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NOTES

THE PRIMA FACIE TORT DOCTRINE IN NEW YORK — ANOTHER WRIT?

The motivating force in the development of law has always been the needs of the people. The law must be geared toward providing man with the security, opportunities and comforts of an orderly society which guarantees, protects and enforces certain basic rights and privileges. The concept of remedy has, therefore, necessarily permeated our law and its development has been delicately keyed toward the realization of these rights and privileges.

In early English law, it was the need for remedy that prompted men to petition the King for a writ to bring to court a particular wrongdoer.[1] What resulted was the development of the English common-law writ system which marked the beginning of modern tort law. The first writ made available was that for the action of trespass, which provided a remedy for all direct and immediate injuries.[2] Eventually, due to popular need, the "action on the case" was developed, extending a remedy to situations which involved obviously wrongful conduct, resulting in injuries which were not forcible or direct.[3]

The implementation of this common-law writ system was choked by rigid procedural formalism. Dissatisfaction mounted and, by the middle of the nineteenth century, these rigid forms of action were virtually abandoned in favor of more liberal procedural codes. Nonetheless, the lingering effect of the writ system remained with the law and has plagued its development.[4] The attitude persisted that unless a plaintiff could bring his action under a particular form, label, or category of tort, he should be remediless. However, strong opposition favored the adoption of

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[1] W. PROSSER, TORTS § 7, at 28 (3d ed. 1964).

[2] *Id. See generally* C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 44-65 (1949); Deiser, *The Development of Principle in Trespass*, 27 YALE L.J. 220 (1917).

[3] W. PROSSER, *supra* note 1, at 29. *See generally* C. FIFOOT, *supra* note 2, at 66-101; Dix, *The Origins of the Action of Trespass on the Case*, 46 YALE L.J. 1142 (1937).

[4] Professor Prosser suggests that the movement away from the common-law forms of action was slowed by a devotion to precedent and the distrust of new ideas. W. PROSSER, *supra* note 1, at 19. *See* James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFFALO L. REV. 315 (1959).

a basic unifying principle or rationale for the whole law of torts.[5] A landmark contribution was made to this effort by Lord Bowen when he said:

> intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.[6]

It is generally agreed that this dictum marks the inception of the "prima facie tort" concept.[7] In this country, the doctrine enjoyed the distinguished support of Mr. Justice Holmes, who was responsible for its ultimate acceptance.[8]

And so, a unifying principle had been established, its virtue being flexibility, its vice uncertainty and indefiniteness. Its usefulness and efficiency would depend on the wisdom of its interpreters. Remedy was no longer to be the product of a procedural ritual, to be jeopardized by the slightest deviation from the required form.[9]

In New York, the "prima facie tort" doctrine has received extensive treatment. The following material will explore in depth the development of the doctrine in this state. The reader is asked to evaluate the New York construction on two grounds: first, does

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[5] *See* F. POLLOCK, TORTS 16-17 (15th ed. 1951); P. WINFIELD, TORTS 7 (T. Lewis ed. 1954).

[6] Mogul S.S. Co. v. McGregor, Gow, & Co., 23 Q.B.D. 598, 613 (1889), *aff'd*, [1892] A.C. 25. *See also* Skinner & Co. v. Shew & Co., [1893] 1 Ch. 413, 422: "At Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse." Here Lord Bowen seems to be offering a more generic statement absent the "trade or business" qualification he employed in *Mogul*.

[7] Note, *The Prima Facie Tort Doctrine*, 52 COLUM. L. REV. 503 (1952). *See* Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 NW. U.L. REV. 563 (1959); Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L.Q. 465, 467-68 (1957); Halpern, *Intentional Torts and the Restatement*, 7 BUFFALO L. REV. 7, 8 (1957).

[8] Aikens v. Wisconsin, 195 U.S. 194, 204 (1904): "[P]*rima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape." Here again no "trade or business" qualification is presented. The complaint alleged that the three defendant newspaper companies had combined in an effort to ruin the plaintiff's newspaper business by refusing advertising space at their regular rates to anyone who would pay to the plaintiff the rate increase he was asking. *See* Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

[9] For a treatment of the doctrine as utilized by various states, see Forkosch, *supra* note 7; Note, *The Prima Facie Tort Doctrine*, *supra* note 7, at 504.

it succeed in embodying the ideal of a unifying principle of tort law, and second, does it efficiently serve the needs of the people, and, if not, what reasonable alternatives can be forwarded that will best provide for the availability of a just remedy?

