

CPLR 1007: Legal Expenses Not Allowed

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of the status of his possessions. However, in an in personam action, no such additional factor being present, service by publication cannot be expected to reach the defendant. It would, therefore, seem likely that the Supreme Court would not react favorably to a case where in personam jurisdiction is to be founded upon notice by publication alone.

It may be possible, however, to justify service by publication in actions arising from automobile accidents. In light of decisions permitting service by publication alone in in rem actions, it may well be asserted that where a party has been involved in an automobile accident requiring the exchange of license information, such as in *Gibbs*, *Polansky*, *Sellars* and *Dobkin*, he shall be presumed to have constructive notice of the possibility of some judicial action in the near future. The onus, therefore, should be upon him to permit the other party to maintain contact with him. This result may be accomplished by requiring him to provide a forwarding address upon moving from the address given at the scene of the accident. When he has failed to do so, service could then be effected by publication.

In a case where a plaintiff obtains a default judgment on a cause of action arising from an automobile accident due to the defendant's lack of actual notice, the defendant's rights are protected by CPLR 317 which permits him to open the default and defend on the merits. However burdensome this procedure may be to a defendant, it would appear that a greater injustice arises when a plaintiff is precluded from all legal recourse due to the defendant's moving to an unknown address thereby making personal or constructive service upon him impossible.

ARTICLE 10—PARTIES GENERALLY

CPLR 1007: Legal expenses not allowed.

*Frank Angelilli Constr. Co. v. Sullivan & Son, Inc.*²⁶ involved an action by a customer against its supplier for breach of warranty of merchantability in which the supplier impleaded the manufacturer under CPLR 1007. As part of the indemnification, the supplier sought legal expenses.

Generally, in the absence of statutory or contractual liability, legal expenses in litigating a cause of action are not recoverable.²⁷ However, there is some New York precedent allowing their

²⁶ 52 Misc. 2d 306, 276 N.Y.S.2d 181 (Sup. Ct. Westchester County 1966).

²⁷ *Edelman v. Goodman*, 47 Misc. 2d 8, 261 N.Y.S.2d 618 (Sup. Ct. Kings County 1965).

recovery where they were incurred by the plaintiff in defending a prior action necessitated by the wrongful act of the defendant.²⁸ The issue becomes somewhat more unclear when, instead of suing for legal expenses previously incurred in a subsequent litigation, the defendant impleads his indemnitor. However, the court in the instant case did not feel compelled to decide this question, since the jury concluded that the manufacturer was not guilty of any wrongful act.

ARTICLE 30 — REMEDIES AND PLEADING

Punitive Damages: Available where there is gross negligence.

Although negligence cases dealing squarely with punitive damages are few, there is dictum that such damages are recoverable in instances of gross negligence or reckless conduct.²⁹ Some negligence cases have conceded the propriety of punitive damages while disallowing their actual award on collateral grounds.³⁰ *Caldwell v. New Jersey Steamboat Co.*,³¹ often cited for the proposition that gross negligence justifies punitive damages, held that the facts there did not indicate such a degree of negligence. In all of these cases, the *soundness* of imposing punitive damages has never been the critical issue. The *Caldwell* court avoided an unequivocal endorsement of such an imposition by relying on the failure to meet the vague standard of "gross negligence." The recent decision in *Soucy v. Greyhound Corp.*,³² apparently the first reported case so holding, foreclosed that avenue of retreat by holding that the plaintiff's allegations of fact,³³ if proven, would meet the standard of gross negligence

²⁸ *Madison County Constr. Co. v. State*, 177 Misc. 777, 31 N.Y.S.2d 883 (Ct. Cl. 1941).

²⁹ *Voltz v. Blackmar*, 64 N.Y. 440, 444 (1876) (assault and battery); *Noonan v. Luther*, 119 App. Div. 701, 703, 104 N.Y. Supp. 684, 686 (3d Dep't 1907) (assault and battery); *DeMarrasse v. Wolf*, 140 N.Y.S.2d 235, 238 (Sup. Ct. Queens County 1955) (malicious prosecution); *Darr v. Cohen*, 94 Misc. 471, 478, 158 N.Y. Supp. 324, 328 (Sup. Ct. N.Y. County 1916) (nuisance abatement). See generally 14 N.Y. JUR. *Damages* § 181 (1960).

³⁰ *Powers v. Manhattan Ry.*, 120 N.Y. 178, 24 N.E. 295 (1890) (jury not apprised of necessity of finding gross negligence); *Cleghorn v. New York Cent. & Hudson River R.R.*, 56 N.Y. 44 (1874) (jury not apprised of necessity of finding gross negligence); *Millard v. Brown*, 35 N.Y. 297 (1866) (defendant prevented from proving facts tending to show his negligence was not gross).

³¹ 47 N.Y. 282 (1872).

³² 27 App. Div. 2d 112, 276 N.Y.S.2d 173 (3d Dep't 1967) (motion to amend complaint to ask for punitive damages).

³³ Plaintiff was injured when bus in which she was riding left the road and rolled over. It was alleged that the bus was old, was equipped with