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was to protect against liability in New York[52] where, ironically, Section 167(3) is available to protect New York insurers. *Quaere:* What would the courts of New York have done if the husband had called the New Jersey insurance company to defend and pay any judgment in the original New York action?

Conclusion

In its present state of effectiveness, it would be well to repeal Section 167(3). The present ease with which the spouse taps the proceeds of the policy at the expense of the insurer will not be rectified until the statute is interpreted as an absolute bar to recovery on a policy issued to the other spouse.

RECENT DEVELOPMENTS IN THE NEW YORK LAW OF PRIMA FACIE TORT

In 1923 the New York Court of Appeals[1] first[2] assented to Lord Bowen's famous proposition[3] that the intentional infliction of injury upon another without justification is prima facie actionable. Since that time the prima facie tort doctrine has come increasingly into use by injured parties in search of a remedy not afforded by traditional tort actions. This increase in prima facie tort litigation provides the occasion for the courts to define the doctrine more precisely and to limit its application within discernible boundaries. It is the purpose of this article to analyze the recent developments in the application of the prima facie tort doctrine in New York.

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[52] *But cf.* Metzler v. Metzler, 8 N.J. Misc. 821, 151 Atl. 847 (1930), where it was held that a wife could not sue her husband in New Jersey on a judgment obtained in New York.

[1] Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923).

[2] Dicta in an earlier New York case had expressed disapproval of the prima facie tort doctrine. See Foster v. Retail Clerks' Protective Ass'n, 39 Misc. 48, 53-56, 78 N.Y. Supp. 860, 864-66 (Sup. Ct. 1902). However, in 1920 the Appellate Division held a complaint sufficient as an "action on the case" where it alleged injury resulting from words not in themselves defamatory. Husted v. Husted Co., 193 App. Div. 493, 184 N.Y. Supp. 844 (2d Dep't 1920). See text at note 7 *infra*.

[3] "Now, 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. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong. . . ." Mogul Steamship Co. v. McGregor, Gow & Co., [1889] 23 Q.B.D. 598, 613, *aff'd*, [1892] A.C. 25.

The latest pronouncement of the Court of Appeals in the prima facie tort area was made in *Brandt v. Winchell*,[4] the culmination of a persistent litigation [5] that has helped shape the law of prima facie tort. The court in this case clearly indicates that the question of what conduct will constitute a prima facie tort is basically a policy decision made by the court.

Essentially the allegations of the complaint were that the defendant, Winchell, with the deliberate intention of wreaking harm upon the plaintiff, embarked on a plan designed to destroy a fund-raising corporation, the Cancer Welfare Fund, organized by the plaintiff, and to make it impossible for him ever again to participate in such activity. In furtherance of this scheme, Winchell allegedly (1) instigated harassing investigations of the plaintiff and the latter's corporation by the State Attorney General that ended in a consent injunction restraining plaintiff from ever engaging in the business of soliciting charitable contributions; (2) fomented a baseless criminal prosecution that ultimately ended in acquittal; (3) prevailed upon the police department to cancel plaintiff's pistol permit and license as a private detective; and (4) published false accusations against the plaintiff that damaged his professional and business reputation. Special damages alleged included loss of salary and the revocation of his detective license. Punitive damages were also requested.

The court dismissed the fourth allegation as sounding in dafamation while not pleading the defamatory statements *in haec verba*. In dismissing the other allegations, the court held that (1) the damages alleged resulted from official governmental action and were not a result of defendant's acts and (2) the defendant's conduct in prodding the official agencies into action could not properly be made the subject of a prima facie tort complaint, even if done for the sole purpose of injuring the plaintiff.

The language of the court is significant:

> The law is now settled in this State that, "Even a lawful act done solely out of malice and illwill to injure another *may* be actionable." . . . This is not to say that the present state of the law is that an act not otherwise tortious will, without exception, become actionable when it is done with the blameworthy purpose of injuring another and such other is in fact injured. There are situations where for one of several reasons a court is constrained to ignore the wrongful motive of the actor. . . . Accordingly, it may fairly be said that whenever the gist of an alleged cause of action (as here) is that an otherwise lawful act has become unlawful because the actor's motives were malevolent, the court is called upon to analyze and weigh the conflicting interests of the parties and of the public in order to determine which shall prevail.[6]

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[4] 3 N.Y.2d 628, 148 N.E.2d 160 (1958).

