Fordham Law Review

Volume 22 | Issue 2 Article 3

1953

Disinterested Malevolence as an Actionable Wrong

John G. Duport

Disinterested Malevolence as an Actionable Wrong

Cover Page Footnote
Member of the New York Bar.

COMMENT

DISINTERESTED MALEVOLENCE AS AN ACTIONABLE WRONG

JOHN G. DUPORT†

PART I

Disinterested malevolence, in its etymological sense, means an evil disposition towards another, free from self-interest, but in its legal sense it ". . . is supposed to mean that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another."[1] The initial objection to this theory of responsibility was that motives are not actionable because the standards of the law are external. To this, Mr. Justice Holmes, who first introduced that expression of tort liability into our law, replied: "That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen."[2]

This tort category is not to be confused with slander of title or malicious falsehood.[3] A known false statement not slanderous per se is an actionable wrong if it causes damage. "Such an action is not one of libel or slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title."[4] In either case, the slander or falsehood is *initially* wrong, but only actionable if damage results. Nor is the subject under discussion to be confounded with ". . . an actionable act whereby the estate of another is lessened other than by personal injury or breach of contract,"[5] because as appears from all of the cases cited under either of those sections,[5a] the "actionable act" had the indicia of a common law tort.

This paper concerns itself solely with the exercise of inherently *lawful acts* motivated by malice, which acts, because of the resulting damage, are converted into actionable wrongs requiring the actors to show justification if they are to escape liability. In that type of tort known as "the intentional infliction of temporal damage" and also under the shorter, hence, more convenient title of "disinterested malevolence," damage is also the *sine qua non* of the cause of action. In the ordinary tort the wrong is actionable regardless of whether damage results, and if no damage appears, plaintiff is still entitled to nominal damages.[6] In an action for the "intentional infliction of temporal

† Member of the New York Bar.

1. Beardsley v. Kilmer *et al.*, 236 N.Y. 80, 90, 140 N.E. 203, 206 (1923).

2. Aikens v. Wisconsin, 195 U.S. 194, 204 (1904).

3. Gale v. Ryan *et al.*, 263 App. Div. 76, 31 N.Y.S. 2d 732 (1st Dep't 1941). See also RESTATEMENT, TORTS § 873 (1939).

4. Raschid v. News Syndicate Co., 265 N.Y. 1, 4, 191 N.E. 713, 714 (1934).

5. N.Y. GEN. CONST. LAW § 25, formerly CODE OF CIV. PROC. § 3343(10).

5a. *Ibid.*

6. Northrop v. Hill, 57 N.Y. 351, 354 (1874); Berney v. Adriance, 157 App. Div. 628, 631, 142 N.Y. Supp. 748, 751 (1st Dep't 1913).

damage," the actionable wrong is not the act per se, as it may be a perfectly lawful act,[7] but rather it is the damage caused by the act. It is the damage caused and alleged which changes the lawful act into a prima facie actionable wrong.[8]

As observed, *false* statements do not fall within this tort classification, but *true* statements may. "Statements may be actionable without a word of falsehood, where the maker acts solely out of disinterested malevolence. *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta*, . . ."[9] This class of tort is not limited to any particular act, but applies to any situation. Malice under this tort category does not mean ill-will, but want of justification or probable cause. To that extent, at least, this type of tort has a facet common to malicious prosecution, where it is likewise necessary to show the existence of probable cause in order to escape liability.[10] In disinterested malevolence, as pointed out in one case, alleging such ill-will adds nothing to the pleading: "The averments which impute malice to the defendant-union do not imply more than is elsewhere stated in the complaint. 'Malice in common acceptance means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse' (*Caldwell v. Tinker*, 169 N.Y. 531, 537.)."[11]

In the cases falling within the penumbra of "disinterested malevolence," because the disputes are very often, as was pointed out by one court, "between two rights that are equally regarded by the law,"[12] "the question," as indicated by another court, "how far one individual shall be restrained from doing acts which are inherently proper out of respect for the rights of others is bound to be a delicate one."[13] One court stated that if the right exercised is equal to that of the one damaged, it cannot be a wrongful infringement upon that right.[14] The better rule appears to be that if "A genuine controversy exists between two competing groups. . . . The plaintiff does not prevail by showing that the defendant's criticism is wrong. . . . What is wrong must be so *clearly wrong* that only 'disinterested malevolence' . . . or something closely akin thereto can have supplied the motive power. . . ."[15] This struggle be-

7. Beardsley v. Kilmer *et al.*, 236 N.Y. 80, 140 N.E. 203 (1923).

8. Aikens v. Wisconsin, 195 U.S. 194 (1904); Advance Music Corp. v. American Tobacco Co., *et al.*, 296 N.Y. 79, 83, 70 N.E. 2d 401, 402 (1946).

9. Ledwith v. International Paper Co., 64 N.Y.S. 2d 810, 813 (Sup. Ct.), *aff'd*, 271 App. Div. 864, 66 N.Y.S. 2d 626 (1st Dep't 1946).

10. Simpson v. Coastwise Lumber & Supply Co., *et al.*, 239 N.Y. 492, 499, 147 N.E. 77, 79 (1925); Schultz v. Greenwood Cemetery, 190 N.Y. 276, 278, 83 N.E. 41, 42 (1907).

11. American Guild of Musical Artists, Inc., *et al.* v. Petrillo *et al.*, 286 N.Y. 226, 231. 36 N.E. 2d 123, 125 (1941).

