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AN ANALYSIS OF THE "PRIMA FACIE TORT" CAUSE OF ACTION*

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In the minuscule area of the modern *prima facie* tort as a cause of action, it might be argued that we have retrograded to our common law forbears. Nevertheless, it is submitted, we find in such theory the same forward-looking approach that long since has led us out of the morass of common law pleading and thinking. Our analysis of the doctrine will reveal a somewhat general agreement, in pleading and in substance, among the several American jurisdictions discussed, albeit in certain aspects a marked disagreement is disclosed. At the same time, this analysis will enable us to postulate an overall and generally acceptable approach to the pleading and substance of such tort. To understand the *prima facie* tort doctrine we must first briefly examine its common law predecessors, and then see its modern American dress.

The skeletal, procedural forms of writ at first overshadowed the meat of the law.¹ Hence, plausible as one's substantive case might appear, if it did ". . . not fit any one of the receptacles provided by the courts . . . the lesson [was] that where there is no remedy there is no wrong."² The early primitive basis of tort liability was to hold a person liable for all harm inflicted upon another, so long as a form of action was

* The use of the *prima facie* tort concept as a cause of action is not restricted to actions and proceedings involving labor and management. As a matter of legal pleading the *prima facie* tort can be used in any factual situation wherein it is applicable, as disclosed hereafter.

The reason why labor lawyers are vitally interested in and concerned with the *prima facie* tort as a cause of action is that in the labor-management field there are union activities which, in quite a few instances, do not quite fall into "traditional" tort categories, and yet involve actual spite or malice. Assuming other factors to be present, a law suit may be instituted in such a situation even though no "traditional" cause of action results, the basis now being the *prima facie* tort.

The New York courts, for example, are beginning to find this concept pressed upon them in numerous instances, and the same is beginning to be true in other jurisdictions. The present analysis, therefore, is of moment to judges and lawyers in the field of labor law.

† See Contributors Section Masthead, p. 519, for biographical data.

¹ ". . . So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms . . ." Maine, *Early Law & Custom* 389 (1883).

² Maitland, *The Forms of Action at Common Law* 4-5 (1941).

provided by the law.³ Thereafter, the conception of wrongful intention and negligence encroached upon the absoluteness of the original liability and, to a degree, altered it.⁴ Thus a new, separate, and general rule of law apparently, but not actually and historically, came into being, viz., whenever one damaged another, wilfully and intentionally, and without just cause or excuse,⁵ a cause of action arose. The historical evolution of the form of this cause of action, as distinguished from its substantive nature and essential elements, discloses that the writ of trespass⁶ was the womb out of which the broad and elastic action on the case emerged.⁷

The action on the case⁸ was originally based upon the doing of an unlawful act, *i.e.*, "by the common custom of the realm" the conduct of the defendant was regarded by the law as wrongful.⁹ But when motive and malice¹⁰ were assimilated, even though as and in special cases, a subjective element was added which involved policy that, as described by one English jurist, was an "unruly steed." While the growth of the economy in England (and in America) demanded that novel causes of

³ Holdsworth, *A History of English Law* III, 375-77 (1923); VIII, 446, 449 (1926) ("primitive" is used at p. 447). See, however, for a contrary view, Winfield, "The Myth of Absolute Liability," 42 *L.Q. Rev.* 37 (1926); see also Fifoot, *The History and Sources of the Common Law* 187 (1949).

⁴ Holdsworth, *op. cit. supra* note 3 at 447. At pp. 447-48 the background of the part played by wrongful intention in the law of tort is developed.

⁵ See also Forkosch, "The Doctrine of Just Cause as Applied to Labor Cases," 23 *Temple L.Q.* 178 (1950), repr. 1 *Lab. L.J.* 789 (1950).

⁶ "[O]nly those [torts] which involve some violence—the violence may be exceedingly small—are known as trespasses." Pollock & Maitland, *The History of English Law* II, 511 (2d ed. 1923). For material and references on the origination of trespass, whether from the appeal of felony or not, e.g., Reppy, *Introduction to Civil Procedure* 113 et seq. (1954).

⁷ Street, *The Foundations of Legal Liability* III, 223, 245 (1906), is insistent that a differentiation be made in terminology, for "the two remedies of trespass and case divide between them the entire field of tort. These are the two purely delictual remedies . . ." There is, he feels, an action of trespass, and a separate action of trespass on the case, which between them embrace all the types of trespass. Separately, "The broad action on the case is used to redress injuries which do not fall within either of the two trespass formations . . ."

Maitland states that "really a new and a very elastic form of action has thus been created . . ." *op. cit. supra* note 2 at 66. See also note 8 *infra*, and Reppy, *op. cit. supra* note 6 at 121 et seq.

⁸ This stems from, or is included in, the writ of trespass which became common during the middle thirteenth century. The writ was "available in some form to recover compensation for damage directly done by violence . . ." Street, *op. cit. supra* note 7 at 232. The authorities disagree as to the origin of the writ, but in general it included situations which we might today call tortious. The writ of trespass (or action) on the case emerged from the writ of trespass in somewhat of a cloud, but there is no question that it was not quite the same as its predecessor and was therefore "new." See, e.g., Holmes, *The Common Law* 274-75 (1881); Ames, *Lectures, infra* note 10 at 442, although compare arguments by Plucknett, "Case and the Statute of Westminster II," 31 *Colum. L. Rev.* 778 (1931), and Dix, "The Origins of the Action of Trespass on the Case," 46 *Yale L.J.* 1142 (1937). See also note 7 *supra*.

⁹ Holdsworth, *op. cit. supra* note 3, VIII, 449-50.

¹⁰ See, e.g., Ames, "How Far An Act May Be A Tort Because of the Wrongful Motive of the Actor," 18 *Harv. L. Rev.* 411 (1905), repr. in Ames, *Lectures on Legal History* 399, 411 (1913), at 411 n.1, borrowing Lord Bowen's adjective, "slippery," to describe the term malice.

action not be dismissed solely because they were novel,¹¹ the judiciary was now called upon not only to hear a plaintiff's case but also to weigh or balance the defendant's arguments; in other words, the courts were to make and set policy.