The New York Rule

Action Not Otherwise a Tort

After receiving limited application in certain factual contexts,[10] the "prima facie tort" doctrine was explicitly recognized in *Advance Music Corp. v. American Tobacco Co.*[11] The complaint alleged that the plaintiff's music publishing business was damaged by the defendants' capricious and inaccurate selection of the weekly ten most popular songs.[12] Dissallowing the defendants' motion to dismiss for insufficiency, the Court adopted the reasoning of Mr. *Justice Holmes* in his acceptance of the doctrine in *Aikens v. Wisconsin*,[13] and concluded that the "cause of action alleges such a prima facie tort and, therefore, is sufficient in law on its face." [14] It has been suggested that perhaps the wording of this holding is largely responsible for the great misunderstanding that has accompanied the doctrine throughout its development, viz., that the "prima facie tort" doctrine merely represents an additional tort category rather than a unifying principle of general applicability.[15] This misunderstanding produced the rule that "prima facie tort" remedies would only be available where no traditional tort remedy existed.[16] Further confusion developed when the doctrine was said to be limited to intentional conduct resulting in damage "by an act or series of acts *which would otherwise be lawful.*" [17] Accordingly, any statement of facts which indicated a traditional

[10] *See* Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923), where plaintiff's unsuccessful complaint alleged that the defendant established his own competing newspaper business in order to injure the plaintiff; Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934), where the Court implied that a cause of action would lie for maliciously circulating false information in order to instigate groundless deportation proceedings.

[11] 296 N.Y. 79, 70 N.E.2d 401 (1946).

[12] By way of damages, the plaintiff alleged that music jobbers and dealers were greatly influenced by the defendants' selections and, as a result, the value of his music was depreciated, his revenues diminished and his business prestige impaired. *Id.* at 83, 70 N.E.2d at 402.

[13] 195 U.S. 194 (1904). *See supra* note 8.

[14] 296 N.Y. at 84, 70 N.E.2d at 403, *citing* American Guild of Musical Artists, Inc. v. Petrillo, 286 N.Y. 226, 231, 36 N.E.2d 123, 126 (1941); *See also* Opera on Tour, Inc. v. Weber, 285 N.Y. 348, 34 N.E.2d 349 (1941).

[15] Brown, *supra* note 7, at 567. *See* Ward, *The Tort Cause of Action*, 42 CORNELL L.Q. 28, 52-53 (1956).

[16] *See* Note, *Recent Developments in the New York Law of Prima Facie Tort*, 32 ST. JOHN'S L. REV. 282 (1958).

[17] Ruza v. Ruza, 286 App. Div. 767, 769, 146 N.Y.S.2d 808, 811 (1st Dep't 1955) (emphasis added).

tort category had to be pleaded separately from the balance of the action in "prima facie tort." [18]

"Consequently, it is not surprising that the remedy need rarely be invoked, for the 'categories of tort' are many, and development within the categories is progressive indeed." [19] This exemplifies the New York attitude toward utilization of the doctrine—to discourage reliance on it and limit remedy to the traditional categories of tort whenever possible;[20] and, when not possible, to require strict adherence to pleading requirements of intent (malice) and special damages.[21] Various considerations are offered by the courts in defense of this position: discouragement of spurious claims, sloppy or inartful pleadings, so-called "shotgun complaints," and even the problem of calendar congestion.[22] Moreover, the courts are quick to note attempts to invoke the doctrine as a means of circumventing a shorter statute of limitations. In *Morrison v. National Broadcasting Co.*,[23] the Court of Appeals declined the opportunity to deal definitively with the "prima facie tort" principle and chose to dismiss the complaint as being barred by the one year statute of limitations.[24] In applying the statute, the Court reasoned that it is the reality and the essence of the action and not its mere name that controls.[25] Since the plaintiff's cause of action "sounded" in defamation, "it would be highly unreal and unreasonable to apply some statute of limitations other than the one which the Legislature has prescribed for the traditional defamatory torts of libel and slander." [26]

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[18] *Id.* at 769, 146 N.Y.S.2d at 811: "If . . . the plaintiff intends to add a claim for damages based on any of the traditional torts, each such tort should be pleaded as a separate cause of action and the resultant damage or injury separately stated" *quoting* Brandt v. Winchell, 283 App. Div. 338, 342-43, 127 N.Y.S.2d 865, 868 (1st Dep't 1954).

[19] 286 App. Div. at 770, 146 N.Y.S.2d at 811.

[20] *See* Forkosch, *supra* note 7, at 475: "In New York the *prima facie* tort doctrine has apparently had its greatest degree of legal adumbration, sophistication, and qualification."

