

CPLR 215(3): Complaint Alleging Corrupt Conduct and Intentional Exposure to Unreasonable, Foreseeable Risk of Harm States a Cause of Action

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between the time that the potential defendant dies and an administrator or executor is appointed, the effect of the court's decision herein is to shorten the limitation period rather than to allow the plaintiff an additional period of time. For example, in a wrongful death action for which the limitation period is only two years,²⁷ the death of the defendant followed by a lapse of eighteen months until an administrator or executor is appointed would, under the interpretation of the instant case, leave the plaintiff only six months in which to bring suit. Instead of aiding the plaintiff, this decision hinders him.

CPLR 215(3): Complaint alleging corrupt conduct and intentional exposure to unreasonable, foreseeable risk of harm states a cause of action.

In *Morrison v. National Broadcasting Co.*,²⁸ the complaint alleged that defendants induced plaintiff, a university professor, to appear on their "rigged" television quiz program by intentional misrepresentations as to the show's legitimacy. Plaintiff further alleged that when the program was exposed as a fraud, his academic position was damaged, viz., fellowships previously applied for were denied, and his good reputation was generally harmed. The appellate division, first department, held that although the facts did not comprise a single complete traditional tort, they did create an actionable basis for relief since the defendants' intentionally false statements foreseeably exposed plaintiff to a known, unreasonable risk of harm and thereby directly damaged him.²⁹

The torts of prima facie tort,³⁰ deceit,³¹ defamation³² and negligence³³ were considered by the court. However, since the complaint failed to allege all the elements necessary to sustain a cause of action under any of the categories relied upon, each was

²⁷ N.Y. DECED. EST. LAW § 130.

²⁸ 24 App. Div. 2d 284, 266 N.Y.S.2d 406 (1st Dep't 1965).

²⁹ *Morrison v. National Broadcasting Co.*, 24 App. Div. 2d 284, 266 N.Y.S.2d 406 (1st Dep't 1965).

³⁰ Prima facie torts are those intentional wrongs whereby otherwise lawful means are employed unjustifiably and maliciously, solely to harm others. Here, the defendants' actions, though not illegal, were initially and intrinsically unlawful; therefore the remedy of prima facie tort was not available.

³¹ This was considered because plaintiff relied reasonably on defendants' knowing misrepresentations to his detriment. Since, however, no goods or services of the plaintiff were transferred to the defendants, deceit was not completed and was eliminated as a remedy.

³² An action for damage to reputation, the classic result of defamation, was brought. However, the essential element of publication about plaintiff by the defendants was not alleged and defamation was thus unavailable as a remedy.

³³ Negligence was considered, but eliminated, since intentional means were employed by the defendants.

ruled inapplicable as a matter of law. The court nevertheless found that the nature of defendants' acts, plaintiff's reliance upon them, and the harm incurred thereby were such as to justify sustaining the complaint. Indeed, the court found that "the intentional use of wrongful means and the intentional exposure of another to the known, unreasonable risk of harm, which results in such harm, provides classic basis for remedy."³⁴

The court relied upon action on the case—the common-law remedy available to recover damages for torts not committed by force, actual or implied,³⁵ and which historically existed only where extant forms of action did not afford a remedy.³⁶ It was noted that prima facie tort, as originally introduced, was a general tort theory independent of procedural categories and inclusive of all intentional harms unjustifiably causing temporal harm.³⁷ The court emphasized that the refinement and subclassification of the general principle into the category "prima facie tort," still left the broad theory of tort to provide methods of solution for the modern court.³⁸

³⁴ *Supra* note 29, at 288, 266 N.Y.S.2d at 410.

³⁵ *Musso v. Miller*, 265 App. Div. 57, 59, 88 N.Y.S.2d 51, 53 (3d Dep't 1942) (malicious words calculated to do harm are not actionable).

³⁶ *Lucci v. Engel*, 73 N.Y.S.2d 78, 79 (Sup. Ct. N.Y. County 1947). "A statement which injures the plaintiff in his reputation is governed by the very stringent rules of libel and slander, but a statement (whether written or oral) which injures him only by misleading other persons into action that is detrimental to him falls within the more lenient rules of liability [of action on the case]"

³⁷ "Prima facie" tort has been called the modern "action on the case." Thornton & McNiece, *Torts and Workmen's Compensation*, 31 N.Y.U.L. Rev. 1509 (1956). Subsequent commentators, however, have noted that New York's application of the prima facie tort concept has been "the most adumbratious, sophisticated and qualified" in the nation. Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L.Q. 465, 475 (1957). Such criticism was directed to the cases following *Advance Music Corp. v. American Tobacco Co.*, 292 N.Y. 79, 70 N.E.2d 401 (1946) (cited as the case introducing prima facie tort to New York), which diminished the comprehensiveness of the principle to a limited tort category. *E.g.*, *Ruza v. Ruza*, 286 App. Div. 767, 146 N.Y.S.2d 808 (1st Dep't 1955), limited applicability to lawful acts committed under circumstances making them unlawful; *Rager v. McCloskey*, 305 N.Y. 75, 111 N.E.2d 214 (1953), ruled that not only were special damages essential to the pleadings, but all elements of the complaint must be pleaded particularly and specifically. For an excellent discussion of the philosophy of the prima facie tort doctrine and the trend in New York, see Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 Nw. U.L. Rev. 563 (1959).

³⁸ *Supra* note 29, at 290-95, 266 N.Y.S.2d at 412-17. See Mr. Justice Holmes' discussion of the right of a man to rely on his fellow man acting lawfully, and the interrelated interests to be weighed in assessing liability for subsequent harms in Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894). See also a presentation of English precedents influencing Holmes in Note, *The Prima Facie Tort Doctrine*, 52 COLUM. L. REV. 503 (1952), and Forkosch, *supra* note 37.

