1919

Boycott - Medical Association

Horace LaFayette Wilgus
University of Michigan Law School

BOYCOTT—MEDICAL ASSOCIATION.—The opinion of McCardie, J., (without a jury), in *Pratt* v. *British Medical Association* (1919), 1 K. B. 244, (noted in the MICHIGAN LAW REVIEW, June, 1919, p. 704), brilliantly reviewing the English cases, merits a fuller statement of the facts and principles involved than was possible in a short note.

The action was by Doctors Burke, Pratt, and Holmes, against the British Medical Association and four of its officers, for damages for conspiracy, *slander* and *libel*.

The Medical Association was incorporated in 1874, "to promote the medical and allied sciences, and to maintain the honour and interests of the medical profession," with the incidental power to carry out these objects. Any registered medical practitioner was eligible to membership, and large numbers of the physicians (more than 50 per cent in the Midland Counties) of England were members; and through its rules and regulations administered by its Council and Ethical Committee, it exerted a powerful influence throughout and beyond the United Kingdom. The members were formed in geographical divisions, composed of those in a particular district, free to govern themselves and make such rules as they deemed expedient, subject to the approval of the Council of the Association. Coventry constituted one division, and a majority of the doctors in this district were members.

In Coventry there had existed for more than eighty years the Coventry Provident Dispensary for securing medical attendance for its 20,000 members and their families, each member paying four shillings, annually, making an income of £4,000, half of which was expended for drugs, druggists and management, the other half going to the doctors constituting the medical staff.

In 1906 a controversy arose between the then medical staff of the Dispensary and the managing committee, and all of the staff resigned. The Committee then invited Doctor Burke, who resided in the Birmingham district, to become a member of the medical staff. He was registered in 1895, and became a member of the Medical Association in 1903. He accepted the call and in June, 1907, moved into Coventry with his family and took up his duties as medical officer of the Dispensary.

In 1904 the Medical Association published "model rules" for divisions (which were adopted by the Coventry division) providing that "no member shall, except in circumstances of great urgency, meet in consultation, or hold any professional relations, with a medical practitioner who shall have been declared by a resolution of the division, if a member, to have broken the rules, or if not a member, to have acted, (after due notice) in contravention of the rules, or who, whether a member or not shall have been declared by the division to have been deemed guilty of conduct detrimental to the honour and interests of the profession." In April, 1906, the Coventry division re-

solved that no member should associate himself with the Coventry Dispensary. In the same year the Medical Association promulgated another model rule (adopted by Coventry division in January, 1907), to the effect that whenever any division passes a resolution declaring the conduct of any medical practitioner detrimental to the honour and interests of the division, the matter shall be reported to the Central Ethical Committee, and if approved by it, or if not, if passed by a three-fourths vote of those present at a special meeting of the division called to consider the matter, formal notice may be sent to every member of the division that "in the opinion of the division the conduct of Doctor ——— is detrimental to the honour and interests of the medical profession;" and likewise, if thought necessary, like notices may be sent to the members of other divisions.

Doctor Burke received his call to the Dispensary Staff in May, 1907; May 26, he was notified he would be boycotted under the above rules, if he accepted. He accepted and took up his duties in June; June 20 the division passed a resolution condemning his conduct; July 16 it resolved he had violated the rules, and the resolution of April, 1906, in accepting the call; July 20, it notified him and asked an explanation; he replied July 29, that he was satisfied with his new position; he was then warned that he would be expelled; August 28, the Executive Committee of the division resolved to ostracise Doctor Burke, "and make the ostracism as complete as possible"; September 3, the division recommended to the Council of the Association that he be expelled; this was communicated to the Birmingham division, September 4; December 18, he was cited to appear before the Ethical Committee, and was expelled February 13, 1908. Notices of this action furnished by the Association, were then sent by the Coventry division to each of its members, and to those of the eight surrounding divisions, each of which had similar rules, making it a breach of duty for any doctor to meet Doctor Burke in consultation or give him any professional recognition, except at the risk of expulsion or censure and for more than ten years, Doctor Burke was, with a single exception, unable to secure any consultation among the doctors in these districts; his private practice was greatly injured, and he and his family were treated as social and professional outcasts. Doctor Pratt, a member of the Medical Association, and Doctor Holmes, who was not, joined the Coventry Dispensary Staff in 1913, and were thereafter treated as Doctor Burke had been. The boycott was further emphasized by the "black list" published each week in the British Medical Journal by the defendants. The only charges against either of the plaintiffs was that they accepted and held appointments on the Dispensary Staff, a highly respectable and well managed institution, which gave them ample remuneration, adequate leisure, full opportunity for private practice, and a right to claim and exert all the honourable requirements of professional men. The only interest affected was the pecuniary interest of the Coventry doctors.