12. Mogul S.S. Co. Ltd. v. McGregor *et al.*, 23 Q.B. 598, 611 (1889).

13. Beardsley v. Kilmer *et al.*, 236 N.Y. 80, 89, 140 N.E. 203, 206 (1923).

14. Brennan v. United Hatters *et al.*, 73 N.J.L. 729, 65 Atl. 165 (1906).

15. Nann v. Raimist, 255 N.Y. 307, 319, 174 N.E. 690, 695 (1931). *Cf.* Denver Local Union No. 13 *et al.* v. Perry Truck Lines, Inc., *et al.*, 106 Colo. 83, 101 P. 2d 436 (1940); Kingston Trap Rock Co., *et al.* v. International Union *et al.*, 129 N.J. Eq. 570, 19 A. 2d 661 (1941).

tween equal rights, apparently common to all jurisdictions, was aptly referred to by a Belgian Court as one between *summum jus* and *summa injuria*.[16] In *Skinner & Co. v. Shew & Co.*, Lord Justice Bowen said: "At Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally and without just cause or excuse."[17] Early English cases appear to support that statement.[18] Apparently, because of the common law repugnance of infringing upon the lawful and equal right of adjoining land owners in the use of their respective lands, the courts refused to extend this theory of wrong to such disputes.[19] Speaking on that point, Professor Ames in his *Lectures on Legal History*, says: "In England it seems to be settled that the owner may act in this malevolent manner with impunity."[20] Mr. Justice Holmes likewise points out that at common law there is absolute justification with regard to the use of land.[21]

In New York, where the dictum of Lord Bowen[22] did not express, at that time, the law of that jurisdiction, this struggle was fraught with difficulties. As late as 1926 one of our higher courts speaking on the subject and quoting with approval from Cooley on *Torts*, said:

"'An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. Where one exercised a legal right only, the motive which actuates him is immaterial.' This statement correctly expresses the law of this State. (*Auburn & Cato Plank Road Co. v. Douglas*, 9 N.Y. 444; *Pickard v. Collins*, 23 Barb. 444; *Morris v. Tuthill*, 72 N.Y. 575; *Kiff v. Youmans*, 86 N.Y. 329.)"[23]

Two of the authorties cited in the *Carroll Building Corp.* case[24] in support of that proposition, *i.e.*, the *Auburn* and the *Pickard* cases,[25] involved disputes between adjoining owners where the tendency in New York was to follow the English doctrine by refusing to inquire into the motives which prompted the acts complained of.[26] As to the other two authorities cited in the *Carroll Building Corp.* case,[27] the *Morris* case involved the foreclosure of a mortgage,

16. Dapsens v. Lambret, Cour d' Appel de Liege, Feb. 9, 1888, [1898] Sirey, 4, 14.

17. [1893] 1 Ch. 413, 422.

18. Garrett v. Taylor, 79 Eng. Rep. 485 (undated); Green v. Button, 150 Eng. Rep. 299 (1835).

19. The Mayor etc. of Bradford v. Pickles, [1895] A.C. 587; The Capital and Counties Bank v. Henty & Sons, 7 App. Cas. 741, 766 (1882).

20. AMES, LECTURES ON LEGAL HISTORY 399 (1913).

21. See note 2 *supra*.

22. *See* Skinner & Co. v. Shew & Co., [1893] 1 Ch. 413, 422.

23. Carroll Building Corp. v. Greenberg Plumbing Supplies, Inc., *et al.*, 216 App. Div. 268, 270, 214 N.Y. Supp. 42, 44 (2d Dep't 1926). See also Hurwitz v. Hurwitz *et al.*, 10 Misc. 353, 355, 31 N.Y. Supp. 25, 26 (Common Pleas 1894).

24. 216 App. Div. 268, 214 N.Y. Supp. 42 (2d Dep't 1926).

25. See text at note 23 *supra*.

26. See also Phelps v. Nowlen, 72 N.Y. 39 (1878); Clinton v. Meyers, 46 N.Y. 511 (1871).

27. See text at note 23 *supra*.

and the *Kiff* case the eviction of a trespasser. There also the courts refused to explore into the motives which prompted the foreclosure or eviction on the ground that the exercise of a legal remedy, if warranted, cannot transform a legal right into an actionable wrong regardless of motive.

In three so-called "spite fence" cases, New York courts likewise refused to inquire into the alleged malicious motives actuating their erection and held in effect that such fences were consonant with the *summum jus* of the owners in the use of their properties.[28]

There are three other lines of cases in New York, where malicious motives were alleged as having motivated the wrongs complained of, which merit consideration, namely, labor disputes, competing economic rights, and cases involving conspiracies. In the first, the courts refused to inquire into the allegedly malicious motive of the defendant union in threatening to strike if the labor objective was proper.[29] If the wrong complained of, as stated by the court in *Collins v. American News Co.* et al.,[30] in distinguishing that case from *Curran v. Galen*,[31] appeared to be "the meddlesome interference of outside third parties between an employee and his employer," (the third parties referred to being a union), because of the public policy involved, the court would inquire into the defendant-union's motives in order to determine whether the labor objective sought was proper. In cases involving competing economic rights, of which *Collins v. American News Co.* et al., is an early example, the court dismissed the complaint and refused to inquire into the motives of publishers of newspapers for threatening to cut off plaintiff's supply of newspapers where plaintiff showed in his complaint that the defendants' acts were justified. After pleading the alleged wrong plaintiff went on to assert that defendants' threats arose out of plaintiff's refusal to desist from distributing hand bill advertisements with the sale of defendants' newspapers, which defendants contended made plaintiff a competitor with their newspapers in the advertising business. In cases involving alleged conspiracies it was held that if two or more persons conspire to do a lawful act in a lawful manner and damage results, even though they acted with a malicious motive an action for conspiracy did not lie.[32] In speaking of a malicious intent as implying the existence of a conspiracy, the court in *Dalury v. Rezinas* et al., said:

"It is a well-settled rule of law that no action lies where a person has been damaged by another through the doing of a lawful act or in the enforcement of a legal remedy, no matter if the purpose and intent of the act was malicious. *It is the act done that must be considered, and not the intent with which it was done,* . . . Nor does a lawful act become unlawful because two or more combine to do the act. A

28. Adler v. Parr, 34 Misc. 482, 70 N.Y. Supp. 255 (Sup. Ct. 1901); Mahan v. Brown, 13 Wend. 261 (N.Y. 1835); Pickard v. Collins, 23 Barb. 444 (N.Y. 1856).

