St. John's Law Review

Volume 30, December 1955, Number 1 Article 15

Torts--Disparagement of Property--Misstatement of Price Not Actionable (Marxman Pipes, Inc. v. Columbia Pictures Corp., 285 App. Div. 135 (1st Dep't 1954))

St. John's Law Review

in the same manner that mental capacity determines responsibility in the area of negligence.

The Court in the instant case did not consider the defendant's capacity to know wrongfulness, and merely stated that liability for battery was predicated on intent to establish the contact.[31] It was asserted that the defendant's age was relevant only to determine what he was capable of knowing in reference to the certainty of the contact, and from that knowledge the necessary intent could be inferred.

It is submitted that the ultimate basis of tort liability is wrongfulness.[32] However, since the law must operate with externals as its guide, knowledge of wrongfulness has been translated into the objective, average man concept.[33] Consequently, where the act is found to have been done intentionally, the law presumes the moral factor and imposes liability.[34] It is indisputable that this judicial technique is just, where the defendant has capacity for wrongfulness. But where the defendant is incapable of knowing wrong, moral responsibility is no longer a possibility; it therefore cannot be presumed. Only a fiction can attribute moral significance to the physical act. The Court in the instant case should have required a finding as to whether or not infants of the defendant's age would have known the act was wrongful. The effect of failing to make such a finding is to impose absolute liability on infants in an area of the law where such should not be the rule.

TORTS — DISPARAGEMENT OF PROPERTY — MISSTATEMENT OF PRICE NOT ACTIONABLE.—Plaintiff marketed a toy airplane which sold for $3.00. The defendant, in a fictional motion picture, depicted the toy as selling for $.65. Plaintiff brought suit, alleging that such representation constituted disparagement of property. The Appellate Division *held,* per curiam, that a cause of action was not stated in the absence of allegations showing how the misstatement of price accomplished disparagement of quality. *Marxman Pipes, Inc. v. Columbia Pictures Corp.,* 285 App. Div. 135, 135 N.Y.S.2d 816 (1st Dep't 1954).

Disparagement of property is a form of interference with economic relations. The earliest cases, arising shortly before 1600, involved oral aspersions cast upon the ownership of realty, thereby

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[31] See RESTATEMENT, TORTS § 16, comment *a* (1929).
[32] See Radin, *Speculative Inquiry Into The Nature Of Torts,* 21 TEXAS L. REV. 697 (1943).
[33] See HOLMES, THE COMMON LAW 161-63 (1881).
[34] *Id.* at 108.

preventing its sale or lease.[1] In the nineteenth century the action was enlarged to include written aspersions concerning land [2] and also the title to personal property.[3] Disparagement of the quality of personalty,[4] and the protection of trademarks,[5] patent rights [6] and copyrights [7] have come within the purview of this action.

It is well established that an action will lie where falsehoods, not actionable per se, are maliciously published and produce actual damage.[8] The plaintiff must prove a false statement, malice, and special damages in order to recover.[9] All jurisdictions agree on the essential elements of the action [10] but disagree as to their nature. Some courts require actual malice,[11] while in others legal malice will suffice.[12] Special damages, the gist of the action,[13] must flow proximately from the false statement.[14] Usually, only the loss of specific sales can be recovered [15] and a general decline in business is not remediable.[16]

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[1] See Pennyman v. Rabanks, Cro. Eliz. 427, 78 Eng. Rep. 668 (Q.B. 1595); Gerrard v. Dickenson, Cro. Eliz. 196, 78 Eng. Rep. 452 (Q.B. 1590).

[2] See Malachy v. Soper, 3 Bing. N.C. 371, 132 Eng. Rep. 453 (Q.B. 1836).

[3] See Like v. McKinstry, 41 Barb. 186 (Sup. Ct. 1863), *aff'd*, 3 Abb. App. Dec. 62 (N.Y. 1868).

[4] See Snow v. Judson, 38 Barb. 210 (N.Y. Sup. Ct. 1862); Western Counties Manure Co. v. Lawes Chemical Manure Co., L.R. 9 Ex. 218 (1874).

[5] See Baeder v. Baeder, 52 Hun 170 (N.Y. Gen. T. 1st Dep't 1889).

[6] See Hovey v. Rubber Tip Pencil Co., 57 N.Y. 119 (1874); Snow v. Judson, *supra* note 4; Hanson v. Hall Mfg. Co., 194 Iowa 1213, 190 N.W. 967 (1922).

[7] See John W. Lovell Co. v. Houghton, 116 N.Y. 520, 22 N.E. 1066 (1889).

[8] See Ratcliffe v. Evans, [1892] 2 Q.B. 524 (C.A.); Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934); British Ry. Traffic & Electric Co. v. C.R.C. Co., [1922] 2 K.B. 260 (1921).

[9] Womack v. McDonald, 219 Ala. 75, 121 So. 57 (1929); Gudger v. Manton, 21 Cal.2d 537, 134 P.2d 217 (1943); Cawrse v. Signal Oil Co., 164 Ore. 666, 103 P.2d 729 (1940).

[10] See, *e.g.*, Herzog v. Kronman, 82 F.2d 859 (D.C. Cir. 1936); International Visible Systems Corp. v. Remington-Rand, Inc., 65 F.2d 540 (6th Cir. 1933); Cronkhite v. Chaplin, 282 Fed. 579 (8th Cir. 1922); Gudger v. Manton, *supra* note 9.

[11] See, *e.g.*, Walley v. Hunt, 212 Miss. 294, 54 So.2d 393 (1951); Wheelock v. Batte, 225 S.W.2d 591 (Tex. Civ. App. 1949).