The rationale employed was fourfold: (1) tort law is elastic, and not limited to "recognized heads of tort";³⁹ (2) intent may be taken to mean conscious knowledge of the foreseeable consequences of a deliberately undertaken act,⁴⁰ as well as intent to effectuate the resultant harm; (3) allegation of general damages is sufficient;⁴¹ and (4) prima facie tort must be considered a non-exclusive remedy.⁴² However, the court, in its rationale, did not employ the reasoning of a similar case decided in the same department. In *Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co.*,⁴³ defendant's furnishing of false information to the Internal Revenue Service led to a commercially destructive investigation of plaintiff. Although stating that prima facie tort should not become a "grab-bag" for left-over intentional torts,⁴⁴ and emphasizing that an intentionally made or intentionally uttered false statement is wrongful,⁴⁵ the court nevertheless applied prima facie rules to the issues presented, demanding allegation of special damages and a concise statement of the material ultimate facts. The court, in the instant case, discussed *Penn-Ohio* merely for its statements as to the availability of a cause of action for intentional wrongdoing outside a classic category, and the non-exclusiveness of prima facie tort law.⁴⁶

It is submitted that such mild reference to a decisive precedent must be construed as a sign of an awareness of the essential distinction between an intentional wrong caused by legal means, and the harm resulting from an intrinsically wrongful act. Such a distinction, obvious as it is, is an important step forward in the efforts of the legal world to bring ethics closer to the law of remedies.

Where the action is caused by an otherwise socially acceptable act (prima facie tort), the motive of the individual acting has a serious effect on the degree of his liability.⁴⁷ Here, damages are, and should be, an important part of the allegations. Where, however, the alleged wrongdoer acts in a manner which is universally

³⁹ *Supra* note 29, at 290, 266 N.Y.S.2d at 412. 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); *Knapp Engraving Co. v. Keystone Photo Engraving Corp.*, 1 App. Div. 2d 170, 148 N.Y.S.2d 635 (1st Dep't 1956).

⁴⁰ *Supra* note 29, at 290, 266 N.Y.S.2d at 412.

⁴¹ *Id.* at 288, 266 N.Y.S.2d at 410.

⁴² "[W]here the conduct is purposely corrupt by conventional standards, intentional as to consequences, or utilizes vicious means . . . the law will allow general recovery for foreseeable harm to established protected interests, such as reputation in . . . occupation. . . . The justification for allowing general damages is the practical recognition that harm normally occurs from a type of conduct even if specific damages are not provable. . . ." *Id.* at 293, 266 N.Y.S.2d at 415.

⁴³ 7 App. Div. 2d 441, 184 N.Y.S.2d 58 (1st Dep't 1959).

⁴⁴ *Id.* at 443, 184 N.Y.S.2d at 60.

⁴⁵ *Id.* at 444, 184 N.Y.S.2d at 61.

⁴⁶ *Supra* note 29, at 291-92, 266 N.Y.S.2d at 413-14.

⁴⁷ *Brown*, *supra* note 37, at 567, and cases cited therein.

accepted as being unlawful, he should not be afforded the benefit of having a plaintiff's complaint dismissed for failure to plead special damages.

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE
AND CHOICE OF COURT

CPLR 302: British long-arm statute given local effect.

Defendant, a New York corporation, appointed plaintiff its exclusive concessionaire in the United Kingdom to sell defendant's product under a contract which stipulated that it was to be governed by the laws of England. In an action for breach of contract, brought in Great Britain, the defendant was personally served in New York pursuant to the British long-arm statute.⁴⁸ Upon defendant's failure to appear, a default judgment was rendered against him. In *Plugmay Ltd. v. National Dynamics Corp.*,⁴⁹ plaintiff brought suit in New York on the English judgment. In rejecting the defendant's contention that the British court had no jurisdiction over it, the New York court, although not bound to do so,⁵⁰ upheld the British judgment. The court noted that CPLR 302 makes a nonresident of New York subject to its jurisdiction when a "single act" takes place in this state, and added that "if the facts were the reverse, this court would have taken jurisdiction of the English defendant by extraterritorial service We can do no less now in affording the English court reciprocal acquisition of jurisdiction over the defendant here. It has the support of our present public policy."⁵¹

CPLR 302(a): Allegations in complaint held sufficient to sustain jurisdiction.

*Saratoga Harness Racing Ass'n v. Moss*⁵² involved an action for damages resulting from an illegal boycott of horse races conducted by the plaintiff, and a tortious interference with the plaintiff's contracts with certain owners and trainers of horses. The tort was alleged to have been committed in New York by the defendants who were non-domiciliaries. The court sustained jurisdiction over the defendants under CPLR 302(a)(2) since the allegations in the complaint stated a valid cause of action and a basis for in personam jurisdiction.

⁴⁸ Supreme Court of Judicature, Order 11, rule 1(f)iii, (g).

⁴⁹ 48 Misc. 2d 913, 266 N.Y.S.2d 240 (N.Y.C. Civ. Ct. 1966).

⁵⁰ It should be noted that principles of comity, and not full faith and credit, apply to judgments of the courts of foreign countries. Thus, our courts are not *bound* to give effect to such judgments, but *may* do so in their discretion.

⁵¹ *Plugmay Ltd. v. National Dynamics Corp.*, 48 Misc. 2d 913, 917, 266 N.Y.S.2d 240, 244-45 (N.Y.C. Civ. Ct. 1966).

⁵² 49 Misc. 2d 855, 268 N.Y.S.2d 619 (Sup. Ct. Saratoga County 1966).