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which requires that the child be present in the state. The Louisiana Supreme Court has made clear that under the doctrine of *parens patriae* Louisiana courts have not only the right but the duty to provide for the best interest of a child found in the state even if the child is technically domiciled elsewhere.⁴⁰ In cases before *Odom* appellate courts had followed this rationale to allow jurisdiction to be exercised under article 10(5) regardless of circumstances and even if the child was in Louisiana against the wishes of his custodial parent.⁴¹ The Fourth Circuit in *Smith v. Ford*⁴² sought to limit the application of the "in state" requirements by refusing to exercise "emergency" jurisdiction when the child's domicile was elsewhere and the mother had brought him to Louisiana without the custodial parent's permission. However, the Fourth Circuit in *Rafferty v. Rafferty*⁴³ expressly rejected the *Smith* rationale on the ground that no such restriction could be found in article 10(5).⁴⁴ Thus the Louisiana courts have not refused to exercise jurisdiction in "child snatching" cases. This could well create problems far worse than Justice Sanders' fear that Louisiana residents will be forced to chase the custodial parent from state to state. The limitation of forums placed on Louisiana residents by a strict construction of article 10 may encourage self-help measures such as "child snatching"—a problem which is troublesome enough without encouragement.

Jan Marie Hayden

THE HUMAN CANNONBALL AND THE PRESS

The plaintiff, the performer of a "human cannonball" act, sued a Cleveland television station for having broadcast his entire act on the evening newscast.¹ The Supreme Court of Ohio acknowledged the plain-

40. *Girtman v. Ricketson*, 221 La. 691, 60 So. 2d 88 (1952).

41. *Rafferty v. Rafferty*, 313 So. 2d 356 (La. App. 4th Cir. 1975); *Lucas v. Lucas*, 195 So. 2d 771 (La. App. 3d Cir. 1966).

42. 288 So. 2d 71 (La. App. 4th Cir. 1974).

43. 313 So. 2d 356 (La. App. 4th Cir. 1975).

44. *Id.*

1. The script of the commentary read: "This . . . now . . . is the story of a *true spectator* sport . . . the sport of human cannonballing . . . in fact, the great

tiff's claim under state law of a right to control the publicity of his act, but held the broadcast privileged due to the performance's newsworthy nature. The United States Supreme Court reversed the decision, *holding* that the first and fourteenth amendments of the Constitution do not immunize the media when they broadcast a performer's entire act without his consent, but added in dictum that the individual states may, by their own laws, privilege the press in such circumstances. *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S.Ct. 2849 (1977).²

The appropriation and commercial use of another's name and likeness in a non-defamatory manner is widely considered a tort under the broad heading of an invasion of the right to privacy.³ Samuel Warren and Louis Brandeis in their landmark article⁴ defined the right of privacy as the "right to be let alone" and the right of each individual to decide whether that which is his should be given to the public.⁵

Although the privacy tort was dismissed by the New York Court of Appeals in the celebrated case of *Roberson v. Rochester Folding Box Co.*,⁶ many states began to grant recovery on the basis of an invasion of the right to privacy.⁷ By 1960, Prosser had categorized actions brought under the privacy tort into four areas—the invasion of private affairs; the public disclosure of embarrassing private facts; publicity placing a person in a false light in the public eye; and the tort with which the Court concerned itself in the instant case, the appropriation of another's name or likeness.⁸

Zacchini is about the only human cannonball around, these days . . . just happens that, *where* he is, is the Great Geauga County Fair, in Burton . . . and believe me, although it's not a *long* act, it's a thriller . . . and you really need to see it *in person* to appreciate it" *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S. Ct. 2849, 2851 n.1 (1977).

2. The majority opinion by Justice White was joined by four other Justices. Justice Powell dissented on the merits and was joined by Justices Brennan and Marshall. Justice Stevens also dissented, on the ground that the federal question had not been fully developed in the case.

3. *Cf.* RESTATEMENT (SECOND) OF TORTS § 652C (Tent. Draft No. 22, 1976): "One who appropriates to his own use or benefit, the name or likeness of another is subject to liability to the other for invasion of his privacy."

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

5. *Id.* at 193-204.

6. 171 N.Y. 538, 64 N.E. 442 (1902).

7. *See* *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905). Although not a case based on appropriation, *Itzkovitch* is one of the earliest reported examples of judicial recognition of the right of privacy.

8. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389-400 (1960) and cases cited therein.