[21] Forkosch, *supra* note 7, at 476.

[22] The courts strongly disfavor sloppy pleading and in attempts to repel indifferent draftsmanship are swift to strike down such pleading. "Prima facie tort" is not a magic phrase and will not rectify an invalid complaint. Ruza v. Ruza, 286 App. Div. 767, 769, 146 N.Y.S.2d 808, 810 (1st Dep't 1955).

[23] 19 N.Y.2d 453, 227 N.E.2d 572, 280 N.Y.S.2d 641 (1967).

[24] N.Y. CIV. PRAC. ACT § 51(3) (now N.Y. CIV. PRAC. § 215(3)). The Court also indicated that special damages had not been adequately proved.

[25] 19 N.Y.2d at 459, 227 N.E.2d at 574, 280 N.Y.S.2d at 644, *citing* Brick v. Cohn-Hall-Marx Co., 276 N.Y. 259, 264, 11 N.E.2d 902, 904 (1937).

[26] 19 N.Y.2d at 459, 227 N.E.2d at 574, 280 N.Y.S.2d at 644. It is interesting to note that the defendant argued and the appellate division, first department, agreed that the cause of action could not be sustained in defamation for want of publication. It is highly questionable whether the statute contemplates causes of action "sounding" in defamation; the statute is more reasonably geared to the traditional tort category.

Nevertheless, the prima facie tort principle was conceived with the ideal of affording just relief, and this purpose or goal remains with us today—unfulfilled by the inadequacies of the traditional types of tort. It is hoped that a closer analysis of the New York rule and its requirements will present a workable alternative to the ineffectual principle currently employed.

Malicious Intent

The early common law took little account of a defendant's motives. "Malicious motives make a bad case worse, but they cannot make that wrong which is in its own essence lawful."[27] But with the development of modern law, the motive for man's actions took on greater significance. Complex relationships, coupled with a need to balance conflicting interests, demanded an evaluation of one's motives in order to differentiate for the purposes of liability.[28] The formulation of the prima facie tort doctrine, of course, requires the premise that the motives of an individual may determine his liability, and that acts, usually acceptable, may be made actionable if done with the motive of injuring another.

This element of intent presents three distinct degree-situations which could reasonably be said to fall within the ambit of prima facie tort:

1. Intent to do the act with the corresponding liability being applied for the reasonably foreseeable consequences of the act;[29]
2. Intent to do the act and intent to injure, notwithstanding the possible presence of some secondary motives;[30]
3. Intent to do the act, the *sole* intent (or motive) being to injure.[31]

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[27] T. COOLEY, TORTS § 534 (4th ed. 1932).

[28] W. PROSSER, TORTS § 5, at 24-25 (3d ed. 1964). *See* Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411 (1905).

[29] Morrison v. National Broadcasting Co., 24 App. Div. 2d 284, 290, 266 N.Y.S.2d 406, 412 (1st Dep't 1965). Judge Breitel notes that the defendants had no intent to injure the plaintiff for they hoped their hoax would not be discovered. *See The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 287-90 (1966).

[30] *See* Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L.Q. 465, 477 (1957). Massachusetts has apparently adopted a distinction between primary or secondary intent or purpose.

[31] Reinforce, Inc. v. Birney, 308 N.Y. 164, 169-70, 124 N.E.2d 104, 106-07 (1954), *quoting* Beardsley v. Kilmer, 236 N.Y. 80, 90, 140 N.E. 203, 206 (1923): "[T]he genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and *exclusively* directed to injury and damage of another" (emphasis added). *See also* Rochette & Parzini Corp. v. Campo, 301 N.Y. 228, 93 N.E.2d 652 (1950); Schisgall v. Fairchild Publications, Inc., 207 Misc. 224, 232, 137 N.Y.S.2d 312, 319 (Sup. Ct. 1955).

It seems certain that the New York interpretation of the doctrine is firmly entrenched in the third category. Any notions New York might have entertained regarding a differentiation between primary and secondary intent (the second degree) were apparently abandoned with the decision in *Reinforce, Inc. v. Birney.*[32] Although a 4-3 decision in the Court of Appeals,[33] it represents the overwhelming authority in favor of New York's strict interpretation and correspondingly limited application of the doctrine. The plaintiff's corporation was organized to supply labor for construction work. He received such workers from the defendant union. A series of disagreements prompted the defendant to refuse to supply men to the plaintiff. As a result, the plaintiff was forced out of business. The Court affirmed the appellate division's dismissal [34] of the complaint, holding that the *plaintiff* had failed to meet his burden of proving "that malice was the only spur to the union's activity, or that damage to plaintiffs was the union's sole purpose." [35]

If the *Reinforce* decision is to be taken literally, the prima facie tort doctrine must be deemed to have been relegated to a rather insignificant corner in the library of tort law. The plaintiff's overwhelming burden of proving that the defendant's sole intention was to injure makes practical reliance on the doctrine most difficult, and perhaps impossible. Nevertheless, the *Reinforce* decision remains the controlling mandate for all actions brought under the banner of prima facie tort.

