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Torts--Intentional Infliction of Temporal Damages Is Cause of Action--Requires Legal Justification by Defendants (Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79 (1946))

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had a right to rely on the contractor's warning his men of the dangerous nature of the compound, but if the shipowner knew that the men had actually not been told, or if the evidence established facts which would have led a reasonable man to inquire, there was nevertheless then a concurrent duty on the shipowner to advise contractor's workers. Here, then, even though the duty was based substantially on the doctrine of a supplier of dangerous chattels,[12] the duty was nevertheless made contingent upon knowledge that the contractor had not himself taken proper precautions. In the present case the court did not go into the question of whether or not the shipowner knew that the men had not been warned.

It may be that the doctrine of *Seas Shipping Co. v. Sieracki*[13] could be extended to cover this situation. There it was held that longshoremen are seamen in the sense that a shipowner owes them the duty of furnishing a seaworthy ship. "Where there is a failure in the discharge of the obligation of seaworthiness, liability follows regardless of negligence," [14] so that this is actually a form of liability without fault. This doctrine is novel and has not been interpreted to any great extent as yet. It may be the courts will construe the duty upon shipowners towards stevedores to be an absolute duty regardless of any concurrent duty or knowledge in other connected parties. On the other hand, one of the reasons offered by the court for adopting this view was that the contractor in that case had neither the right nor opportunity to discover or remove the cause of peril.

A. G. K.

TORTS—INTENTIONAL INFLICTION OF TEMPORAL DAMAGES IS CAUSE OF ACTION — REQUIRES LEGAL JUSTIFICATION BY DEFENDANTS.—The Advance Music Corporation is engaged in the business of publishing musical compositions. Deriving its income from sales of sheet music to the general public, music jobbers, motion picture studios, etc., it advertises extensively to promote the popularity of its songs. Sheet music is handled on a consignment basis by jobbers and premature return means severe loss of business to the plaintiff. The defendants, the American Tobacco Company and an advertising concern, are creators of a weekly commercial radio program with a widespread audience, which program is known as "Your Hit Parade" and which purports to present the ten most popular songs of the week. The defendants also circulate weekly lists of these songs

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[12] MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916).
[13] 328 U. S. 85, 90 L. ed. 809 (1946).
[14] Fodera v. Booth Am. Shipping Corp., 159 F. (2d) 795 (C. C. A. 2d 1947).

among dealers, jobbers and the general public calculated to cause them to rely on their representations that these songs are the best ten of the week. Plaintiff alleges that defendants' choice is not the result of an accurate nationwide survey as claimed by them, but is capricious and willful, and it alleges further that plaintiff's songs are not given their proper place on the program, all of which has caused serious damage to the plaintiff's business.

Advance Music Corporation alleged three separate causes of action against the defendants. The first cause of action was instituted to obtain an injunction against the continuance of the radio program. The second cause of action was for damages for injuries to plaintiff's business which resulted from the intentional and wanton conduct of the defendants in making fraudulent, false, and malicious statements which constituted a deception of the public. The third cause of action demanded damages as a result of the negligent misrepresentations of the defendants. The original complaint had been dismissed by the Supreme Court as not stating a sufficient cause of action. The opinion caused a dismissal of a federal court case,[1] which stated the same complaint, on the basis of *Erie Railroad Co. v. Tompkins*.[2] An amended complaint stating the aforesaid three causes of action was thereupon submitted to the Supreme Court and was upheld as sufficient in that it stated intent to injure the plaintiff; that it was clear that the defendants' acts were likely to and had caused actual damage to the plaintiff, and that although plaintiff and defendants were not in competition, they were competing with each other in creating the belief that certain particular songs are popular.[3] Defendants appealed to the Appellate Division, which reversed the Supreme Court decision and dismissed the amended complaint.[4] The court stated that the first cause of action could not be upheld since it is a well-settled rule in New York that in the interests of freedom of speech, equity will not intervene to enjoin the disparagement of property.[5] The second cause of action was also insufficient because the injury was to the general public and plaintiff could not sue on its behalf, and plaintiff itself was not deceived nor had it taken action in reliance upon the allegedly false representations made by the defendants. The third cause of action for negligent misrepresentations gave no basis for relief, because of the failure to allege and prove that the defendants were under a duty to the plaintiff to act with care and that the plaintiff had acted upon the statements to its

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[1] Remnick Music Corp. v. American Tobacco Co., 57 F. Supp. 475 (S. D. N. Y. 1945).