The state of the law concerning the appropriation tort has been likened to a "haystack in a hurricane."⁹ Many states have refused to recognize the right of an individual to control the exploitation of his name,¹⁰ whereas others recognize the right but base recovery on differing theories as to the nature of the harm involved. The majority of courts view the appropriation tort as an injury to a property right; a minority view classifies the wrong as an injury to personal freedom.

Prosser suggested that the injury which flows from the appropriation tort is damage to a property right,¹¹ the proprietary interest each individual holds in his name or likeness.¹² As an indication that the property interest has actually been appropriated, courts have required a showing that the offending party made some commercial gain from the use of the plaintiff's property, and used the amount of his unjust enrichment as the measure of recovery.¹³ When the plaintiff is a famous performer, the jurisprudence has recognized the celebrity's legitimate desire to protect his property interest in his performance.¹⁴ In such cases, the courts have dismissed claims by offending parties that persons who publicize their performing talents lose the right to privacy.¹⁵ However, as in other types of appropriation cases, absent a showing of commercial use by the defendant, recovery frequently has been denied.¹⁶

In contrast, the personal injury theory of appropriation stresses the injured party's freedom to choose the manner and mode of exploiting his

9. *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956) (opinion by Chief Judge Biggs).

10. *See, e.g., Carson v. National Bank of Commerce Trust & Sav.*, 501 F.2d 1082 (8th Cir. 1974) (applying Nebraska law).

11. Prosser, *supra* note 8, *esp.* 406.

12. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 *Nw. U.L. REV.* 553, 562 (1960).

13. *See O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir.), *cert. denied*, 315 U.S. 823 (1941) in which Judge Holmes, in dissent, discussed the amount of recovery a plaintiff may demand in appropriation cases. "The appellant is entitled to recover the reasonable value of the use in trade and commerce of his picture for advertisement purposes, to the extent that such use was appropriated by the appellee." *Id.* at 170.

14. *See Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956). The court found a "kind of property right in the performer to the product of his services." *Id.* at 487.

15. In *Sharkey v. National Broadcasting Co.*, 93 F. Supp. 986, 987 (S.D.N.Y. 1950), a professional boxer had not lost standing to challenge the unauthorized use of his performance.

16. *E.g., Gautier v. Pro-Football Inc.*, 107 N.E.2d 485 (N.Y. 1952) (no commercial benefit to the defendant was found when the plaintiff's half-time performance at a football game was broadcast over television).

name or likeness. It has been argued that the property theory of appropriation disguises the true injury to the plaintiff—the lost right to keep an event private and the corresponding right to demand a price for abandoning his privacy.¹⁷ In this light, the *use* to which the name or likeness is put is not as important as the injured party's loss of freedom to choose whether his name will be used in a certain way. An individual's right to grant the exclusive privilege of exploiting his reputation has been termed the "right of publicity."¹⁸

The most unsettled area of the law concerning invasions of the right of privacy, however, involves the privilege given the press. Warren and Brandeis noted that the right of privacy must yield to the press privilege in matters of general or public interest.¹⁹ Many early cases honored the privilege by dismissing suits claiming an invasion of privacy for publication of news reports in newspapers.²⁰ The privilege was also extended to feature articles in magazine sections of newspapers.²¹

The news privilege rests upon the first amendment provisions for freedom of speech and of the press. The United States Supreme Court held in *New York Times v. Sullivan*²² that the press has great latitude with regard to defamatory news reports.²³ Three years later, the Supreme Court in *Time, Inc. v. Hill*²⁴ relied on *New York Times* to limit recovery in privacy cases involving news stories which cast a "false light" on the plaintiff's reputation. The Court held that certain matters within the public interest, although of a private nature, could be published without incurring liability due to the press protection of the first amendment. The right of privacy has also been forced to yield in the face of first amendment

17. Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 989 (1964).

18. For a discussion of the right of publicity as an aspect of the privacy right, see *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

19. Warren & Brandeis, *supra* note 4, at 214.

20. For a discussion of the recognition of the privilege in this context, see Gordon, *supra* note 12, at 571-73.

21. See, e.g., *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) (a feature article updated coverage of a child prodigy years after he had reached adulthood and shunned publicity). See also *Sarat Lahiri v. Daily Mirror Inc.*, 295 N.Y. Supp. 382 (1937).

22. 376 U.S. 254 (1964).

