (1966) 15 Int. and Comp. L.Q. 175) although it has been pointed out that several early English cases provide a possible foundation for such developments (Mathieson, Comment (1961) 39 Can. Bar Rev. 409; Flitton and Palmer, "The Right to Privacy: A Comparison of New Zealand and American Law" (1968) 3 Recent Law 86, 149).

3. McKinney's Consolidated Laws, c. 6.

That these forward-looking provisions were enacted as early as 1903 was largely the result of an historical accident—the decision of the New York Court of Appeals in *Roberson v. Rochester Folding Box Co.*⁴ The facts of this case were that the defendants had printed 25,000 photographs of Miss Roberson without her consent and had used them for advertisement of their product. The plaintiff contended that the pictures had been displayed in saloons and warehouses, among other places, that she had been recognised by her friends and other people, and that she had been humiliated and her good name attacked. She also alleged that she had suffered greatly in body and mind, had been confined to her bed, and was forced to employ a physician. She asked for damages and an injunction against further exhibition of the picture by the defendants. The majority of the court decided that no right of privacy was mentioned by the great commentators or sustained by any precedents and that recognition of such a right would lead to much groundless litigation.⁵

This decision raised an immediate storm of comment and criticism throughout the state. The *New York Times*, in a strong editorial, echoed what it believed to be the opinion of the people, saying in part:

If there is, as Judge Parker says there is, no law to cover these savage and horrible practices, practices incompatible with the claims of the community in which they are allowed to be committed with impunity to be called a civilised community, then the decent people will say that there is such a law, and the Court of Appeals will not be left to shadowy analogies and precedents for its conclusion that these outrages are legally unpreventable and unpunishable.⁶

As a result of the public reaction, the legislature at its next session enacted the first American right of privacy statute.

Being a direct consequence of the *Roberson* case, the language of the Act was confined to an attempt to correct the injustices of that decision. It did not create an absolute right of privacy but gave protection only against unauthorised use of a person's name, portrait or picture within the state "for advertising purposes" or "for the purposes of trade".

THE MEANING OF SECTIONS 50 AND 51

General

The purposes of sections 50 and 51 have been judicially defined on various occasions. In one case it was pointed out that they were born of the need to protect the individual from selfish, commercial exploita-

4. 171 N.Y. 538. For a survey of the common law developments in this field in New York up to the time of the *Roberson* decision, see Hofstadter, "The Development of the Right of Privacy in New York" (The Crosby Press, 1954).

5. The now celebrated article of Warren and Brandeis, "The Right to Privacy", 4 Harv. L. Rev. 193 (1890), was noted by the court, but was not considered to be sufficiently persuasive to justify a verdict for the plaintiff.

6. Aug. 23, 1902, at 8, col. 2.

tion of his personality,⁷ while in another it was held that the primary purpose was to protect the sentiments, thoughts and feelings of an individual and was rooted in popular resentment at the refusal of the courts to grant recognition to the newly expounded right of an individual to be immune from commercial exploitation.⁸ The interpretation of the sections by the courts presents an interesting example of judicial balancing of interests—the public interest in the freedom of the press on the one hand, against the individual's right to be free from commercial importunity on the other. As one commentator has pointed out, one of the most difficult problems concerning the right of privacy is that of the privilege to publish. The complex problem of how far to limit the activities of the press and enlarge the individual's right to be let alone is not easily resolved.⁹

Before expanding on this theme, it may be worth pointing out what the recent cases have had to say on the scope and construction of the sections.

First, it is clear that there continues to be no common law right to privacy in New York, and that the only remedy for invasion lies within the terms of the sections.¹⁰ Secondly, the right of action under section 51 is personal and cannot be maintained by anyone other than the person whose privacy is invaded.¹¹ Thirdly, the protection granted by section 51 is not a "property interest" but is a right of privacy which is purely personal and non-assignable. In *Bowman Gum v. Topps Chewing Gum*¹² it was held that the purchaser of the right to use the photographs of certain baseball players could not maintain an action under section 51 to obtain an injunction to prevent others from using photographs of the same players.

Unfortunately, recent cases do not seem to have settled the controversy which has existed since the enactment of sections 50 and 51—that is, whether they are to be strictly or liberally construed. In *Spahn v. Julian Messner Inc.*¹³ it was held that the sections were not to be construed narrowly, yet two other recent cases¹⁴ emphasise the penal nature of section 50 and point out that this section at least must be strictly

7. *Gautier v. Pro-Football Inc.*, 304 N.Y. 354, 358 (1952).

8. *Flores v. Mosler Safe Co.*, 7 N.Y. 2d 276 at 280, 196 N.Y.S. 2d 295 at 978 (1959).