[5] See Brandt v. Winchell, 286 App. Div. 249, 141 N.Y.S.2d 674 (1st Dep't 1955) (per curiam), dismissing without leave to replead the amended complaint of Brandt v. Winchell, 283 App. Div. 338, 127 N.Y.S.2d 865 (1st Dep't 1954).

[6] Brandt v. Winchell, *supra* note 4, at 634-35, 148 N.E.2d at 163-64.

The court then stated that public policy in effect insulated defendant from answering in damages to plaintiff because official action is deemed presumptively valid and may not be collaterally attacked through the use of the prima facie tort doctrine. This interposition of public policy considerations squarely presents the question of what conduct is actionable as a prima facie tort.

Since the prima facie tort action is in effect an action on the case [7] designed to supplement and not to supplant traditional tort categories,[8] New York has taken the position that prima facie tort may not be predicated on facts that fit into a recognized common-law action.[9] Thus, a prima facie tort complaint would not lie where the specific acts alleged constituted defamation,[10] interference with contract relations,[11] disparagement of property,[12] or abuse of corporate office.[13] But it has also been maintained that otherwise lawful acts can be converted into a prima facie tort when motivated solely by an intent to injure.[14] The Appellate Division synthesized these views in the statement: "The key to the prima facie tort is the infliction of temporal harm resulting in damage, without excuse or justification by an act or series of acts *which would otherwise be lawful.*" [15] This indication that only otherwise lawful acts can be made tortious by motive is subject to the inherent ambiguity of the terms "lawful-unlawful." The more precise meaning is probably that only an act not otherwise a tort upon the plaintiff can support a prima facie tort action in view of the decision in *Shisgall v. Fairchild Publications, Inc.*[16] There it was held that the intentional breach of contract by

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[7] See Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 A.D.2d 170, 172, 148 N.Y.S.2d 635, 637 (1st Dep't 1956); Brandt v. Winchell, 283 App. Div. 338, 342, 127 N.Y.S.2d 865, 868 (1st Dep't 1954).

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

[9] See Knapp Engraving Co. v. Keystone Photo Engraving Corp., note 7 *supra;* Ruza v. Ruza, note 8 *supra;* Brandt v. Winchell, note 7 *supra.*

[10] Kaplan v. K. Ginsburg, Inc., 7 M.2d 136, 160 N.Y.S.2d 1018 (Sup. Ct. 1957); Green v. Time, Inc., 147 N.Y.S.2d 828 (Sup. Ct.), *aff'd mem.*, 1 A.D.2d 665, 146 N.Y.S.2d 812 (1st Dep't 1955), *aff'd mem.*, 3 N.Y.2d 732, 143 N.E.2d 517 (1957); Dubourcq v. Brouwer, 124 N.Y.S.2d 61 (Sup. Ct.), *aff'd mem.*, 282 App. Div. 861, 124 N.Y.S.2d 842 (1st Dep't 1953). *But see* LoBianco v. Scott Publications, Inc., 82 N.Y.S.2d 248 (Sup. Ct. 1948).

[11] Paramount Pad Co. v. Baumrind, 3 A.D.2d 655, 158 N.Y.S.2d 687 (1st Dep't 1957) (per curiam); Best Window Co. v. Better Business Bureau, Inc., 148 N.Y.S.2d 652 (Sup. Ct.), *rev'd on other grounds,* 1 A.D.2d 1002, 151 N.Y.S.2d 833 (1st Dep't 1956).

[12] Mennella v. Garroway, 138 N.Y.L.J. No. 88, p. 6, col. 7 (Sup. Ct. Nov. 1, 1957).

[13] See Abrams v. Allen, 297 N.Y. 52, 74 N.E.2d 305 (1947).

[14] Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934); Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923); J.J. Theatres, Inc. v. V.R.O.K. Co., 96 N.Y.S.2d 271 (Sup. Ct. 1950); Avallone v. Bernardi, 83 N.Y.S.2d 905 (Mount Vernon City Ct. 1948), *aff'd mem.*, 276 App. Div. 1094, 96 N.Y.S.2d 685 (2d Dep't 1950).