23. In *New York Times*, the Court interpreted the Constitution as requiring a public official to show that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

24. 385 U.S. 374 (1967).

concerns when accurate reports of sensitive matters are reprinted from the public records.²⁵

Although the press has been given a wide privilege in reporting the news when the interest involved was the public disclosure of private or embarrassing facts, recovery frequently has been granted when a proprietary interest is found to have been invaded by the news gathering process. An unauthorized broadcast of a "restricted admission" sporting event under the guise of a news report has been held to violate the promoter's property right in the performance despite the event's news value.²⁶ The privilege of reporting the news has also fallen when a property interest in the product of news gathering was found to exist. In *International News Service v. Associated Press*,²⁷ the plaintiff's news stories were copied by a rival news service, an act which the Court found to be an injury to the plaintiff's property rights. As Justice Pitney explained, although the news itself was an item in the public domain, news reports which were the product of an expensive news gathering process were forms of property which a competing news agency could not appropriate.²⁸

The news privilege has also been held not to sanction disruptive or unruly news gathering techniques, such as the harassment of a famous person.²⁹ Nor has the privilege been held to excuse invasions of privacy which arise in the course of surreptitious news gathering activities.³⁰

25. *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975). The Court noted in *Cox Broadcasting* that the privilege given to the accurate reporting of private facts gleaned from the public records does not necessarily apply to appropriation cases. *Id.* at 489. By explicitly distinguishing the privacy tort in *Cox Broadcasting* from the appropriation tort, the Court raised the question of the nature of the privilege which might apply in appropriation cases. *Id.*

26. *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938). The defendant posted observers outside a baseball park and broadcast a description of the game over radio.

27. 248 U.S. 215 (1918).

28. *Id.* at 240. "The contention that the news is abandoned to the public for all purposes . . . is untenable. Abandonment is a question of intent, and the entire organization of Associated Press negatives such a purpose." *Id.* The holding in *International News Service* has, however, been narrowly applied to cases similar to the principal case. The principle remains that news itself is within the public domain. L. GREEN, *INJURIES TO RELATIONS* 90 (1st ed. 1968).

29. In *Gallela v. Onassis*, 487 F.2d 986 (2d Cir. 1973), a famous photographer claimed a newsman's privilege in photographing Jacqueline Onassis. Judge Smith noted that "there is no threat to a free press in requiring its agents to act within the law." *Id.* at 996.

30. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (news reporters surreptitiously photographed and tape recorded the plaintiff in his home and used the material in an article on "quackery"). "The first amendment has never been

The instant case raised for the first time the issue whether the first and fourteenth amendments preclude recovery when commercial entertainment is presented as part of a news program. Zacchini's consent to the filming, implicit or otherwise,³¹ was not in contention since the plaintiff had asked the reporter to refrain from filming his act the day before the news crew returned to videotape his performance.³² The Supreme Court of Ohio recognized that a non-consensual appropriation of the plaintiff's property right in the act was an invasion of that state's common law right of privacy.³³ However, the Ohio court felt compelled to deny recovery to Zacchini on the basis of the privilege accorded the press in *Time v. Hill* and *New York Times*, holding that the newscast of the cannonball act was a matter of public interest.³⁴ This application of a constitutionally protected privilege was the issue brought to the Supreme Court.

The Supreme Court's holding in the case was very narrow, allowing the states to grant recovery for a news broadcast only when the performer's entire act is shown without his consent. Since the issue presented was only one of compensation for a violation of the plaintiff's right to privacy after the fact of publication and not for injunctive relief,³⁵ the Court was not compelled to consider the intriguing first amendment problem of enjoining a portion of a news broadcast.

The Court distinguished its holding in *Time v. Hill* from the issue raised in the instant case. *Zacchini* was said to involve a property right in a performance and did not concern a false light invasion of privacy as did *Time v. Hill*.³⁶ A proprietary interest of this sort, the Court concluded,

construed to accord newsmen immunity from torts or crimes during the course of newsgathering." *Id.* at 249.

31. Traditionally, a plaintiff is not entitled to recover for an appropriation if he has consented to the commercial use of his name or likeness. See *Sharman v. C. Schmidt & Sons Inc.*, 216 F. Supp. 401 (E.D. Pa. 1963). The plaintiff in the instant case performed his cannonball act within a fenced area inside the fairgrounds. Spectators, who paid an admission fee to enter the fair, were not charged a separate fee to observe Zacchini's act. 97 S. Ct. at 2851.

32. 97 S. Ct. at 2851.

33. 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976). "The interest which the law protects is that of each individual to the exclusive use of his own identity, and that interest is entitled to protection from misuse whether that misuse is for commercial purposes or otherwise." *Id.* at 458.

34. *Id.* at 461.

35. 97 S. Ct. at 2854.