The court concluded that the notices sent were intended to and did operate coercively; were, and were meant to be, threats; were intended to disturb and intimidate each doctor who received them; back of them was the whole power of the British Medical Association; they were emphasized by the pub-

lished "black list;" the threat of ruin was the very point and object of the scheme; whether the offending doctor was a member or not, the doom was the same for all who met or recognized a Coventry Dispensary doctor; it was a prolonged, deliberate and pitiless boycott; the intimidation was a general, effective, and continuous fear of expulsion, or ostracism, or both, involving the destruction of professional repute.

The plaintiffs claimed this was an actionable conspiracy; and the defendants contended that the acts and threats were within the limits of their legal rights.

As to conspiracy. This is not important, except as an aid in the proof, or to enhance damage, in any agreement to commit any of the well-known species of tort, including knowingly procuring a breach of contract. In such cases one can commit the tort as well as many. *Lumley* v. *Gye* [1853], 2 E. & B. 216; *Quinn* v. *Leathem* [1901], A. C. 495, 510; *South Wales M. F.* v. *Glamorgan Co.* [1905], A. C. 239; but it seems to have been considered of importance in the cases where courts undertake to protect a man in the lawful exercise of his calling. These usually arise from molestation by a combination of persons, since molestation by one person only is usually very slight; and some cases use conspiracy as if it made that which is lawful, if done by one, actionable if done by several in combination. It is necessary therefore to ascertain the principles involved in *Quinn* v. *Leathem* [1901], A. C. 495. These are: A has a right to deal with B, if he is willing to deal with A; but this right of A is nugatory, unless B is at liberty to deal with A, if he choose. There is therefore a correlative duty on everyone, as C, not to interfere with this liberty of B, except so far as C's own liberty of action justifies. So C's interference with B's liberty to deal with A affects A. If this is justifiable, A has no redress; if wrongful, ordinarily, B only can sue, since his liberty is immediately affected and A's damage is too remote; but if C's interference is wrongful, and intended to, and does, damage A, that is, if A is wrongfully and intentionally struck at and damaged through B, such damage is not too remote, or unforseen, but is the direct and intended result; this may be done by one; it requires no combination of persons. If C inflicts damage on A, by a threat of personal violence to B, who wishes to deal with A, and he abstains because of C's threat, and A is thereby damaged, C's act is actionable by A. *Garret* v. *Taylor* (1620), Cro. Jac. 567; *Tarleton* v. *M'Gawley* (1794), Peake N. P. C. 270; *Giblan* v. *Natl. Amal. Lab. U.* [1903], 2 K. B. 600, 619, 620. *Allen* v. *Flood* [1898], A. C. 1, does not conflict with this, for there was no intimidation, coercion, or threats there.

"In my opinion," says the judge, "the rule of law is reasonably clear that a single person or a body of persons will commit an actionable wrong if he or they inflict actual pecuniary damage upon another by the intentional employment of unlawful means to injure that person's business, even though the unlawful means may not comprise any specific act which is per se actionable."

But what is "unlawful means"? This perhaps is not susceptible of exhaustive definition. Personal violence (*Tarleton* v. *M'Gawley*); threats of personal violence (*Garret* v. *Taylor; Keeble* v. *Hickeringill* (1706), 11 East

576 n); nuisance, (*Lyons* v. *Wilkins* [1899], 1 Ch. 255); fraud, (*National Phonograph Co.* v. *Edison Bell &c. Co.* [1908], 1 Ch. 335), are unlawful means. In *Quinn* v. *Leathem* [1901], A. C. 495, the only threat was, not of personal violence, to a customer that his servants would be directed to cease working for him, if he continued to deal with the plaintiff. See also *Giblan's Case* [1903], 2 K. B. 600, and *Conway* v. *Wade* [1909], A. C. 506. "I can draw no distinction between a threat to *cause* a strike and a threat to inflict upon a man the slur of professional dishonour," says the court.

There is a difference between a *warning* and a *threat*, which is one of fact; the threat involves intimidation and coercion, of some kind. It is in respect to the coercion involved in threats that combination and conspiracy are important. A wrongful act of one may be easily resisted, but not that of many; a combination not to work is lawful, but a combination to prevent others from working is not; not to work oneself is lawful, but to order others who wish to work not to do so is different; a threat by a union to an employer to call his union employees out, who are willing to work, is a form of coercion, intimidation, molestation, and annoyance which is difficult to resist, and requires justification.

Justification has been discussed in the cases for wrongfully inducing a breach of contract with the following result: "No one can legally excuse himself to a man, of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his rights, or without malice, or bona fide, or in the best interest of himself, nor even that he acted as an altruist seeking only the good of another and careless of his own advantage,"—*Read* v. *Friendly Soc. &c.* [1902], 2 K. B. 88, 96, 97, 732, 737; *Glamorgan Coal Case* [1905], A. C. 239; *Smithies Case* [1909], 1 K. B. 310.

No different rule can exist where an injury to another's trade has been caused by such unlawful means as threats, intimidation, or violence, although no breach of contract has been caused thereby, and self interest is not a justification. To hold otherwise would negative the decisions from *Garret* v. *Taylor* in 1620, to *Quinn* v. *Leathem* in 1901.