For example, assume that a number of steamship owners group into an association with the object of securing a particular carrying trade, and allow rebates only to customers who will deal with them to the exclusion of rivals. This practice drives a non-member out of business and he sues; may he recover?¹² Even with an allegation of malicious intent to injure, the plaintiff cannot prevail against a justification based upon the defendant's primary and controlling self-interest to increase profits, because the policy of the common law is to encourage all competition which is not furthered by evil and otherwise unlawful means or ends.¹³ Here the balance of justice is a policy of fair economic competition which upholds all conduct not otherwise illegal and transcends even "the worst possible spirit of malevolent vindictiveness. . . ."¹⁴ Judicial policy, in this aspect, reflects the political and the economic,¹⁵ and to the extent that the judiciary is but one arm of our American tripartite form of government, governmental policy as well.¹⁶

The action on the case was thus, as Maitland describes it, "a very elastic form of action."¹⁷ As we have seen, it could be used not only for

¹¹ E.g., *Chapman v. Pickersgill*, 2 Wils. K.B. 145, 146, 95 Eng. Rep. 734 (1762): ". . . torts are infinitely various, not limited or confined"

¹² It should be noted that no statutory condemnation, analogous to the American Sherman Antitrust Act, was then in force, and so only the common law could be invoked to support the action which was based upon a conspiracy.

¹³ See *Mogul Steamship Co. v. McGregor*, 23 Q.B.D. 598 (1889), *affd.*, A.C. 25 (1892), analyzed by this writer, *supra* note 5. See also note 37 *infra*.

¹⁴ Prosser, *Torts* 22 (2d ed. 1955).

¹⁵ In the *Mogul Steamship* case, *supra* note 13, Lord Bowen commented:

To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel or perfection

23 Q.B. at 615. Lord Fry wrote, at 625-26:

To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the Courts. Competition exists when two or more persons seek to possess or to enjoy the same thing: it follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition

(By statute, of course, e.g., our own Federal Trade Commission Act, and its amendments, as well as the Robinson-Patman Act, we may legislatively draw a line between fair and unfair competition which the judiciary now enforces; also, in questions of unfair competition such as "palming-off," the courts likewise draw a judicial line between the licit and the illicit, as Lord Bowen and Lord Fry, at pp. 615 and 626, themselves illustrated and as discussed in *Reddaway v. Banham*, A.C. 199, 65 L.J.Q.B. 381 (1896).)

Throughout the discussion by any court or commentator upon the genesis and utilization of the prima facie tort doctrine there flow aspects of unfair competition and other tortious conduct; these "traditional" torts are excluded from discussion except peripherally.

¹⁶ E.g., the Congress has legislated in the field and has set forth the legislative policy as one of free competition. See, in general, this writer's *Antitrust and the Consumer* (1956) esp. Chaps. II and III, and his "Labor and Price Control," 2 Lab. L.J. 567 (1951).

¹⁷ *Supra* note 7.

negligence in today's usual sense, but also for intentional injury.¹⁸ It is the limited area which this latter phrase evokes which is of importance here. We must exclude negligence *qua* lack of care, breach of duty, violation of statute, etc., from our discussion and concentrate upon the intent, the motive, and the malice¹⁹ to do evil, *i.e.*, to harm a person, whether directly or indirectly, by setting in motion or furthering a chain of events. And yet the concept we examine is insufficiently stated in the preceding sentence, for the "intent to do evil" should be further analyzed with respect to its three terms: "intent," "to do," and "evil." For example, we have stated that evil may be equated with "to harm a person," and yet it has been held that various types and degrees of harm will not suffice to create a legal "injury" that will give rise to a cause of action. Accordingly, the maxim *damnum absque injuria* may apply.²⁰ Moreover, the application of this doctrine is not affected by the addition of wilfulness.²¹

Previously we have remarked that the primitive basis of civil liability held one responsible for all harm inflicted upon another, assuming a writ was available. This concept, in effect, was furthered by both Lord Bowen²² and Holmes²³ who spoke merely of the infliction of (temporal)

¹⁸ See, e.g., *Wilson v. Smith*, 10 Wend. (N.Y.) 324 (1833), and *Kelly v. Lett*, 35 N.C. 50 (1851). In *Yates v. Joyce*, 11 Johns. (N.Y.) 136, 140 (1814), an action on the case was brought by the assignee of a judgment which was a lien on defendant's property. It was alleged that the defendant, knowing of the lien and assignment, and intending to injure plaintiff and prevent him from having satisfaction, tore down a barn worth \$300 and thereby left the ground of less value than the judgment, with defendant being the insolvent and otherwise unable to pay. Plaintiff received judgment, the court upholding the form:

It is the pride of the common law, that wherever it recognizes or creates a private right, it also gives a remedy for the wilful violation of it If, then, there is any remedy for [plaintiff], it is in this form of action only that he can obtain it

Compare, however, the famous squib case as to the requirement of immediacy of injury, *Scott v. Shepherd*, 2 Win. Bl. 892, 3 Wils. K.B. 403, 95 Eng. Rep. 1124, 1127-28 (1773) (Blackstone's dissent), and *Street*, op. cit. supra note 7 at 266, where, referring to the idea of trespass for interference with domestic relations he states: "A significant fact in connection with the use of the action of trespass in this field is that the principle that trespass lies only for direct injury is flatly repudiated"

¹⁹ Motive and malice are used here for purposes of coloration, rather than description. Their usage is not ordinarily admired. *Pollock*, Torts 18-20 (15th ed., Landon 1951).

²⁰ E.g., the *Mogul Steamship* case, supra notes 13 and 15; *Year Book of Henry IV*, Hil. 11 Hen. IV 47, pl. 21 (A.D. 1410-11), cited and quoted in *Pollock*, op. cit. supra note 19, at 106-07.

²¹ See, e.g., Lord Dunedin's remarks in *Sorrell v. Smith*, A.C. 700, 727-28 (1925), referring to *Allen v. Flood*, A.C. 1 (1898) (see, esp., Lord Herschell's remarks at 139-40, that the proposition "that a man is bound in law to justify or excuse every wilful act which may damage another in his property or trade . . . is far too wide; everything depends on the nature of the act, and whether it is wrongful or not.")

²² In *Skinner & Co. v. Shew & Co.*, 1 Ch. 413, 422, 62 L.J. Ch. 196 (1893): "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." See also his dictum in the *Mogul Steamship* case, supra note 13, 23 Q.B.D. at 613.