36. Justice White stated for the majority that "it is also abundantly clear that *Time, Inc. v. Hill* did not involve a performer, a person with a name having commercial value, or any claim to a 'right of publicity'." *Id.* at 2855.

was closely akin to the interest protected by patent and copyright laws and deserved the same type of protection.³⁷

As the protected interest was different, so was the press privilege of a different nature. Without the privilege in false light cases the press would be forced to minimize the publication of stories in the public interest. In right of publicity cases the performer does not seek to halt publication of his act and in fact encourages it as long as he receives compensation for the increased exposure.³⁸ In the instant case, recognition of Zacchini's commercial stake in his performance and his right of recovery when his interests were injured did not deprive the public of the opportunity to see his act.³⁹ Neither the public nor the press, according to the Court, were injured under this theory of recovery.

Traditionally the type of appropriation the Court found in *Zacchini*, in which the plaintiff's *property* interest was injured, has involved some commercial exploitation of the plaintiff's reputation or performance.⁴⁰ A necessary element of the appropriation tort is the defendant's unjust enrichment by the appropriation.⁴¹ In keeping with this analysis of the injured interest, Zacchini's recovery should have been based on the defendant's commercial gain. However, because the Court found that no constitutional privilege prevented recovery under Ohio law, the case was remanded to determine damages in accordance with that state's law which bases recovery on the injury done to the plaintiff's right of publicity—a theory of recovery which focuses on the injured party's diminished personal freedom,⁴² not on reduced commercial gain.

Justice Powell, in dissent, noted that this theory of damages was

37. The Court cited its recent decisions in *Goldstein v. California*, 412 U.S. 546 (1973) and *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) in which greater latitude was found for state protection of copyright and patent interests. The goal of state laws concerning privacy actions, as well as state copyright and patent laws, is to encourage the production of works which benefit the public. 97 S. Ct. at 2858.

38. 97 S. Ct. at 2856.

39. "It is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it." 97 S. Ct. at 2858-59.

40. See *Gautier v. Pro-Football Inc.*, 107 N.E.2d 485 (N.Y. 1952).

41. This enrichment was a prerequisite to recovery in most, but not all, states. Prosser, *supra* note 8, at 403.

42. 97 S. Ct. at 2857 n.12. The Court noted that if Zacchini is not able to prove his damages, or if he was in fact benefited by the broadcast, he will not be entitled to recover.

inconsistent with the majority's determination that the right of publicity was a proprietary interest.⁴³ Traditionally, courts applying the property theory of appropriation had required a close nexus between profits and appropriation, when news media defendants were involved.⁴⁴ Obviously with this consideration in mind, Justice Powell argued that any liability which accrued to a media defendant should be based on the *use* made of the broadcast.⁴⁵ Absent a showing of commercial exploitation, a news station should not be liable to the performer. However, the majority's emphasis on the property right aspect of the appropriation tort allowed the Court to stay within prior jurisprudence that subordinated the press privilege when a property interest was invaded.⁴⁶ The ticklish task of assessing damages was left to Ohio law, which does not distinguish among the uses to which the film might be put.⁴⁷

Following the *Zacchini* decision, news stations might choose to water down their coverage of such acts as *Zacchini's* by using only still photographs or verbal accounts to avoid liability. In this manner, the public, according to Justice Powell, will lose the benefit of complete and vigorous news reporting that the first amendment was intended to foster.⁴⁸ When weighed against the public's need for coverage of such newsworthy events, the proprietary interest claimed by the plaintiff should yield.⁴⁹ To avoid this balancing approach, the majority stressed that a broadcast of the plaintiff's *entire* act posed a substantial threat to the economic value of that performance.⁵⁰ This interest in the very means by which *Zacchini* earned his living transcended the public's need for a broadcast of the entire performance.⁵¹ To protect this interest, the Court devised an "entire act" formula, which places a telecast of the plaintiff's complete performance outside the news privilege.⁵²

43. *Id.* at 2859 n.2.

44. This requirement was based on a desire to provide a form of protection for the press. *See Prosser, supra* note 8.

45. 97 S. Ct. at 2860 (Powell, J., dissenting).

46. *See* text at notes 26-28, *supra*.

47. The interest protected by Ohio common law prevents misuse by a defendant "whether that misuse is for commercial purposes or otherwise." 351 N.E.2d at 458.

48. *See* 97 S. Ct. at 2860 (Powell, J., dissenting).

49. *Id.*

50. *Id.* at 2857.

51. Neither the majority nor Justice Powell expressly stated that recovery was based on a balancing of the interests involved. The majority and the dissent did implicitly weigh the proprietary interest of the plaintiff against the interest in a free and unrestricted press, but found the scales to dip on opposite sides.