Despite the influence of varying policy considerations, no real attempt has been made to distinguish prima facie tort causes of action factually and thereby proportion the necessary degree of intent to the harm realized. For example, while the policies favoring free competition and encouragement of enterprise might warrant the "sole intent to injure" requirement, no similar considerations demand retention of this requirement in the personal injury area.[36] Apart from the usual situation where damage to one's trade, business or profession is alleged,[37] recovery has been sought

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[32] 308 N.Y. 164, 124 N.E.2d 104 (1954).

[33] Some conjecture must be entertained as to the reliability of the holding of the case in light of recent changes in membership in the Court of Appeals. Many believed the answer to be forthcoming in the *Morrison* case, but the opinion stopped short of the merits of the doctrine itself.

[34] 282 App. Div. 736, 122 N.Y.S.2d 369 (2d Dep't 1953) (mem.).

[35] 308 N.Y. at 167, 124 N.E.2d at 105. *See* Forkosch, *supra* note 30, at 477-79. The corporation was also a party-plaintiff.

[36] *See* Forkosch, *supra* note 30, at 479. The factual context should determine the relationship between intent and justification by establishing the particular policy considerations controlling.

[37] Brandt v. Winchell, 3 N.Y.2d 628, 148 N.E.2d 160, 170 N.Y.S.2d 828 (1958); Rager v. McCloskey, 305 N.Y. 75, 111 N.E.2d 214 (1953); Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70; N.E.2d 401

for damage caused by malicious instigation of groundless deportation proceedings,[38] malicious labor union activities,[39] and even a family conspiracy to destroy the marital and financial status of the wife.[40] In each situation, different policy considerations come into play. This undoubtedly intentional failure by the courts to differentiate factually has distorted not only the intent requirement of the doctrine, but also the element of justification and, perhaps most strikingly, the requirement of special damages. It is strongly indicative of the New York attitude to confine the doctrine to what might be termed a "newly created traditional tort."

A reasonable alternative to the *Reinforce* decision should be discernible in the appellate division's opinion in *Morrison v. National Broadcasting Co.*[41] The plaintiff was a university professor who was induced to participate as a contestant on the defendants' television quiz show by relying on their false misrepresentations as to the show's legitimacy, when, in fact, it was "rigged." The plaintiff alleged that, as a result of his innocent association with the show and the resulting public exposure, his professional and personal reputations were damaged and he was deprived of a fellowship that might have been available to him.

Realizing the restrictive construction precedent had afforded the prima facie tort doctrine in New York, Judge Breitel hastened to dismiss any reliance on the "label" of prima facie tort. He first eliminated the applicability of the sole intent or "disinterested malevolence" [42] requirement by noting that the defendants had no intention to injure the plaintiff, for they were gambling that there would be no exposure. He then insisted that the defendants' conduct was not "otherwise lawful," since the "ultimate purpose and the scheme were corrupt, in the sense that no socially useful purpose but only gain by deceit was intended. . . ." [43] Thus, the

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(1946); Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923). A typical statement was made in Benton v. Kennedy-Van Saunm Mfg. & Eng'r Corp., 2 App. Div. 2d 27, 152 N.Y.S.2d 955 (1st Dep't 1956): "Competition as such, no matter how vigorous or even ruthless, is not a tort at common law." *Id.* at 29, 152 N.Y.S.2d at 958.

[38] Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934).

[39] Rochette & Parzini Corp. v. Campo, 301 N.Y. 228, 93 N.E.2d 652 (1950); American Guild of Musical Artists, Inc. v. Petrillo, 286 N.Y. 226, 36 N.E.2d 123 (1941).

[40] Ruza v. Ruza, 286 App. Div. 767, 146 N.Y.S.2d 808 (1st Dep't 1955).

[41] 24 App. Div. 2d 284, 266 N.Y.S.2d 406 (1st Dep't 1965), *rev'd on other grounds*, 19 N.Y.2d 453, 227 N.E.2d 572, 280 N.Y.S.2d 641 (1967). *See generally The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 287 (1966).

