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## Prima Facie Tort: Is Actual Malice Necessary?

Henrik H. Hansen

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## RECENT DECISIONS

### *Prima Facie Tort: Is Actual Malice Necessary?*

Plaintiff in *Marcus v. Textron*,<sup>1</sup> a tort action, alleged that defendant breached its contract with plaintiff solely to injure plaintiff. The court granted defendant's motion to dismiss for failure to allege special damage, and indicated that the prima facie tort action "is not a substitute for traditional tort or contract actions,"<sup>2</sup> that malevolent purpose is a necessary ingredient of the prima facie tort action,<sup>3</sup> and that "[m]ixed motives of commercial gain and personal antagonism are not sufficient" to establish a cause of action "even though the commercial gain is sought by means that are questionable morally or ethically."<sup>4</sup>

The prima facie tort doctrine arose out of dissatisfaction with the "pigeon-hole" classification of intentional torts.<sup>5</sup> Justice Holmes defined the action in what is now a classic statement:

" . . . prima facie, the intentional infliction of temporal damages is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."<sup>6</sup>

While the prima facie tort doctrine is of recent development,<sup>7</sup> the existing prima facie tort decisions cast doubt on the general validity of the conclusions set forth in the *Marcus* case.<sup>8</sup> That these conclusions are doubtful will be demonstrated by

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1. 177 N.Y.S.2d 964 (Sup.Ct. 1958).

2. *Id.* at 965.

3. *Id.* at 966: "It is difficult to plead a prima facie tort except by the conclusory statement that the act or acts were *motivated by malice . . .*"

4. The court cites *Benton v. Kennedy-Van Saun Mfg. & Eng. Corp.*, 2 App. Div.2d 27, 1952 N.Y.S.2d 955 (1956), wherein defendant's desire for commercial gain was held to justify his act. There the court said:

"Defendant's self-interest negatives malice, even though the means employed might be of questionable morality and ethical validity. Competition as such, no matter how vigorous or even ruthless, is not a tort of common law." (152 N.Y.S.2d 955, 958).

Compare the foregoing statement with the disposition in the *Schisgall* case, *infra* note 13, and the *Langan* case, *infra* note 18. See also *infra* note 19.

5. Halpern, *Intentional Torts and the Restatement*, 7 Buffalo L. Rev. 1 (1957).

6. *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904). Note that the intent required is the specific intent to harm. *Ruza v. Ruza*, 286 App. Div. 767, 769, 146 N.Y.S.2d 808, 811 (1st. Dep't 1955).

7. Pound, *Modern Trends in Tort Law*, 16 NACA L.J. 21, 28 (1955). The New York Court of Appeals formally adopted the prima facie tort doctrine in *Advance Music Corporation v. American Tobacco Co.*, 296 N.Y. 79, 70 N.E.2d 401 (1946).

8. The writer believes that the disposition of the case is sound, but challenges the conclusions set forth in the decision as faulty.

exploring the relation of "disinterested malevolence," that is, malevolent purpose,<sup>9</sup> to the required justification.

Representative<sup>10</sup> cases suggest, with respect to disinterested malevolence, the emergence of three different results, which, as will be shown, are dictated by competing public and private interests:

- (1) the act is not actionable though the actor is motivated solely by malevolence;
- (2) the act is actionable only if the actor is motivated solely by malevolence;
- (3) the act is actionable though the actor is not motivated by malevolence.

I. An act motivated solely by malevolence does not necessarily give rise to a cause of action. For example, conspiring solely for malevolent reasons to have plaintiff removed from his union position by preferring against him charges which are true was held justified in *Walsh v. Judge*.<sup>11</sup> And in *Brandt v. Winchell*,<sup>12</sup> where plaintiff alleged that defendant, solely for malevolent reasons, urged law enforcement officers to bring criminal proceedings against plaintiff, the act was also held justified. The public interest in the exposure by private persons of others reasonably suspected of criminal activity was held to outweigh the harm to plaintiff to such an extent as to garb defendant with civil immunity in both cases.

II. There are two kinds of situations in which an act becomes actionable only if committed out of disinterested malevolence:

- (1) a traditional tort action lies, but the defendant acts only for malevolent reasons;
- (2) the facts do not fit a traditional tort action and the act is generally not considered morally evil in the absence of a solely malevolent purpose.

An example of a case arising in the first situation is *Schisgall v. Fairchild*

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9. Malevolent purpose is more than the specific intent to harm. It is the reason or motive for the act. For example, one may intend to kill another person, but may not have any malevolent purpose, such as revenge, as in the commonly cited mercy killing situation.

