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PRIMA FACIE TORT RECOGNIZED IN MISSOURI

*Porter v. Crawford & Co.*¹

Plaintiff sustained damage in an automobile collision involving a motorist insured by Carriers Insurance Company. In settlement of plaintiff's claim, Carriers' agent and adjuster, Crawford & Company, delivered a draft to the plaintiff. Plaintiff deposited the draft in his checking account and wrote checks against the deposit. Without notifying the plaintiff, Carriers stopped payment on the draft, and plaintiff's checks were returned as drawn on insufficient funds. When plaintiff was assessed service charges for the returned check, he sued Crawford & Company and Carriers.²

In Count I of his petition, plaintiff alleged that Carriers issued the stop payment order with the intent to injure him and that this act was careless, reckless, malicious, and unjustified. In Count II, plaintiff alleged that defendant Crawford & Company, also intending to cause injury, knowingly and willfully failed to notify him that Carriers intended to stop payment. Plaintiff prayed for actual and punitive damages for the service charges, his embarrassment and humiliation, and the damage to his reputation. The defendants moved to dismiss for failure to state a cause of action. They argued that plaintiff could not recover for negligent failure to notify him of the stop payment order because they had no duty to provide such notice. Both motions to dismiss were sustained by the trial court, and plaintiff appealed.³

On appeal, plaintiff asserted that his petition pleaded not negligence but an intentional tort, judicially cognizable in Missouri under the prima facie tort doctrine.⁴ This doctrine allows recovery on proof of an injurious but otherwise lawful act done without justification and with the intent to injure the plaintiff.⁵ Defendants countered that the prima facie tort is not recognized

1. 611 S.W.2d 265 (Mo. App., W.D. 1980).

2. *Id.* at 267. Defendants each filed a cross-claim against plaintiff's bank. The cross-claim asserted that if the plaintiff sustained damage as a result of defendant's acts, the bank contributed to this injury and should contribute proportionally to any judgment against the defendants. *Id.*

3. *Id.* Defendants' third party petitions were also dismissed since they were contingent on plaintiff's claim. *Id.*

4. *Id.*

5. Recognition of a cause of action in prima facie tort can be traced to the late 1800s when Sir Patrick Pullock stated that there is "a general proposition of English law that it is wrong to do a willful harm to one's neighbor without justification or excuse." F. POLLOCK, *LAW OF TORTS* 21 (1st ed. 1887). The doctrine resurfaced several years later in the much quoted dictum of Lord Bowen that "intentionally to do that which is calculated in the ordinary course of things to do damage

in Missouri. Under Missouri law, they maintained, no amount of bad intent can make a defendant liable for lawful conduct.⁶

The Missouri Court of Appeals for the Western District reversed the dismissal of plaintiff's claims and became the first Missouri court to recognize the prima facie tort.⁷ The court endorsed the Restatement (Second) of Torts

and which does, in fact, damage another . . . is actionable if done without just cause or excuse." *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q.B.D. 598, 613 (1889) (dictum), *aff'd*, 1892 A.C. 25 (H.L.).

Justice Holmes is credited with introducing the concept of recovery for a prima facie tort in the United States. *See Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904) (J. Holmes); *Plant v. Woods*, 176 Mass. 492, 504, 57 N.E. 1011, 1015 (1900) (Holmes, C.J., dissenting); *Vegeahn v. Guntner*, 167 Mass. 92, 106, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting); Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

At an early date, both Massachusetts and New York allowed recovery in prima facie tort for injuries caused by unjustified acts that, although otherwise lawful, were done with the intent to injure. *See Moran v. Dunphy*, 177 Mass. 485, 487, 59 N.E. 125, 126 (1901) (maliciously and without justification causing plaintiff to be discharged from employment); *Walker v. Cronin*, 107 Mass. 555, 562 (1871) (intentional and unjustified acts causing plaintiff's workmen to leave work); *American Guild of Musical Artists v. Petrillo*, 286 N.Y. 226, 231, 36 N.E.2d 123, 125 (1941) (intentional and unjustified acts by labor unions to encourage union membership); *Beardsley v. Kilmer*, 236 N.Y. 80, 89, 140 N.E. 203, 205 (1923) (unjustified business competition practiced for spite); *Kuyek v. Goldman*, 150 N.Y. 176, 178, 44 N.E. 773, 774 (1896) (intentionally and fraudulently inducing plaintiff to marry pregnant woman).