29. National Protective Ass'n *et al.* v. Cumming *et al.*, 170 N.Y. 315, 63 N.E. 369 (1902).

30. 34 Misc. 260, 69 N.Y. Supp. 638 (Sup. Ct. 1901).

31. 152 N.Y. 33, 46 N.E. 297 (1897).

32. Prospect Park & C.I.R. Co. v. Morey *et al.*, 155 App. Div. 347, 140 N.Y. Supp. 380 (2d Dep't 1913).

conspiracy is an agreement between two or more persons to do an unlawful act. If the act to be done be not unlawful, then the agreement or combination to do it is not a conspiracy, and injury caused thereby is not actionable, except a combination which assumes a public or quasi public aspect. . . ."[33]

The "combination," to which the court refers as an exception to the rule, means a combination by a large number for the sole purpose of inflicting injury.[34]

The quoted language of the court in the *Dalury* case is important for two reasons: first, because it shows that the criterion at that time was whether the act complained of was inherently lawful or the remedy legal. If it was, the intent that motivated the act would not be subject to judicial inquiry as a legal right could not be transformed into an actionable wrong, regardless of the resulting injury; second, the emphasized portion of that opinion expresses, as will be seen, the correct present-day viewpoint in New York, namely, in order to determine whether the act complained of is actionable, the defendant's motive must be ascertained objectively by the court from the act itself and not by a subjective excursion into the defendant's mental processes by a jury. The validity of this observation is further buttressed by the fact that malice in its legal sense is, as already demonstrated, implied from the wrong complained of.[35]

Although, as established by Lord Justice Bowen, the theory of tort under discussion was generally recognized in early common law, it nevertheless met with difficulty in its application in the very jurisdiction of its origin. Hence, in one case, it was held a proper labor objective, regardless of motive, for one union to threaten a strike if the members of another union on the same job were not discharged. Apparently, the determining factor of that case was the attempt by the members sought to be discharged to perform work foreign to their trade and within the trade of the other union.[36] What caused great consternation in some legal circles was not the result reached but the rationale upon which it was premised in contradiction to Lord Bowen's earlier dictum. Lord Weston, voting with the majority, said: "Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong."[37] Lord MacNaughten, also voting with the majority, was even more explicit for he said, in substance, that it was nonsense to state that one who performs a lawful act which causes damages, even though actuated by malice,

33. 183 App. Div. 456, 459, 170 N.Y. Supp. 1045, 1048, 1049 (1st Dep't 1918). (Emphasis supplied).

34. Newton Co. v. Erickson *et al.*, 70 Misc. 291, 295, 126 N.Y. Supp. 949, 952 (Sup. Ct. 1911).

35. American Guild of Musical Artists, Inc., *et al.* v. Petrillo *et al.*, 286 N.Y. 226, 231, 36 N.E. 123, 125 (1941).

36. Allen v. Flood, [1898] A.C. 1.

37. *Id.* at 92.

must have his conduct inquired into in order to determine whether it was justified.[38]

In *Quinn v. Leathem*,[39] a contrary result was reached. There, it was held to be an actionable wrong against an employer, and not a proper labor objective, for a union maliciously to induce an employee to break his contract of employment, leave his job and to cause a customer of the employer to refrain from dealing with such employer by threatening to call out on strike the employees of that customer who were members of that union. Much discussion has followed as to whether this case overruled the *Allen*[40] case. The editors of Law Reports Annotated,[41] state that such inference is unwarranted by pointing out that the proposition laid down in the *Allen* case—"that the exercise of an absolutely legal right cannot be treated as wrongful and actionable merely because a malicious intention prompted such exercise,—was acquiesced in by each and all of the law lords who wrote in *Quinn v. Leathem*, —with the exception of the lord chancellor, . . ."

Several cases which arose in Continental Europe and are collected by Professor Ames in his *Lectures on Legal History*,[42] merit consideration because of their lucid treatment of the subject and the juxtaposition of the civil and common laws on that point. In *Prince de Wagram v. Marias*,[43] the defendant deliberately, and for no good reason, created so much noise on his land as to frighten away game from plaintiff's adjoining estate and thereby spoil plaintiff's prearranged hunt. Defendant was held accountable for his malicious act. Professor Ames points out that the result would have been different had the defendant disturbed plaintiff's game while hunting on his own land as the rights of each would then have been equal and refers to *Keeble v. Hickeringill*,[44] where Lord Holt made the same distinction. Another cited case of interest is that of *Reding v. Kroll, et Donnersback*,[45] where defendant prohibited his employees from patronizing plaintiff's saloon because of its demoralizing effect upon them. Although it was held justifiable as a reasonable measure of discipline, the court unequivocally stated that a different result would have obtained had defendant failed to show such justification, for it said: ". . . les défendeurs auraient certainement *abusé de leur droit*, et, dès lors, commis un acte quasi-délictueux, s'il était établi, comme de demandeur l'affirme en termes de plaidoirie, *que leur défense ne repose sur aucune nécessité* de discipline ouvriere, *qu'elle a été portée malicieusement et par pur esprit de vengeance*;. . ."[46]

38. *Id.* at 151.
39. [1901] A.C. 495.
40. See note 36 *supra*.
41. 62 L.R.A. 698 (1913).
42. See note 20 *supra*.
43. Cour de Paris, Dec. 2, 1871, [1873] Dalloz 2, 185.
44. 88 Eng. Rep. 898, 90 Eng. Rep. 906, 907, 908 (1706).
45. Trib. de Luxembourg, Oct. 2, 1896, [1898] Sirey, 4, 16.
46. *Id.* at 16. (Emphasis supplied). *Cf.* Speyer *et al.* v. School Dist. No. 1 *et al.*,

In *Dapsens v. Lambret*,[47] the defendant, a political rival of plaintiff, used his workmen as a means of ruining plaintiff's business. The court in holding him accountable made this interesting comment: "Attendu qu'on ne saurait admettre qu'il soit permis, même par des actes licites absolument parlant, de ruiner un citoyen sans autre intérêt ou mobile que celui de la vengeance; *qu'alors le summum jus devient la summa injuria.*"[48]