9. Comment, 4 N.Y.L. Forum 229, 233 (1958).

10. *Association for Preservation of Freedom of Choice, Inc. v. Emergency Civil Liberties Committee*, 37 Misc. 2d 599, 236 N.Y.S. 2d 216 (1962); *Fleischer v. W.P.I.X. Inc.*, 30 Misc. 2d 17, 213 N.Y.S. 2d 632 (1962); *Flores v. Mosler Safe Co.* (supra); *Cardy v. Maxwell*, 9 Misc. 2d 329, 169 N.Y.S. 2d 547 (1957); *Russell v. Marlboro Books*, 18 Misc. 2d 166, 183 N.Y.S. 2d 216 (1959).

11. *D.C.N.Y.*, 1953, *Mtr. of Rome Sentinel Co. v. Boustedt*, 43 Misc. 2d 598 (1964); *Runyon v. U.S.*, C.A. Fla. 281 F. 2d 590 (1960).

12. *D.C.N.Y.* 103 F. Supp. 944 (1952).

13. 43 Misc. 2d 219, 250 N.Y.S. 2d 529, affd. 23 A.D. 2d 216, 260 N.Y.S. 2d 451, affd. 18 N.Y. 2d 324, 274 N.Y.S. 2d 877, vacated on other grounds 387 U.S. 239, affd. 21 N.Y. 2d 124, 286 N.Y.S. 2d 832 (1964).

14. *Cardy v. Maxwell*, 9 Misc. 2d 329, 169 N.Y.S. 2d 547 (1957); *People on Complaint of Maggio v. Charles Scribner's Sons*, 205 Misc. 818, 130 N.Y.S. 2d 514 (1954).

construed. It does not seem, however, as though formulae of construction have any real importance to the development of the meaning of the sections. For example, the interpretations given to the words "for advertising purposes or for the purposes of trade" in cases under section 51 have been applied to cases under section 50,¹⁵ and there are many instances where decisions refer to the meaning of sections 50 and 51 without differentiating between the two.

"Name, Portrait or Picture" Under Sections 50 and 51

Recent decisions on the meaning of "name, portrait or picture" under sections 50 and 51 have produced no significant change in what was established prior to 1954. However, the case of *People on the Complaint of Maggio v. Charles Scribner's Sons*¹⁶ decided in that year provides a useful summary of the law on this subject.

To violate the statute, the name must be used in such a context as to unequivocally point to and identify the complainant. The use of the word 'name' in the statute, in association with the words 'portrait' or 'picture' clearly indicates that this was intended. A portrait or picture leaves no doubt as to the identity of the subject. Where a name is used, it, like a portrait or picture, must upon meeting the eye or ear, be unequivocally identified as that of the complainant.

In this case it was held that the publishers of the book "From Here to Eternity" were not liable under section 50 merely because the author had made use of the nick-name of the complainant (known only to a few intimates) together with the complainant's surname, as there was nothing else in the book to identify the complainant with the fictional character therein described.

The rule in this case was followed in *La Forge v. Fairchild Publications Inc.*¹⁷ Here the publication complained of consisted of a two-page pictorial story entitled "Fashion Follows a Pattern". The spread consisted of a dozen or more individual photographs taken at a race track of boys, young men and mature males each garbed in a sports jacket of a particular material. The plaintiff, one of those portrayed, had not consented to the use of the picture, but the court held that there was no violation of the statute because the plaintiff was not "identified" by name or otherwise.

Although the court held that there were other grounds for holding the defendant blameless,¹⁸ it is submitted that if the decision had turned merely on the identification point it would leave much to be desired. While a person may, for instance, go to the race track and accept being photographed or televised in a crowd scene as part of the risk

15. *People on Complaint of Maggio v. Charles Scribner's Sons* (see Note 14 (supra))—a case under s. 50.

16. *Idem.*

17. 23 A.D. 2d 636, 257 N.Y.S. 2d 127 (1965).

18. The court also held that the story and photographs were not for advertising purposes or the purposes of trade.

of appearing in public, this acceptance does not, in all probability, extend to being singled out from the crowd and being publicised commercially without his consent. The mere fact that a name is not attached to the photograph is little consolation to the unwilling participant, as for the most part, the people from whom the individual wishes to remain private will not need a name to make an identification.