10. For a more adequate list of prima facie tort cases see: Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 Cornell L.Q. 465 (1957); Halpern, *supra* note 8; Comment, 22 Fordham L. Rev. 185 (1953); Note, 32 St. John's L. Rev. 282 (1958).

11. 258 N.Y. 76, 179 N.E. 264 (1932).

12. 3 N.Y.2d 628, 170 N.Y.S.2d 828 (1958), noted in 8 Buffalo L. Rev. 181 (1958).

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*Publications*,<sup>13</sup> where defendant solely out of malevolence breached its contract to publish plaintiff's book after it was written. Defendant's act was held unjustified, and plaintiff's prima facie tort action allowed. In view of the *Schisgall* case the statement that "the prima facie tort action is not a substitute for traditional tort or contract actions," although literally true, appears too broad because it obscures the fact that where a traditional action lies, a prima facie tort action may also lie if the actor is motivated solely by malevolence.

An example of a case arising in the second situation, where the act is not generally considered morally "bad" in the absence of the actor's actual malicious purpose, is *Ledwith v. International Paper Co.*<sup>14</sup> There plaintiff incurred the enmity of defendant corporation's officers by discovering that they were doing certain unlawful acts. Consequently, defendant demoted and then discharged plaintiff. The court held defendant's conduct was unjustified because it was motivated solely by actual malice.

III. Actual malice never has been required in intentional tort actions. Nor is it surprising that the prima facie tort action does not always require actual malice, especially since actual malice is not in terms required by formulation of the prima facie tort doctrine. For example, in *Advance Music Corporation v. American Tobacco Co.*,<sup>15</sup> where plaintiff alleged that defendant sponsor of "Your Hit Parade" intentionally harmed plaintiff without justification by excluding from or misplacing on the "hit list" songs published by plaintiff, the court held that the complaint, which did not allege actual malice, stated a cause of action. In an action for inducement to terminate an at-will contract,<sup>16</sup> where defendant was motivated by self-interest, the court held that the confidential relationship between plaintiff and defendant precluded defendant from exercising what otherwise would be a privilege to induce plaintiff's employees to quit plaintiff and work for defendant. And where there was no showing that defendant entertained any malevolent purpose, defendant union's demand that plaintiff discharge its barmaids and hire male bartenders before plaintiff's employees could join defendant's union was held arbitrary and therefore unjustified.<sup>17</sup> A defendant bank was held accountable when it foreclosed a property mortgage to force plaintiff corporation into bankruptcy and enable defendant to purchase plaintiff's property at a fraction of its market value, since creditors, although the defendant was motivated by the desire for commercial gain.<sup>18</sup>

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13. 207 Misc. 224, 137 N.Y.S.2d 312 (Sup. Ct. 1955).

14. 64 N.Y.S.2d 810 (Sup.Ct. 1946), *aff'd* 271 App. Div. 8644, 66 N.Y.S.2d 626 (1st Dep't 1946).

15. *Supra* note 7.

16. *A. S. Rampell, Inc. v. Hyster Co.*, 3 N.Y.2d 369, 165 N.Y.S.2d 475 (1957), noted in 7 Buffalo L. Rev. 178.

17. *Wilson v. Hacker*, 200 Misc. 124, 101 N.Y.S.2d 461 (Sup.Ct. 1950).

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

In conclusion, the cases indicate that an act solely malicious may not be wrongful if it incidentally advances a desirable public interest, but an act which does not appreciably do so may be wrongful if it is solely malicious. Where the social or legal consequences of the act are undesirable a malicious motive is not required, because merely the intent to harm may be sufficient to make the act wrongful. As the foregoing cases also indicate, an analysis of the prima facie tort theory should not proceed by a mechanical ordering of motives, because in a given fact situation the existence of a particular motive may be of little or no consequence.<sup>19</sup> Rather, it is important first to articulate the social or legal interests involved, and then determine the necessity for and the importance of a given motive with respect to those interests.

*Henrik H. Hansen*

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19. Defendant's desire for commercial gain is often a justifying motive. *Terry v. Dairymen's League*, 2 App. Div.2d 494, 157 N.Y.S.2d 71 (3rd Dep't 1956). Obviously, a malicious motive will *never* justify defendant's act. Consider the validity of the following statement in analyzing the prima facie tort doctrine: "Mixed motives of commercial gain and personal antagonism are not sufficient to establish a cause of action."