Professor Ames, referring to those two cases, states: "The two cases illustrate in a very convincing manner how the motive with which an act is done may determine its lawfulness or unlawfulness."[49] If this is intended to mean that the motive is to be inquired into subjectively in order to determine whether the act is or is not actionable, it is not in accord with the present day viewpoint in New York, where the motive must be ascertained objectively by the court from the act complained of and not by a subjective excursion into defendant's mental processes by a jury.[50] In *Monnier v. Renaud*,[51] the court inquired whether defendant had been motivated by "un sentiment de malveillance injustifiée"—a phrase which apparently found its way into our law under the term of "disinterested malevolence."[52]

PART II

We now consider, in keeping with the complex social and economic adjustments of our times and the general attempt to bring fairer dealing into the market place, the judicial effort to balance the equities between competing equal rights so that the *summum jus* could no longer excuse the *summa injuria* without justification.

The leading American case on the subject is that of *Aikens v. Wisconsin*.[53] There the question before the Court was whether a Wisconsin statute, under which informations were brought against the plaintiffs in error, which made it a criminal offense for any two or more persons to combine for the purpose of maliciously injuring another in his reputation, trade, business or profes-

261 Pac. 859 (Colo. 1927), where a public official having charge of certain schools ordered the pupils to lunch at home or on the school premises as a result of which plaintiff, a neighboring cafeteria owner where some pupils formerly lunched, suffered loss and where the court arrived at the same conclusion, stating that, if the order was made in good faith for the good of the school and its pupils, it was of no consequence that it injured plaintiff. Also National Fireproofing Co. v. Mason Builders Ass'n *et al.*, 169 Fed. 259, 265 (2d Cir. 1909), where the court said that an agreement entered into for the primary purpose of promoting the interests of the parties is not rendered illegal because it may incidentally injure third persons. Also Arnold v. Burgess, 241 App. Div. 364, 272 N.Y. Supp. 534 (1st Dep't 1934), *aff'd*, 269 N.Y. 510, 199 N.E. 511 (1935).

47. Cour d' Appel de Liege, Feb. 9, 1888, [1890] Sirey, 4, 14.

48. (Emphasis supplied).

49. AMES, LECTURES ON LEGAL HISTORY 406 (1913).

50. 236 N.Y. 80, 140 N.E. 203 (1923).

51. Cour de Cassation, June 9, 1896, [1896] Dalloz, 1, 582, 584.

52. See opinion of Mr. Justice Holmes in Aikens v. Wisconsin, 195 U.S. 194, 204 (1904).

53. 195 U.S. 194 (1904).

sion by any means whatever, was violative of the Fourteenth Amendment. The Journal Company, publisher of a newspaper, increased its advertising charges. Plaintiffs in error, who were managers of three rival newspapers, agreed among themselves that if any person should agree to pay the increased rate to the Journal Company he should not be permitted to advertise in any of their newspapers except at a corresponding increased rate but if he should refuse to pay the Journal Company the increased rate he should be allowed to advertise in their newspapers at the rate previously charged. It was alleged that this conspiracy was carried out and caused much damage to the Journal Company. Mr. Justice Holmes writing for the majority, in affirming the convictions of the plaintiffs in error, said:

"It has been considered that, prima facie, the intentional infliction of temporal damage 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. . . . If this is the correct mode of approach it is obvious that justifications may vary in extent according to the principle of policy upon which they are founded, and that while some, for instance, at common law, those affecting the use of land, are absolute, . . . others may depend upon the end for which the act is done. . . . See cases cited in 62 L.R.A. 673. It is no sufficient answer to this line of thought that motives are not actionable and that the standards of the law are external. That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen. *Quinn v. Leathem*, [1901] A. C. 495, 524.[54] "Finally it is argued that the Supreme Court of Wisconsin would hold that the statute extends to acts of which the motives were mixed and which were done partly from *disinterested malevolence* and partly from a hope of gain."[55]

Another leading case is that of *Tuttle v. Buck*,[56] where the court held on a demurrer that a complaint, which alleged in substance that defendant, a banker and man of wealth and influence, maliciously established a barber shop, employed a barber to carry on that business and used his influence to attract customers from plaintiff's barber shop, not for the purpose of serving a legitimate end of his own, but solely to injure plaintiff, and whereby plaintiff's business was ruined, stated a good cause of action. Likewise in *Roaback v. Motion Picture Machine Operators' Union, etc.*, et al.,[57] the court held that it was malicious, therefore an illegal labor objective for defendant to ruin plaintiff's business by means of picketing in the attempt to compel plaintiff to hire union operators when plaintiff had always operated his projectors by himself and without assistance. In *Hutton v. Watters*,[58] the court speaking on the point of the justification required in this type of tort in order for defendant to escape liability, said:

"Every one has the right to establish and conduct a lawful business, and is en-

54. *Id.* at 204.
55. *Id.* at 206. (Emphasis supplied).
56. 107 Minn. 145, 119 N.W. 946 (1909).
57. 140 Minn. 481, 168 N.W. 766 (1918).
58. 132 Tenn. 527, 179 S.W. 134 (1915).

titled to the protection of organized society, through its courts, whenever that right is unlawfully invaded. Such right existing, the commission of an actionable wrong is established against any one who is shown to have intentionally interfered with it, without justifiable cause or excuse. To establish justification, it must be made to appear, not only that the act complained of was otherwise lawful and performed in a lawful manner, but likewise that it had some real tendency to effect a reasonable advantage to the doer of it."[59]