²³ *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904):

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

"damage," and did not include in their statements of the law any term such as "injury," "wrong," etc. In effect they merely added "wilfully and intentionally," or only "intentional,"²⁴ to the primitive basis of civil liability, and created a cause of action stemming from, if not based upon, the intent to do harm. This approach was supported by Holmes as follows: "It is no sufficient answer to this line of thought²⁵ 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."²⁶

The nub of this approach is found in the distinction between the consequences of one's action which the law, as a matter of law, will hold one to have foreseen, and the consequences which one personally knows will actually flow from his action and deliberately, *i.e.*, intentionally and wilfully, so acts to produce. In this latter situation the facts, not the law, coalesce into a factual and factually-intended harm, rather than a legally-drawn one. When the law infers a consequence, it may additionally and conditionally require a second legal item, namely, an "injury." In the factual situation of harm and intent to harm, no legal inference is utilized and, hence, no additional requirement apparently is necessary.²⁷ This analysis, while perhaps strained, at least enables us to see how a distinction and a differentiation may conceivably be drawn, and to hold one liable for his factual intention and factual deeds.²⁸ Another possible

of pleading, requires a justification if the defendant is to escape (citing the Mogul Steamship case)

In this case Holmes (White dissenting) upheld, as constitutional under the 14th Amendment Due Process Clause, a Wisconsin statute which prohibited combinations for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession. The facts involved three newspapers combining in a rate war against a fourth, similar to the Mogul Steamship facts, whereupon this criminal prosecution of the conspiracy followed.

²⁴ Holmes meant, by the use of "intentional," whatever else might be added by "wilful," as used by Bowen, for Holmes knew of Sir Frederick Pollock's limitation of his general statement, as quoted in note 30 *infra*, to a "wilful harm." See also Holmes' 1891 letter to Pollock (Holmes-Pollock Letters I, 35 (Howe ed. 1941)):

The general criterion of liability in tort for which I have contended as you know is the tendency of an act under the circumstances known to the actor—according to common experience. If the probability of harm is very great and manifest the act is called malicious or intentional If less but still sufficient to impose liability it is called negligent

See further, Holmes, "Privilege, Malice, and Intent," 8 Harv. L. Rev. 1 (1894) repr. in *Collective Legal Papers* 117-18 (1921).

²⁵ See Holmes' language in note 23 *supra* for his line of thought, although there should be added the additional aspect of a justification.

²⁶ Aikens v. Wisconsin, *supra* note 23 at 204, citing *Quinn v. Leatham*, A.C. 495, 524 (1901).

²⁷ See on this, the expressions by Holmes in his 1891 letter to Pollock, *supra* note 24.

²⁸ As well as the "direct" consequences, e.g., as Pollock might well conclude, in his analysis of the famous squib case, that Shepherd, who first threw the lighted squib into a building full of people, "went about to do harm, and having begun an act of wrongful mischief, he cannot stop the risk at his pleasure, nor confine it to the precise object he laid out, but must abide it fully and to the end." Pollock, *Torts* 26 (15th ed., Landon 1951).

distinction may be found in Pollock's 1874 letter to Holmes wherein he distinguishes between "*Delict* proper [as] being the breach of a general duty, *i.e.*, not arising from any special position of the party [and] . . . *Quasi-delict* [as] the breach of a particular duty (*i.e.*, one which does arise from, etc.). . . ."²⁹

This Pollock-Bowen-Holmes approach, if it thusly may be termed, has been severely criticized abroad³⁰ and, in light of the English decisions, apparently is not the law.³¹ One English writer has contended that "the categories of tort (not, of course, the categories of particular torts [such as negligence]) are closed. . . . [T]he search for any general principle of liability must be in vain. The tortious quality of an act cannot be discerned by intuition, any more than its criminal quality. It can only be discovered by reference to the experience of our forefathers. . . ."³² And yet, it is submitted, the experience of our forefathers, which is found in the common law, did not foreclose the legal proposition sponsored by Pollock and furthered by Bowen and Holmes. At most, the common law did not mention this proposition, that is, while it did not support it, it did not reject it. Even the critics deny "that the law of torts does not, or should not, develop, within its categories, in accordance with the ever-changing needs of society." But to this statement they now add, "that, in the practical atmosphere of a court of law, the litigant cannot succeed merely by asserting that he has been harmed: he must show that the harm which he has suffered falls within one of the recognized categories

²⁹ Holmes-Pollock Letters, *supra* note 24, I, 4. See, on the concept in general, the Holmes letter quoted in the cited note.

³⁰ Prof. Landon, in his fifteenth edition of Pollock, *op. cit. supra* note 28 at 40-46, retained his 1939 Excursus A in which he remarked (p. 41) that Sir Frederick's "views expressed are in some respects open to criticism." Quoting (at p. 42) the "general proposition of English law" put forth by Pollock, "that it is a wrong to do wilful harm to one's neighbor without lawful justification or excuse," Prof. Landon points out that Sir Frederick, in his first edition, "stated that there was 'no express authority that I know of' for this proposition; but in 1892 Bowen L.J. in the course of his judgment in *Skinner & Co. v. Shew & Co.* [*supra* note 22] remarked obiter" to that effect and so enabled Pollock to claim it as authority. However, continued Landon, "the truth is that the House of Lords has definitely rejected any such general test . . ." In support, there were cited *Mayor of Bradford v. Pickles*, A.C. 587 (1895), *Allen v. Flood*, *supra* note 21, and *Sorrell v. Smith*, A.C. 700 (1925).

These three decisions of the highest tribunal prove once and for all that the mere infliction of harm upon a person does not give him either a right of action or a right to call upon the defendant to justify his conduct. Pollock, however, refused to alter his exposition. There was a stubborn texture in him which made him unwilling to admit that his theories were erroneous, whatever the House of Lords might say. There can be no doubt . . . that the dicta of Bowen . . . have been held by the House of Lords to be inconsistent with the basic principles of the common law
Pollock, *op. cit. supra*.

³¹ See, e.g., Lord Herschell's comments, *supra* note 21.

