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statute permitting the lender to place reasonable restrictions on the use of the vehicle; neither should it be viewed as holding that the parental liability for allowing an incompetent minor access to a vehicle or expressly permitting the operation thereof, is solely controlled by Section 59. The decision must be regarded as an inadvertence of the true principles involved. The rule must then be viewed as one not supported by principle or authority and should be repudiated at the earliest opportunity. Barring this, the effect on the decisional law in the future may be significant.

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THE APPLICABILITY OF SECTIONS 50 AND 51 OF THE NEW YORK CIVIL RIGHTS LAW TO WORD PICTURES

Decisions of the state and federal courts have led to some confusion as regards the proper interpretation to be accorded Sections 50 and 51 of the New York Civil Rights Law. These sections provide that any person whose name, portrait, or picture is used within this state for advertising purposes or for the purposes of trade without his written consent, first obtained, may sue and recover damages for any injuries sustained by reason of such use. They also provide for the granting of injunctive relief and contain a penal element.[1]

The point in controversy is whether or not the words "portrait" and "picture" as used in the above sections apply to a word-painting. Does a graphic description of an individual wherein he is identifiable by reference to appearance, habits or details of his private life constitute a picture or a portrait within the purview of the act?

This question has never been passed upon either by the state or federal courts. Statements made by the courts by way of dicta, however, intimate that such a portraiture published without the consent of the subject would be sufficient to support an action under this statute.[2]

Were it not for two circumstances these dicta might be of no great significance. But the cases construing these statutes are as yet so few in number that these casual expressions of opinion assume an importance out of proportion to the weight that would ordinarily be accorded such statements in a better documented branch of the law. They are even more significant when considered from the standpoint of their possible effect in circumscribing the right of the individual to complete freedom of expression.

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[1] N. Y. CIVIL RIGHTS LAW §§ 50, 51.

[2] *See* Levey v. Warner Bros. Pictures, Inc., 57 F. Supp. 40, 42 (D. C. N. Y. 1944); Binns v. Vitagraph Co., 210 N. Y. 51, 57, 103 N. E. 1108, 1110 (1913).

In *Levey v. Warner Bros. Pictures, Inc.*, the statement is made that the phrase "portrait or picture" as used in the statute, ". . . requires a clear representation of a person whether by photograph, statue, imitation, or word painting." [3] This statement is unquestionably dictum in the case, which involved a characterization contained in a motion picture. The decision has, nevertheless, been cited for this proposition.[4]

In *Binns v. Vitagraph Co.*, the court states that "a picture within the meaning of the statute is not necessarily a photograph of the living person, but includes any representation of such person." [5] This statement, when read out of the context appears to confirm the dictum of the court in the *Levey* case quoted above.

This conception was first afforded judicial cognizance in the *Roberson* case.[6] This leading case denied the existence of a right to privacy under the then existing laws of New York. The following statement is made in the course of a general discussion of the advisability of recognizing such a right: ". . . the right of privacy once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations, or habits." [7] It is also suggested in "The Right to Privacy",[8] an article of which Justice Brandeis was co-author, and which directed the attention of legal scholars to this problem. There it is said: "If you may not reproduce a woman's face photographically without her consent, how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic description coloured to suit a gross and depraved imagination." [9]

If it be conceded that the gravamen of an invasion of one's right of privacy is an interference with one's right to pass through the world without being singled out and exposed to the public eye, except as one's occupation or mode of life make this impossible, then it must also be conceded that a description of one's habits or a commentary on one's life will ordinarily be a much more serious invasion of one's right of privacy than the mere publication of a photograph.

Nevertheless, the contention is made here that no action may be maintained under Sections 50 and 51 by an individual injured by the publication of a word portrait, for it is apparent on consideration

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[3] Levey v. Warner Bros. Pictures, Inc., 57 F. Supp. 40, 42 (1944).

[4] McKinney's Consolidated Laws of New York, Annotated, Book 8, pocket part, p. 51.

[5] Binns v. Vitagraph Co., 210 N. Y. 51, 57, 103 N. E. 1108, 1110 (1914).

[6] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902).

[7] *Id.* at 545.

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

[9] *Id.* at 214.

of the history of the statutes that it was not the intent of the legislature to give any such right of action.

In 1890, *The Right to Privacy,* by Warren and Brandeis, appeared in the Harvard Law Review. It called attention to the problem of those, whose right to be let alone had been violated, with special reference to the activities of sensational journalists. The authors concluded that there was sufficient basis in the common law for the courts to enforce the right of the individual to protection from the prying eyes of society. While conceding that the right of privacy does not extend to the publication of matters of general interest, they urged that the right should include not only the use of an individual's name or picture, but should protect him against the publication of graphic descriptions as well.

In 1902 the Court of Appeals was presented with the issue of the existence of a right of privacy in the *Roberson* case.[10] In that case, the defendant used photographs of a child, without obtaining consent to do so, in connection with an advertisement of a brand of flour. These portraits were displayed in stores, warehouses, saloons, and other public places to the humiliation and distress of the plaintiff. Whereupon an action was brought to enjoin the defendant from so using the plaintiff's portrait. In ruling in favor of the defendant, the Court of Appeals referred to the Warren and Brandeis article, but specifically rejected the contentions made there respecting word paintings and graphic descriptions.[11] The Court felt that a vast field of unnecssary litigation would be opened up by the establishment of an *unlimited* right of privacy. The court did, however, invite action by the legislature to create a restricted right which would correct the situation presented in the *Roberson* case. The decision in this case aroused a storm of public protest.[12]

Directly thereafter the legislature enacted the statute which is now embodied in Sections 50 and 51 of the Civil Rights Law. There can be little doubt that the passage of this statute was in response to the suggestion made by Judge Bartlett in the *Roberson* case.[13] In view of the fact that Judge Bartlett referred at some length to the Warren and Brandeis article, it seems likely that the framers of the statute had that article before them as well. Under these circumstances it is striking that the legislators followed the text of Judge Bartlett's suggestion almost verbatim. Judge Bartlett cautioned against a future statute which would make the non-consensual publication of a graphic description of an individual violative of his right

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[10] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902).