If it becomes a matter of weighing the equities as between the *summa injuria* of several and the *summum jus* of the general public the latter unquestionably controls.[60] In *American Bank and Trust Co.* et al. *v. Federal Reserve Bank of Atlanta* et al.,[61] plaintiffs, several country banks of Georgia, alleged that they derived an important part of their income from charges on payment of checks drawn by their depositors when sent in through other banks; that banks of the Federal Reserve system were forbidden to make such charges and that the defendant bank for the purpose of compelling plaintiffs to become members of the system, accumulated such checks in large amounts and then required cash payment at par so as to compel plaintiffs to maintain so much cash in their vaults that they must either submit or go out of business. The Supreme Court reversed the Circuit Court of Appeals' dismissal of the complaint for want of equity and held that the complaint stated a cause for an injunction as prayed for. Mr. Justice Holmes writing for the Court, said:

"The defendants say that the holder of a check has a right to present it to the bank upon which it was drawn for payment over the counter, and that however many checks he may hold he has the same right as to all of them and may present them all at once, whatever his motive or intent. They ask whether a mortgagee would be prevented from foreclosing because he acted from *disinterested malevolence* and not from a desire to get his money. But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. *Most rights are qualified.* The interests of business also are recognized rights, protected against injury to a greater or less extent, and in case of conflict between the claims of business on the one side and of third persons on the other, lines have to be drawn that limit both. A man has a right to give advice, but advice given for the sole purpose of injuring another's business and effective on a large scale, might create a cause of action. . . . If without a word of falsehood but acting from what we have called *disinterested malevolence* a man by persuasion should organize and carry into effect a run on a bank and ruin it, we cannot doubt that an action would lie."[62]

In 1923, the Court of Appeals of New York in the leading case of *Beardsley v. Kilmer* et al.[63] was faced squarely with the question whether a malicious motive, in the exercise of a lawful and equal economic right, could transform such right into an actionable wrong because of the resulting damage. In that

59. *Id.* at 527, 179 S.W. at 135.
60. Read v. Hibbing, 150 Minn. 130, 184 N.W. 842 (1921).
61. 256 U.S. 350 (1921).
62. *Id.* at 357, 358. (Emphasis supplied).
63. 236 N.Y. 80, 140 N.E. 203 (1923).

case plaintiff alleged that defendants had established a rival newspaper as a means of revenge against plaintiff for articles which appeared in plaintiff's newspaper concerning the defendants. At the close of plaintiff's case the trial court dismissed the complaint. The judgment of dismissal was affirmed by both the Appellate Division,[63a] and the Court of Appeals. The latter court held that since plaintiff's evidence showed that defendants' motives in establishing their newspaper were mixed in the sense that they were both as a means of revenge and also to establish a legitimate enterprise, the latter overcame the former and constituted justification in law, and in affirming the judgment dismissing the complaint said:

"This concededly involves a consideration of motives and of the general question when an inherently lawful act will be held actionable because of the impulses which lead to its performance. The answer to such a question may easily be determined by slight circumstances. . . .

"From the evidence which has been summarized we have no doubt that a jury would have been permitted to say that one of the purposes of the defendants in establishing their newspaper was to punish and take revenge upon the plaintiff for what were regarded as his unjustifiable attacks upon them. . . . We think also that the evidence establishes without contradiction that defendants had in view the establishment of a business enterprise which would be sanctioned by advantages to themselves and by benefit to the community. . . . *Therefore if our interpretation of the evidence is correct we have a case where the plaintiff is complaining of and seeking redress for injuries caused by an act which is the product of mixed motives some of which are perfectly legitimate.* The question is whether his cause of action can successfully rest upon such a foundation. We feel sure it cannot. . . .

"We think also that as a matter of logic and analogy another justifying purpose must be added as one which will exculpate from liability. Justification ought not to rest entirely upon selfishness. Altruism ought to have some place in the consideration of the enabling motives, *and if one of the purposes is to perform an act or establish a business which will be of benefit to others and give them service not before enjoyed we think such an act ought to confer the same protection as one which looks only to personal and selfish gains.* These views find recent support in one of Mr. Justice Holmes' epigrammatic phrases which, in a discussion of this general subject, speaks of 'disinterested malevolence' and which is supposed to mean that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another. (*American Bank & Trust Co. v. Fed. Reserve Bank of Atlanta*, 256 U.S. 350). . . . We cannot afford to move the law to a stage where any person who, for his own advantage, starts a new business will be compelled to submit to the decision of a jury the question whether also there was not a malicious purpose to injure some person who is thus brought under a new and disadvantageous competition."[64]

Although it does not appear from the official report of that case, the record on appeal to the Court of Appeals shows that defendant's answer contained specific and general denials but no affirmative defense of justification. The relevancy of this observation will be seen from what follows. The rules for-

63a. 200 App. Div. 378, 193 N.Y. Supp. 285 (3d Dep't 1922).

64. 236 N.Y. 80, 86, 140 N.E. 203, 204 (1923) (Emphasis supplied).

mulated by that case may be succinctly set forth as follows: (1) "slight circumstances," will determine whether the lawful act complained of may be transformed into an actionable wrong because of the resulting injury; (2) if the act complained of consists of mixed motives—one which will be of benefit to either the actor or others or both and the other intentionally to cause damage and damage results, it is not actionable; (3) it is a question of law to be determined objectively by the court and not a question of fact to be determined subjectively by a jury as to whether the act complained of consists of mixed or unmixed motives.

In *Gray v. Fogarty*, et al.,[65] the court held a complaint sufficient on the theory of disinterested malevolence which alleged that certain city officials conspired to injure plaintiff by raising the grade of a road in front of his property for the benefit of a developer, citing the *Beardsley* case, among others, as authority. One justice dissented on the ground that a lawful act could not be transformed into an actionable wrong because of the motive which prompted it. In *Barile v. Fisher*,[66] the court speaking of a labor objective said: "When doubt arises whether the contemplated objective is within the legal sphere, or without and so illegal, it is for the courts to determine."[67]

In April 1941, the Court of Appeals of New York in *Opera on Tour, Inc. v. Weber*,[68] was called upon to decide whether two labor unions were engaged in promoting a lawful labor objective when one of them induced the other to join in a combination to destroy plaintiff's enterprise solely because of its use of machinery in the production of music in lieu of the employment of musicians. The court in reversing the judgment of the Appellate Division for defendant and affirming that of Special Term for plaintiff not only decided that the lawful act (to strike) had become unlawful because of the harmful public aspect of the combination but also stated:

"For such activities labor is not free from legal responsibility.