[12] See, *e.g.*, Lehman v. Goldin, 160 Fla. 710, 36 So.2d 259 (1948); *cf.* Dalzell v. Dean Hotel Co., 193 Mo. App. 379, 186 S.W. 41 (1916); see Smith, *Disparagement of Property II*, 13 COLUM. L. REV. 121, 137-39 (1913).

[13] See Carroll v. Warner Bros. Pictures, Inc., 20 F. Supp. 405 (S.D. N.Y. 1937); Kendall v. Stone, 5 N.Y. 14 (1851).

[14] Burkett v. Griffith, 90 Cal. 532, 27 Pac. 527 (1891); Wilson v. Dubois, 35 Minn. 471, 29 N.W. 68 (1886).

[15] Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories, Inc., 17 F.2d 255 (8th Cir. 1926); Stevenson v. Love, 106 Fed. 466, 468 (C.C.D. N.J. 1901) (dictum); Tobias v. Harland, 4 Wend. 537, 540 (N.Y. Sup. Ct. 1830) (dictum).

[16] Tower v. Crosby, 214 App. Div. 392, 212 N.Y. Supp. 219 (4th Dep't 1925); Shaw Cleaners & Dyers v. Des Moines Dress Club, 215 Iowa 1130, 245 N.W. 231 (1932); see Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 198 (1936).

The statement is defamatory if it tends to prejudice the plaintiff's product in the eyes of a substantial minority.[17] Generally, the falsity may pertain to anything that is capable of influencing the decision of a customer.[18] The Restatement imposes liability for any publication of a false statement under such circumstances as would lead a reasonable man to foresee that a sale of property would thereby be prevented.[19] This rule does not limit recovery to words directly attacking quality. In England the action has not failed because the words remotely affected quality. Thus in *Malachy v. Soper,*[20] false statements caused the plaintiff's mining shares to become much depreciated and lessened in value.[21] In Canada,[22] a publication that a house was haunted was held sufficient to support an action by the owner to recover damages for the depreciation in value of the property. In this country a Pennsylvania court, allowing recovery, acknowledged certain misrepresentations to be ". . . a most successful mode of depreciating the value of the land. . . ." [23] In these cases, the fact that the misrepresentations affected only value was in no way controlling in the courts' final determination.

In New York there seems to be a tendency to more loosely construe the action for disparagement of product. In *Al Raschid v. News Syndicate Co.,*[24] the plaintiff sued for malicious prosecution. The defendant had uttered false statements which resulted in the institution of deportation proceedings against the plaintiff. No recovery was allowed because the plaintiff failed to make out a cause of action. The court, however, considered the doctrine expressed in *Ratcliffe v. Evans,*[25] a leading case in the development of disparagement actions, as offering a possible remedy for the wrong committed.[26] Similarly, in *Advance Music Corp. v. American Tobacco Co.,*[27] the plaintiff alleged that he was injured by the defendants' intentional failure to include his songs in a rendition of the ten most popular tunes of the week. The plaintiff failed to recover because of his inability to prove

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[17] See Peck v. Tribune Co., 214 U.S. 185 (1909); 2 CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS § 43.2d (2d ed. 1950).

[18] See 2 CALLMANN, *op. cit. supra* note 17, § 43.2b.

[19] Paramount Pictures v. Leader Press, 106 F.2d 229, 231 (10th Cir. 1939) (dictum); see RESTATEMENT, TORTS §§ 626, 629, comment *f* (1938).

[20] 3 Bing. N.C. 371, 132 Eng. Rep. 453 (C.P. 1836).

[21] *Id.* at 377, 132 Eng. Rep. at 456.

[22] See Manitoba Free Press Co. v. Nagy, 39 Can. Sup. Ct. 340 (1907).

[23] Paull v. Halferty, 63 Pa. 46, 50 (1869).

[24] 265 N.Y. 1, 191 N.E. 713 (1934).

[25] [1892] 2 Q.B. 524 (C.A.). "That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law." *Id.* at 527.

[26] See Al Raschid v. News Syndicate Co., *supra* note 24 at 4, 191 N.E. at 714; 14 B.U.L. REV. 856 (1934).

[27] 268 App. Div. 707, 53 N.Y.S.2d 377 (1st Dep't 1945), *rev'd on other grounds,* 296 N.Y. 79, 70 N.E.2d 401 (1946).

special damages. Had the opposite been true, there is little doubt that he would have recovered on the theory of disparagement.[28] The significance of the latter case lies in the fact that it was the omission of a statement, rather than a publication, that caused the injury.

The instant case denies a cause of action on the basis of the nature of the false statement. In concluding that misrepresentations solely of value will not support a disparagement action, the Court seems to have departed from the more liberal construction placed on the action in the *Al Raschid* and *Advance Music* cases. This determination, coupled with the difficulty of proving special damages, greatly limits the availability of the remedy. Since equity will not enjoin such defamations,[29] the adequacy of judicial protection becomes highly questionable.[30] The common-law system of writs could not have more efficiently produced a *damnum absque injuria.*

The action for disparagement of product is concerned with the effect of a false statement upon the public estimation of a product. In an age when the buying habits of the public are controlled by labels, and the price they reflect, rather than by the inherent quality of goods, it seems unrealistic to indulge in refinements such as found in the instant case. It is submitted that if a misrepresentation tends to lessen the estimation of a good in the eyes of a reasonable man, recovery should be allowed. The injurious effect of the statement, rather than its nature, should be controlling.

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[28] See 45 COLUM. L. REV. 473 (1945); 14 FORDHAM L. REV. 114 (1945).
[29] See Marlin Fire Arms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902).
[30] See Note, *Equity and the Disparagement of Business,* 24 ST. JOHN'S L. REV. 269 (1950).