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

[16] 207 Misc. 224, 137 N.Y.S.2d 312 (Sup. Ct. 1955).

one contracting party for the sole purpose of inflicting damage on the other contracting party states a cause of action in prima facie tort.

Within this broad concept that acts not otherwise a tort upon the plaintiff can be made so when motivated solely by a desire to injure, the Court of Appeals has now apparently created the exception that the malicious instigation of official action will not give rise to prima facie tort liability. This result is analogous to the results reached in lower court cases that held malicious use of a statutory remedy to enforce a judgment[17] or the bringing of a suit for declaratory judgment[18] could not be the basis of a prima facie tort.[19] Where official action is involved, however, there seems to be a distinction between merely instigating official action and producing the conditions without which official action could not have been taken.[20] Thus, a prima facie tort complaint was sufficient where it alleged plaintiff-employee had been subjected to prosecution for tax evasion because defendant-employer had filed fraudulent statements of plaintiff's earnings with state and federal agencies.[21] Similarly, a complaint would lie where plaintiff was deported on the basis of false information furnished immigration officials by defendant.[22]

Beyond the area of official action there are few guideposts to indicate what policy considerations will impel the courts to decide that specific conduct is sufficiently prima facie tortious to require defendant to justify it or be held liable. Perhaps to avoid meeting this question head on, stringent requirements of pleading, damages, and intent have been formulated relevant to prima facie tort actions.

In form, the pleadings must be confined to allegations of fact and special damage, with any statement of wrongdoing and injury appropriate to a traditional tort pleaded as a separate cause of action.[23] If the complaint concerns written or oral statements made by the defendant, at least a summary of the statements must be pleaded.[24]

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[17] Bono Sawdust Supply Co. v. Hahn & Golin, 3 A.D.2d 221, 159 N.Y.S.2d 725 (2d Dep't 1957).

[18] Travelers Indemnity Co. v. Unger, 4 M.2d 955, 158 N.Y.S.2d 892 (Sup. Ct. 1956).

[19] *But see* Schauder v. Weiss, 88 N.Y.S.2d 317 (Sup. Ct. 1949), *aff'd mem.*, 276 App. Div. 967, 94 N.Y.S.2d 748 (2d Dep't 1950), where a complaint was sufficient as a prima facie tort where it alleged that defendants maliciously conspired to institute fraudulent divorce proceedings against plaintiff wife. *Compare* Rager v. McCloskey, 305 N.Y. 75, 111 N.E.2d 214 (1953), *with* Schauder v. Weiss, *supra*. See also J.J. Theatres, Inc. v. V.R.O.K. Co., 96 N.Y.S.2d 271 (Sup. Ct. 1950).

[20] This distinction was put forth in the argument in *Brandt v. Winchell* but was not considered by the Court of Appeals because it was not properly supported by the allegations of the complaint.

[21] Gale v. Ryan, 263 App. Div. 76, 31 N.Y.S.2d 732 (1st Dep't 1941).

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

[23] Brandt v. Winchell, 283 App. Div. 338, 127 N.Y.S.2d 865 (1st Dep't 1954); Sheppard v. Coopers' Inc., 156 N.Y.S.2d 391 (Sup. Ct.), *aff'd mem.*, 2 A.D.2d 881, 157 N.Y.S.2d 898 (1st Dep't 1956).

[24] See Al Raschid v. News Syndicate Co., note 22 *supra*. The purpose of the rule apparently is to enable the court to determine if the gist of the action

Strict enforcement is given these rules to insure that poor pleadings in traditional torts cannot be hidden behind a prima facie tort smokescreen.[25]

Damage is a necessary element of the prima facie tort action [26] and the severe circumscription of the type of damage recoverable is another effective method of limiting the scope of the doctrine. Although some few cases have allowed damages of another kind,[27] the rule now generally adopted in New York demands that the injury must be to plaintiff in his trade or business.[28] Damage to reputation is not sufficient.[29] Damages claimed must be specially pleaded,[30] although not necessarily with mathematical precision,[31] and must have been proximately caused by defendant's acts.[32] So exacting are the pleading requirements that a complaint must name employers and customers who have left plaintiff's business by virtue of defendant's conduct.[33]

The specificity of these damage requirements would seem to curtail severely, if not eliminate altogether, the possibility of collecting consequential damages.[34] There is some doubt as to whether punitive damages may be awarded. The presence of actual malice nor-

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is defamation. See also the pleadings reported in Brandt v. Winchell, 3 N.Y.2d 628, 148 N.E.2d 160 (1958).