"'. . . 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. . . .' (Mr. Justice Holmes in *Aikens v. Wisconsin*, 195 U.S. 194, 204).

". . .

"Harm done to another or to the public may be countenanced only if the purpose, in the eye of the law, is sufficient to justify such harm."[69]

The importance of this decision is apparent. By adopting unequivocally and for the first time the language of Mr. Justice Holmes, written 37 years earlier, it placed this state in step with the majority of other jurisdictions by definitely recognizing the intentional infliction of temporal damages as an

65. 237 App. Div. 855, 261 N.Y. Supp. 842 (2d Dep't 1932).

66. 197 Misc. 493, 94 N.Y.S. 2d 346 (Sup. Ct. 1949).

67. *Id.* at 499, 94 N.Y.S. 2d at 352. *Cf.* Walsh v. Judge, 258 N.Y. 76, 179 N.E. 264 (1932); Tate v. Sonotone Corp., 272 App. Div. 103, 69 N.Y.S. 2d 535 (1st Dep't 1947).

68. 285 N.Y. 348, 34 N.E. 2d 349 (1941).

69. *Id.* at 355, 356, 34 N.E. 2d at 352.

actionable wrong unless justified. Therefore, in New York it is no longer debatable as to which should prevail, the *summum jus* or *summa injuria*. If the injury occasioned was the sole motivating force in the exercise of the former it is no longer a sheltered use but an actionable abuse. Parenthetically, it should be observed that the *Aikens* and *Opera on Tour* cases involved combinations having public or quasi public aspects. For the most part, the cases cited by Mr. Justice Holmes as authority for his broad proposition also involved labor disputes or combinations which because of their public aspect had illegal objectives. In fact, he refers to the Law Reports Annotated[70] where the English and American authorities in point are not only marshalled, but the wide divergence of judicial views are reviewed as well.

In July 1941, the Court of Appeals of New York in *American Guild of Musical Artists, Inc.* et al. *v. Petrillo*, et al.,[71] in holding a complaint sufficient where the gravamen was phrased after that of the *Opera on Tour* case, said:

"In *Opera on Tour, Inc. v. Weber* (285 N. Y. 348) this court applied against a labor union the broad doctrine that harm intentionally done is actionable *if not justified*. (Cf. Pollock on The Law of Torts, [14th ed.] pp. 43-55.) This complaint, therefore, is sufficient as such, unless the purpose of the defendant-union must be presumed to be a lawful labor objective,—an activity having some reasonable connection with wages, hours, health, safety, the right of collective bargaining or some other condition of employment. (*Opera on Tour, Inc. v. Weber, supra.*) *But no sign of such a justification reveals itself on the face of the complaint; . . .*"[72]

It is to be noted that, up to this point, the last two New York cases considered involved labor disputes or combinations having public or quasi public aspects. In 1944, the first case in New York not within those categories came up for review. In *Langan v. First Trust & Deposit Co.* et al.,[73] action was brought by the trustee in bankruptcy of a corporation against the directors and members of the executive committee of the bankrupt corporation and against a bank and another corporation alleged to have been used by the bank as a vehicle, to recover damages arising out of the acquisition of assets of the bankrupt by the vehicle corporation through foreclosure of a mortgage. The complaint was dismissed at the close of plaintiff's case and the dismissal affirmed by the Appellate Division. In reversing, the Court of Appeals said:

"In our judgment, the evidence (when so regarded) affords room for an inference of actual intent of the defendants to hinder the unsecured creditors of the Company in the realization of their respective claims, and also gives countenance to an inference of consequent prejudice to such claimants through the Bank's acquisition of the Company's property at a minor fraction of its market value. Hence, as we conclude, the plaintiff should not have been dismissed for a failure of proof, seeing that harm intentionally done is actionable if not justified. (*American Guild of Musical Artists v. Petrillo*, 286 N.Y. 226, 231; *Kreviczky v. Lorber*, 290 N.Y. 297.) In saying this, we have, of course, no thought of suggesting what the even-

70. See Note, 62 L.R.A. 673 (1900).

71. 286 N.Y. 226, 36 N.E. 2d 123 (1941).

72. *Id.* at 231, 36 N.E. 2d at 125. (Emphasis supplied).

73. 293 N.Y. 604, 59 N.E. 2d 424 (1944).

tual disposition of the controversy should be. *If the acts of the defendants were not more than an honest defense of their own business interest, then this litigation cannot be maintained.* All we now decide is that such a justification cannot here be claimed consistently with the above definition of meaning of a nonsuit."[74]

The next case to reach to the Court of Appeals on the subject under discussion was that of *Advance Music Corp. v. American Tobacco Co.*, et al.[75] In that case the complaint of a music publisher alleged that its revenue was chiefly derived from the sales of sheet music made to the public and that it expended large sums for advertising to create a demand for the songs it published. The complaint further alleged that defendants presented a weekly radio program of music consisting of nine or ten songs, of what the defendants announced were the most popular songs of the week, under the title of "The Lucky Strike Hit Parade," but that the selections made by the defendants were the result of caprice in that it did not correctly represent the most popular songs and that defendants' representations were made with intent to injure plaintiff who was thus damaged in the sale of its sheet music. The defendants attacked the complaint under Rule 106 of the Civil Practice Act. Special Term's denial of the motion for dismissal of the complaint was reversed by the Appellate Division of the First Department. The Court of Appeals reversed the order of the Appellate Division, affirmed that of Special Term and unanimously held that the complaint recited a good cause of action. Chief Judge Loughran, writing for the court, said:

"Thus in sum and substance the second cause of action constitutes a statement to this effect: The defendants are wantonly causing damage to the plaintiff by a system of conduct on their part which warrants an inference that they intend harm of that type. So read, the second cause of action is, we think, adequate in its office as a plaintiff's pleading.

