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# Business Tort—Newspaper's Refusal to Accept Advertising—A Job for Prima Facie Tort.—J. J. Gordon, Inc. v. Worcester Telegram Publishing Co

H Wayne Judge

# CASE NOTES

**Business Tort—Newspaper's Refusal to Accept Advertising—A Job for Prima Facie Tort.—*J. J. Gordon, Inc. v. Worcester Telegram Publishing Co.*[1]**—Corporate plaintiff was engaged in the real estate business in and around the city of Worcester, Massachusetts. Defendant was the owner and publisher of the only three newspapers with a general circulation in the Worcester area. Plaintiff had advertised his real estate in defendant's newspaper for more than a year prior to March 15, 1961, when the defendant refused to continue publication of plaintiff's advertisements. Plaintiff brought a tort action for damages resulting from this refusal, alleging that this advertising is an "absolute necessity" to the carrying on of his business, that the defendant's newspapers are a public utility, and that the defendant "without just cause, maliciously refused" and continues to refuse to accept plaintiff's advertising for publication in its newspapers. The trial court sustained the defendant's demurrer, which decision was affirmed on appeal. HELD: A newspaper publisher is engaged in a private enterprise and is, therefore, under no obligation to accept advertising from all who may apply for it.

The right of one engaged in a private enterprise to refuse to deal with anyone whomsoever has long been recognized as a fundamental tenet of American law.[2] A well-recognized exception to this general rule exists, however, in the case of a business affected with a public interest.[3] In efforts to hold newspapers liable for refusal to deal, it has often been urged that the newspaper industry falls into this latter category.[4] Notwithstanding implications to the contrary,[5] however, the courts have, with the exception of one Ohio nisi prius case,[6] unanimously held that the newspaper business is not one affected with a public interest.[7] Thus the court in the instant

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[1] 177 N.E.2d 586 (Mass. 1961).

[2] FTC v. Raymond Bros.-Clark Co., 263 U.S. 565, 573 (1924); United States v. Colgate & Co., 205 U.S. 300, 307 (1919); Eastern States Lumber Ass'n v. United States, 234 U.S. 600, 614 (1914); Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46, 48 (2d Cir. 1915); Restatement, Torts § 762 (1939).

[3] It has been held that telegraph, telephone, water, gas, and other like companies, that have received from public authority franchises which also provide for accommodation of the general public, owe a duty to serve all persons who make proper application for such service and who comply with such reasonable rules as may be fixed. Coy v. Indianapolis Gas Co., 146 Ind. 655, 659, 46 N.E. 17, 19 (1897); Gray v. Western Union Tel. Co., 112 Ky. 355, 67 S.W. 59 (1901); Weld v. Edison Illuminating Co., 197 Mass. 556, 84 N.E. 101 (1908); Sullivan v. Minneapolis & Rainy River Ry., 121 Minn. 488, 142 N.W. 3 (1913); Restatement, Torts § 763 (1939).

[4] See In re Louis Wohl, Inc., 50 F.2d 254 (E.D. Mich. 1931), and cases cited therein.

[5] "Courts have upon their own initiative declared cotton gins and tobacco warehouses affected with incidents of a common calling; as to newspapers . . . decisions conflict." Smith, Dowling & Hale, Cases on Public Utilities 6 (2d ed. 1936). Citing Uhlman v. Sherman, 22 Ohio N.P. (n.s.) 225 (1919). Contra, In re Wohl, Inc., 50 F.2d 254 (E.D. Mich. 1931).

[6] Uhlman v. Sherman, 22 Ohio N.P. (n.s.) 225 (1919).

[7] Journal of Commerce Pub. Co. v. Tribune Co., 286 Fed. 111 (7th Cir. 1922);

case concluded that the defendant had no duty to accept the plaintiff's advertising.

