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Pleading Special Damages--Itemization

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The dissent argued that the cause of action pleaded was one for indemnification and as such was prematurely brought since it would not accrue until there was an actual — and satisfied — judgment on behalf of the infant against the retailer in the Connecticut action. It would seem that even though the action be viewed as one for indemnification it could nonetheless be allowable by simple analogy to an impleader cause of action, which may be asserted when a party is or *may be* liable to the pleading party.[91]

An impleader cause of action in New York is one for indemnity, and though an indemnity cause of action does not accrue until actual payment by the third-party plaintiff of any judgment recovered against him, impleader traditionally permits assertion of the indemnity claim on a hypothetical basis (*i.e.*, without it being certain that there will be anything for which the third-party plaintiff would have to be indemnified).

Thus, even though there is no express statutory authorization for permitting such a premature independent action for idemnification, the action may be permitted by a liberal construction of the CPLR as required by section 104, and a liberal construction of the pleadings as authorized by section 3026.[92] Furthermore, the court after allowing the complaint, can either stay the proceedings until the Connecticut action culminates or continue the action, but stay any judgment until the Connecticut action is completed, thereby insuring that defendant's rights will not be prejudiced. There was obviously a jurisdictional problem involved in this case, in that the other action, pending in Connecticut, was beyond the control of the New York courts. The case was distinguished on that ground by another case,[93] which indicated that an independent indemnity claim will not be allowed before its technical accrual when jurisdictional problems are not present.

Pleading Special Damages — Itemization

Rule 3015(d) of the CPLR requires that special damages be itemized. Although the rule is new, there is some indication that it merely codifies the existing case law which recognizes a distinction between general damages[94] which need not be pleaded with

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[91] CPLR § 1007.

[92] Section 3026 provides: "Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced." Ultimately, the significance of the instant case lies not so much in the construction it has given hypothetical pleadings, but rather in the further indication that the first department stands ready to construe pleadings liberally in order to allow a plaintiff with an honest claim his day in court.

[93] Morey v. Sealright Co., 247 N.Y.S.2d 306 (Sup. Ct. 1964).

[94] General damages are such as are naturally presumed to follow from the injuries alleged. 4 SEDGWICK, DAMAGES § 1261 (9th ed. 1912).

particularity and special damages[95] which must be specifically stated. It probably goes further, however, in its specific requirement of itemization.

In most actions, including negligence, breach of contract or libel per se, special damages are not a necessary element to the cause of action. Obviously, therefore, a complaint in such an action is not subject to a motion to dismiss under rule 3211(a)(7) for omission of special damages. Rather, the pleading party will be prevented from proving special damages unless he amends his complaint.[96]

However, in some cases special damages *are* an integral part of the cause of action, and a complaint which fails to allege such damages will be insufficient and subject to a motion for dismissal for failure to state a cause of action. Thus, in *Hecht v. Air Reduction Co.*,[97] a complaint in prima facie tort pleaded only general damages and, hence, the complaint was dismissed. Similarly, in *Cowan v. Time, Inc.*,[98] the court held a complaint in a libel action (which was not libel per se)[99] insufficient because it failed to allege special damages.[100]

The question has arisen in recent years of whether or not special damages must be pleaded in an action for intentional harm falling outside the categories of the conventional or traditional torts. The first department has indicated that a failure to plead special damages in these actions will subject them to a motion to dismiss.[101] On the other hand, the second department has held that every action for intentional harm falling outside the conventional tort area does not have to be denominated a prima facie tort

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[95] Special damages are not presumed to follow from the injuries alleged and would surprise the defendant if asserted at trial for the first time. Comment, 9 CORNELL L.Q. 70, 71 (1923).

[96] Kurak v. Traiche, 226 N.Y. 266, 123 N.E. 377 (1919).

[97] 41 Misc. 2d 463, 245 N.Y.S.2d 935 (Sup. Ct. 1963); *accord,* Gillis v. Georgas, 225 N.Y.S.2d 164 (Sup. Ct. 1962); Franklin v. Aware, Inc., 3 Misc. 2d 833, 155 N.Y.S.2d 726 (Sup. Ct. 1956), *aff'd,* 3 App. Div. 2d 703, 160 N.Y.S.2d 621 (1st Dep't 1957).