". . .

"This difference over the general principle of liability in tort was composed for us in Opera on Tour, Inc. v. Weber, (285 N.Y. 348). We there adopted from Aikens v. Wisconsin (supra) the declaration that 'prima facie, the intentional infliction of temporal damage is a cause of action which . . . requires a justification if the defendant is to escape.' The above second cause of action alleges such a prima facie tort and, therefore, is sufficient in law on its face. (*American Guild of Musical Artists v. Petrillo,* 286 N.Y. 226, 231).

". . .

"The justification that is required in a case like this must, of course, be one which the law will recognize (*Beardsley v. Kilmer,* 236 N.Y. 80; *Langan v. First Trust & Deposit Co.,* 293 N.Y. 604, 608. See Winfield, The Law of Tort, 2d ed. 15-21; Ames, Lectures on Legal History and Miscellaneous Legal Essays, 399 *et seq.*, and the cases in this court there cited.)"[76]

This commentary would not be complete without giving some consideration to the comparatively recent case of *Pagano, Inc.*, et al. *v. New York Life*

74. *Id.* at 608, 609, 59 N.E. 2d at 425. (Emphasis supplied).

75. 296 N.Y. 79, 70 N.E. 2d 401 (1946).

76. *Id.* at 83, 84, 85, 70 N.E. 2d at 402, 403. (Emphasis supplied).

Ins. Co.,[77] because it illustrates that the theory of tort under review is still the cause of some confusion. In that case defendant acquired an entire city block in the City of New York for the purpose of constructing a large apartment house thereon. Plaintiffs were the owner and a tenant of a piece of property in the city block immediately south of defendant's intended project. The gravamen of the complaint was that defendant, as part of a plan to reduce the value of plaintiff's property, so that it could later purchase it at a fraction of its value, induced certain public officials of the City of New York to have the city enter into a contract with defendant whereby the city was to condemn the city block in which plaintiffs' property was located and thereafter lease it to defendant for the purpose of constructing a large parking garage thereon; that part of such garage was to be allocated for use by tenants of defendant's project; that defendant, as part of the plan, maliciously published, or caused to be published, newspaper articles to the effect that plaintiffs' property was about to be condemned, although defendant knew or should have known that such proposed condemnation was illegal. Plaintiffs then alleged their damage. Defendant's answer consisted in part of general denials and an affirmative defense of justification supported by voluminous documentary proof. The allegations of the complaint were buttressed by exhibits, which appear to spell out the very justification defendant would have to plead and prove to escape liability. Parenthetically, it should be noted, that because of plaintiffs' exhibits it is very probable that defendant would have been successful had it tested the legal sufficiency of the complaint under Rule 106. This observation is predicated on the dictum in the *Petrillo* case, where, as we have seen, the Court of Appeals sustained the sufficiency of that complaint because "no sign of such a justification reveals itself on the face of the complaint." Indicating that a contrary result would have obtained had the complaint revealed such justification. The weakness of that procedure is that it frequently reacts against defendant because leave to plead over again is usually granted, and plaintiff is then informed how to frame a good cause of action. In the *Pagano* case, the defense being founded upon facts established prima facie by documentary evidence or official record, defendant moved for summary judgment under the unnumbered paragraph of Rule 113. Special Term in denying the motion said, *inter alia:*

"This would appear to be an action for 'the intentional infliction of temporal damage' (*Advance Music Corp'n v. Am. Tobacco Co.*, 296 N.Y. 79). In such an action the fact that the acts complained of are lawful does not bar the right to a recovery (*Beardsley v. Kilmer*, 236 N.Y. 80). We assume, for the purpose of this application, that the acts and conduct complained of are lawful. That brings us to the issue of the defendant's motives. Plaintiffs, on one hand, allege the defendant's motives to be malicious and the defendant, on the other hand, asserts the absence of malice and the presence of proper motives. . . . Where, as here, the search is for the motive which prompted the acts complained of, which involves the ascertainment

77. 198 Misc. 598, 99 N.Y.S. 2d 643 (Sup. Ct. 1950).

of subjective considerations, the remedy of summary judgment should be exercised sparingly and with the greatest of caution (*Levine v. Behn*, 282 N.Y. 120)."[78]

As we have seen, the *Beardsley* case, cited by Special Term for the proposition that lawful acts do not bar the right to a recovery, holds to the contrary. If the acts are lawful the right to recovery is barred so long as one of the defendant's motives is the conducting of a legitimate enterprise which will benefit not only the defendant but others as well. Special Term, apparently, misconstrued the *Beardsley* case because it concluded that the allegation of defendant's malicious motives rendered the complaint impervious to attack regardless of the fact the *Beardsley* case held that defendant's motives may be malicious so long as it also has the motive of establishing a legitimate business. Because of that erroneous approach Special Term also concluded that it would be necessary for a jury to ascertain the operation of defendant's mind. As the court put it, a jury would have to go into "the ascertainment of subjective considerations." In the *Beardsley* case, however, the Court of Appeals, in dismissing the complaint, held that the question of justification was one of law and not of fact because defendant's motives were to be inferred from the objective facts and not from subjective considerations. The objective facts in the *Beardsley* case were the establishment of a newspaper, the objective facts in the *Pagano* case, the proposed establishment of a public garage.

In the *Pagano* case the Appellate Division of the First Department unanimously reversed the order of Special Term and granted defendant's motion for summary judgment not for the reasons advanced, although they appear valid, but on the ground that "plaintiffs' affidavits failed to set forth evidentiary facts to controvert the defense [of justification] or show any actionable wrong resulting in damage." This defect being decisive the court apparently believed it was unnecessary to review, as urged by the defendant-appellant, the errors aforementioned assigned to the court below.