[25] See Ruza v. Ruza, 286 App. Div. 767, 146 N.Y.S.2d 808 (1st Dep't 1955); Kaplan v. K. Ginsburg, Inc., 160 N.Y.S.2d 1018 (Sup. Ct. 1957).

[26] Rager v. McCloskey, 305 N.Y. 75, 111 N.E.2d 214 (1953); Brandt v. Winchell, 286 App. Div. 249, 141 N.Y.S.2d 674 (1st Dep't 1955) (per curiam), dismissing the amended complaint of Brandt v. Winchell, 283 App. Div. 338, 127 N.Y.S.2d 865 (1st Dep't 1954).

[27] See Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934) (plaintiff deported because of defendant's false statements); Schauder v. Weiss, 88 N.Y.S.2d 317 (Sup. Ct. 1949), *aff'd mem.*, 276 App. Div. 967, 94 N.Y.S.2d 748 (2d Dep't 1950) (personal discomfort resulting from fraudulent divorce proceedings). A reading of Gale v. Ryan, 263 App. Div. 76, 31 N.Y.S.2d 732 (1st Dep't 1941), would indicate that the case belongs in this category. However, Test v. Eldot, 135 N.Y.L.J. p. 7, col. 4 (Sup. Ct. Feb. 29, 1956), points out that the complaint in *Gale v. Ryan* contains averments of injury to employment and business.

[28] When *Brandt v. Winchell* came before the Appellate Division for the first time, the court stated that injury actionable in prima facie tort is "ordinarily" in the trade or business area. See Brandt v. Winchell, 283 App. Div. 338, 342, 127 N.Y.S.2d 865, 868 (1st Dep't 1954). But in dismissing the amended complaint the court categorically stated that the damage recoverable ". . . consists of injury due to loss in plaintiff's occupation or business." Brandt v. Winchell, 286 App. Div. 249, 250, 141 N.Y.S.2d 674, 675 (1st Dep't 1955) (per curiam).

[29] Rager v. McCloskey, note 26 *supra.*

[30] Brandt v. Winchell, note 28 *supra.*

[31] See Federal Waste Paper Corp. v. Garment Center Capitol, Inc., 185 Misc. 818, 824-25, 57 N.Y.S.2d 200, 206 (Sup. Ct. 1945).

[32] Brandt v. Winchell, 3 N.Y.2d 628, 148 N.E.2d 160 (1958).

[33] Faulk v. Aware, Inc., 155 N.Y.S.2d 726, 732 (Sup. Ct. 1956).

[34] *Cf.* J.J. Theatres, Inc. v. V.R.O.K. Co., 96 N.Y.S.2d 271 (Sup. Ct. 1950) (time spent away from business because of defendant's harassing lawsuits not sufficient injury for prima facie tort).

mally makes exemplary damages recoverable [35] and in at least one case the court did not find the pleading of exemplary damages inappropriate to the prima facie tort action.[36] However, statements that the action is concerned only with "temporal" [37] or "actual" [38] damages and that special damages alone are recoverable [39] may show a trend to exclude exemplary damages from the prima facie tort recovery. While there is no public policy against granting exemplary damages,[40] the apparent desire of the courts to restrict the efficacy of the prima facie tort doctrine may result in the disallowance of such redress. Underlying these strict rules is the policy consideration:

> 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 the allegation of temporal damage which makes such an action maintainable upon a proper statement of a cause in prima facie tort. . . .[41]

The intent upon which a prima facie tort complaint can be predicated in New York differs from that necessary in most other jurisdictions [42] and from that required in traditional tort actions where the intent to do the act productive of the injury is all that is required.[43] For prima facie tort liability in New York, the intent of the actor must have been solely to injure the plaintiff.[44] This intent, called malice, need not incorporate actual ill-will [45] or spite directed against the person injured, but merely the infliction of wrongful harm upon him without just cause or excuse.[46] Nor does malice in this sense mean merely that the injury is foreseen as an inevitable consequence of the act,[47] for the harm must not only be foreseen but also provide

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[35] See McCORMICK, DAMAGES § 79 (1935).