In *Lahr v. Adell Chemical Co., Inc.*¹⁹ the Court of Appeals for the First Circuit missed an opportunity to repair an obvious gap in the law of privacy in New York. At present, there is no protection extended to the person whose name or picture is not published, but who is nonetheless readily identifiable by other means, i.e. by a word-painting or by an accurate voice imitation. The latter was involved in *Lahr*, where an imitation of the voice of the plaintiff—a professional entertainer—was used in television commercial advertising. The court, however, refused to extend the meaning of the statute to this particular invasion of privacy, and it is interesting to note that this decision marks one of the rare instances where American law may be less advanced than English law in this area.²⁰

The rule that corporations do not have a right of action under sections 50 or 51 was reaffirmed in *Association for the Preservation of Freedom of Choice, Inc. v. Nation Co.*²¹ and *Association for the Preservation of Freedom of Choice, Inc. v. Emergency Civil Liberties Committee.*²²

Consent

Sections 50 and 51 provide that only a written consent may relieve a publisher of his duty to an individual under the sections.²³ Oral consent is no defence to an action under the sections and may operate only to reduce the award of damages.²⁴ This rule is quite definite and takes no account of what might be considered an estoppel by failure to register a protest. For example, in *Durgom v. Columbia Broad-*

19. 300 F. 2d 256 (1962).

20. *Sim v. H. J. Heinz Co. Ltd.* [1959] 1 All E.R. 547, [1959] 1 W.L.R. 313 (C.A.). The plaintiff had appealed a refusal to grant him an interlocutory injunction against the use of an alleged representation of his voice in a television advertisement, claiming that there had been not only a libel but also a passing off. The Court of Appeal agreed with the court below that the grant of an interlocutory injunction was not justified, as it would amount to a pre-judging of the issue of libel, and that it would therefore be inappropriate to grant the injunction in the matter of the alleged passing off. It was not, however, indicated that the cause of action for passing off would be invalid, and McNair J., in the court below, said: ". . . it would seem to me to be a grave defect in the law if it were possible for a party, for the purpose of commercial gain, to make use of the voice of another party without his consent." See Mathieson, Comment (1961) 39 Can. Bar. Rev. 409.

21. 35 Misc. 2d 42, 228 N.Y.S. 2d 628 (1962).

22. 37 Misc. 2d 599, 236 N.Y.S. 2d 628 (1962).

23. See *Metzger v. Dell Publishing Co.*, 207 Misc. 182, 136 N.Y.S. 2d 888 (1955). Also *Selsman v. Universal Photo Books, Inc.*, 18 A.D. 151, 238 N.Y.S. 2d 686 (1963), and *Schneiderman v. New York Post Corp.*, 31 Misc. 2d 697, 220 2d 1008 (1961).

24. *Lomax v. New Broadcasting Co.*, 18 A.D. 2d 229, 238 N.Y.S. 2d 781 (1963).

*casting System, Inc.*²⁵ the plaintiff knew that he was to be portrayed in a television programme and, far from registering a protest, apparently aided in the programme's production. Nonetheless, the New York Supreme Court held that as the plaintiff had otherwise a right of action under the sections, his failure to express his displeasure did not deprive him of his right to an award of damages because his written consent to the portrayal had not been obtained.

The question of consent has, however, given rise to problems in the areas of publication in a different context from that originally consented to, and *alteration* of the matter to the publication of which consent was given.

In *Sherwood v. McGowan*²⁶ the plaintiff actress consented to appear in a film which was to be sponsored for showing on television. In fact the film was never sponsored and was given to the defendant operator of a television station to show as he thought fit. The defendant showed the film from time to time, and as a result the plaintiff brought an action for invasion of privacy. The Appellate Division of the New York Supreme Court held, however, that as the plaintiff had consented to an exhibition there was no invasion of privacy because it was not shown to the audience contracted for. Interestingly enough, the fact that the consent was given while the actress was an infant was held to be immaterial for the purposes of resort to section 51.

Alteration of the matter to the publication of which consent was given may, however, give rise to an action under section 51. In *Russell v. Marlboro Books*²⁷ a picture of a highly-respected fashion model was taken with her consent to its publication on the understanding that the picture was to be used to advertise serious books. Instead, the picture appeared in a highly suggestive setting, and the New York Supreme Court held that these facts stated a cause of action under section 51.²⁸ This case may, however, be contrasted with *Dahl v. Columbia Pictures Corporation*,²⁹ where the plaintiff objected to the use of artist's sketches of her for the purpose of advertising a film in which she appeared, although she had consented to the use of her name, photograph and likeness in connection with the advertising of the film. The burden of her complaint was that the sketches were exaggerated and suggestive. The court held that consent was to be construed in accordance with the standards then prevailing in the motion picture industry, and that as long as the advertising was in keeping with the theme of the picture or had some relation to actual scenes depicted, it fell within the terms of the plaintiff's consent and left her with no basis for complaint.

25. 29 Misc. 2d 394, 214 N.Y.S. 2d 752 (1961).