Malice. It is sometimes said malice is essential to the action. This is a word of uncertain meaning. It is frequently used merely in a formal sense, as in libel where no question of privilege can arise. Here it is only an epithet or legal expression without real significance. This can be put aside. *Reg.* v. *Munslow* [1895], 1 Q. B. 758; *Abrath* v. *N. E. Ry.* [1886], 11 App. Cas. 247, 253.

It is however used to indicate an actual state of mind, which appears to be of two kinds: *spite* and *ill will;* and also an *indirect, wrong, corrupt,* or *unlawful motive,* or an *unjustifiable intention to inflict injury. Dickson* v. *Earl of Wilton* (1859), 1 F. & F. 419, 427; *Turnbull* v. *Bird* (1861), 2 F. & F. 508, 524; *Browne* v. *Dunn* (1893), 6 R. 67, 72; *Royal Aquarium Case* [1892], 1 Q. B. 431; *Stuart* v. *Bell* [1891], 2 Q. B. 341, 351; *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, 247; *Mitchell* v. *Jenkins* (1833), 5 B. & Ad. 588. Actual malice, in the sense indicated in these decisions is not an essential element in the present case. If the plaintiff proves damage caused by such illegal means as violence or threats he has established all the law requires.

But if an appellate court should hold otherwise, then the court felt compelled to say the evidence shows in this case that the defendant doctors were angrily hostile to plaintiffs, unceasingly bitter toward them, sought every opportunity to humiliate them, and admittedly wished to render their lives unbearable and not only to punish, but to ruin them. This constituted actual malice on their part if any is necessary.

But it was contended that the defendant Medical Association could not have such malice. It was admitted that the acts of its agents in this case fell within the scope of their authority. It is now settled that a master, corporate or not, may be liable for the actual malice of his servant, since such a state of mind rests on the same juristic footing as any other state of mind, and in appropriate cases the servant's state of mind is imputed to his principal. This is true in libel: *Citizens' Life Ins. Co.* v. *Brown* [1904], A. C. 423; CLERK AND LINDSELL, Torts, p. 64, (6th Ed.); *Phil. W. & B. R. Co.* v. *Quigley* (1858), 21 How. (U. S.) 202; and in malicious prosecution: *Barwick* v. *English J. S. Bk.* (1867), L. R. 2 Ex. 259; *Cornford* v. *Carlton Bank* [1900], 1 Q. B. 22; *Lloyd* v. *Grace & Co.* [1912] A. C. 716; *Goodspeed* v. *East Haddam Bank* (1853), 22 Conn. 439.

The court also held that rules and regulations were in unlawful restraint of trade, injurious to the public, and void. *Nordenfeldt Case* [1894], A. C. 535; *Russell* v. *Amal. Soc.* [1912], A. C. 421; *Neville* v. *Dominion &c. Co.* [1915], 3 K. B. 556.

The defendants, although given full opportunity, made no effort to justify the slander and libel charges. Judgment was rendered for £1,000 in favor of Doctor Burke, and £700 to each of the others.

There are numerous American cases, some in conflict, on all the above propositions. In the main, however, the recent American cases, especially those in the Supreme Court of the United States, and in the Supreme Judicial Court of Massachusetts, support the rules above given upon conspiracy, coercion, threats, intimidation, malice, etc. Some of these are: *Angle* v. *Chicago &c. R. R. Co.* (1893), 151 U. S. 13, 14 S. Ct. 244; *Bitterman* v. *Louisville &c. R. R. Co.* (1907), 207 U. S. 205, 31 S. Ct. 91, *Gompers v. Bucks Stove Co.* (1910), 221 U. S. 418, 31 S. Ct. 492; *Lawler* v. *Loewe* (1915), 235 U. S. 522, 35 S. Ct. 170; *Truax* v. *Raich* (1915), 239 U. S. 33, 36 S. Ct. 7; *Hitchman Coal &c. Co.* v. *Mitchell* (1917), 245 U. S. 228, 38 S. Ct. 65; *Vegelahn* v. *Guntner* (1896), 167 Mass. 92; *Martell* v. *White* (1904), 185 Mass. 255; *Berry* v. *Donovan* (1905), 188 Mass. 353; *Steinert & Co.* v. *Tagen* (1911), 207 Mass. 394; *Burnham* v. *Dowd* (1914), 217 Mass. 351; *Cornellier* v. *Haverhill Shoe Assn.* (1915), 221 Mass. 554; *Harvey* v. *Chapman* (1917), 226 Mass. 191; *Martineau* v. *Foley* (1918), 231 Mass. 220; *Smith* v. *Bowen* (1919), 232 Mass. 106; *Auburn Draying Co.* v. *Wardell* (1919), 227 N. Y. 1. Compare *contra, Macauley Brós.* v. *Tierney* (1895), 19 R. I. 255; *National Protective Assn.* v. *Cumming* (1902), 170 N. Y. 315; *Lindsay* v. *Montana F. of L.* (1908), 37 Mont. 265; *Bossert* v. *Dhuy* (1917), 221 N. Y. 342. H. L. W.