[36] See Shisgall v. Fairchild Publications, Inc., 207 Misc. 224, 236, 137 N.Y.S.2d 312, 323 (Sup. Ct. 1955).

[37] See Brandt v. Winchell, 3 N.Y.2d 628, 148 N.E.2d 160 (1958).

[38] See Brandt v. Winchell, 286 App. Div. 249, 251, 141 N.Y.S.2d 674, 676-(1st Dep't 1955) (per curiam).

[39] See Sheppard v. Coopers' Inc., 156 N.Y.S.2d 391, 395-96 (Sup. Ct.), *aff'd mem.*, 2 A.D.2d 881, 157 N.Y.S.2d 898 (1st Dep't 1956).

[40] See Loucks v. Standard Oil Co., 224 N.Y. 99, 112, 120 N.E. 198, 202 (1918).

[41] Test v. Eldot, 135 N.Y.L.J. p. 7, col. 4 (Sup. Ct. Feb. 29, 1956).

[42] See Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L.Q. 465, 474-79 (1957); Note, *The Prima Facie Tort Doctrine*, 52 COLUM. L. REV. 503, 507 (1952).

[43] See PROSSER, TORTS § 8 (2d ed. 1955); RESTATEMENT, TORTS § 13, comments *d, e* (1938).

[44] Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923); Ruza v. Ruza, 286 App. Div. 767, 146 N.Y.S.2d 808 (1st Dep't 1955).

[45] A complaint will be sufficient if the facts alleged warrant an inference that the defendant intends harm to the plaintiff. Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946).

[46] See Advance Music Corp. v. American Tobacco Co., note 45 *supra*; American Guild of Musical Artists, Inc. v. Petrillo, 286 N.Y. 226, 36 N.E.2d 123 (1941).

[47] See Aikens v. Wisconsin, 195 U.S. 194 (1904).

the motivating force for the commission of the act.[48] Thus, if it can be foreseen that an act will wreak harm upon another while at the same time benefiting the actor and the harm is not desired, but merely permitted, there will be no liability.[49] The benefit to the actor will be deemed to justify the harm to the plaintiff, and justification is the complete defense to a prima facie tort. The premise is that self-interest negates malice even when the means used to promote that self-interest are of questionable morality or ethical validity.[50]

The concept of justification must therefore be viewed as the neutralizing factor that will override the intent to injure. What constitutes justification is again a policy consideration, *i.e.*, the justification pleaded must be something of which the courts will take notice.[51] Normally a showing that defendant's conduct was motivated, at least in part, by some economic reason will provide justification[52] if the economic benefit to be attained is not too remote from the means used to achieve it.[53] It has been said that social justification is also possible,[54] but a defendant raising such a defense runs the risk that the court will find that he is attempting to act as the conscience of society.[55]

The interplay of justification and intent has resulted in some cases where liability was apparently predicated on the basis of foreseeability of injury rather than the presence of actual intent to injure. Courts have granted an injunction where a labor union deprived a minority of seniority rights to favor the majority;[56] allowed a recovery against a defendant subcontractor whose fraudulent overcharging of the prime contractor caused the latter to breach a contract with

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

[49] Benton v. Kennedy-Van Saun Mfg. & Eng. Co., 2 A.D.2d 27, 152 N.Y.S.2d 955 (1st Dep't 1956).

[50] *Id.* at 29, 152 N.Y.S.2d at 958.

[51] Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946); Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923). See also Opera on Tour, Inc. v. Weber, 285 N.Y. 348, 34 N.E.2d 349, *cert. denied*, 314 U.S. 615 (1941); Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927).