26. 3 Misc. 2d 234, 152 N.Y.S. 2d 658 (1956).

27. 18 Misc. 2d 166, 183 N.Y.S. 2d 8 (1959).

28. See also *Manger v. Kree Institute of Electrolysis, Inc.*, 233 F. 2d 5 (1956).

29. 12 Misc. 2d 574, 166 N.Y.S. 2d 708, affd. 7 A.D. 2d 969, 183 N.Y.S. 2d 992 (1957).

It appears therefore that in dealing with the question of consent and subsequent alteration each case must turn on its own facts subject only to the general rule that the court will have regard to what the plaintiff could reasonably expect in the way of alteration after consent.

Advertising and the Purposes of Trade

Sections 50 and 51 prohibit only the use of a name, portrait or picture for advertising purposes or for the purposes of trade. From the point of view of the individual's right to privacy this limitation leaves him vulnerable in many areas, and the courts, in an effort to take into account the competing interest in freedom of expression, have reduced even more the effectiveness of the sections by constructions which favour publishers rather than individuals. Broadly speaking, only the most blatant commercial appropriations of names or pictures may be discouraged by the sections as presently interpreted.

This part of this article is entitled "Advertising and the Purposes of Trade", but in effect it deals only with "advertising" as the words "the purposes of trade" have provided a weapon for those who emphasise freedom of expression rather than the right of the individual to privacy, and are dealt with in the next section.

In the foundation case of *Lahiri v. Daily Mirror*,³⁰ "advertising" was defined as "a solicitation for patronage" while "the purposes of trade" was held to mean "the publisher's profits through increased circulation" where the primary purpose is to amuse and astonish the reading public rather than to disseminate news.³¹ In another landmark case, *Gautier v. Pro-Football Inc.*³² it was pointed out that claims based on use of a name or picture "for advertising purposes" have received much more liberal treatment than those grounded on use "for purposes of trade", and explained that the reason for this difference was that "the compelling public interest in the free flow of ideas in the market place does not extend to advertising matter". It is significant that virtually the only cases of recent years (and there are few) in which there has been an award of damages are those in which there has clearly been "a solicitation for patronage". Moreover, these were not of the type which increased in any way the impact of the publishing medium involved.³³ For example, *Manger v. Kree Institute of Electrolysis, Inc.*³⁴ involved the appropriation of the plaintiff's name for the

30. 162 Misc. 776, 295 N.Y.S. 382 (1937).

31. Note, however, that in *Sidis v. F. R. Corporation*, D.C.N.Y. 34 F. Supp. 19, affd. 113 F. 2d 806, cert. denied 311 U.S. 711 (1938). It was noted that most newspapers and magazines are published for profit, and the fact that a profit is made by the publisher in circumstances alleged to come within the prohibition of the sections is not a decisive factor in determining whether there has been publication for "the purposes of trade". See also *Goelet v. Confidential, Inc.*, 5 A.D. 2d 226, 171 N.Y.S. 2d 223 (1958).

32. 278 App. Div. 431, 106 N.Y.S. 2d 553, affd. 304 N.Y. 354 (1951).

33. The writer has found only two exceptions to this, both involving very special facts. See *Myers v. U.S. Camera Pub. Co.*, 9 Misc. 2d 765, 167 N.Y.S. 2d 771 (1957), and *Metzger v. Dell Pub. Co.* (see Note 23 (supra)).

34. See Note 28 (supra).

purposes of increasing sales of electrolytic equipment, while *Schneiderman v. New York Post Corporation*³⁵ involved the use of the news of the plaintiffs' recent marriage as an inducement to join a particular country club.

It is clear that sections 50 and 51 have not, of recent years, offered anything more than a protection against blatant advertising, and that the words "for purposes of trade" are superfluous. Nonetheless, it is an interesting exercise to look at the various concepts which the courts have erected to sugar the perhaps bitter pill of "freedom of expression" which is administered to the individual seeking redress for invasion of his privacy where less than obvious advertising is involved.

Before moving on to this topic, however, it is worth noting that not even all advertising without the individual's consent is prohibited by the sections. In *Booth v. Curtis Publishing Co.*³⁶ use was made of the concepts of "incidental" and "collateral" advertising. The plaintiff had consented to the publication of her likeness in the defendant's travel magazine, but objected when the defendants reproduced the picture in another magazine for the purpose of advertising the first one. The court distinguished this case from *Flores v. Mosler Safe Co.*,³⁷ in which it was held to be a statutory violation for a safe manufacturing company to publish, in its commercial advertising, a total reproduction of a news article concerning the plaintiff which appeared in an independent news medium, to illustrate the loss of valuable business records in the event of fire. This, the court in *Booth* held, was "collateral" advertising and clearly a violation, but said that Miss Booth was the victim of mere "incidental" advertising and not entitled to damages. "Incidental" advertising was defined here as "a reproduction used to illustrate the quality and content of the periodical in which it originally appeared".

