Equitable Relief from Negligent Statements and Misrepresentations

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emergency, to extend its immunity to property in which it has an undivided equitable interest. That is, property in which the title vests in a third party but which is partly paid for by the Government, as in the case of 60 Payment Facility Contracts previously discussed.

Thus, it is interesting to observe that the field of tax avoidance is one in which the Federal Government plays a dual role; as tax collector it seeks to extend the scope of its taxes and block all possible loopholes; as a participant in commercial and industrial activities, it musters every legal expedient in an effort to avoid taxes.

RAPHAEL J. MUSICUS.

EQUITABLE RELIEF FROM NEGLIGENT STATEMENTS AND MISREPRESENTATIONS

The traditional doctrine of the law of torts requires one who undertakes to do a thing, even though gratuitously, to act with care if he acts at all. However, this rule is greatly modified when the act is in the form of the spoken or written word rather than in the form of a physical act. In such case the principle has been that "negligent words are not actionable unless they are uttered directly, with knowledge or notice that they will be acted on, to one to whom the speaker is bound by some relation of duty, arising out of public calling, contract or otherwise, to act with care if he acts at all." 1 Liability for misrepresentation is similarly restricted to instances involving a breach of duty.

While it is true that an action will lie for slander or libel, there is a broad field between the truth in a particular case and libel or slander. Many have entered this field, or found themselves in it, only to discover that *damnum absque injuria* is more than a Latin phrase. The fact that the interests of the public are injured by misrepresentations or negligent statements or that the untruth results in a public nuisance appears to be of no concern to a court of equity.

In 1830 the courts of this state set down, and have since quite rigidly followed, the rule that "when the words are spoken, not of the trader or manufacturer, but of the quality of the articles he makes or deals in, to render them actionable *per se*, they must import that the plaintiff is guilty of deceit or malpractice in making or vending them." 2 In the absence of such a libel or slander impeaching the integrity, knowledge, skill, diligence or credit of the plaintiff, the words are not actionable unless special damage be alleged and proved,

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2 Tobias v. Harland, 4 Wend. 537 (N. Y. 1830).
and a "general allegation of loss of customers is not sufficient to enable the plaintiff to show a particular injury." 3

Fifty-five years ago the United States District Court, Eastern District of Pennsylvania, had before it a request by a manufacturer of cement in Rosendale, New York, to enjoin a manufacturer in Lehigh, Pennsylvania, from designating its cement as "Rosendale Cement", a name that had been used by manufacturers in Rosendale for many years and had become a by-word for a particular type of product. 4 Damages for the business diverted through the false representation were also sought.

From the point of natural justice the complaint was a valid one and any fair-minded business man would not have hesitated to grant the relief sought. The established rules of law, however, prevented the relief, the court stating: "No man can maintain a private action for a public nuisance, though he is injured by it, unless his injury is of such a special character, different from that which is sustained by the public generally. This is a sound rule of the common law. It is intended to prevent vexatious litigation. When an injury is a public one it should be prosecuted as a public wrong. So here the wrong, if there is one, is committed against the public. If it be said that the cement manufacturers of Rosendale are specially injured, because their trade is affected, it may be properly answered that they are all injured alike. It is a public injury as to them, just as it would be to all the dealers in linen for a man to sell as Irish linen fabrics that are not such. It is a damage to the complainants and the other cement manufacturers of Rosendale for the defendants to sell their cement as Rosendale cement, but, like many other causes of damage, in our judgment, it is that kind which the law calls damnum absque injuria." 5

Equity's claim that it stands ready to take jurisdiction when the remedy at law is inadequate has always been its forte. But, when having taken jurisdiction, equity decides that nothing can be done, although freely admitting that a wrong has been committed, the lawyer as well as the layman wonders where next to turn.

Although many have appeared at the bar of justice requesting relief from the misrepresentations or negligent statements of their neighbors or competitors, each is turned away with the explanation that the proof of special damages at law will grant the relief sought; equity, therefore, will not intervene. To prove the special damages with the particularity required is conceded to be a hopeless if not impossible task. But there we stood, and still we stand.

An interesting case arose some twelve years later in the courts of New York. 6 A magazine publisher whose advertising sales were

3 Ibid.
5 Ibid.
suffering from a decreasing circulation, seeking to regain the advertising of a nationally known manufacturer of fine rifles whose displays in the magazine had been cancelled, published damaging articles apparently written by real correspondents, but in fact written by the publisher himself. At first the articles purported to explain why the advertising had been discontinued, but in later issues progressed to a disparaging comparison of the manufacturer's article with those of competitors; a studied program was undertaken with the admitted purpose of inducing the public to buy another manufacturer's product or to coerce the former advertiser to continue its patronage.