[52] See Benton v. Kennedy-Van Saun Mfg. & Eng. Co., note 49 *supra;* Barile v. Fisher, 197 Misc. 493, 94 N.Y.S.2d 346 (Sup. Ct. 1949). See also Holmes, *Privilege; Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894). The privilege to inflict harm upon another ". . . rests on the economic postulate that free competition is worth more to society than it costs." *Ibid.*

[53] Thus, the conduct of labor unions has frequently been held unjustified when it was found to be directed toward an improper union objective. See, *e.g.*, Opera on Tour, Inc. v. Weber, 285 N.Y. 348, 34 N.E.2d 349, *cert. denied*, 314 U.S. 615 (1941).

[54] See Beardsley v. Kilmer, note 51 *supra.*

[55] See Wilson v. Hacker, 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. 1950); *cf.*, Unity Sheet Metal Works, Inc. v. Farrell Lines, Inc., 101 N.Y.S.2d 1000 (Sup. Ct. 1950).

[56] Bucko v. Murray, 170 Misc. 902, 11 N.Y.S.2d 402 (Sup. Ct.), *aff'd mem.*, 258 App. Div. 867, 16 N.Y.S.2d 537 (1st Dep't 1939), *aff'd mem.*, 283 N.Y. 634, 28 N.E.2d 35 (1940).

the plaintiff;[57] allowed recovery against a vendee and a broker who conspired to deprive plaintiff-broker of his commission on the sale of a house;[58] and sustained a complaint in a tax fraud case.[59] In none of these cases does it appear that defendant's sole intent was to injure the plaintiff. It will be observed however that in the union case the minority that was stripped of seniority rights had previously refused to strike with the union and the presence of an actual intent to injure could have been inferred. In the other cases, the defendants all had practiced a fraud upon a third party. It is submitted, therefore, that what is seemingly based solely upon an intent to commit an act resulting in foreseeable harm actually rests upon an inferred intent to injure derived from a failure of justification. In effect, defendants were precluded from establishing their intent to commit a fraud upon a third party by way of defense and therefore the only inference possible from the facts alleged was that the injury resulting to the plaintiffs was solely intended. This would be in accord with Justice Holmes' statement that the question of privilege, *i.e.*, justification, would not arise at all unless the defendant were assumed to have had notice of the probable consequences of his act.[60]

The most important recent case in the area of the intent-justification conflict is *Reinforce, Inc. v. Birney*,[61] a case that casts doubt as to whether the defendant bears the burden of coming forward to show justification or if the plaintiff must prove that defendant was motivated solely by malice. Before this decision the cases had presumed that if the facts pleaded were such as to warrant an inference of malice the burden was on the defendant to affirmatively show a justification for his action.[62] In *Reinforce, Inc. v. Birney*, however, the Court of Appeals states that if the record shows an ". . . absence of proof that the motivation was entirely malicious, plaintiff has no remedy of law." [63] Taken literally, this view would mean the end of the prima facie tort doctrine in New York for it would be a rare case indeed where a plaintiff could prove such single-minded intent conclusively. Few actions could survive a motion to dismiss at the end of plaintiff's case and defendant would be relieved of the burden of coming forward with a justification. The *Reinforce* case in this respect is against the traditional interpretation of the prima facie tort doctrine, and, in view of the consequences such a rule would have, it seems unlikely that it will be followed.

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[57] Bloomer v. Thermal Fuel Corp., 88 N.Y.S.2d 361 (Sup. Ct. 1949).

[58] Avallone v. Bernardi, 83 N.Y.S.2d 905 (Mount Vernon City Ct. 1948), *aff'd mem.*, 276 App. Div. 1094, 96 N.Y.S.2d 685 (2d Dep't 1950).

[59] Gale v. Ryan, 263 App. Div. 76, 31 N.Y.S.2d 732 (1st Dep't 1941).

[60] Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 6 (1894).

[61] 308 N.Y. 164, 124 N.E.2d 104 (1954).

[62] See, *e.g.*, Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946); Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923); Wilson v. Hacker, 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. 1950).

[63] 308 N.Y. 164, 170, 124 N.E.2d 104, 107 (1954).