The court relies to a considerable extent on the Restatement of Torts, section 762,[8] which lays down the general rule guaranteeing the right to refuse to deal. The rule as stated in the section is supported by important policy considerations and rests upon the fundamental assumptions of free business enterprise. Denial of this privilege to select business relations would interfere, it is thought, with an important factor in the competitive process and might defeat its aim. The privilege is basic also to the politics of individualism. Yet policy considerations do not support the privilege in certain circumstances:

> The special circumstances in which liability is imposed are those in which the assumptions upon which the privilege rests are thought to be inapplicable or where the exercise of the privilege is thought unduly to curtail the liberty of others. In some cases legislation has limited the privilege.[9]

The privilege, therefore, is not an absolute one and in special circumstances a duty to enter or continue business relations may well arise. Indeed, it might be argued that the circumstances of the principal case gave rise to just such a duty and that defendant's liability should be predicated on the expanding principle of business tort law called "prima facie tort."[10]

The prima facie tort theory was originated and its prerequisites set out

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Poughkeepsie Buying Serv. Inc. v. Poughkeepsie Newspapers, Inc., 205 Misc. 982, 131 N.Y.S.2d 515 (Sup. Ct. 1954). See Times Picayune Publishing Co. v. United States, 345 U.S. 594, 624-25 (1953); Associated Press v. United States, 326 U.S. 1 (1944).

[8] Restatement, Torts § 762 (1939):

> One who causes intended or unintended harm to another merely by refusing to enter into a business relation with the other or to continue a business relation terminable at his will is not liable for that harm if the refusal is not
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> (a) a breach of the actor's duty to the other arising from the nature of the actor's business or from a legislative enactment, or
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> (b) a means of accomplishing an illegal effect on competition, or
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> (c) part of a concerted refusal by a combination of persons of which he is a member.

In reference to the above exceptions, the American Law Institute adds the following:

> Caveat: Except as stated in §§ 763-765, the Institute takes no position as to the liability of one who causes harm to another by refusing to enter into a business relation with the other or to continue a business relation terminable at his will when the refusal is of the kind stated in Clauses (a), (b) or (c).

[9] Restatement, op. cit. supra note 8, § 762, comment *a*. For example, Wagner National Labor Relations Act, 49 Stat. 457 (1935), as amended, 29 U.S.C. §§ 151-66 (1961), made it an "unfair labor practice" for an employer, whose business is sufficiently concerned with interstate commerce to bring him within the control of Congress, to discharge a man if the motive of the discharge is to interfere with his activity or membership in a union. A particular type of nonfeasance is thus made unlawful when motivated by a forbidden purpose. See Legislation, Statutory Qualifications of the Privilege to Inflict Commercial Injury, 31 Colum. L. Rev. 687 (1931).

[10] See Hale, Prima Facie Tort, Combination and Non-Feasance, 46 Colum. L. Rev. 196, 217 (1946).

by Lord Bowen in his famous dictum in the *Mogul Steamship Company* case:

> Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse.[11]

Massachusetts, at the insistence of Mr. Justice Holmes,[12] adopted the prima facie tort principle at an early date[13] and although only the more recent and almost exclusively New York[14] cases use the full label, "prima facie tort," the doctrine is well established in American law.[15]

The circumstances of this case are unique and the policy considerations conflict.[16] The Massachusetts court places the defendant's conduct squarely within section 762 of the Restatement and disregards exceptions "not relevant to this case." Yet, when one considers the case in the light of the prima facie tort theory a new question is presented: Does a party, in a monopoly position, whose trade it is to hold another's business before the public, have the privilege to arbitrarily break off a course of business dealings when this conduct is calculated to turn the buying public away from him and to thereby seriously injure him in his trade? In all other areas of tort law liability is predicated upon objective conduct, the wrongful "act." An absolute prerequisite for liability in those areas, therefore, is the "act" and,

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[11] Mogul Steamship Company v. McGregor, [1892] A.C. 25.

[12] Holmes, Privilege, Malice, and Intent, 8 Harv. L. Rev. 1 (1894).