The distinction is not clear to the writer apart from the fact that it appears to be based on the fact that in *Flores* a safe was being advertised whereas in the present case a magazine was being advertised. The court makes much, of course, of the idea of "preserving a strong and free press", but it is not made entirely clear how closely permission to use what were, to Miss Booth at least, offensive advertisements is connected to the idea of freedom of the press.

THE BALANCING OF INTERESTS

General

As was mentioned in the previous section the courts, in interpreting sections 50 and 51, have been beset with doubts about the constitutional validity of the sections in the face of the First Amendment, and have severely limited their effect in an effort to avoid constitutional conflict. What follows is a description of the concepts which the courts have used to accommodate the public's "right to know" where the alleged

35. 31 Misc. 2d 697, 220 N.Y.S. 2d 1008 (1961).

36. 15 A.D. 2d 343, 223 N.Y.S. 2d 737, affd. 11 N.Y. 2d 907, 228 N.Y.S. 2d 468 (1962).

37. See Note 8 (supra).

statutory infringement is anything more than obvious advertising. To a large extent these concepts overlap, but it is convenient for purposes of analysis to consider them separately.

The Fictionalisation Test

The primary test which the New York courts have utilised in determining when publicity in communications media is for "trade" rather than communication may be broadly defined as that of "fictionalisation in character". The United States Supreme Court decision in *Time, Inc. v. Hill*³⁸ has had a profound effect upon this test, but it is worthwhile to point out the development of the test in order to evaluate the impact of the Supreme Court decision.

Over a period of time the New York courts made it clear that they would grant relief under the statute if there was "fictionalisation in character", but the test was a hard one for a plaintiff to meet. Perhaps the best statement of the rule is to be found in the dissenting opinion of Judge Peck in *Sutton v. Hearst Corporation*³⁹:

The question is whether the account is fictional or novelized and whether if to some extent it varies from the truth the variance is repugnant to one's sense of decency. We must take into account whether what is alleged to be the variance or literary embroidery is harmless in nature or whether it gives the article a character or impression out of line with the truth and is offensive.

It is clear that naming the test "fictionalisation in character" was to some extent misleading, because a plaintiff not only had to prove fictionalisation, but also had to prove that the fiction was offensive.

There was, however, some relaxation of the test in two cases in 1963 and 1964. *Hill v. Hayes*⁴⁰ involved James J. Hill and his family and *Life* magazine. Mr. Hill became a public figure quite involuntarily when three desperadoes held his family captive for several hours. A book, a film and play, all entitled "The Desperate Hours", were inspired by the incident. None of them used Mr. Hill's name, and numerous changes were effected in the fictionalised depiction of the incident, obviously for dramatic effect. Physical assaults were related in the novel although none had occurred in the actual incident. Several years after the incident, *Life* printed an article discussing the imminent arrival of the play to the Broadway stage. Actors from the play were photographed at the original Hill household, and the article noted that the incident had been captured in the literary medium of a novel. The article contained some ambiguous language about the relationship of the play to either the incident or the novel. The Appellate Division held that the term "re-enacted", as used in the article, referred to the incident rather than to the events of the novel. Thus, the statement was untrue since the play was not a re-enactment

38. 385 U.S. 374 (1966).

39. 277 App. Div. 155, 98 N.Y.S. 2d 233 (1950).

40. 18 App. Div. 2d 485, 240 N.Y.S. 2d 286, affd. 15 N.Y. 2d 986, 260 N.Y.S. 2d 7 (1963).

of the original incident but, rather, a sensationalised version thereof. The court came to the "inescapable conclusion that this was done to advertise and attract further attention to the play, and to increase present and future magazine circulation as well".⁴¹ Liability under New York law followed.

The other case which relaxed the rigours of the *Sutton* test was *Spahn v. Julian Messner, Inc.*,⁴² in which the plaintiff was a prominent baseball player of whom the defendant had published a children's biography. The trial court held that there had been a non-factual, offensive novelisation of the plaintiff's life and held the defendants liable. The interesting feature is, however, that the appellate court, while affirming the decision of the trial court, held that the untruths were *laudatory*.

It was at this point in time, when the New York courts were evincing a tendency to curb freedom of expression in favour of individual privacy, that the United States Supreme Court heard an appeal from the decision in *Hill v. Hayes*,⁴⁰ and elevated the view which the New York courts had previously held to a constitutional principle, although in slightly different form. In *Time, Inc. v. Hill*³⁸ the majority applied the reasoning it had used in *New York Times Co. v. Sullivan*⁴³ and held that "the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth". The judgment of the New York Court of Appeals was set aside and the case remanded for further proceedings not inconsistent with the opinion.