[42] This phrase was first used by Mr. Justice Holmes in Aikens v. Wisconsin, 195 U.S. 194, 206 (1904). *See also* American Bank & Trust Co. v. Federal Bank, 256 U.S. 350, 358 (1921).

[43] 24 App. Div. 2d at 287, 266 N.Y.S.2d at 409. The New York interpretation maintains, of course, that only conduct "otherwise lawful" can

court initiated a morally sanctioned criterion for determining what was to be considered "otherwise lawful" conduct, rather than resorting to the simpler tortious—non-tortious distinction enunciated above.[44]

Turning attention next to the various related causes of action, the court concluded that no liability could be based on any one traditional tort, but rather elements of each tort were indeed present and when considered collectively could constitute an actionable harm. For example, while plaintiff's action in defamation would fail because of the lack of publication, the harm resulting to him was identical (injury to reputation), although induced neither by slander nor libel.[45] Similarly, an action in deceit would feature all the essential elements except that, although there was a knowing misrepresentation to induce the plaintiff to act, and plaintiff relied upon it, the resulting harm was not in obtaining the plaintiff's property or services. And finally, the element of foreseeability of consequences, traditionally indigenous only to negligence theories, was of pivotal significance in determining the ultimate sufficiency of plaintiff's complaint. However, a negligence action could not be maintained because the means employed were intentional.[46] Every element in the plaintiff's complaint was identifiable with some traditional tort category; conversely, the defendants' conduct and the resulting harm to the plaintiff "fall neatly within general principles of law, even if not within any of the numbered forms of a form book." [47] Accordingly, the court concluded that the intentional use of wrongful means (deceit), coupled with the resulting forseeable injury (negligence—defamation), "provides classic basis for remedy." [48]

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be made actionable because of the malicious motive of the actor. Conduct not "otherwise lawful" could not be made actionable via the "prima facie tort" doctrine.

[44] *See* text at note 17, *supra*. Judge Breitel's rather conceptual differentiation appears to be an attempt to further separate the New York construction of the "prima facie tort" doctrine from his holding and in so doing elevate morals or ethics to a position of significance in determining liability.

[45] 24 App. Div. 2d at 287-88, 266 N.Y.S.2d at 410. Other quiz show participants who have employed this cause of action have been unsuccessful for failure to allege special damages. Holt v. Columbia Broadcasting System, Inc., 22 App. Div. 2d 791, 792, 253 N.Y.S.2d 1020, 1022 (2d Dep't 1964); Clark v. National Broadcasting Co., 28 Misc. 2d 481, 482, 209 N.Y.S.2d 60, 61 (Sup. Ct. 1960); Davidson v. National Broadcasting Co., 26 Misc. 2d 936, 939, 204 N.Y.S.2d 532, 535 (Sup. Ct. 1960); Goldberg v. Columbia Broadcasting System, Inc., 25 Misc. 2d 129, 130, 205 N.Y.S.2d 611, 613 (Sup. Ct. 1960).

[46] 24 App. Div. 2d at 287-88, 266 N.Y.S.2d at 410.

[47] *Id.* at 288, 266 N.Y.S.2d at 410.

[48] *Id.* *See* Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co., 7 App. Div. 2d 441, 184 N.Y.S.2d 58 (1st Dep't 1959); Gale v. Ryan, 263 App. Div. 76, 31 N.Y.S.2d 732 (1st Dep't 1941).

As the precise rationale of the court becomes clearly focused, a distinct resemblance to Lord Bowen's and Justice Holmes' ideal of a general unifying principle becomes apparent. Resigned to the fact that prima facie tort in New York meant little more than another tightly construed tort category, Judge Breitel chose to revitalize the theory under a different heading.[49] Although decided under the banner of "injurious falsehood," in theory the case represents the ideals of prima facie tort. In this atmosphere of true prima facie tort, the *Reinforce* sole intent requirement is discarded in favor of the more workable concept of probability as expounded by Mr. Justice Holmes. " 'If the probability of harm is very great and manifest the act is called malicious or intentional. . . . If less but still sufficient to impose liability it is called negligent. . . .' "[50] This concept of implied malice or implied intent to injure based on the probability of the resulting damage should not offend the legal conscience. It results from the application of classic concepts of tort law far more fundamental than the use of traditional categories. It creates an atmosphere hostile to the strict dichotomy between negligent and intentional conduct and the element of justification can be given perspective which is sympathetic to the injured party, yet conscious of the considerations underlying the activity.