[98] 41 Misc. 2d 198, 245 N.Y.S.2d 723 (Sup. Ct. 1963); *accord,* Pappas v. Brink, 20 App. Div. 2d 613, 245 N.Y.S.2d 441 (3d Dep't 1963); Tollfsen Sales Corp. v. General Slag Corp., 11 App. Div. 2d 713, 205 N.Y.S.2d 925 (2d Dep't 1960).

[99] The same rule is applicable to a slander which is not a slander per se. Weiss v. Nippe, 5 App. Div. 2d 789, 170 N.Y.S.2d 642 (2d Dep't 1958); Blens Chems. Inc. v. Wyandotte Chem. Corp., 197 Misc. 1066, 96 N.Y.S.2d 47 (Sup. Ct. 1950).

[100] If the action is for a public nuisance the complaint must show that the plaintiff has suffered some special damages different from those common to all citizens. 4 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE § 106 (1953).

[101] Zausner v. Fotochrome, Inc., 18 App. Div. 2d 649, 235 N.Y.S.2d 698 (1st Dep't 1962).

(which would require the pleading of special damages).[102] Thus, the intentional infliction of serious mental distress without physical impact is actionable per se without the necessity of pleading special damages.[103]

Where special damages are an integral element of the cause of action, the courts require considerable particularity, especially in the libel and slander cases. Thus, allegations such as those pleaded in *Cowan*[104] that the pleader had suffered special damages, with no attempt at itemization, will be deemed a pleading of general damages. Where the special damages supporting the cause of action are the loss of customers, as in *Hecht*, the specific customers lost must be named.[105] Furthermore, even where the plaintiff names specific customers who have been lost, the loss constituting special damages, the court may characterize the damages as too speculative and dismiss the complaint.[106]

The early CPLR cases indicate that under rule 3015(d), the courts may require considerable specificity in the pleading of special damages in all actions where they are sought. In view of the retention of the bill of particulars under the CPLR, such a practice would be lamentable.[107]

Bill of Particulars — Broad Interpretation of Rule 3042

The function of a bill of particulars is to amplify the pleading, limit the proof, and prevent surprise at the trial.[108] When the

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[102] Halio v. Laurie, 15 App. Div. 2d 62, 222 N.Y.S.2d 759 (2d Dep't 1961).

[103] *Ibid.*

[104] 41 Misc. 2d 198, 245 N.Y.S.2d 723 (Sup. Ct. 1963); *accord,* Leather Dev. Corp. v. Dun & Bradstreet, Inc., 15 App. Div. 2d 761, 224 N.Y.S.2d 513 (2d Dep't 1962), *aff'd,* 12 N.Y.2d 909, 188 N.E.2d 270, 237 N.Y.S.2d 1007 (1963).

[105] Reporters' Ass'n of America v. Sun Printing & Publishing Ass'n, 186 N.Y. 437, 79 N.E. 710 (1906); Henkin v. News Syndicate Co., 27 Misc. 2d 987, 210 N.Y.S.2d 302 (Sup. Ct. 1960).

[106] Trachtenberg Bros. v. Henrietta Steins, Inc., 64 N.Y.S.2d 565 (Sup. Ct. 1946).

[107] The current federal practice rules do not provide for a bill of particulars since its purposes could be adequately served by a motion to make more definite, expanded machinery of discovery, and the pretrial conference. 2 MOORE, FEDERAL PRACTICE §§ 1217-20 (2d ed. 1948). In accordance with the federal practice the First and Final Reports of the Advisory Committee omitted any provision for the bill of particulars. However, the change was rejected by the Codes Committee and the bill of particulars is retained in the CPLR. See 38 ST. JOHN'S L. REV. 190, 215 n.54 (1963).

[108] Solomon v. Travelers Fire Ins. Co., 5 App. Div. 2d 1017, 174 N.Y.S.2d 85 (2d Dep't 1958); Runals v. Niagara Univ., 16 Misc. 2d 853, 185 N.Y.S.2d 315 (Sup. Ct. 1959).