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## Torts—Prima Facie Tort

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## Damage to Property from Surface Water of Neighboring Lands

In *Kossoff v. Rathgeb-Walsh, Inc.*,<sup>4</sup> the issue arose whether an upper property owner has the right to make improvements on his property which, without leader pipes, drains, or ditches, have the effect of increasing the flow of surface water from the higher to the lower lot.

Under the civil law doctrine, as between the owners of higher and lower lots, the upper proprietor had an easement to have surface water flow naturally from his land onto the land of the lower proprietor. The lower proprietor had no right to obstruct its flow and cast it back on the land above.<sup>5</sup> However, in *Barkley v. Wilcox*,<sup>6</sup> decided in 1881, New York rejected the civil law approach. In that case, improvements to the defendant's land caused the surface water to back up on the plaintiff's higher premises where it seeped into the plaintiff's cellar and caused damage. The Court held that the lower land owner had a right to improve his property and was not subservient to his higher neighbor.

In the *Kossoff* case, the defendant made improvements on his upper lot which caused surface water to flow onto plaintiff's previously improved lower lot to the damage of the plaintiff. The plaintiff alleged that since he had improved his lot first, he had the right to insist that the defendant keep his land in its natural state, so that the surface water would percolate into the ground without flowing upon plaintiff's land. The adoption of such a rule, said the Court, would result in an inversion of the civil law doctrine, creating a dominant tenement in the lower proprietor and a servient estate in the upper.

In re-examining the *Barkley* case, the Court concluded that the discussion therein of the rights and liabilities of upper and lower owners did not signify that only the lower owner has the right to improve his land. Both the upper and lower land owners have equal rights to improve their properties, provided, of course, that the improvements are made in good faith to fit the property to some rational use to which it is adapted and that the water is not drained into the other property by means of pipes or ditches.<sup>7</sup> Such a doctrine is in keeping with our society's encouragement of expansion and improvement.

### Prima Facie Tort

Due to the modern trend of extending liability in tort actions where plaintiff suffers temporal damage as a result of defendant's intentional action, courts have been continually confronted with problems of increased litigation,

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4. *Kossoff v. Rathgeb-Walsh, Inc.*, 3 N.Y.2d 583, 170 N.Y.S.2d 789 (1958).

5. *People v. Stowell*, 139 C.A.2d 728, 294 P.2d 474 (1956).

6. 86 N.Y. 140 (1881).

7. *Kossoff v. Rathgeb-Walsh, Inc.*, *supra* note 4.

spurious claims, and immateriality of motive in tort actions.<sup>8</sup> Limits on such actions have been set in terms of justification for defendant's actions.<sup>9</sup> In *Brandt v. Winchell*,<sup>10</sup> the Court was faced with a problem of justification where the plaintiff alleged that defendant, by instigating baseless investigations and actions by public authorities, had caused him to be barred from any future solicitation of charitable contributions, to lose his private detective's license and pistol permit, and to be tried criminally.<sup>11</sup> Plaintiff's complaint also alleged false and malicious accusations of dishonesty and incompetency, but the Court, in reviewing an Appellate Division order directing dismissal of the complaint as failing to state a cause of action, summarily disposed of that allegation as sounding in slander or libel without the requisite allegation of the words spoken of the plaintiff.

Plaintiff presented his case on two distinct lines of argument, stating first that the action taken against him by the public authorities, which resulted in the alleged damages, was not justified. The Court answered this by pointing out that the plaintiff had not shown that the actions of the public authorities had been vacated or set aside and consequently the plaintiff was blocked in his contention by a presumption that these authorities had acted in good faith and on independent inquiry. Thus, the Court concluded, the results of their acts cannot be made the basis of claim by the plaintiff.