Justification

The element of justification was designed to afford the balancing mechanism of the various interests involved. A successful prima facie tort action would mean that the interest of the plaintiff in being free from injury outweighed the desirability of sanctioning the defendant's conduct. Although originally the desirability of the defendant's conduct was limited to the economic area,[51] the concept has developed to include both economic and social justification.[52]

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[49] In this regard, it is interesting to note Judge Breitel's hesitancy in naming the principle he expounded. He suggested that 'no doubt' much of the difficulty in this area results from the use of labels—the idea being that once a particular label is applied, substantive requirements are implied. Nevertheless, the term resorted to was "injurious falsehood." 24 App. Div. 2d at 292, 266 N.Y.S.2d at 414.

[50] Forkosch, *supra* note 30, at 469 n.24. *See also* Commonwealth v. Pierce, 138 Mass. 165 (1884). For application of the doctrine in the negligence area, *see generally* Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 NW. U.L. REV. 563, 564 n.11 (1959); Note, *The Prime Facie Tort Doctrine*, 52 COLUM. L. REV. 503, 505-08 (1952).

[51] Mogul S.S. Co. v. McGregor, Gow, & Co., 23 Q.B.D. 598, 613 (1889), *aff'd*, [1892] A.C. 25.

[52] Campbell v. Gates, 236 N.Y. 457, 460, 141 N.E. 914, 915 (1923). The justification must be of a type that the courts will recognize. Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 85, 70 N.E.2d 401, 403 (1946). *See* Note, *Abstaining from Willful Injury—The Prima Facie Tort Doctrine*, 10 SYRACUSE L. REV. 53, 59-62 (1958).

Under the present construction of the doctrine as enunciated by the *Reinforce* decision, the significance of defendant's justification in determining his liability is for all practical purposes eliminated. The premise is best expressed as the greater the intent required, the less the justification needed to excuse the resulting harm. Accordingly, since *Reinforce* demands sole intent to injure, any secondary motive, while not being sufficient to outweigh the plaintiff's interest in remaining unharmed, will violate the sole intent requirement and thereby preclude recovery. It would be more accurate, therefore, to speak in terms of secondary motive rather than justification under the New York construction.

The *Reinforce* decision is of further significance in that it places the burden of showing lack of justification upon the plaintiff, so that absent proof that the motivation was solely malicious, plaintiff is without remedy.[53] The interplay between the elements of intent and justification is obvious.[54] This crucial relationship as portrayed by the *Reinforce* decision has relegated prima facie tort to the smallest of pigeonholes. Considering the few situations in which the defendant's conduct is *solely* malicious, coupled with the plaintiff's difficult burden of proving lack of justification, practical reliance on the doctrine seems impossible and the availability of remedy appears limited by the slavish formalism of the traditional tort categories.

It would be constructive, at this point, to apply the motive definition utilized by Judge Breitel in *Morrison* to the determination of the issue of justification. Judge Breitel treated the motive requirement for his "injurious falsehood" tort as falling within the first degree-situation of intent, *i.e.*, intent to do the act with the corresponding liability being applied for the reasonably foreseeable consequences of the act. Since the sole intent requirement was not considered applicable, Judge Breitel was able to apply an unstilted concept of justification. While the defendant's desire to make money would have necessarily constituted sufficient "justification" in a case where sole intent is an integral part of the cause of action, it was not considered to be sufficiently socially desirable to outweigh the harm to the plaintiff.

The importance of distinguishing fact situations in prima facie tort actions is once again apparent when the element of justification is considered. As mentioned above, justification developed first in the area of trade competition and, in many instances, any

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[53] Reinforce, Inc. v. Birney, 308 N.Y. 164, 170, 124 N.E.2d 104, 107 (1954).

[54] "Whatever may have been the motives of the defendant . . . was entirely immaterial. Even if it acted wilfully and maliciously . . . it would not be liable provided it had a just and rightful purpose to serve." Peabody, Jr. & Co. v. Travelers Ins. Co., 240 N.Y. 511, 519, 148 N.E. 661, 664 (1925). *See* Benton v. Kennedy-Van Saum Mfg. & Eng'r Corp., 2 App. Div. 2d 27, 152 N.Y.S.2d 955 (1st Dep't 1956).

showing of a competitive motive was an absolute defense.[55] But factual differentiation demands the application of varying social considerations. Justification of the means will vary with the nature of the harm, the benefit sought by the defendant, and the means employed.[56] While the competitive motive in the business world might legitimately be retained as about absolute justification, the mere showing of a profit motive should not constitute an absolute justification where the same policies favoring free competition are not involved, as in *Morrison*. In an action brought to recover for injury resulting from union activity, where the acts bear a "reasonable connection with wages, hours, health, safety, the right of collective bargaining, or any other condition of employment . . .," [57] the defense of justification would be easily satisfied. Where personal, as opposed to business, motives are involved, a more stringent application of justification would seem desirable. However, even where the defendant acts for purely non-business reasons, other policy considerations may operate to absolve the defendant from liability. In cases involving instigation of judicial proceedings, it is posited that society's interest in maintaining effective laws must not be handicapped by discouraging the instigation of actions; this interest is outweighed only when the proceedings prove absolutely groundless.[58]