The strict standards thus far described serve more as an aid to the defense and the court when examining a prima facie tort complaint than as a guide to a plaintiff in determining if conduct can be actionable as such a tort. In this respect *Best Window Co. v. Better Business Bureau* [64] deserves careful attention. It represents an attempt by the court to illuminate one of the most difficult problems in the prima facie tort area—the vague line that separates the prima facie tort from the tort of interference with contract relations.[65]

In that case the court held that a prima facie tort is basically a lawful act converted into a tort by the presence of the intent to injure.[66] But the tort of interference with contract relations is in itself a wrongful act, *i.e.*, the unprivileged invasion of another's property right in the contract, committed intentionally and knowingly.[67] The court adopts the *Restatement* [68] view that the intent here need only be to effect the purpose of severing the contract relations of the plaintiff [69] and not, as in prima facie tort, solely to injure him. For interference with contract relations to lie there must be an express contract for a term.[70] Where there is only a contract terminable at will, however, and the termination is brought about by means not unlawful in themselves, the action will be for discontinuance of business relations,[71] because, in essence, a prima facie tort depends upon a showing that

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[64] 148 N.Y.S.2d 652 (Sup. Ct. 1955), *rev'd on other grounds*, 1 A.D.2d 1002, 151 N.Y.S.2d 833 (1st Dep't 1956) (reversed for deficiencies in pleading).

[65] The lack of clear distinction between the two torts probably arises out of the fact that in Lumley v. Gye, 2 E. & B. 216, 118 Eng. Rep. 749 (Q.B. 1853), the first case in which liability was imposed for interference with another's contract, the court supported its decision by reasoning similar to that which expresses the prima facie tort doctrine.

Many cases by way of dicta have cited with approval the statement in Note, 52 COLUM. L. REV. 503, 508 (1952), that prima facie tort cases normally comprehend some form of interference with contractual relations. See, *e.g.*, Brandt v. Winchell, 283 App. Div. 338, 342, 127 N.Y.S.2d 865, 868 (1st Dep't 1954). The *Best Window Co.* decision, however, seems to be the first instance where a court has attempted to evaluate the statement. The distinction the case makes seems well founded if it is taken to mean that liability for interference with contract relations is imposed for intentional interference with another's property; and in prima facie tort as a recognition that there is no policy in the law that allows a person to intentionally inflict harm upon another for no reason but to injure him.

[66] *Accord*, Ruza v. Ruza, 286 App. Div. 767, 146 N.Y.S.2d 808 (1st Dep't 1955). See also Shisgall v. Fairchild Publications, Inc., 207 Misc. 224, 137 N.Y.S.2d 312 (Sup. Ct. 1955).

[67] *Accord*, Campbell v. Gates, 236 N.Y. 457, 125 N.E. 817 (1923); Lamb v. Cheney & Son, 227 N.Y. 418, 147 N.E. 914 (1920).

[68] RESTATEMENT, TORTS § 766 (1939).

[69] 1 HARPER AND JAMES, TORTS 492 (1956); PROSSER, TORTS § 106, at 735 (2d ed. 1955).

[70] S. C. Posner Co. v. Jackson, 223 N.Y. 325, 119 N.E. 573 (1918); Terry v. Dairymen's League Co-operative Ass'n, 2 A.D.2d 494, 157 N.Y.S.2d 71 (3d Dep't 1956).

[71] Terry v. Dairymen's League Co-operative Ass'n, note 70 *supra*.

the defendant acted solely out of malice.[72] The same policy considerations that call for special damages in the prima facie tort area will probably dictate that actual, special damages also be pleaded in this action. Moreover, since the contract is terminable at will, the scope of the defendant's privilege is greater and therefore, justification will easily be found for his conduct.[73]

A related problem arises, however, where there is no express contract for a term but there is either a contract terminable at will or a reasonable expectancy of business advantage to the plaintiff deriving from his relation to another. An action for interference with these advantageous relations will lie if unlawful means—fraud, intimidation, or breach of fiduciary duty—are used to deprive the plaintiff of the benefits of that advantage.[74] Absent the use of unlawful means, no action would lie for the deprivation unless it were motivated solely by an intention to injure the plaintiff. There, prima facie tort would be the proper action.

