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Torts—Prima Facie Tort

Dawn Girard

been greatly limited by exceptions[48] and has been the subject of adverse criticism by the great majority of text writers.[49] On these bases the Court confined its reasoning primarily to the consideration of the foreseeability test.

Proximate cause and foreseeability are not rigid mechanical rules; therefore, their application must be dependent upon the particular facts of each case.[50] It would seem foreseeable that a convict, even a trusty, in an effort to escape without means of rapid transportation to facilitate his flight, would force a passing motorist to transport him. An equally probable result under these circumstances would be that the escaping prisoner would use force, threats and duress to effect his purposes, as in the instant case. And it seems highly reasonable that injury to a passer-by would in some manner be effected.

Prima Facie Tort

In an action to recover damages for the malicious refusal of defendant union to allow its members to work for plaintiffs on the same terms on which they worked for other employers, the Court held,[51] the union's "interference" with plaintiff's business was not based solely on malicious motives, and so was justifiable concerted activity.

The jury in the first instance had found that the defendant's activity *was* solely malicious; the Appellate Division reversed, holding that the defendant had the absolute right to refuse to allow members to work for the plaintiffs "for any reason or for no reason at all";[52] a concurring opinion stated that malice was a relevant factor, but that in this case the evidence was insufficient to establish that defendant's activity was prompted *solely* by malice. The Court of Appeals affirmed the Appellate Division for essentially the same reasons as those in the Appellate Division concurring opinion.

Unions are exempt from the anti-trust laws and may engage in concerted activity against employers if their activities are directed toward a legal labor objective.[53] In this case, the defendant union apparently tried to harrass the plaintiff corporation because its controlling stockholder (also a plaintiff) had at

48. *Comstock v. Wilson*, 257 N. Y. 231, 177 N. E. 431 (1931); *Cohn v. Ansonia Realty Co.*, 162 App Div. 791, 148 N. Y. Supp. 39 (1st Dep't 1914); *Klumbach v. Silver Mount Cemetery Ass'n.*, 242 App. Div. 843, 275 N. Y. Supp. 180 (2d Dep't 1934).

49. Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260.

50. *Wheeler v. Horton*, 92 App. Div. 368, 86 N. Y. Supp. 1095 (1st Dep't 1904).

51. *Reinforce, Inc. v. Birney*, 308 N. Y. 164, 124 N. E. 2d 104 (1954).

52. 282 App. Div. 736, 737, 122 N. Y. S. 2d 369 (2d Dep't 1953).

53. *Nat'l Protective Ass'n. v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902); *Opera on Tour v. Weber*, 285 N. Y. 348, 34 N. E. 2d 349 (1941); N. Y. GENERAL BUSINESS LAW §340(3).

one time been a union representative, and subsequently had become a labor relations consultant for various employers, in which capacity he had often opposed the defendant's proposals. The Court nevertheless found that the purposes of the union were not solely malicious, though no other possible reasons for the action of the union were given by either the Court of Appeals or the Appellate Division, so no recovery for the intentional injury to plaintiffs' property was possible; i.e., there was justification for the union's action. The dissenters believed tha the jury's findings of fact as to motive should not be upset; the majority apparently believed that the jury's findings were completely unreasonable.

Defense to Libel Action

In *Crane v. Telegram Corp.*,[54] the plaintiff alleged that the defendant falsely published that he was "under indictment" and that this statement constituted a libel, for which he requested compensatory and punitive damages. Truth was pleaded as a complete and partial defense, in that the plaintiff was "indicted" in a moral or non-legal sense; various individuals had accused the plaintiff of certain crimes. The plaintiff challenged the legal sufficiency of the defenses under Rule 109 of the Rules of Civil Practice, and moved to strike them. Special Term granted the motion, which was reversed by the Appellate Division[55] but reinstated by the Court of Appeals. The Court unanimously held that the defense of truth of a charge different from that made in the publication is insufficient.

Truth may be a complete or partial defense to a libel action,[56] and must be pleaded and proved by the defendant.[57] In pleading justification the specific facts and circumstances constituting the alleged truth must be set forth; a mere allegation that the libellous matter is true is insufficient.[58] It is well established that to constitute a complete defense or justification, the truth must be co-extensive with the alleged defamatory words,[59] as construed in their ordinary and natural meaning.[60] A workable test is whether the libel as published would have a different effect on the mind of the reader from that of the pleaded truth.[61] A partial de-

54 308 N. Y. 470, 126 N. E. 2d 753 (1955).

55. 282 App. Div. 963, 126 N. Y. S. 2d 17 (2d Dep't 1953).

56. *Sydney v. MacFadden Newspaper Pub. Corp.*, 242 N. Y. 208, 151 N. E. 209 (1926), held that any matter written or printed is libelous "if it tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induces an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society."

57. *Bingham v. Gaynor*, 203 N. Y. 27, 96 N. E. 84 (1911); *Flickenstein v. Friedman*, 266 N. Y. 19, 193 N. E. 537 (1934).

58. *Wolf v. Wolf*, 198 Misc. 527, 101 N. Y. S. 2d 787 (1950); *Meyers v. Huschle Bros.*, 273 App. Div. 107, 75 N. Y. S. 2d 354 (1st Dep't 1947).

59. *White v. Barry*, 288 N. Y. 37, 41 N. E. 2d 448 (1942); *Flickenstein v. Friedman, supra*, note 57.

60. *Mencher v. Chesley*, 297 N. Y. 94, 75 N. E. 2d 257 (1947); *Cafferty v. Southern Tier Pub. Co.*, 226 N. Y. 87, 123 N. E. 76 (1919).

61. *White v. Barry, supra*, note 59.