[13] Bogni v. Perrotti, 224 Mass. 152, 112 N.E. 853 (1916); Moran v. Dunphy, 177 Mass. 485, 59 N.E. 125 (1901); Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900); Walker v. Cronin, 107 Mass. 555 (1871).

[14] Knapp Engraving Co., v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170, 148 N.Y.S.2d 635 (1956); Green v. Time, 147 N.Y.S.2d 828 (Sup. Ct. 1955); Ruza v. Ruza, 1 App. Div. 2d 669, 286 App. Div. 767, 146 N.Y.S.2d 808 (1955); Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946).

[15] Aikens v. State of Wisconsin, 195 U.S. 194 (1904); Huskie v. Griffin, 75 N.H. 345, 74 Atl. 595 (1909); Opera on Tour Inc. v. Weber, 285 N.Y. 348, 34 N.E.2d 349 (1941); Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934); Seavey, Bad Motive Plus Harm Equals a Tort, 26 St. John's L. Rev. 279 (1952). The American Law Institute recognized the principle in 1939 and used it in the formulation of the rule:

> One who without privilege so to do, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby.

Restatement, Torts, Explanatory Notes § 9, comment *a* at 190 (Tent. Draft No. 6. 1939).

[16] One may ordinarily refuse to deal with another at his pleasure; no requirement of justification for the refusal is made. One may not, however, without justification purposely divert the other's trade with third persons. There is no general duty to do business with all who offer their wares or patronage, but there is a general duty not to interfere purposely with another's reasonable expectancies of trade with third persons, whether or not the expectancies are secured by contract, unless the interference is privileged under the circumstances.

Restatement, Torts § 766, comment *b* (1939).

generally, there can be no liability for nonfeasance. In the area of prima facie tort, however, liability is predicated upon "intent." The act may be a lawful one but if done with the intent to injure another in his trade it is actionable.[17] It has been argued that an "act" should not be necessary for liability in this area simply because liability is predicated upon "intent,"[18] and therefore, nonfeasance motivated by the requisite intent should be actionable on a prima facie tort theory.[19] The theory, therefore, seems singularly appropriate for the circumstances of the instant case.

The courts, however, have consistently refused to extend the prima facie tort doctrine to cases involving nonfeasance.[20] They will struggle to find an act in the proper case[21] but will not seek justification for mere nonfeasance. Although the older cases required fraud, physical violence or economic pressure, the more recent cases require, at least, "inducement" or "persuasion" of potential customers.[22] It might be argued then that when the defendant here deliberately broke off a course of business dealings which had existed for over a year[23] he had committed the necessary positive

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[17] Herron v. State Farm Mutual Ins. Co., 14 Cal. Rptr. 294, 363 P.2d 310 (Sup. Ct. 1961); Goodman v. Mutual Broadcasting System, 185 N.Y.S.2d 152 (Sup. Ct. 1959); J. J. Theaters, Inc. v. V.R.K.O. Co., 96 N.Y.S.2d 271 (Sup. Ct. 1950).

[18] The American Law Institute provides an example of an instance where liability is imposed for refusal to deal motivated by an illegal intent: "One who in his business refuses to deal with another in order to establish or maintain an illegal monopoly is liable to the other for the harm caused thereby." Restatement, Torts § 764 (1939).

[19] Hale, supra note 10; Note, The Prima Facie Tort Doctrine, 52 Colum. L. Rev. 503 (1952).

[20] But no case has decided, so far as we are aware that the refusal of one individual to deal with another requires justification. . . . Even the most ardent advocates of the principle that the intentional infliction of temporal harm requires justification have stopped short of asserting that it applies to harm resulting from nonaction, in the absence of facts creating a duty to act.
Green v. Victor Talking Mach. Co., 24 F.2d 375 (2d Cir. 1928).

[21] "Where there is a combination of several persons for the purpose of concerted non feasance, however, the act of combining may be held to supply the missing ingredient of affirmative action." Hale, supra note 10, at 206.