[2] 304 U. S. 64, 82 L. ed. 1188 (1938).

[3] Advance Music Corp. v. American Tobacco Co., 183 Misc. 855, 51 N. Y. S. (2d) 692 (Sup. Ct. 1942).

[4] Advance Music Corp. v. American Tobacco Co., 268 App. Div. 707, 53 N. Y. S. (2d) 337 (1st Dep't 1945).

[5] Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163 (1902).

damage.[6] The Appellate Division also pointed out that failure to prove special damages in the second and third causes of action would be fatal to the maintenance of the actions.[7] Plaintiff thereupon appealed to the Court of Appeals. *Held,* judgment of Appellate Division reversed and order of Special Term affirmed. *Advance Music Corp. v. American Tobacco Co.,* 296 N. Y. 79, 70 N. E. (2d) 401 (1946).

The Court of Appeals sustained the second cause of action on the ground that, *prima facie,* the intentional infliction of temporal damages is a cause of action which requires legal justification if the defendants are to escape. The court did not decide whether the complaint stated any other separate cause of action. Since it is a reviewing court, it was not necessary for it to determine the nature of the judgment to which the plaintiff might be entitled.[8]

The legal concept that an action will lie for knowingly and intentionally and without reasonable justification injuring another's business is not a new one. It appears in *Skinner & Co. v. Shew & Co.,*[9] a patent infringement case, which pointed out that at common law there was a cause of action and damages would be recoverable whenever a person did damage to another willfully without just cause or excuse. This class of action included trade libel, which applies to the main case. The English court went further than the court in the instant case in declaring that even if actual damage had not yet occurred, but was likely to do so, chancery would prevent the wrongful action by injunction. The rule that willful harm is actionable if the defendant does not justify his conduct, as a matter of substantive law, no matter what the form of pleading, was adopted by the United States Supreme Court in a conspiracy case[10] and was made New York law in two subsequent cases. Both New York cases are labor cases which hold that the immunity of labor unions from legal responsibility does not include harm done to another or to the public unless the acts bear a reasonable relation to the lawful benefits which the unions are seeking.[11]

By accepting this rather bold and broad proposition, the court has come away from the theory that there is no cause of action except under some accepted heading of tort liability. The law of torts is not static. The novelty of an action for which no direct precedent

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[6] Ultramares Corp. v. Touche, 255 N. Y. 170, 174 N. E. 441 (1931).

[7] Reporters' Assn. v. Sun Printing & Pub. Assn., 186 N. Y. 437, 79 N. E. 710 (1906).

[8] N. Y. RULES OF CIV. PRAC., 106.

[9] 1 Ch. 413 (1893).

[10] Aikens v. State of Wisconsin, 195 U. S. 194, 49 L. ed. 154 (1904).

[11] Opera on Tour, Inc. v. Weber, 285 N. Y. 348, 34 N. E. (2d) 349 (1941); American Guild of Musical Artists v. Petrillo, 286 N. Y. 226, 36 N. E. (2d) 123 (1941).

exists will not operate as a bar to legal remedy.[12] Every form of action when brought for the first time has no precedent to support it, but this lack of precedent does not exclude a remedy for the wrong complained of since the court will adapt its machinery to sustain recovery on legal principles clearly applicable to the new state of facts.[13]

That the defendants must show greater legal interest in themselves in order to avoid liability for intentional damage to another's business has been shown in several New York cases. One of these concerned competing businesses and it was held that since the defendant had a legal right to engage in disadvantageous competition, his acts were not actionable even if malicious motives were also shown.[14] If the acts of the defendant are no more than an honest defense of its own business, litigation can not be maintained.[15] Other cases extended this theory beyond competing businesses in stating that labor unions interfering with another's business must prove lawful labor objectives, or else discontinue their injurious activities.[16]