³² Prof. Landon, in Pollock, *op. cit. supra* note 30 at 45. Compare this language and approach with that of Prof. Warren Seavey in his *Cogitations on Torts 5-7* (1954), e.g., the law of torts "is not static but dynamic [J]udges . . . should be most free from the shackles of *stare decisis* . . . [so as to meet] the needs of successive generations."

of liability. In short, despite Pollock's advocacy, a plaintiff does not substantiate a cause of action by proving unjustifiable harm: he must prove a [categorized] tort, not a mere academic theorem."³³ In other words, the law is that a tort is not the showing of harm; therefore, merely showing harm does not result in a tort cause of action! But, continues the argument, the ever-changing needs of society permit (require?) a development in the law of torts; this development, however, can occur only within the recognized categories of liability; since merely showing harm does not fall within one of the recognized categories of liability, there can be no development of tort law which will embrace this area of conduct! This circular and strait-jacket reasoning is fallacious in that it rejects the extension to, or creation of, new categories of liability or, within one of the recognized categories, denies the possibility of addition or extension. And yet, as we have seen, the evolution of the action on the case discloses that such methods of addition, extension, or creation not only were possible but actually occurred in early English law.

Another mode of argument is suggested by the concept of the action on the case, heretofore stated to be based originally upon the mere doing of an unlawful act ("by the common custom of the realm" the conduct of the defendant was regarded by the law as being wrongful). The common law, similar to the law of today, dealt with facts as they occurred. These facts were characterized as wrongful or not wrongful and, depending upon the judicial cloak in which the facts were garbed, liability was or was not upheld. But the judicial mind, in so characterizing the facts was subjectively employed; hence questions of policy (and even of intuition!) *did* enter. Thus, Pollock's limitation of the general principle to "wilful" harm inflicted, or Bowen's to that harm "wilfully and intentionally" inflicted, or Holmes' to that which was "intentional," incorporated and utilized a concept which was not solely the infliction of harm, but which required that it be something more. This "something more" might well partake of the nature of a wrong, *i.e.*, a *delict* or a *quasi-delict*. To quote Lord Herschell, "everything depends on the nature of the act, and whether it is wrongful or not."³⁴ But the "nature" of the act is a judicial characterization, and it is from this characterization that wrongfulness does or does not flow! We are therefore in the arena of policy, whether it be termed judicial or public.

There is a two-fold aspect of policy which enters the *prima facie* tort theory. Assuming that we may accept the theory as a working principle, the first and necessarily determinative question (where intent and

³³ *Ibid.*

³⁴ *Supra* note 21.

temporal damage are conceded or proved) is whether, as a matter of judicial policy, the conduct of the defendant is wrongful.³⁵ Here, we have translated the early "common custom of the realm" into "judicial policy"; it is now required that defendant's conduct be characterized as "a" wrong that the law will require him to justify. If the law upholds the plaintiff's allegations as a legal cause of action then, when the defendant seeks to justify, his facts must likewise be characterized as, or as not, a "justification."³⁶ In other words, the law will weigh one policy against the other and apply that which is more conducive to the public weal. There can be no required justification or application of judicial policy to defendant's facts before the plaintiff's cause of action is accepted as such. But when the cause of action is upheld, policy necessarily enters in characterizing the defendant's facts as or as not a justification. We may now inquire why judicial policy is not initially permitted to enter the plaintiff's case if and when the defendant is permitted to go forward with his attempted justification.³⁷ One obvious response is that in rejecting

³⁵ We must not overlook the fact that plaintiff, in proving the facts to support his cause of action, may additionally (or necessarily) prove facts which disclose a justification in defendant. In such a situation the plaintiff has proved himself right out of a cause of action and court, but the analysis here assumes no such factual occurrence.

³⁶ On this aspect see this writer's "Doctrine of Just Cause as Applied to Labor Cases," supra note 5, and also his Treatise on Labor Law c. IX (1953).

³⁷ In *Vegeahn v. Guntner*, 167 Mass. 92, 105-06, 44 N.E. 1077, 1080-81 (1896), Holmes' dissent produced these paragraphs (citations omitted) which, from the discussion already had, are not difficult of understanding:

I agree, whatever may be the law in the case of a single defendant, . . . that when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose, or the defendants prove, some ground of excuse or justification. And I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable, as well as doing it by falsehood or by force . . .

Nevertheless, in numberless instances the law warrants the intentional infliction of temporal damage because it regards it as justified. It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable any one even to form an intelligent opinion about them. In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas for which a rational defense is ready.

To illustrate what I have said in the last paragraph, it has been the law for centuries that a man may set up a business in a country town too small to support more than one, although he expects and intends thereby to ruin some one already there, and succeeds in his intent. In such a case he is not held to act 'unlawfully and without justifiable "cause" . . . The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged . . . Yet even this proposition nowadays is disputed by a considerable body of persons, including many whose intelligence is not to be denied, little as we may agree with them.

I have chosen this illustration partly with reference to what I have to say next. It shows without the need of further authority that the policy of allowing free competition justifies the intentional infliction of temporal damage, including the damage of inter-

the *prima facie* tort doctrine the English judiciary has thereby exercised just such approach and held it to be against judicial policy to require anyone to respond under such factual situation. Secondly, it might be argued that Parliament may always characterize a situation as wrongful (which it has not done with respect to this doctrine), whereupon the judiciary must accept and follow this legislatively-imposed public policy.³⁸ Thirdly, it may be urged that permitting such a cause of action to be availed of would open a veritable Pandora's box of legal ills which the body economic (and judicial) could not sustain. But these arguments are not particularly satisfying. The second concedes that the judiciary has promulgated the policy against the doctrine, even though the legislature may change it. We are forced back to the first argument which wholly disregards the historical fact that the action on the case remains an evolving and changing concept that was born of necessity and nurtured in torment. Since policy is changeable and responsive, judicial approaches and concepts react differently in successive generations;³⁹ no judicial system has ever stood still. The third argument confesses a judicial impotency to rectify injustices and right wrongs which stands as an anomaly in the light of modern emphasis upon the individual's civil and legal rights.

Nevertheless, the judicial answer of the English courts has been that no *prima facie* tort cause of action, as we analyze the term in this paper, can be utilized. Of course, we might slightly alter Holmes' statement of the doctrine by stating that *prima facie*, the intentional infliction of "injury" (not merely "temporal damage") gives rise to a cause of action which requires a justification if the defendant is to escape. This is obviously acceptable to the English courts, but we do violence to the concepts here analyzed. The terms "injury" and "damage" or "harm" vary in legal meaning and result in different conclusions of law in the formulation of the doctrine. With this caveat, we turn to the American decisions, emphasizing but a few of the jurisdictions because of the manifest difficulty in covering all state and federal cases.

ference with a man's business, by some means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade

The only debatable ground is the nature of the means by which such damage may be inflicted. We all agree that it cannot be done by force or threats of force

³⁸ See, e.g., *Aikens v. Wisconsin*, supra note 23; also, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), and this writer's "Jurisdiction [of the N.L.R.B.] And Its Impact on State Powers," 16 *Ohio St. L.J.* 301 (1955).