[11] *Id.* at 545.

[12] O'Brien, *The Right of Privacy* (1902) 2 COL. L. REV. 438 (written by a member of the court in defense of the decision in the Roberson case).

[13] *See* Rhodes v. Sperry and Hutchinson Co., 193 N. Y. 223, 227, 85 N. E. 1097, 1098 (1908).

of privacy.[14] The conclusion is almost inescapable that the legislature intended to do likewise.

Since the passage of the act the courts have been in substantial agreement that the statute must be strictly construed due to its penal character,[15] and have recognized the fact that the intent of the legislature was only to provide relief in cases of a type similar to the *Roberson* case.[16] If this is so then the rule of strict construction would preclude the extension of the statute to a situation not clearly within the legislative intent.

Even assuming that it were proper to interpret the statute as being applicable to word paintings there are practical considerations which render such an interpretation inadvisable. Warren and Brandeis in their article in the Harvard Law Review recognized the fact that the most frequent intruders on the privacy of individuals were the newspapers. That is as true today as it was then. It is common knowledge that certain newspapers habitually exploit the intimate details of rape, divorce, and marital scandal, in order to appeal to those persons for whom such sordidities have a morbid attraction. Yet under the present decisions, newspapers and magazines are specifically exempted from the operation of the statute.[17] On whom then would the burden of liability fall if an identifiable word picture becomes actionable? Seemingly it would fall squarely on authors, playwrights, and publishers. Writers ordinarily are engaged in the presentation and interpretation of the action and reactions of real persons. Their characters may be synthesized from the characters of many human beings but in general are a reflection of the author's impressions of people with whom he has come in contact.[18] It is quite true that occasionally a person may be greatly embarrassed or humiliated by an identifiable characterization in a literary work. To date it has been felt that the law of libel afforded the individual sufficient protection from injuries of this sort. To further extend this protection to include non-defamatory writings seems an open invitation to baseless litigation; and would subject every author to the fear of criminal prosecution at the behest of every individual who fancied himself identified in some literary work.

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[14] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 545, 64 N. E. 442, 443 (1902).

[15] Binns v. Vitagraph Co., 210 N. Y. 51, 55, 103 N. E. 1108, 1110 (1914); Humiston v. Universal Film Manufacturing Co., 189 App. Div. 467, 178 N. Y. Supp. 752 (1st Dep't 1921).

[16] Damron v. Doubleday Doran and Co., Inc., 133 Misc. 302, 303, 231 N. Y. Supp. 444, 445, *aff'd w. o.*, 226 App. Div. 796, 234 N. Y. Supp. 773 (1st Dep't 1929).

[17] Sidis v. F-R Publishing Corp., 113 F. (2d) 806, 810 (C. C. A. 2d 1902); also see cases cited in note 15 *supra*.

[18] Phillips Brooks, *Literature and Life:* "Life comes before literature, as the material comes before the work. The hills are full of marble before the world blooms with statues."

Some of the tendency of the courts to enlarge the scope of Sections 50 and 51 may be due to a confusion of terms. These statutes are ordinarily referred to as the "right of privacy" statutes. The same phrase is used by legal writers and by the courts of other states to define a very broad personal right, only partially recognized in most jurisdictions.[19] Of this extensive right the New York statutes recognize only a small part.

It may be that public policy as influenced by changing social conditions necessitates the adoption of an unlimited right of privacy into the body of our laws. Until such time as the legislature sees fit to effect such a result our courts are bound to stay within the rigid confines of the statute as it now exists.

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WHEN IS MALPRACTICE BY A PHYSICIAN ACTIONABLE?

The cases interpreting the New York Statute of Limitation relative to malpractice actions [1] have proceeded in two main channels that are completely contradictory in their socio-legal philosophy.

One line of adjudication, determining the persons to whom the act refers, has narrowed it exclusively to practitioners of medicine, making the relationship between doctor and patient the salient point of application of this statute. The second line of interpretation, marking the accrual of the cause of action, has tended to lessen the chance of recovery by the patient for a doctor's negligence.

Malpractice has been quite forthrightly defined by the Court of Appeals. In a case where the defendants, public accountants, pleaded this statute as an affirmative defense against an action for negligently false accountings, the court said, "Section 50, subdivision 1, of the Civil Practice Act, in so far as it prescribes a limitation in actions to recover damages for malpractice, refers to actions to recover damages for personal injuries resulting from the misconduct of physicians, surgeons and others practicing a profession similar to those enumerated." [2]

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[19] Nizer, *The Right of Privacy* (1941) 39 MICH. L. REV. 526; Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68 (1905); Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918); Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911); Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931) (relief granted on grounds of constitutional guaranty); (1896) 31 L. R. A. 283; 18 Ann. Cas. 1017.

[1] N. Y. CIV. PRAC. ACT § 50. "Actions To Be Commenced Within Two Years. The following actions must be commenced within two years after the cause of action has accrued: (1) An action to recover damages for assault, battery, seduction, criminal conversation, false imprisonment, malicious prosecution or malpractice."

[2] Ultramares Corp. v. Touche, Niven, 248 N. Y. 517, 518, 162 N. E. 507 (1928).