The court uses the term "temporal damages" which has its origin in the personal slander cases of the early common law courts, which did not want to encroach on the jurisdiction of the church over defamation. Therefore the common law courts would not uphold an action unless "temporal" or pecuniary damages, as opposed to spiritual damage, were proven. Historically, the requirement of special damages in trade libel cases stems from the same factor which made their proof essential in the aforementioned personal slander cases.[17] Up to the present time, the rule in New York with respect to property disparagement or trade libel cases has been that special damages must be proven, that is, that specific loss of sales and customers be enumerated so that the defendant might be enabled to meet the charge.[18] This may have been a workable rule centuries ago when businesses were small and local and it was comparatively simple to ascertain specific customers lost. In our modern economy, however, with its far-flung business structures, the rule is objectionable because of the apparent practical difficulties in setting forth actual customers and sales lost. The tendency in other jurisdictions has been that a general allegation of disparagement and consequent loss of business is enough to sustain a cause of action.[19] The court does

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[12] Kujek v. Goldman, 150 N. Y. 176, 44 N. E. 773 (1896).

[13] Keller v. Butler, 246 N. Y. 249, 158 N. E. 510 (1927).

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

[15] Langan v. First Trust & Deposit Co., 293 N. Y. 604, 59 N. E. (2d) 424 (1944).

[16] Opera on Tour, Inc. v. Weber, 285 N. Y. 348, 34 N. E. (2d) 349 (1941); American Guild of Musical Artists v. Petrillo, 286 N. Y. 226, 36 N. E. (2d) 123 (1941).

[17] Note, 41 ILL. L. REV. 662 (1947).

[18] Reporters' Assn. v. Sun Printing & Pub. Assn., 186 N. Y. 437, 79 N. E. 710 (1906).

[19] Black & Yates v. Mahogany Assn., 129 F. (2d) 226 (C. C. A. 3d 1942).

not discuss the measure of damages, but since it stated that the second cause of action was a good one, it can be implied that the failure to allege specific customers and sales lost is not a bar to recovery, actual damage having been shown by a general decline of business.

The court has made forward strides in providing a remedy for a just complaint which could be fitted into no particular tort heading. Instead of barring recovery and consigning this action to the ranks of *damnum absque injuria,* the court applied a broad legal principle to a new set of facts, giving legal redress where it was badly needed, and considering justice rather than the narrow interpretation of legal principles which have not grown with our economy.

H. P.

WILLS — CONDITIONS TENDING TO DISRUPTION OF DOMESTIC RELATIONS—PUBLIC POLICY.—The motion made by appellants, is to take testimony before trial as to the motive and purpose of the testatrix in Articles Seventh and Eighth of her will. The proceeding in which the trial is to be had and for which the examination is sought is for determination of the validity of said articles of the will.

Article Seventh creates a trust and gives the income for life to the testatrix's son and, upon his death, gives the principal to his widow and issue other than his then wife or issue of said wife, and provides that if there be no such widow or issue the principal is to be distributed among several charities. Article Eighth expresses the "purpose and will that under no circumstances shall any portion of my estate" be paid to the then wife of the testatrix's son or any issue of said wife.

Appellants, being the son and disinherited wife and issue, attack these provisions of the will as being against public policy in that testatrix's purpose was to induce the son to divorce his wife. Appellants state that the evidence they propose to elicit from the witnesses sought to be examined before trial will disclose such purpose on the part of testatrix. *Held,* denial of motion affirmed. The intention of the testatrix, whatever it may have been, is immaterial because the will does not tend to induce a divorce and is thus not contrary to public policy. The testimony sought is, therefore, inconsequential. Mr. Justice Callahan and Mr. Justice Glennon dissented on procedural grounds. *Matter of Rothchild's Will,* — App. Div. —, 66 N. Y. S. (2d) 573 (1st Dep't 1946).

A condition attached to a legacy, the evident purpose of which was to induce the legatee to secure a divorce, is void in contravention of good morals and public policy.[1] However, to offend public

[1] Cruger v. Phelps, 21 Misc. 265, 47 N. Y. Supp. 61 (Sup. Ct. 1897).