³⁹ See, e.g., Plucknett, *A Concise History of the Common Law* 283-84 (1929), disclosing the fourteenth century judicial distinction between trespass and case, and the development of the latter by creating new forms of action. In America, for example, reversals have so done, e.g., *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (analysis and citations in Black's opinion for the Court); *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Prosser, Torts* 636 (2d ed. 1955).

We have already noted Holmes' early exposition of the *prima facie* tort doctrine, written during his tenure on the Supreme Court of the United States;⁴⁰ he never deviated from this approach.⁴¹ Such views, however, had been formulated and promulgated while he was a member of the Massachusetts Supreme Court.⁴² There, in 1896, he upheld as a cause of action but justified on the facts "the intentional inflicting of temporal damage, including the damage of interference with a man's business," when free competition "in the battle of trade" so required it.⁴³ Although, in effect, he was merely following earlier Massachusetts law,⁴⁴ his colleagues apparently had to be convinced of this fact. Hence, when he later dissented in a particular situation, he nevertheless could write that: "The difference between my brethren and me now seems to be a difference of degree. . . ."⁴⁵ In Massachusetts, therefore, whether committed by (apparently) one or (definitely) more persons who act in concert, the intentional infliction of damage without justification gives rise to a cause of action.⁴⁶ This statement, however, is somewhat deceptive. By including "without justification" we either require a term or add an aura; if the former, then our *prima facie* tort theory is somewhat altered; if the latter, then we include a frame of reference in our discussion which, at

⁴⁰ *Supra* note 23.

⁴¹ See, e.g., *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350 (1921). It is interesting to note that plaintiff-appellants argued, *inter alia* that: Motive is sometimes controlling The tendency is away from the doctrine of the cases originating with *Allen v. Flood* [*supra* note 21] One of the first departures from this doctrine was announced by Mr. Justice Holmes in *Plant v. Woods*, 176 Mass. 492, . . . 57 N.E. 1011.

In his opinion in the *American Bank* case, at p. 358, Holmes wrote:

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 conclusions. Most rights are qualified The interests of business also are recognized as 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 upon a bank, and ruin it, we cannot doubt that an action would lie

Of course Holmes shortly points out that "this is not private business" which is here involved.

⁴² In the gathering of material for the jurisdictions which follow, except for that of New York, I have relied upon, and wish to express my appreciation for, the efforts of two students, Stephen Lang and Gerald Bitman.

⁴³ *Vegeahn v. Guntner*, 167 Mass. 92, 106, 44 N.E. 1077, 1080 (1896).

⁴⁴ E.g., *Walker v. Cornin*, 107 Mass. 555, 562 (1871): "The intentional causing of such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong. This proposition seems to be fully sustained by the references in the case of *Carew v. Rutherford* (1870), 106 Mass. 1, 10, 11."

⁴⁵ *Plant v. Woods*, 176 Mass. 492, 504, 57 N.E. 1011, 1016 (1900).

⁴⁶ E.g., *Owen v. Williams*, 322 Mass. 356, 77 N.E.2d 1318 (1948); *Vegeahn v. Guntner*, *supra* note 43; *Carew v. Rutherford*, *supra* note 44; Hale, "Prima Facie Torts, Combination, and Non-Feasance," 46 *Colum. L. Rev.* 196 (1946), adopts the views of Holmes, now accepted by a large majority of jurisdictions, that combination is not necessary or essential to support a *prima facie* tort.

the outset, is not present. The corrected statement of law might read better as follows: (1) the intentional infliction of harm or damage *prima facie* gives rise to a cause of action; (2) where the pleading of allegations of this cause of action itself discloses a justification, then no sufficient cause of action arises; (3) where (2) is not present and, hence, only (1) appears, unless the defendant(s) pleads and proves a justification, the plaintiff's cause of action, if proved, will be sufficient to support a judgment.⁴⁷ The defendants' justification so pleaded or proved must consist of interests (or rights?) which are "direct and immediate and not indirect, remote or consequential."⁴⁸ Also, there must be "an intention on the part of the . . . [defendants] to injure the plaintiff," otherwise the defendants' conduct, "though resulting incidentally in damage to the plaintiff, was not a wrong. . . ."⁴⁹ This intent to injure may be either primary or secondary; the former in the sense that defendants' primary object or purpose in engaging in the conduct is to cause the harm or damage; the latter in the sense that defendants' self-interest requires that certain (ends and) means be engaged in which, although known by defendants necessarily to result in harm or damage to plaintiffs, are not the primary reason for their conduct in the context of activities and desires. Only a primary intention to injure is actionable in Massachusetts.⁵⁰

In New York the *prima facie* tort doctrine has apparently had its greatest degree of legal adumbration, sophistication, and qualification. The doctrine is accepted as per se supporting a cause of action, but the requirements surrounding its pleading and proving are numerous and minute. Thus, "where specific torts account for all the damages sustained, whether provable as general damages or pleadable or provable as special damages, *prima facie* tort does not lie."⁵¹ In other words, the doctrine supports a sort of residual or last-chance cause of action, deriving "from the ancient form of action on the case, [and] covering those

⁴⁷ E.g., *Johnson v. East Boston Savings Bank*, 290 Mass. 441, 195 N.E. 727 (1935).

⁴⁸ *Saveall v. Demers*, 322 Mass. 70, 72, 76 N.E.2d 12, 13 (1947), per Qua, J., first setting forth as law "that intentional harm to the business of another . . . is a tort unless justified . . ." Note that the Massachusetts court states that "a tort" results, but it must be cautioned that the facts included a combination of defendants.

⁴⁹ *Boylston Housing Corp. v. O'Toole*, 321 Mass. 538, 552, 74 N.E.2d 288, 297 (1947).

⁵⁰ *Robitaille v. Morse*, 283 Mass. 27, 32, 186 N.E. 78, 80 (1933);

An illegal primary object or purpose is not made out under the law simply because one of the purposes in seeking to secure a trade advantage by a combination is the destruction and ruin of the business of another. It is necessary that such a purpose should be the primary object of the combination entered into with the malicious intention of damaging the plaintiff, and that the means used should cause his damage.