The manufacturer appealed to equity for an injunction to restrain the publisher from continuing its malicious course. After a review of the facts the court admitted quite frankly that "the natural inclination of all fair-minded men, charged with the responsibility of administering the law, would be to relieve the plaintiff from the annoyance to which it is subjected from wholly unworthy motives..." But did the court follow its "natural inclination"? Quite the opposite; the court without further hesitation went right on to say: "But equity does not undertake to relieve from all the annoyances caused by those who are inconsiderate of the feelings and business interests of others. On the contrary, it is a general rule, which has some exceptions, that it will not undertake to interfere where a party has an adequate remedy at law and when it does not interfere it is guided by principles of equity, which during the long course of its administration have become established." The "adequate remedy at law" is, of course, proof of special damages. All that was required was that the Marlin Arms Company furnish a court and jury with the names and addresses of those who would have purchased Marlin rifles, but who were dissuaded from so doing because of the false articles printed in defendant's magazine and then prove the resultant loss! Needless to say, there is no record of Marlin's having so much as attempted to avail itself of this "adequate remedy at law".

Efforts have been made to break away from tradition and recognize the wrong done in such instances by granting adequate relief, but thus far the efforts have been unavailing. Forty years ago, Judge Gray of the New York Court of Appeals voiced his objections to the attitude of the courts in failing to grant relief when natural justice demanded such relief. In an opinion strongly dissenting from the court's failure to grant an injunction in a suit involving the right of privacy, he stated: "In the social evolution, with the march of the arts and sciences and in the resultant effects upon organized society, it is quite intelligible that new conditions must arise in personal relations, which the rules of the common law, cast in the rigid mould of an earlier social status, were not designed to meet. It would be a reproach to equitable jurisprudence, if equity were powerless to

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7 Id. at 389, 64 N. E. at 164.
8 Ibid.

extend the application of the principles of common law, or of natural justice, in remedying a wrong, which, in the progress of civilization, has been made possible as the result of new social, or commercial conditions." But this objection has gone unheeded.

While courts of law have seen fit to award damages for negligent statements when a close privity between the parties has been established, generally speaking, in the absence of libel or slander, words are not actionable without proof of special damage. The legal principle is tersely reiterated in *Jaillet v. Cashman.* The court, while sympathizing with an aggrieved plaintiff who sought to prevent a competitor from making false representations to the plaintiff's customers concerning the plaintiff's product, distinguished between business ethics and law: "There is moral obligation upon everyone to say nothing that is not true, but the law does not attempt to impose liability for a violation of that duty unless it constitutes a breach of contract obligation or trust, or amounts to a deceit, libel or slander. Theoretically, a different rule might be logically adopted, but as a matter of practical expediency such a doctrine seems absolutely necessary."

In most instances the courts have recognized the public interests involved, and the losses caused to members of the community through negligent representations, but in each such instance the courts have shrugged their shoulders and have held that the right to relief rests in the public or the state and not in the aggrieved plaintiff. "We heartily condemn such business methods, but we find no grounds in precedent or reason for extending the jurisdiction so far as to enjoin them." Thus, as applied to such cases, *stare decisis* leads to legal stability and commercial instability. No adequate restraining force exists to prevent disparagement of property in New York, and the remedy at law, requiring allegation and proof of special damages leaves the victim helpless. "It is settled by authority that a libel on a thing is not actionable unless the owner of the thing alleges and proves that he has sustained pecuniary loss as a necessary consequence of the publication." "Words relating merely to the quality of the articles made, produced, furnished or sold by a person though false and malicious, are not actionable without special damage."

As heretofore indicated, the courts will award damages to one to

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whom a duty is owed to compensate for losses sustained through reliance on words negligently written or spoken. But the rule is strictly applied and the duty arising out of public calling, contract, or otherwise must be clearly demonstrated. Great reluctance to extend the rule exists and even though the misrepresentations or negligent statements do great harm to one or many, unless a privity exists between the parties, or libel or slander are involved, the courts rely on the inaction of those jurists who preceded them.

The strictness of the rule and the reluctance to extend it is amply demonstrated in Ultramarines v. Touche.\textsuperscript{15} Public accountants employed by a rubber importer had certified a balance sheet which presented a picture of thriving prosperity, whereas the bare facts proved a condition of hopeless insolvency. Negligence on the part of the accountants in failing to ascertain the facts was irrefutable. Thirty-two copies of the balance sheet were serially numbered and furnished to the importer. The number of copies requested and the defendant's knowledge that the importer relied upon extensive credit to conduct his business furnished ample notice to the defendant that, in all probability, the balance sheet would be used in obtaining credit. The plaintiffs, on the strength of the certified report, advanced substantial sums to the importer. When the inevitable bankruptcy occurred, the lender sued the accountants for the loss occasioned by their negligence. The court held the accountants harmless because of the lack of privity between the litigants. The court, in so doing, greatly restricted the scope of "public calling" by declaring that "... public accountants are public only in the sense that their services are offered to anyone who chooses to employ them. This is far from saying that those who do not employ them are in the same position as those who do."

