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MALICE IN TORT

As a general rule it may be stated that malice is of no consequence in an action of tort other than to increase the amount of damages, if a cause of action is found and that whatever is not otherwise actionable will not be rendered so by a malicious motive. In the case of *Allen v. Flood*, which is perhaps the leading one on the subject, the plaintiffs were shipwrights who did either iron or wooden work as the job demanded. They were put on the same piece of work with the members of a union, which objected to shipwrights doing both kinds of work. When the iron men found that the plaintiffs also did wooden work they called in Allen, a delegate of their union, and informed him of their intention to stop work unless the plaintiffs were discharged. As a result of Allen's conference with the employers plaintiffs were discharged. They brought an action against Allen for maliciously inducing their discharge. There being no injury to a legal right verdict was brought for the defendant. Held, that there was no cause of action because an action in itself lawful cannot be made unlawful on account of bad motives. This rule became recognized throughout both English and American jurisprudence.

The most notable of all the cases sustaining this doctrine are those concerning what are commonly known as spite fences. In these cases the defendant from purely malicious motives has erected a fence upon his own property in such a manner as to cut off his neighbor's light and air or injure him in some other way. The majority of these cases hold that the injured party can have no legal redress. So also in the case of *Auburn & C. P. L. Road Company vs. Douglas*, 9 N. Y. 444, it was held that the owner of land adjoining a toll road has a legal right to construct a parallel road upon his own land and the fact that he does it maliciously so that travelers can leave the toll road, pass over his land and thereby avoid the toll gate will not render it actionable, as the individual who uses his property in such a manner as would otherwise be lawful does not subject himself to liability by the fact that his motive is malicious. There is, however, a slightly growing movement to modify the law in these extreme cases and allow the plaintiff redress. Mr. Ames in his paper on *Law and Morals* (footnote 1) 22nd *Harvard Law Review*, 97, says:

"Criminative law regards the word and the act of the individual. . . . The law, except in certain cases based upon public policy, asks the further question, was the act blameworthy?"

And a little further on, touching upon the same subject:

"Suppose again that the owner of a piece of land sinks a well not for the purpose of benefiting himself but to drain his neighbor's spring, or builds a fence of the kind commonly known as spite fences for the purpose of cutting off his neighbor's light and air. The modern tendency is to make the land owner responsible for his malicious act. In thirteen states he must make compensation for draining the spring. In four states one who erects a spite fence must pay for the damages to the neighbor. Six states (footnote No. 2) have passed statutes giving one an action for the building of such fences."

Those states having statutes are California, Connecticut, Maine, Massachusetts, New Hampshire, Vermont and Washington. Michigan seems to have been the foremost in the spite fence crusade, and thus we find among the first cases decided along the new principle:

"A fence erected maliciously and with the express purpose of depriving the adjoining owner of light and air is a nuisance." (footnote No. 3 *Burke v. Smith*, 69 Mich. 380).

However, a number of other states have taken it up and we find a decision in *Bush v. Mockett*, 95 Nebraska, 552, which rules that a land owner will be enjoined from erecting a fence on his land to the great damage of his neighbor and without any useful purpose on his part, but for the sole purpose to annoy and punish the party injured.

In the case of underground waters of the class called percolating waters the decisions against a malicious abuse of their use have been more widespread. The question in these cases seems to be, has a man an absolute right to all percolating waters under his land, or is it correlative to the rights of others? The doctrine is now well accepted in most states to the effect that one may not maliciously draw percolating subterranean waters from another's land. Some states even go so far as to hold that adjoining land owners must be careful of each other's rights in exercising even the lawful and legitimate uses of their wells.

The general rule of *Allen v. Flood* has also been departed from by certain courts in holding liable in tort one who engages in business for the sole and malicious purpose of interfering with and destroying another's business. In *Tuttle v. Buck*, 107 Minn. 145, it was held that:

"A complaint which states in substance that the defendant, a banker and a man of wealth and influence in the community, maliciously established a barber shop, employed a barber to carry on the business and used his personal influence to attract customers from the plaintiff's barber shop, not for the purpose of serving any legitimate purpose of his own, but for the sole purpose of maliciously injuring the plaintiff, whereby the plaintiff's business was ruined, states a good cause of action."

An action for malicious prosecution, while seemingly an exception to *Allen v. Flood*, is not, for although want of probable cause may justify a jury in finding malice, it is not the malice but is the degree of want of probable cause constituting constructive malice, which completes the cause of action. A jury may bring in a verdict for the plaintiff and find no actual malice, but only lack of probable cause, or they may find for the defendant no matter how malicious his act if there was probable cause.

The old rule of *Allen v. Flood* seems to be rapidly giving place to a new order based on fair play and moral justice, in which the motive of the defendant will be a factor in forming the cause of action.

WM. C. ELIOT.