The impact of this case on *Spahn* is obvious. While, presumably, laudatory fictions are still actionable, the plaintiff will have to prove knowledge of the fiction on the part of the defendant or reckless disregard of the truth before a case for recovery under section 51 is made out. Since in *Spahn* the biography was put together from secondary sources which had already been published, it is highly likely that had the case come before the New York courts after *Time, Inc. v. Hill* recovery would have been denied.

It is clear that the scant protection which was previously offered to the individual's right of privacy by the "fictionalisation" test has now been effectively removed by the Supreme Court, for it is the writer's belief that where knowledge or reckless disregard of the truth may be proved, it will be only a very rare case where the plaintiff will not also have an action in defamation, given the fact that this presently offers any greater protection.

41. 18 App. Div. 2d at 489, 240 N.Y.S. at 290.

42. 43 Misc. 2d 219, 250 N.Y.S. 2d 529, affd. 23 App. Div. 2d 216, 260 N.Y.S. 2d 451 (1964).

43. 376 U.S. 254 (1964).

“Public Figures” Under Sections 50 and 51

The application of the principles of *Sullivan* to a suit under sections 50 and 51 raises the inevitable question whether a public figure has less of a right to privacy than someone who is not a public figure. The short answer is yes, but this is not as significant as the answer to the question of who is a “public figure,” because the person who is not a public figure as presently defined is unlikely to have any motivation to seek redress under sections 50 or 51. Who, then, is a public figure? Once again, the answer seems to be clear that anyone who is newsworthy, whether voluntarily⁴⁴ or involuntarily, is a public figure. This was expressly recognised by the majority of the Supreme Court in *Time, Inc. v. Hill*. Mr. Justice Brennan said:⁴⁵

The guarantees for free speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of the press.

This rule is not, however, novel. It was recognised as long ago as 1938 in *Sidis v. F. R. Corporation*.⁴⁶ In this case a magazine had featured a biographical sketch of the plaintiff who, in 1910, had graduated from Harvard at the age of sixteen but who later became a recluse. The plaintiff sued under section 51 but was refused redress on the ground that he was a public figure and that an invasion of his privacy, years later, was justified in order to satisfy legitimate curiosity or interest in his later career.⁴⁷

As was the case with the “fictionalisation” test, this rule showed signs of relaxation in the 1960’s. In *Hill v. Hayes* the court stated that part of its reason for awarding damages was that “the occurrence had been relegated to the outer fringe of the public consciousness” and that the information was not news or newsworthy per se.⁴⁸ Thus a new test of newsworthiness was imposed on the rule in *Sidis* which had implied that stale news was always revivable.⁴⁹

44. *Goelet v. Confidential, Inc.*, 5 A.D. 2d 226, 171 N.Y.S. 2d 223 (1958).

45. See Note 38 (supra). At 388.

46. D.C.N.Y. 34 F. Supp. 19, affd. 113 F. 2d 806, cert. denied 311 U.S. 711 (1938).

47. See also *Estate of Hemingway v. Random House Inc.*, 49 Misc. 2d 726, 268 N.Y.S. 2d 531, affd. 25 A.D. 2d 719, 269 N.Y.S. 2d 366 (1966), where the widow of Ernest Hemingway was held to be a public figure for the purpose of s. 51.

48. See Note 41 (supra).

49. This development was adumbrated by a dictum in *Rome Sentinel Company v. Boustedi*, 43 Misc. 2d 598, 252 N.Y.S. 2d 10 (1964), to the effect that the ordinary citizen may be newsworthy and unable to obtain redress under ss. 50 and 51 during a “brief period and for a reasonable length of time thereafter”.

Time, Inc. v. Hill, however, represses this development and the current law must be that however dated the newsworthiness of an individual he has no redress under sections 50 and 51. The fact that Hill and his family were notable only for their participation in an incident which took place some time before the suit was brought is significant.

As was pointed out earlier, if Hill could recover only where the account of his brief moment of notoriety was falsely recounted or recounted with reckless disregard for the truth, then sections 50 and 51 are virtually emasculated.

The question remains, however, whether a public figure has any protection at all under the statute. The cases seem to indicate that in theory the answer is yes. In *Booth v. Curtis Publishing Company*⁵⁰ there is a dictum to the following effect:

. . . defendant's contention that a public figure has no right of privacy is rejected. Such contention confuses the fact that projection into the public arena may make for newsworthiness of one's activities, and all the hazards of publicity thus entailed, with the quite different and independent right to have one's personality, even if newsworthy, free from commercial exploitation at the hands of another. . . .