In Nann v. Raimist,\textsuperscript{16} an action between two rival labor unions, in which the one sought to enjoin the other from issuing false and misleading statements concerning its rival, Judge Cardozo says: "Equity does not intervene to restrain the publication of words on a mere showing of their falsity (Marlin Fire Arms Co. v. Shields, 171 N. Y. 384). It intervenes in those cases where restraint becomes essential to the preservation of a business or other property interests threatened with impairment by illegal combinations or by other tortious acts, the publication of the words being merely an instrument and an incident (citing cases)."

The reason advanced is that "Courts have enough to do in restraining physical disorder without busying themselves with logomachies in which the embattled words are the expression of the opinion of the writer or the speaker."\textsuperscript{17}

Clark, in his Principles of Equity says of disparagement of property: "There is no plausible reason why equity should not give

\textsuperscript{15}255 N. Y. 170, 174 N. E. 441 (1931).
\textsuperscript{17}Id. at 318, 174 N. E. at 694.
injunctive relief since only rights of property and not of personality are involved. The strong tendency in this country, however, has been to refuse relief... and assigns as the reason therefor that it is “due largely to confusing the subject with disparagement of character.”

Others have advanced as the reason for the rule the constitutional guaranty of freedom of speech and press which in terms provides that “Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.” The only limitations to this freedom are the law of slander and libel.

Whichever reason the reader may favor, the law of New York remains fixed that equity will not restrain disparagement of property. Quite recently the established principles were put to a new test under conditions which were impossible to foresee when those principles were first established. A music publisher sought to enjoin the American Tobacco Company from continuing its weekly radio program “Your Hit Parade” for failing to give credit where credit was due.

The publisher’s claim of injury arose from allegedly unfair opinions expressed by the tobacco company in its nation-wide radio program in which it was represented that the songs performed constituted the nine or ten most popular songs of the week selected by an extensive and accurate survey. The plaintiff further claimed that the songs were chosen arbitrarily and without regard to any survey, and that songs published by the plaintiff, though entitled by all proper standards to be listed among the nation’s ten most popular songs, were, nevertheless, omitted from “Your Hit Parade.” The radio program, because of its appearance of authenticity and because of its widespread public reception, had become in the minds of the public, music jobbers and dealers, motion picture studios, etc., a criterion for determining the most popular songs in the nation.

The representations of the defendant, the plaintiff asserted, were of a nature to cause and in fact had caused damage to the plaintiff.

The plaintiff attacked from every angle; an injunction to prevent the continuance of the program was demanded, fraud on the public to the plaintiff’s damage was claimed, and damages were sought for the negligent misrepresentations.

The Appellate Division (First Department) found no difficulty in reversing the trial court and dismissing the complaint, answering the allegations by parading the authorities.

The injunction was refused because “in this state it is well settled that equity will not intervene to enjoin a disparagement of property.”

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18 CLARK, PRINCIPLES OF EQUITY (1919) § 238.
The alleged deception of the public gave no basis for relief because "when an injury is committed against the public, that is not a matter for complaint by plaintiff." The action for negligent misrepresentations fell because of 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 negligent statements to his damage.

The court further demonstrated that relief is available only through proof of special damages. Following the authorities developed long before the discovery of the radio, the court went on to say: "Moreover, with respect to the second and third causes of action, there are absent appropriate statements of special damage. In the most general terms, plaintiff has pleaded that defendant's acts and representations have caused it to lose sales and the opportunities to develop its business. A disparagement may cause injury to plaintiff and yet not be actionable. Both as a matter of pleading and proof there must be a definite showing of specific loss of trade, that is, loss of specific customers or sales." The plaintiff had a legitimate complaint, but not a legal complaint, a new member had joined the ranks in the field of damnnum absque injuria.

Thirty years ago Dean Pound expressed with optimism a belief that a way would be found to grant relief in cases which fell short of the legal concept of unfair competition but which nevertheless resulted in business losses from negligent statements or misrepresentations. "In substance the traditional doctrine puts anyone's business at the mercy of any insolvent malicious defamer who has sufficient imagination to lay out a skillful campaign of extortion. So long as denial of relief in such cases rests on no stronger basis than authority our courts are sure to find a way out." 21 Perhaps thirty years is too soon in which to expect the courts to find a way, but it is hardly too soon to restate the optimistic hope; too many have never heard of the golden rule.

DONAL C. NOONAN.

NEWS-GATHERING AGENCIES AND FREEDOM OF THE PRESS

The Associated Press case 1 now awaiting final decision by the United States Supreme Court is a landmark in the history of freedom of the press. 2 The issue awaiting final adjudication has been

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21 Pound, Equitable Relief Against Defamation and Injuries to Personality (1916) 29 Harv. L. Rev. 640, 668.