⁵¹ *Ruza v. Ruza*, 286 App. Div. 767, 770, 146 N.Y.S.2d 808, 811 (1st Dep't 1955). The illegality of the means or methods, or of the purposes or ends, is ordinarily sufficient for a traditional category of tort to be invoked. It is only when neither the means nor the ends can, by virtue of their illegality or other categorization, support a known tort cause of action that recourse may ultimately and conceivably be had to the *prima facie* tort doctrine. For a discussion of the means-end doctrine, see this writer's *Treatise on Labor Law* c. IX (1953).

situations where intentional harm has been inflicted, resulting in damage, by an act or series of acts which might otherwise be lawful and which do not fall within the category of traditional tort actions."⁵² The intention to harm must be "distinguished from the intention merely to commit the act," and when this specific intention to harm "has motivated the action, and has caused the injury to plaintiff, all without excuse or justification," the doctrine may be invoked.⁵³ The purpose of the defendant must be "solely to produce damage,"⁵⁴ even though he ordinarily has a right to do what he does.⁵⁵ "The key to the prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, *by an act or a series of acts which would otherwise be lawful.*"⁵⁶ (Emphasis added.) As originally suggested, the New York "courts have sought to confine the doctrine within reasonable limits by requiring [a] plaintiff to state in his complaint the material facts, not merely conclusions, in plain and concise form; to separately state the allegations referable to this cause as distinguished from the allegations which may be the basis for the pleading of other causes concerned with specific traditional torts; and to allege special damages, which alone are recoverable for such prima facie tort."⁵⁷ These allegations of special damage "must state specifically

⁵² Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170, 148 N.Y.S.2d 635 (1st Dep't 1956), citing Aikens v. Wisconsin, supra note 23, and Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946), among other New York cases.

⁵³ Ruza v. Ruza, supra note 51 at 769, 146 N.Y.S.2d at 811, quoted in Benton v. Kennedy-Van Saun Mfg. & Eng. Corp., 2 App. Div. 2d 27, 28, 152 N.Y.S.2d 955, 957 (1st Dep't 1956). The term "operative misconduct," has been used by the courts to denote and limit the factual situation. See, e.g., Best Window Co. v. Better Business Bureau, 2 Misc. 2d 55, 59, 146 N.Y.S.2d 382, 385 (1955); Brandt v. Winchell, 283 App. Div. 338, 343, 127 N.Y.S.2d 865, 869 (1st Dep't 1954). Only a person so injured may avail himself of the cause of action, e.g., the cause as a counterclaim is available only to the defendant able to plead the necessary allegations and not to his co-defendants. Arco Painting Corp. v. Klemitt Const. Corp., per Benvenaga, J., N.Y.L.J., Feb. 18, 1957, p. 6, col. 6.

⁵⁴ A. S. Rainpell, Inc. v. Hyster Co., 1 Misc. 2d 788, 791, 148 N.Y.S.2d 102, 105 (1955), quoting from Coleman & Morris v. Pisciotta, 279 App. Div. 656, 657, 107 N.Y.S.2d 715, 716 (2d Dep't 1951). See also Hutson v. Bright (N.Y. County, Spec. III) N.Y.L.J., Dec. 13, 1956), p. 8, col. 1, per McGivern, J.:

The basic issue emerging, therefore, is the question whether defendant is genuinely pursuing the avowed purpose or whether its acts are conceived and motivated solely in revenge, as claimed, with no concern for legitimate labor objective

⁵⁵ "The second involves doing what is right but with malevolence, including an intent to cause injury." Best Window Co. v. Better Business Bureau, 148 N.Y.S.2d 652, 656, rev'd, 1 App. Div. 2d 1001, 151 N.Y.S.2d 833 (1st Dep't 1956) (complaint dismissed because of deficiencies in pleading), referring to the situation found in Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923).

⁵⁶ Ruza v. Ruza, supra note 51 at 769, 146 N.Y.S.2d at 811.

⁵⁷ Sheppard v. Coopers' Inc., 156 N.Y.S.2d 391, 395 (1956) (citations before each semi-colon omitted). See also Test v. Eldot (N.Y. County, Spec. III) N.Y.L.J., Feb. 29, 1956, p. 7, col. 4, per Saypol, J.:

To permit a recovery in prima facie tort upon an allegation and proof of general damage would throw open to regulation of morals and ethics all conduct which, when substandard, results in injured feelings without other and special damage. It is the allegation of temporal damage which makes such an action maintainable upon a proper statement of a cause in prima facie tort

and with particularity the item of loss claimed by the plaintiff, giving the names of the employers, customers or others who are claimed to have taken away their business from plaintiff."⁵⁸

Apart from these three pleading requirements there is a fourth requisite which the New York Court of Appeals has left in a state of questionable confusion as to its proof, namely, the question of intent (motive, malice). We have already mentioned the necessity of an intention to harm, as distinguished from an intention to commit the act, but the pleading must allege not only such an intent but also that it was the *sole* motivation for the acts complained of. In Massachusetts there is apparently a distinction between a primary and secondary intent or purpose, but in New York this distinction has seemingly been abandoned if *Reinforce, Inc. v. Birney*, decided December 31, 1954, may be so interpreted.⁵⁹ In that case the Court of Appeals agreed with the trial court that the evidence in support of the pleading "was insufficient to show that malice was the only spur to the union's activity, or that damage to plaintiffs was the union's sole purpose." The court also upheld the trial judge's charge "that if the motives were found to be mixed—good or bad—defendants must win the case, provided their acts had some reasonable relation to wages, hours of employment, collective bargaining or some other valid union objective." The dismissal of the complaint by the intermediate appellate court was likewise upheld "because plaintiffs did not carry their burden of showing that defendants' acts were solely 'malicious,' that is, that they were done 'without legal or social justification'"⁶⁰ These statements and views, which the majority of the Court of Appeals accepted must be contrasted with the statements of the court itself, for there is a possible source of confusion, if not inconsistency, to be found.

The trial judge felt that the evidence was insufficient to disclose malice as "the only spur," or that plaintiff's damage "was the union's sole purpose." The appellate division dismissed the complaint because the plaintiffs failed to show that the defendants' actions "were solely" malicious. These terms warrant the inference that the plaintiff cannot plead or prove merely that the primary motive or intent was the malicious infliction of temporal damage, but that no demarcation into primary and secondary

⁵⁸ *Faulk v. Aware, Inc.*, 155 N.Y.S.2d 726, 732 (1956).