Most assuredly, then, [the plaintiff] has a right of privacy, although it does not protect her from true and fair presentation in the news or from incidental advertising of the news medium in which she was properly and fairly presented.

Moreover, in *Spahn v. Julian Messner, Inc.*⁵¹ Justice Markowitz of the New York Supreme Court said:

Even as to those aspects of one's life deemed to be within the legitimate interest of the public, the use of an individual's name, portrait or picture is legally restricted. Since the rationale of waiver or loss of the protection afforded by the right of privacy postulates the public's right to know, the privilege of using another's name, portrait or picture without permission exists only within the strict confines of the vindication of this public interest. An individual's *pro tanto* waiver of his exclusive property interest and right in his personality is precisely commensurate with the extent of the legitimate interest of society.

While it has previously been pointed out that in all probability *Hill* overrules the actual decision in *Spahn*, the majority opinion in *Hill* took no express position on what protection remains to public figures, and by implication the dicta above were adopted by the United States Supreme Court. The words of comfort offered the individual by the dicta are, however, in my submission, illusory. When the definition of a public figure is made in terms of newsworthiness and at the same time the public's right to know is placed above the individual's right

50. 15 A.D. 2d 343, 223 N.Y.S. 2d 737, affd. 11 N.Y. 2d 907, 228 N.Y.S. 2d 468 (1962).

51. See Note 42 (supra).

to privacy, not much remains. An individual has a right to privacy when the public has no legitimate interest in his personality, but the public has this legitimate interest when what the individual does or has is newsworthy. Given the broad sweep accorded to newsworthiness by Mr. Justice Brennan in *Hill*,⁵² the impact of sections 50 and 51 is virtually nil except in cases of direct commercial exploitation.

Newsworthiness

As the United States Supreme Court noted in *Hill*,⁵³ decisions under sections 50 and 51 reflect the fact that applications of the sections "may raise serious questions of conflict with the constitutional protections for speech and press". In this context Mr. Justice Brennan mildly observed that "... decisions under the statute have tended to limit the statute's application".⁵³

While *Hill* provides a definitive statement of the constitutional limits of the application of the sections, it may be interesting to canvass the fact situations of a few extreme cases decided before *Hill* in an effort to show that *Spahn* and *Hill v. Hayes* were in themselves revolutionary decisions on the part of the New York courts, and that as a generalisation the decision in *Time, Inc. v. Hill* was only a projection of the trend of the main stream of New York decisions. Before *Hill* the New York courts already had a very broad conception of what was newsworthy and what therefore must supplant the protection of sections 50 and 51.

In 1953 the Appellate Division of the New York Supreme Court decided *Oma v. Hillman Periodicals, Inc.*⁵⁴ The facts of this case were that the defendants published a sensationalised article about corruption in boxing, and on the back cover of the magazine placed a large photograph of the plaintiff, although the plaintiff was not mentioned in the article. Below the photograph appeared the plaintiff's name, and above the photograph there was the caption: "Tycoon—this man can make \$25,000 on a single deal, but it might cost him his life. Why?". The court, denying liability, held:

Plaintiff is a public figure in the news and his activities were a subject of fair comment. His activities as a member of the class of fighters were the subject of discussion, and his picture was directly related to the discussion. The publication of plaintiff's picture was not for trade or advertising, but to illustrate an article on public affairs. An illustration is relevant, even though being but an illustration there was no necessity for its use to the exclusion of other parallel illustrations. It is immaterial that its manner of use and placement was designed to sell the article so that it might be paid for and read.

52. See Note 38 (supra). At 388.

53. See Note 38 (supra). At 382.

54. 281 App. Div. 240, 118 N.Y.S. 2d 720. See also *Siegel v. Esquire, Inc.*, 4 A.D. 2d 477, 167 (N.Y.S. 2d 246 (1957)).

In *Dallesandro v. Henry Holt & Company*,⁵⁵ the defendant displayed a picture on the cover of "Waterfront Priest", a book it published, that showed a Father Corridan, the subject of the book, in conversation with the plaintiff, a longshoreman and rank-and-file union member. The book purported to be the true story of a priest's "one-man crusade against gangsterism and terror on the New York waterfront". The court held that this was a picture illustrating a matter of public interest and did not, therefore, fall within the purview of sections 50 and 51.