PART III

In a substantive sense New York will recognize as justification in law such mixed motives as appeared in the *Beardsley* case, in the New York cases cited by Professor Ames in his *Lectures on Legal History*, and in defense of one's business as alluded to by the court in the *Langan* case. The New York cases cited by Professor Ames, some of which were reviewed under Part I hereof, were mostly disputes of early origin between adjoining property owners, where, in keeping with the common law theory of that day, the equal right of each owner to use his land as he saw fit (with certain exceptions) was held justification in law exculpating the defendant regardless of the resulting injury to his neighbor.

One court speaking of the justification required said that the defendant must

78. Pagano, Inc., *et al.* v. New York Life Ins. Co., 198 Misc. 598, 99 N.Y.S. 2d 643 (Sup. Ct. 1950), *rev'd*, 278 App. Div. 647, 103 N.Y.S. 2d 123 (1st Dep't 1951).

show social or economic justification for his actions,[79] another that the defendant must show that he "sought to acquire a direct and immediate, rather than a remote or secondary benefit from such acts."[80]

From the adjective point of view, if the justification required in order to escape liability does not appear on the face of the complaint,[81] or is not disclosed from plaintiff's proof,[82] then it must be pleaded as an affirmative defense,[83] and disposed of by trial,[84] or by motion for summary judgment where "The documentary evidence" of the defendant, "established that the actions of the defendant were legally justified" and "The plaintiff's affidavits failed to set forth evidentiary facts to controvert the defense or show any actionable wrong resulting in damage."[85]

Where there is a lack of justification or probable cause it may be inferred from the act as to whether it was solely malicious.[86] But the inference will be to the contrary if the plaintiff does not allege that the act complained of was solely malicious and exclusively directed to his injury, because as was stated in one case:

"It is quite likely, to say the least, that the purpose and motive of the corporate defendant was to further its own interests rather than to injure plaintiff."[87]

Before closing, consideration should be given to Professor Ames' classification of acts motivated by malice, as set out in his *Lectures on Legal History*. He groups them into three categories: "(1) Cases in which the wrongful motive has no legal significance, the actor, by general judicial opinion, being subject to no liability at law, however severe the judgment against him in the forum of morals; (2) Cases which have divided judicial opinion, some courts deciding that the actor should be charged because of his wrongful motive, others ruling that he should not be charged notwithstanding his wrongful motive; (3) Cases in which it is generally agreed that the actor should be charged because of his wrongful motive."[88] Although he gives several examples, for the sake of brevity, one of those for each group will suffice. Under group (1) a creditor who malevolently pursues his debtor with all the rigor of law in order to ruin him; under (2) disputes arising between adjoining property owners; under (3) where the actor is motivated solely and exclusively by malevolence and where the act is of no benefit to him or another.

79. Barile v. Fisher *et al.*, 197 Misc. 493, 496, 94 N.Y.S. 2d 346, 350 (Sup. Ct. 1949).

80. Fashioncraft, Inc. v. Halpern *et al.*, 48 N.E. 2d 1, 3 (Mass. 1943).

81. American Guild of Musical Artists, Inc., *et al.* v. Petrillo *et al.*, 286 N.Y. 226, 231, 36 N.E. 2d 123, 125 (1941).

82. Beardsley v. Kilmer *et al.*, 236 N.Y. 80, 140 N.E. 203 (1923).

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

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

85. Pagano, Inc., *et al.* v. New York Life Ins. Co., 278 App. Div. 647, 103 N.Y.S. 2d 123 (1st Dep't 1951), *reversing*, 198 Misc. 598, 99 N.Y.S. 2d 643 (Sup. Ct. 1950).

86. Dean v. Kochendorfer, 237 N.Y. 384, 389, 143 N.E. 229, 231 (1924).

87 McDonald Bros. Inc. v. Ralston *et al.*, 63 N.Y.S. 2d 909, 912 (Sup. Ct. 1946).

88. AMES, LECTURES ON LEGAL HISTORY 399 (1913).

The editors of Law Reports Annotated,[89] have set out the following two rules which are worthy of note:

"(1) 'If one does an act which he has a perfect right to do, to accomplish some real benefit or pleasure to himself, or others in whom he has a genuine interest, and for doing which in good faith no action would lie, he is not rendered liable to an action therefor by the fact that he did it from bad motive and with intent to injure another, and such injury results.'

"(2) 'But if one with the sole and malicious purpose of injuring another, and without any benefit, interest, or pleasure (other than that which he derives from his wicked intent) to himself or others, commits an act which, if done in good faith, would be justifiable, he is liable in an action in favor of such other person for the damage he may have sustained therefrom.'"

From the foregoing it is manifest that this early struggle ostensibly between equal competing rights, actually was one where the right exercised under the guise of *summum jus* became the *summa injuria* with no legal restraint or accountability. This laissez-faire credo, although in accord with the "rugged individualism" of that era, was diametrically opposed to elementary principles of jurisprudence where all rights are regarded as giving rise to concomitant obligations. In order to reconcile these differences an attempt was made to distinguish personal from economic rights. Such distinction was summarily rejected by Mr. Justice Holmes on the ground that ". . . the interest of business also are recognized rights, protected against injury to a greater or lesser extent, and in case of conflict between the claims of business on the one side and of third persons on the other, lines have to be drawn that limit both." Since this laissez-faire attitude countenanced a dog-eat-dog philosophy which aggravated rather than solved the many problems arising in a highly competitive and complex economy, it was at once repudiated by Mr. Justice Holmes' dictum that "Most rights are qualified."

Now, in most American jurisdictions, in keeping with the broader ethical norm of social and economic conduct predicated on that dictum, the means no longer justifies the end. The exercise of any legal right causing damage must be justified if one is to escape liability.

In New York, we have seen that this theory of law, originally applicable to lawful acts which became unlawful only if perpetrated in a combination having public or quasi public implications, has been extended to cover all aspects with the possible exception of certain disputes between adjoining property owners not involving public policy or rights specifically proscribed by legislative fiat.

89. 62 L.R.A. 727 (1915).