Plaintiff's second argument anticipated this reasoning by the Court, insisting that the defendant should nonetheless be liable in *prima facie* tort since no matter what others had done, and despite the fact that defendant's acts may have been otherwise lawful, they were made unlawful, and the grounds of a cause of action in *prima facie* tort, because they were done with the sole motive of injuring plaintiff. In deciding against plaintiff on this contention, the Court said that where an act is charged to be unlawful solely for its motive, the interest of the public, in addition to those of the plaintiff and the defendant, must be weighed, and where the benefit to the public outweighs the damage to the plaintiff, the defendant must be held free from civil liability.

For the greater part of the history of the common law, a man's motive could not be the basis of a cause of action in tort. The classic argument was that although a malicious motive might aggravate a recognized tort, if the facts complained of did not fit into one of the established tort categories, there could be

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8. PROSSER, LAW OF TORTS 18 (2d ed. 1955).

9. See *Advance Music Corp. v. American Tobacco Co.*, 296 N.Y. 79, 70 N.E.2d 401 (1946).

10. 3 N.Y.2d 628, 170 N.Y.S.2d 828 (1958).

11. Plaintiff was convicted in the criminal matter, the conviction was reversed on appeal, and an acquittal resulted on the second trial. The circumstances of probable cause were such as to make a cause of action for malicious prosecution tenuous.

no cause of action, for the categories of tort were closed.<sup>12</sup> By 1955, however, the doctrine of *prima facie* tort was generally accepted in the United States, with New York, in *Advance Music Corp. v. American Tobacco Co.*,<sup>13</sup> following the doctrine established by the United States Supreme Court in an opinion by Mr. Justice Holmes, announcing, ". . . *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, . . . requires a justification if the defendant is to escape."<sup>14</sup>

Under the *prima facie* tort theory, a motive, malicious, unmixed with any other, and exclusively directed to the injury and damage of the plaintiff, may make otherwise lawful conduct actionable.<sup>15</sup> But where defendant's conduct is ordinarily proper, such as reporting irregularity to the police, the burden would seem to be on the plaintiff to show a lack of justification.<sup>16</sup> It is an established presumption, which was relied upon in the present case, that everything done in pursuance of duty by a public official is properly and rightfully done until the contrary is shown.<sup>17</sup> Thus, it must necessarily be inferred that plaintiff's conduct was inimical to the interest of the public, and by holding the defendant immune from civil liability in exposing the plaintiff, despite his motive for so doing, the Court maintains a proper balance of the interests of society and that of the plaintiff. To allow plaintiff to recover here would eliminate an important part of the process of exposing those whose conduct does not conform to the standards set by society. By finding justification in this case, the Court has established a limitation on actions in *prima facie* tort which is not only logical but one with which few will quarrel.<sup>18</sup>

### Negligence — Prima Facie Case

In *Lubelfeld v. City of New York*,<sup>19</sup> the Court of Appeals unanimously reversed the lower court's dismissal of the plaintiff's complaint. The plaintiff cab-driver was shot by Long, an intoxicated police officer while the latter was off duty. The plaintiff testified that his cab had been stopped by three uniformed police officers who directed him to take Long wherever he wished to go and that the shooting occurred shortly thereafter. The plaintiff argued that the uniformed policemen knew that Long was intoxicated, that they deemed it necessary to en-

12. New York Court of Appeals quoting P. A. Landon, Editor of Pollack's 14th Edition, in *Advance Music Corp. v. American Tobacco Co.*, *supra* note 9.

13. *Supra* note 9.

14. *Aikens v. Wisconsin*, 195 U.S. 194 (1904). For an excellent review of the history of intentional torts, see, Halpern, *International Torts and the Restatement*, 7 BUFFALO L. REV. 7 (1957).

15. See *Beardsley v. Kilmer*, 236 N.Y. 80, 140 N.E. 203 (1923).

16. See Halpern, *supra* note 14 at 8.

17. In re *Whitman*, 225 N.Y. 1, 121 N.E. 479 (1918).

18. A good general discussion of the problem may be found in Beale, *Justification for Injury*, 41 HARV. L. REV. 553 (1928).

19. 4 N.Y.2d 455, 176 N.Y.S.2d 302 (1958).