Considering the status of the doctrine as set forth in the *Reinforce* decision, this discussion must be termed purely academic and by way of suggestion. The sole intent requirement has paralyzed the basic principle of prima facie tort—justification. Placing the burden of proving lack of justification on the plaintiff has had a similar effect. The burden should rest logically with the defendant unless exceptionally strong facts necessitate a presumption that the defendant's acts were fully justified. Then and only then should the plaintiff be plagued with the burden of showing no justification.

So far it is evident that considerable adjustments must be made with the intent requirement and, consequently, the element of justification. One element of prima facie tort remains to be considered—the requirement of special damages. Together, these

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[55] Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923); Benton v. Kennedy-Van Saum Mfg. & Eng'r Corp., 2 App. Div. 2d 27, 152 N.Y.S.2d 955 (1st Dep't 1956).

[56] W. PROSSER, TORTS § 5, at 26 (3d ed. 1964).

[57] Opera on Tour, Inc. v. Weber, 285 N.Y. 348, 355, 34 N.E.2d 349, 352 (1941).

[58] *Compare* Brandt v. Winchell, 3 N.Y.2d 628, 148 N.E.2d 160, 170 N.Y.S.2d 828 (1958), where plaintiff unsuccessfully complained that the defendant instigated harassing investigations of him and his business by the State Attorney General, *with* Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934), where the plaintiff's allegations that deportation proceedings were instigated by the defendant's furnishing immigration officials with false information were upheld.

elements, if properly applied, will afford maximum availability of a just remedy to the exclusion of ill-founded claims.

Special Damages

The New York construction of the prima facie tort doctrine requires the pleading of special damages.[59] An application of this requirement can be found in *Faulk v. Aware, Inc.*[60] where the plaintiff was required to specify in the complaint the names of employers and customers who were claimed to have taken away their business from the plaintiff, as well as the particular items of loss claimed.[61]

The reason most often advanced for the blanket retention of this requirement is best stated as follows:

> To permit a recovery in prima facie tort upon an allegation and proof of general damage would throw open to regulation of morals and ethics all conduct which, when substandard, results in injured feelings without other and special damage. It is allegation of temporal damage which makes such an action maintainable upon a proper statement of a cause in prima facie tort. . . .[62]

Another argument in favor of the requirement of special damages emphasizes the remedial purpose of the doctrine. It is argued that since the prima facie tort doctrine is essentially an exception to the rules of tort law, made to provide the plaintiff with additional grounds upon which to claim recovery, the least a plaintiff can do is show actual injury.[63] The source of this argument is discernable by resorting to the common law. The action of trespass, often a basis for criminal liability, required no proof of any actual damage, since the direct invasion of plaintiff's rights was regarded as a tort in itself.[64] The action on the case, on the other hand, developed purely as a tort remedy for indirect injury; there could ordinarily be no liability unless actual damage was proved. It is, therefore,

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[59] Brandt v. Winchell, 3 N.Y.2d 628, 148 N.E.2d 160, 170 N.Y.S.2d 828 (1958); Nichols v. Item Publishers, Inc., 309 N.Y. 596, 132 N.E.2d 860 (1956); Rager v. McCloskey, 305 N.Y. 75, 111 N.E.2d 214 (1953); Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co., 7 App. Div. 2d 441, 184 N.Y.S.2d 58 (1st Dep't 1959); *cf.* O'Connell v. Press Publishing Co., 214 N.Y. 352, 108 N.E. 556 (1915).

[60] 3 Misc. 2d 833, 155 N.Y.S.2d 726 (Sup. Ct. 1956), *aff'd mem.*, 3 App. Div. 2d 703, 160 N.Y.S.2d 621 (1st Dep't 1957).

[61] *See also* Reporters' Ass'n of America v. Sun Printing & Publishing Ass'n, 186 N.Y. 437, 443, 79 N.E. 710, 712 (1906).

[62] Test v. Eldot, N.Y.L.J., Feb. 29, 1956, at 7, col. 4. *See* Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L.Q. 465, 476-77 (1957).

[63] *See* Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170, 148 N.Y.S.2d 635 (1st Dep't 1956).