52. The Court recognized the problem in drawing the line at an entire act.

The "entire act" standard is both too broad and too narrow. It is too narrow if a performance's economic value is substantially threatened by broadcasting less than the entire act. A movie producer, for example, would be greatly injured by a short film clip exposing the "surprise ending" of his motion picture. The damage suffered "goes to the heart"⁵³ of the producer's ability to earn a living as directly as did the film of Zacchini's flight and yet would not be covered by the holding in the instant case. The test is too broad when it would cover a film normally considered newsworthy. For example, a news film of the President of the United States reacting to a performance of Zacchini's act would subject a news station to liability.

The Court could have avoided the problem of defining the portion of a performance which constitutes the value of the act by expressly stating the holding in terms of a balancing process. By balancing the performance's newsworthiness against the harm done to the plaintiff, and by not considering how much of the performance was broadcast, the Court could have granted Zacchini recovery. This would have avoided the arbitrary "entire act" test and allowed a clearer constitutional privilege to emerge in later cases.

Further, the Court could have avoided the appropriation problem entirely by dealing with the case as one involving the media's right of access to newsworthy events. Previously the Court has upheld restrictions on the media's access to the sources of newsworthy items when access to such material is barred to the public generally.⁵⁴ The Court might have treated the restricted admission aspect of Zacchini's performance in the same way and held that the defendant had no inherent right of access to the performance for the purpose of filming it. Liability would flow from the abuse of the limited access granted by Zacchini.

The *Zacchini* decision allows the states to set their own standards of privilege in situations such as that of the instant case. The Court's narrow holding is actually of minimal significance. Previously it had been assumed that the press privilege extended to broadcasts of performers' acts in legitimate news programs. The privilege remains intact after *Zacchini*

"Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth amendments do not immunize the media when they broadcast a performer's entire act without his consent." 97 S. Ct. at 2856-57.

53. *Id.* at 2857.

54. See *Pell v. Procunier*, 417 U.S. 817 (1974) (upheld a California restriction on prison interviews); *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977) (upheld a Texas ban on filming prison executions).

as long as the performance is not broadcast in its entirety. The state of the law in appropriation cases is as unsettled now as it was before the instant case, and perhaps even more so due to the "entire act" test and the confusion over what type of damage is suffered. It appears that Judge Biggs' haystack in a hurricane has been hit with a fresh burst of wind.

James N. Mansfield III

APPELLATE REVIEW OF DAMAGE AWARDS—AN AFFIRMATION
OF THE TRIAL COURT'S "MUCH DISCRETION"

While operating a dado saw at his place of employment, plaintiff cut off four fingers and a large part of his right hand. The Third Circuit Court of Appeal affirmed the trial court's decision requiring the employer's parent corporation and its insurer to pay \$350,000 in damages,¹ but on rehearing reduced the award to \$140,000.² The Louisiana Supreme Court reinstated the trial court's award and *held* that courts of appeal should modify an award for damages upon a showing that the trial judge or jury abused its discretion in setting the amount but "only to the extent of lowering it (or raising it) to the highest (or lowest) point which is reasonably within the discretion afforded that court." *Coco v. Winston Industries, Inc.*, 341 So. 2d 332 (La. 1976).

Louisiana courts have consistently adhered to the constitutional mandate for courts of appeal to review quantum of general damages awarded by the trial court.³ The Louisiana Supreme Court has also consistently upheld the rule of Civil Code article 1934(3) that the judge or jury must be given much discretion in setting awards and has held that the rule does not violate the Louisiana Constitution.⁴ To strike a balance between these two

1. *Coco v. Winston Indus., Inc.*, 330 So. 2d 649 (La. App. 3d Cir. 1976).

2. *Id.* at 667 (on rehearing).

3. LA. CONST. art. V, § 10(B): SCOPE OF REVIEW

Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts.

See, e.g., *Temple v. Liberty Mut. Ins. Co.*, 330 So. 2d 891 (La. 1976); *Boutte v. Hargrove*, 290 So. 2d 319 (La. 1974); *Watts v. Town of Homer*, 301 So. 2d 729 (La. App. 2d Cir. 1974). *See also* *Gonzales v. Xerox Corp.*, 320 So. 2d 163, 165 n.1 (La. 1975) for a brief recap of the evolution of appellate review of fact in Louisiana.

4. *See, e.g.*, *Anderson v. Welding Testing Laboratory, Inc.*, 304 So. 2d 351,