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Torts—Sufficiency of Libel Complaint

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off."[37] This is not to say that the acts complained of in the instant case should be condoned. The question, rather, is the *à propos* remedy for protection. Here, for example, Electrolux could have found another outlet for its trade-ins. They could also have brought the situation to the attention of the Attorney General for a possible application of Section 396 of the General Business Law. An application to the Federal Trade Commission might have had a salutary effect. Perhaps none of these would be effective, but nevertheless, as was said by a leading scholar in this area,

> The real need for careful thought arises when a court is asked to enjoin a kind of trade injury, which although novel is bound to arise again and again. Then, if the court goes ahead, it will be undertaking the regulation of competition, and not just stopping objectionable acts by this single defendant. The court will be beginning a permanent job of business management . . . That is what will happen if they consent to enjoin trade practices now unfamiliar to them like false advertising or the piracy of dress designs. So, before the courts start on such a big job, they want to be sure that it can be handled well in private litigation. Moral indignation against the defendant and his "dirty tricks" does not suffice to make the relief wise.[38]

Inasmuch as the instant decision has been handed down, what will be its impact on future cases? It is submitted that it should receive the same treatment accorded the case on which the Court so heavily relies, *i.e. International News Service.*[39] It should be limited in effect to substantially the same fact situation, leaving to the legislature any further regulation of "unfair competition."

SUFFICIENCY OF LIBEL COMPLAINT

A recent case, *Tracy v. Newsday, Inc.*,[40] presented the question of the sufficiency of a libel complaint. The defendant had published in its newspaper an article concerning the failure of an alleged sex offender, Jerome, to appear in court for trial. The article relating the events in the case contained a reference to the effect that plaintiff, who was an investigator for Jerome's attorney, had helped Jerome carry his bags from his hotel four days before the trial, and also that plaintiff was the last person to hear from Jerome who had called him three days before the trial to cancel an appointment to go with plaintiff to the trial. By way of *innuendo* plaintiff claimed that the article identified him as having helped Jerome jump bail and escape the consequences of his criminal action, that the statements are false, and that as a result he had been held up to public contempt, disgrace and ridicule and had been irreparably injured in his calling as a police inspector and criminologist. The Supreme Court

37. Chafee, *op. cit. supra* note 1; *Pound, Equitable Relief Against Defamation and Injuries to Personality,* 29 HARV. L. REV. 640 (1916); Nims, *Unfair Competition by False Statements or Disparagement,* 19 CORNELL L.Q. 63 (1933); see also Chief Justice Hughes in A.L.A. Schecter Poultry Corp. v. United States., 495, 531-2 (1935).

38. Chafee, *op. cit. supra* note 1.

39. *Supra* note 11.

40. 5 N.Y.2d 134, 182 N.Y.S.2d 1 (1959).

dismissed the complaint;[41] the Appellate Division reversed;[42] and the Court of Appeals in a four-three decision reversed the Appellate Division and held that the complaint did not state a cause of action.[43]

In order for a publication to be actionable without proof of special damages it must be libelous *per se, i.e.* it must on its face subject the plaintiff to public aversion, contempt, hatred or disgrace, cause the public to form unsavory opinion of plaintiff, or damage him in his trade or business.[44] *Innuendo* pleaded in a libel complaint is merely for the purpose of explaining the defamatory meaning which the plaintiff would give to the publication; it cannot expand, extend or change a publication so as to give it a defamatory meaning.[45] In this case the Court split on the question of whether the publication was capable of an actionable meaning. It has been generally held that it is for the court and not the jury to decide whether an admittedly published statement is capable of a defamatory meaning.[46] If the court decides that the publication is capable of a defamatory meaning and a non-defamatory meaning, it is then for the jury to decide which meaning the publication actually imparted and in addition whether the publication related to the plaintiff.[47]

The majority in the *Tracy* case held that the publication in question was incapable of any defamatory meaning. The dissenting minority on the other hand, felt that it might be construed as defamatory and for that reason the issue should have been submitted to the jury. It has been said of the judicial function in this area—"A court, it is fundamental, should never take from a jury doubtful questions of fact, but it is equally basic that a court shirks its duty if it creates an issue where none exists."[48] It does not seem that a publication such as this, which on its face tends to rebutt the libelous meaning urged in the *innuendo,* can be said to be libelous *per se.* The majority opinion reached a wise result holding it was not, and thereby, denying plaintiff recovery unless he could prove special damages.

MUNICIPAL LIABILITY FOR FAILURE TO PROVIDE POLICE PROTECTION

On an appeal, testing the sufficiency of the complaint, a holding by the

41. — Misc. —, 160 N.Y.S.2d 152 (1957).

42. 5 A.D.2d 865, 171 N.Y.S. 2d 717 (1958).

43. Tracy v. Newsday, Inc., *supra* note 40.

44. Katopolis v. Brooklyn Spectator, Inc., 287 N.Y. 17, 38 N.E.2d 112 (1941); Nichols v. Item Publishers, 309 N.Y. 596, 132 N.E.2d 860 (1956); Balabanoff v. Hearst Consolidated Publications, Inc., 294 N.Y. 351, 62 N.E.2d 599 (1945); Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (1947).

45. Fray v. Bennett, 5 Sandf. 65 (1851) *aff'd* 6 N.Y. 209 (1852); Fleishmann v. Bennett, 87 N.Y. 231 (1881); O'Connell v. The Press Publishing Co., 214 N.Y. 352, 108 N.E.2d 556 (1915); Hayes v. American Defense Society, 252 N.Y. 266, 169 N.E. 380 (1929).

46. Moore v. Francis, 121 N.Y. 199, 23 N.E. 1127 (1890); O'Connell v. The Press Publishing Co., *supra* note 45.

47. Sanderson v. Caldwell, 45 N.Y. 398 (1871); First National Bank v. Winters, 225 N.Y. 47, 121 N.E. 459 (1918); Julian v. American Business Consultants, 2 N.Y.2d 1, 155 N.Y.S.2d 1 (1956).

48. Crane v. N.Y. World Telegram Corp., 308 N.Y. 470, 479-480, 126 N.E.2d 753, 759 (1955).