[64] W. PROSSER, TORTS § 7, at 29 (3d ed. 1964).

concluded that since the prima facie tort doctrine developed from the action on the case, the special damages requirement is logically retained.

Despite the persuasiveness or logic of the argument in favor of special damages, nowhere is there found any reference to the basic distinction between general and special damages. General damages, as distinguished from special, actual or temporal damages, are awarded for injury which "necessarily" [65] follows from the conduct complained of, or "whenever in the course of experience the loss is a direct and natural consequence of the wrongdoing." [66] The *Morrison* decision in the appellate division offered a similar rationale which spoke of foreseeable harm which normally results from a type of conduct.[67]

Although the Court of Appeals did not pass on the merits of prima facie tort or of the precise holding of the appellate division, an interesting analogy can be appreciated from the decision. The Court applied the one year statute of limitations by concluding that the action "sounded" in defamation.[68] It appears that the "sounding" test would be highly accurate in regard to determining the need to allege special damages. Accordingly, special damages would be required in all actions "sounding" in defamation except where the particular conduct could be more accurately described as "sounding" in libel or slander *per se*. The awarding of general damages in libel or slander *per se* actions results from the serious probability of injury. The injury to the plaintiff in *Morrison* was to his profession, a category of "*per se*" defamation, and therefore general damages are indeed appropriate.

It is apparent then that this final requirement must also undergo a significant re-shaping. The prima facie tort doctrine must be geared toward an appreciation of the basic concepts of damages based on probability. Only then will the doctrine serve the interests of society and at the same time prevent the long-expected flood of spurious claims.

Conclusion

The restrictive attitude of the New York courts is seemingly without logical justification. In an effort to confine the rule as much as possible, for whatever reasons, the courts have aborted its

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[65] C. MCCORMICK, DAMAGES § 32 (1935). *See* RESTATEMENT OF TORTS § 904 (1939).

[66] Ratcliffe v. Evans [1892] 2 Q.B. 524. *See generally* Halpern, *Intentional Torts and the Restatement*, 7 BUFFALO L. REV. 7 (1957).

[67] 24 App. Div. 2d 284, 294, 266 N.Y.S.2d 406, 415 (1st Dep't 1965). *See* Rager v. McCloskey, 305 N.Y. 75, 81, 111 N.E.2d 214, 217 (1953), where Judge Fuld seemed to approve the test for general damages as damages to be "calculated in the ordinary course of events."

[68] 19 N.Y.2d 453, 459, 227 N.E.2d 572, 574, 280 N.Y.S.2d 641, 644 (1967).

purpose and ignored the basic ideals and principles upon which it is based.

An alternative construction must be implemented if these ideals and principles are not to be ignored. It must be evaluated on the basis of its providing new avenues of just remedy based on a common principle of tort law, without causing the dreaded rash of petty, spurious complaints. To provide this remedy the doctrine must flourish in an atmosphere that knows no strictures between one "traditional" tort principle and another. Reliance on the doctrine, however, should be limited to conduct which is not otherwise a tort. Although violative of the general principle of prima facie tort, the practical result for the injured party will be the same; and the plaintiff is placed under no accountable hardship considering the liberal provisions for amending complaints. All non-traditionally tortious conduct which involves a reasonable probability of injury should be exposed to the possible sanctions of prima facie tort. Where such injury has resulted, the defendant must logically shoulder the burden of showing his conduct was justified. If this probability of injury is great, the plaintiff should be allowed to recover on a showing of general damages. If the strict sole intent requirement is to be retained, its application must be limited to the area of business competition.

It must always be remembered that the prima facie tort doctrine was conceived in an effort to provide maximum availability of just remedy by initiating a common principle of tort law and by eliminating the remnants of needless procedural formalism. What is not often appreciated is that while the principle will extend to society the availability of remedy, it will also exact from society a more thorough implementation of the morals or ethics that are mutually valued. Therefore, the benefit of the prima facie tort principle is coupled with an obligation on the individual to conform his conduct to what is best termed accepted norms.

The failure of the principle has marked an unfortunate failure of the courts to provide for this extension of remedy and to impress this obligation on the conscience of society. The development of the principle has been stunted while the predominant purpose of the courts, *i.e.*, to serve the people, has been frustrated. Practical considerations and problems of modern judicial administration have undoubtedly been the source of this frustration. It appears that many courts have relegated the needs of the people to a secondary position outweighed by the congestion of the courts and the substitution of the goal of maximum efficiency. Efficiency is a weak substitute for remedy, and no substitute for justice.