[22] It is evident that the claim for damages is based upon conduct, or more specifically, language, tending to persuade the public to withdraw its custom from the plaintiff and having that effect to its damage. Such conduct having such effect is equally actionable whether it produces the result by persuasion, by threats or by falsehood, and it is enough to allege and prove the conduct and effect, leaving the defendant to justify it if he can.
Mr. Justice Holmes in American Well Works v. Layne, 241 U.S. 257, 259 (1916).

[23] These circumstances may be analogized to those covered by the Good Samaritan doctrine, a principle familiar to the negligence area of tort law, which raises a duty where formerly none had existed. The doctrine provides, in essence, that although there is no general duty to aid a party in danger, if the defendant attempts to aid him and takes control of the situation, he is regarded as entering voluntarily into a relation of responsibility, and hence assuming a duty. Thereafter he will be liable for any failure to use reasonable care in dealing with him and particularly if he abandons him in a position of danger. Slater v. Illinois Central R.R., 209 Fed. 480 (6th Cir. 1911); Black v. New York, New Haven & Hartford R.R., 193 Mass. 448, 79 N.E. 797 (1907); Prosser, Torts § 32 (1941).

"act."[24] The defendant is not a mere supplier of a commodity; this newspaper is an essential link between the plaintiff and his prospective customers, and the nature of the defendant's business is such that even so-called "nonfeasance" on his part will have an effect on the business decisions of prospective land buyers. The refusal to run an advertisement which has customarily appeared might be considered a form of persuasion.

The American Law Institute expresses no opinion as to liability in circumstances covered by the exceptions to section 762.[25] It is safe to assume that the Institute took this position because of the scarcity of case law on the issue of how far the prima facie tort doctrine has extended into this refusal to deal area. Had the plaintiff marshalled his facts and framed his declaration on a prima facie tort theory, however, it would seem that this court would, at least, have been required to discuss the area[26] and it could not have dismissed the case as an ordinary "refusal to deal."

H. WAYNE JUDGE

**Constitutional Law—Commerce Clause—State Occupation Tax as Measured by Gross Receipts.—*Washington-Oregon Shippers Coop. Ass'n, Inc. v. Schumaker.*[1]**—Respondent, Washington-Oregon Shippers Coop. Ass'n, Inc. (hereinafter referred to as WOSCA), a non-profit corporation[2] domiciled in the state of Washington, was formed to gain the advantages of carload or volume rates for its members[3] by providing services to consolidate shipments. As each member is engaged in a business involving the purchase and transportation of products from extra-state sources, WOSCA handles *only* interstate shipments.

Shipping procedure is as follows: the out of state vendor, upon receiving an order from a purchasing member of WOSCA, ships the commodities in care of WOSCA to consolidators who arrange the commodities in carload lots and ship them to Washington distributors. The latter segregate the shipments and make delivery to the purchasing members. Another contractor, who pays the carriers and others out of WOSCA's operating capital as

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[24] See Legislation, supra note 9, at 692.

[25] Restatement, op. cit. supra note 8, § 762, caveat.

[26] It may be, then, that courts, even without the aid of statutes, will be more disposed than they were previously to scrutinize the motive of the intentional infliction of harm by non-feasance, as well as by affirmative acts. They may perhaps place legal limits on bargaining power when it is based on a corporation's threat of non-feasance in the form of a refusal to buy, sell or employ as well as when it is based on a threat by individual workers to do the affimative act of combining, followed by the non-feasance of a refusal to work.
Hale, supra note 10, at 217.

[1] 367 P.2d 112 (Wash. 1961).

[2] WOSCA is exempt from regulation by the ICC as a freight forwarder under 56 Stat. 284 (1942), as amended, 49 U.S.C. 1002(c) (1958).

[3] Corporate membership consists of 119 business entities, with principal places of business in Washington or Oregon. This appeal did not concern transactions involving Oregon members.