To illustrate, assume *A,* the exclusive manufacturer of certain machinery, contracts to supply *B* with such machinery, who in turn contracts to supply *C,* a retailer, with the machinery. *D* induces *A* to break his contract with *B*.[75] *D* is liable to *B* for interference with contract relations. If fraud, intimidation, or if possibly a fiduciary position was used to effect the breach and thereby deprive *C* of prospective advantage, *D* is liable to *C* for interference with advantageous relations. If lawful means were used, then there is no liability to *C* unless the action were taken with the sole intent by *D* to injure *C*. But if *D* himself were a retailer, used lawful means, and was motivated at least in part by the spirit of competition, no action would lie by *C* against *D* for the economic end would justify his action as it affects *C*. In all these instances, *D* would be liable to *B*.

Conclusion

The interpretation placed by the New York courts on the prima facie tort doctrine indicates that it has been strictly confined and will probably be of little utility in the future. The ten-year statute of limitations that presumably attaches to prima facie tort[76] has led to many attempts to avoid the shorter statute of limitations that apply to other torts. However, such attempts have met with little success.[77]

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[72] Terry v. Dairymen's League Co-operative Ass'n, note 70 *supra.*

[73] Terry v. Dairymen's League Co-operative Ass'n, note 70 *supra;* PROSSER, TORTS § 107 (2d ed. 1955).

[74] Duane Jones, Inc. v. Burke, 306 N.Y. 172, 117 N.E.2d 237 (1954); Silva v. Bonafide Mills, Inc., 82 N.Y.S.2d 155 (Sup. Ct. 1948); General Out Door Advertising Co. v. Hamilton, 154 Misc. 871, 278 N.Y. Supp. 226 (Sup. Ct. 1935).

[75] See RESTATEMENT, TORTS § 870, comment *b,* illus. 1 (1939).

[76] See N.Y. CIV. PRAC. ACT § 53.

[77] See, *e.g.,* Ruza v. Ruza, 286 App. Div. 767, 146 N.Y.S.2d 808 (1st Dep't

As the scope of the actions for interference with contract relations and prospective advantage increase, the corresponding scope for the use of the prima facie tort doctrine will probably be constantly diminished. Each case that deals with the doctrine seems to carve out some new area of privileged conduct or add a stricter interpretation of the elements of the prima facie tort. It would seem that the courts, in their zeal to insure that the doctrine would not get out of hand, have reduced it to relative impotency. If the doctrine of the *Reinforce* case is strictly followed, it is probable that the prima facie tort will be merely of historical significance.

THE ELLIS CASE—SOME ASPECTS OF ADOPTION IN THE CONFLICT OF LAWS

Introduction

Within the past year the Ellis adoption case has received nationwide publicity. After the Supreme Court of Massachusetts denied a petition by Mr. and Mrs. Melvin Ellis for adoption [1] of Hildy McCoy and rendered a custody decree in favor of the natural mother,[2] the petitioners removed the child from the jurisdiction and effected an adoption in Florida.[3] The case highlights certain aspects of adoption in the conflict of laws. This note will deal with two jurisdictional factors involved in the case. First, was the Florida court bound to accord full faith and credit to the Massachusetts decrees? Second, did the Florida court have the necessary jurisdiction to decree an adoption?

Facts of the Ellis Case

Pursuant to an agreement with Marjorie McCoy, upon the birth of her illegitimate child Hildy McCoy, the Ellises took the girl from the hospital with a view toward adopting her.

1955); Green v. Time, Inc., 147 N.Y.S.2d 828 (Sup. Ct.), *aff'd mem.*, 1 A.D.2d 665, 146 N.Y.S.2d 812 (1st Dep't 1955), *aff'd mem.*, 3 N.Y.2d 732, 143 N.E.2d 517 (1957); Dubourcq v. Brouwer, 124 N.Y.S.2d 61 (Sup. Ct. 1953), *aff'd*, 282 App. Div. 861, 124 N.Y.S.2d 842 (1st Dep't 1953); Lucci v. Engel, 73 N.Y.S.2d 78 (Sup. Ct. 1947).

[1] Ellis v. McCoy, 332 Mass. 254, 124 N.E.2d 266 (1955).

[2] See Ellis v. Doherty, 334 Mass. 456, 136 N.E.2d 203 (1956).

[3] *In re* Adoption of Hildy McCoy, Chancery No. 199852, N. Fla., July 10, 1957.