In *Delinger v. American News Company*⁵⁶ it was briefly held that the publication and distribution of a magazine article illustrated by a photograph of the plaintiff, a physical training instructor, as a candidate for the title of "Mr. Universe—1956" and containing a discussion in general terms of the relationship between muscular development and virility did not constitute an actionable use for trade or advertising under section 51. Similarly in *Estate of Hemingway v. Random House, Inc.*⁵⁷ the widow of Ernest Hemingway was not able to restrain the publication of a biography of Hemingway on the ground that her privacy was being invaded, because "Compelling evidence in the free flow of ideas and dissemination of factual information has outweighed considerations of individual privacy in conjunction with factual publications of such type, whether authorized or not, and as to such a book the proscription is ordinarily without relevance".

This random sample of cases decided before *Hill v. Hayes, Spahn and Time, Inc. v. Hill* demonstrates, in my view, that the New York courts were continuously aware of the First Amendment freedoms and that the two former cases were aberrations.

CONCLUSION

The conclusion of this paper may be brief in the light of its purpose—to examine a privacy statute with a view to predicting the fate of a similar statute in New Zealand.

We have seen that the New York experiment has worked reasonably well where the individual has sought protection from invasions of his privacy by appropriation of his name or picture for strictly commercial purposes. However, we have also seen that sections 50 and 51 must be accounted a failure in the remainder of the limited area of privacy which it was designed to protect. The reason for this is clear. Currently in the United States the First Amendment freedoms are valued more highly than the individual's right to privacy, and the Supreme Court

55. 4 App. Div. 2d 470, 166 N.Y.S. 2d 805.

56. 6 A.D. 2d 1027, 178 N.Y.S. 2d 231 (1958).

57. See Note 10 (supra).

has not fulfilled the promises which it was reputed to have made in *Griswold v. State of Connecticut*.⁵⁸

It would seem reasonable to conclude, in view of the fact that New Zealand's constitution is unwritten and that there is no Bill of Rights embodying First Amendment concepts, that a statute similar to sections 50 and 51 could be more successful in New Zealand. This prediction would, however, ignore the subtle pressures which would operate on the House of Representatives against the enactment of such legislation, and ignore the omniscience of the judges in its interpretation.

More specifically, the powerful press lobby in New Zealand could, and probably would, insist on some provision in the legislation to the effect that liability should not be incurred for reasonable reporting of matters of public interest. In this field such a provision would be very hard to draft in more specific terms, and the use of terms like "reasonable reporting" and "public interest" would leave the door wide open for judicial legislation. Moreover, it is likely that the judges would be opposed to being put in the unenviable position in which the New York (and federal) judges have been placed, in balancing the competing interests of freedom of the press and the individual's right to privacy. The New Zealand judges might therefore exert pressure at the pre-legislative stage to prevent enactment of the legislation at all.⁵⁹

Given, however, that the legislation were to be enacted (with the almost inevitable proviso relating to the reporting of matters of public interest), the problem facing the New Zealand courts would be exactly that faced by New York courts, and there is no doubt that a large body of confused and intricate case law would build up as a result of efforts of the judges to accommodate new situations in old precedents.

It is the conclusion of this paper, therefore, that little more can be expected of a New Zealand statute along the lines of sections 50 and 51 than has been achieved in New York. It is conceivable, of course, that New Zealand courts would not interpret a "reporting of matters of public interest" clause as widely as the United States Supreme Court interpreted the First Amendment in *Time, Inc. v. Hill*. But nonetheless there is good reason to suppose that in a country where freedom of the press, although not a matter of constitutional principle or convention, is a valued part of a highly democratised system of government, the individual's right of privacy would be sacrificed in favour of the public's right to know.

K. B. Farquhar*

*LL.M. (Vic. and Michigan), Assistant Professor of Law, University of Western Ontario.

58. 381 U.S. 479 (1965). The court spoke of a marital right of privacy, noting that various constitutional guarantees create zones of privacy. It was thought by many after the decision was given that the court would set about defining the content of these zones (see Symposium on *Griswold v. Connecticut*, 64 Mich. L. Rev. 197 (1965)) but so far this has not happened.

59. One member of the judiciary has a seat on the New Zealand Law Revision Commission.

“If a man can make himself a real master of his art, we may say that he has learned his trade, whatever his trade may be. Let him know how to advertise, and the rest will follow.”

Anthony Trollope

Just as a retail store must advertise to increase or retain business, the lawyer must window-dress (to a certain extent) to remind the client of his seriousness of purpose. Dress can imply all manner of attitudes and states of mind. How often in literature is a character's clothing mentioned to discuss personality or status? At Vance Vivian we have capitalised on a society in which “clothing oft proclaims the man” and within that society we feel there is no profession where outward appearance means more than in law. For that reason Vance Vivian are particularly well prepared to suit the lawyer, both starting and culminating a career.



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