⁵⁹ 308 N.Y. 164, 124 N.E.2d 104 (1954). The quotations which follow are at the pages parenthesized. The Reinforce decision was by a bare majority of four to three, with the three dissenters joining in a minority opinion. Since this decision the composition of the Court of Appeals has changed, but only by the replacement of one of the minority judges, so that even if the new judge votes as did his predecessor, the Reinforce determination will not be reversed. It is therefore the current law of New York.

⁶⁰ At p. 106. The minority felt that "This is an action for damages for conspiracy, in ruining plaintiff's business by concerted action that has no relation to any lawful labor union objective." (p. 109).

is permissible. In other words, apparently plaintiff must plead that no portion of the defendants' act was conceived of a purpose other than malice; that defendants' "only" motive is the malicious infliction of harm. This raises the question of mixed motives, that is good and bad, which is found in the rephrased charge of the trial judge. The rephrasing by the Court of Appeals was that the defendants in such a mixed situation must prevail, "provided" their acts "had some reasonable relation" to self-interest and betterment, *i.e.*, a "valid union objective." The inference now permitted to be drawn is that in a situation where a primary and a secondary motive are disclosed, the defendants win provided they prove (or the facts as pleaded or proved by plaintiff disclose) a reasonable relation between their acts and a valid union objective. In short, the court finds that their motives are primarily involved with self-interest and betterment. In effect, this is the Massachusetts approach, but the following language of the Court of Appeals either rejects or restricts this approach:⁶¹

But when men quit work in concert, they offend against the law if their *sole and unmixed motive or purpose* is to injure an employer. But, if the acts of unions "have any reasonable connection with wages, hours of employment, health, safety, the right of collective bargaining, or any other condition of employment or for the protection from labor abuses, then the acts are justified." The result is not changed by the fact that the work stoppage or refusal injures an employee. Such harm, although intentionally done, is actionable only if not justified. If the doers, by means not in themselves unlawful, of acts not in themselves unlawful, *have any proper purpose to serve*, they are not liable for the damage they cause. Unions, as well as everyone else, may claim the benefit of the settled rule 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*." . . .

In the absence of proof that the motivation was entirely malicious, plaintiff had no remedy at law. In the *Rochette* situation, the union withdrew its members from an employment because the union thought it to its interest so to do. In each case it was impossible on the record, to find that the sole motivation was "malicious," hence, there was no basis for a judgment against the union. (Emphasis added.)

Such language seemingly indicates that the Court of Appeals has rejected the Massachusetts approach and modified somewhat its apparent support of the trial judge's charge. To this view we may now add these quoted words: "In the absence of proof that the motivation was entirely malicious, plaintiff had no remedy at law," and conclude that it is the plaintiff, not the defendant, who has the burden of, and who must go

⁶¹ 308 N.Y. at 169-70, 124 N.E.2d at 106-07. Citations are omitted, although it should be mentioned that *Aikens v. Wisconsin*, supra note 23, was one of these citations. The *Rochette* case discussed is *Rochette v. Parzini Corp.*, 301 N.Y. 228, 93 N.E.2d 652 (1950).

forward with, the proof to disclose a "sole and unmixed motive or purpose." If this analysis of the New York position is correct, it follows that the *prima facie* tort doctrine, as evolved in English common law and as utilized in the federal and Massachusetts jurisdictions, has been modified⁶² to the extent that it is difficult, if not impossible, in a practical situation, for a plaintiff to succeed. Some of the reasons for these restrictions have been footnoted.⁶³ It may well be that in a trade and business atmosphere where great commercial interests and numerous types of litigation are involved, Pandora's box is kept closed as a practical matter by placing numerous and additional safeguards upon it. It would appear, however, that the strings have been pulled too tightly, for the cause of action is choking to death if the ramifications above developed are accepted as law.

The legal view and overall approach in other jurisdictions, generally speaking, is patterned upon the federal and Massachusetts position, although minor exceptions are similarly found. For example, Connecticut usually follows the Massachusetts approach,⁶⁴ while an 1898 Illinois decision denounced interferences with one's business "from motives of malice"⁶⁵ because, as another case declared, "it is the motive that determines the question of liability."⁶⁶ While trade competition is ordinarily a sufficient justification, "the mere fact that the person . . . [so motivated] has a temporal or pecuniary interest to be served by the act is not such justification."⁶⁷ Iowa⁶⁸ has adopted the Minnesota approach which, in general, follows the Massachusetts view albeit with a slight inclination towards the stricter New York position. Thus a 1909 Minnesota opinion stated:

To divert to oneself the customers of a business rival by the offer of goods at a lower price is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless

⁶² The *prima facie* tort doctrine states, as we have seen, that where it applies it is the defendant who must justify; now, if the New York courts are to follow the reasoning above given, the plaintiff must, as part of his case, first disprove the availability of a justification by and on behalf of the defendants, else he has failed to make out and prove a sufficient cause of action. This, it is submitted, is rather harsh and not the intention of the judiciary albeit such are the consequences which flow.

⁶³ *Supra* note 57.

⁶⁴ E.g., *R and W Hat Shop, Inc. v. Sculley*, 98 Conn. 1, 118 Atl. 55 (1922); *Connors v. Connolly*, 86 Conn. 641, 86 Atl. 600 (1913).

⁶⁵ *Doremus v. Hennessy*, 176 Ill. 608, 52 N.E. 924 (1898).

⁶⁶ *Kemp v. Division No. 241, etc.*, 255 Ill. 213, 240, 99 N.E. 389, 399 (1912). See, however, *Feeley v. McAuliffe*, 335 Ill. App. 99, 104, 80 N.E.2d 373, 375-76 (1948): "So long as the conduct was lawful, any question of bitterness and hostility on the part of the actor is immaterial . . ."

⁶⁷ *Carpenters' Union v. Citizens' Committee etc.*, 333 Ill. 225, 236, 164 N.E. 393, 397 (1928).

⁶⁸ E.g., *Boggs v. Duncan-Schell Furniture Co.*, 163 Iowa 115, 143 N.W. 482 (1913); *Dunshee v. Standard Oil Co.*, 152 Iowa 624, 132 N.W. 371 (1911).

of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, . . . he is guilty of a wanton wrong and an actionable tort.⁶⁹

✓ New Jersey⁷⁰ and North Carolina⁷¹ likewise support the Massachusetts position but California, for example, holds that an act lawful in itself does not become unlawful or actionable merely because of the presence of a malicious or wrongful motive.⁷² Thus, even though one's purpose is to injure another's business, absent illegal means or (other illegal) ends, no cause of action arises.⁷³ There is some indication, however, that this negative approach may be in the process of change.⁷⁴

In the light of legal history, the *prima facie* tort doctrine, as above discussed and analyzed, does not represent an exception to the traditional concepts upon which other tort causes of action are based. A *prima facie* tort, like other tort concepts, emerged from the common law writs but non-use apparently resulted in desuetude until resurrected by necessity. Now, however, resurrection and condition go hand in hand. Before the doctrine can be employed, certain conditions, strict in some jurisdictions and less strict in others, must be met. In New York, as a practical matter, the exceedingly strict requirements will relegate the use of this doctrine to limbo unless, as it is here suggested, the *Reinforce* strictures be limited to the facts of that case or to the type of contractor-union situation there involved. Holmes' overall approach, in general, has been adopted in other jurisdictions, but not always in its complete form. The courts, however, are still engaged in evolving another "traditional" cause of action which may or may not be denominated a *prima facie* tort, although its genesis is there traceable. The following appear to be the

⁶⁹ *Tuttle v. Buck*, 107 Minn. 145, 151, 119 N.W. 946, 948 (1909). The use of "fair competition" in juxtaposition to "justifiable" permits us to utilize, as a corollary, the use of "unfair competition" as non-justifiable. In this aspect, therefore, this case might well hold that the "traditional" tort of unfair competition sustains an ordinary cause of action, eliminating the *prima facie* tort doctrine from consideration. On this analysis see *Schonwald v. Ragains*, 32 Okla. 230, 122 Pac. 203 (1912), approving the *Tuttle* doctrine in an unfair competition case. See also *Canellos v. Zotalis*, 145 Minn. 292, 177 N.W. 133 (1920), distinguishing its facts from the *Tuttle* case, and *Harding v. Ohio Casualty Ins. Co.*, 230 Minn. 583, 41 N.W.2d 818 (1950).

⁷⁰ E.g., *Kamm, Inc. v. Flink*, 113 N.J.L. 582, 586, 175 Atl. 62, 66 (1934), holding "natural justice" provides a remedy; *Schechter v. Friedinan*, 141 N.J. Eq. 318, 57 A.2d 251 (1947); *Stein v. Schmitz*, 21 N.J. Misc. 218 (1943); *Standard Radio Corp. v. Triangle Radio Tubes, Inc.*, 125 N.J.L. 131, 14 A.2d 763 (1940);

⁷¹ E.g., *Coleman v. Whisnant*, 225 N.C. 494, 35 S.E.2d 647 (1945), approved and followed in dictum in *Childress v. Abeles*, 240 N.C. 667, 84 S.E.2d 176 (1954).

⁷² *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407 (1908); *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492 (1893).

⁷³ E.g., *Katz v. Kapper*, 7 Cal. App. 2d 1, 44 P.2d 1060 (1935); *Union Labor Hospital Ass'n v. Vance Redwood Lumber Co.*, 158 Cal. 551, 112 Pac. 886 (1910).

⁷⁴ See, e.g., *Masoni v. Board of Trade of San Francisco*, 119 Cal. App. 2d 738, 742, 260 P.2d 205, 208 (1953), where the court's opinion referred to a "balancing of the importance, social and private, of the objective advanced by the interference . . ."

characteristics, if not the essential elements, of such an evolving tort cause of action, although in listing these items many of this writer's views are incorporated:

1. The *prima facie* tort doctrine is a separate and distinct theory and should not be confused with the traditional torts.

2. If there is any other traditional tort available, then a *prima facie* tort cause of action should not lie.⁷⁵

3. The *prima facie* tort cause of action is applicable whether one or more persons act.⁷⁶

4. The presence of intent, as further described in the following items and not merely motive, desire or purpose, is an essential element in such a cause of action.

5. The intent is factual, rather than legal, although it may be "mixed."

6. The intent is to commit the harm or damage, not merely the act that occasions the harm or damage.

7. The intent contains aspects or elements of malice, a wicked or evil motive.

8. These aspects of malicious intent or motive not only must be "primary" but must dominate the overall picture.⁷⁷

9. There must be temporal harm or damage which resulted from the acts so motivated or was so intended to result.

10. This resulting temporal damage must not be speculative or so indirect or remote as to require strained findings of fact by the court or jury.

11. Such temporal damage must be specifically pleaded and proved.

12. Unless there is compliance with item 11, there is no cause of action.

13. If there is compliance with item 11 and a cause of action otherwise is found to exist, consequential and punitive damages should also be allowed.⁷⁸

14. A justification, if found in the facts as pleaded, destroys the

⁷⁵ However, because of the suggestion in item 12 below, that punitive damages be available, it may be that this view should be modified to permit a *prima facie* tort cause of action so as to punish the commission of these wicked acts. This writer does not, as yet, subscribe to this view.

⁷⁶ See, however, note 46 *supra*, and text.

⁷⁷ However, this does not mean that the New York view is herein adopted, nor does it mean that it is the Massachusetts view which is favored. Rather, a mean between the two is utilized, namely, that intent is divided into primary and secondary, but that the former is to dominate and control the total picture. Whether or not such domination and control is present in a particular fact situation is, or course, a question for judicial (policy) determination, so that no rigid formula can be attempted.

⁷⁸ See, for the opposed New York rule, note 57 *supra*.

existence (assuming it ever did exist) of any cause of action denominated as a *prima facie* tort.

15. If a justification is not found in the allegations of the complaint, the defendant(s) may plead a justification.

16. The justification so pleaded must be as broad as the charge in order to be a complete one; otherwise, it may be used in mitigation of damages.

17. The justification need not be as dominant as is the malice charged in the complaint (as required in items 6, 7, and 8, above) but it must be the primary *raison d'etre*.⁷⁹

18. In determining whether the charge of evil or the defense of justification should control, the court (jury) must weigh not only the conflicting private interests involved but also the welfare and interests of the people, *i.e.*, the state.

19. In any event, the burden is upon the plaintiff to plead, prove, and disclose a controlling interest which is served best through the medium of a judgment in the action.

⁷⁹ In this suggestion we reject the (apparent) New York view and utilize that of Massachusetts, as discussed in the text keyed to note 50 *supra*.