Although actions in prima facie tort have been most prevalent in New York, other states have recognized the principle that unjustified, intentional acts are actionable. *See, e.g.*, *Tulle v. Pate*, 372 F. Supp. 1064, 1071 (D.S.C. 1975) (applying Georgia law); *French v. United States Fidelity & Guar. Co.*, 88 F. Supp. 714, 721 (D.N.J. 1950) (applying New Jersey law); *Diaz v. Kay-Dix Ranch*, 9 Cal. App. 3d 588, 591-92, 88 Cal. Rptr. 443, 445 (1970) (dictum); *Connors v. Connolly*, 86 Conn. 641, 647-48, 86 A. 600, 602 (1913); *Pendleton v. Time, Inc.*, 339 Ill. App. 188, 195-96, 89 N.E.2d 435, 438 (1949); *Boggs v. Duncan-Shell Furniture Co.*, 163 Iowa 106, 115-16, 143 N.W. 482, 486 (1913); *Tuttle v. Buck*, 107 Minn. 145, 150, 119 N.W. 946, 947-48 (1909); *Memphis Steam Laundry-Cleaners, Inc. v. Lindsey*, 192 Miss. 224, 239, 5 So. 2d 227, 232 (1941); *Huskie v. Griffin*, 75 N.H. 345, 348, 74 A. 595, 598 (1909); *Louis Kamm, Inc. v. Flink*, 113 N.J.L. 582, 586-87, 175 A. 62, 66 (1934); *Stollo v. Jersey Cent. Power & Light Co.*, 20 N.J. Misc. 217, 222-23, 26 A.2d 559, 561-62 (Sup. Ct. 1942).

A few states have explicitly rejected the doctrine or shown disfavor towards it. *See, e.g.*, *Krause v. Hartford Accident & Indem. Co.*, 331 Mich. 19, 25, 49 N.W.2d 41, 44 (1951); *Nees v. Hocks*, 272 Or. 210, 214-15, 536 P.2d 512, 514 (1975).

6. 611 S.W.2d at 268. Defendants also argued that even if prima facie tort is the law in Missouri, plaintiff failed to plead special damages necessary to recovery. *Id.*

7. *Id.* The trial court's dismissal of the third party petitions was affirmed, however, because contribution in Missouri is limited to negligent tortfeasors and plaintiff's petition rested on intentional acts. *Id.*

section 870⁸ and ruled that a party who alleges an intentional lawful act by the defendant, an intent to cause injury to the plaintiff, an injury to the plaintiff, and the absence of or insufficient justification for the defendant's act has stated a cause of action in prima facie tort.⁹ This decision, the court claimed, is consistent with the guarantee contained in the Missouri Constitution that every injury shall have a certain remedy¹⁰ and with Missouri's tradition of adopting new forms of action based on restatement principles.¹¹

Missouri is not the first jurisdiction to recognize that a plaintiff should be compensated for unjustified and malicious harm, even when traditional tort theories do not apply. Recovery in prima facie tort has been allowed most often in New York, but that state has shaped the doctrine into a specific tort category with restrictive elements.¹² The *Porter* court, in contrast, seemed

8. *Id.* at 272. RESTATEMENT (SECOND) OF TORTS § 870 (1979) states: One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.

A detailed analysis of the restatement position on prima facie tort is contained in Note, *Prima Facie Tort*, 11 CUM. L. REV. 113, 120-24 (1980).

9. Courts in prior cases have applied the theory that a plaintiff should not suffer from unjustified and malicious acts without compensation in numerous fact situations including: (1) labor union aggression without justification, *e.g.*, *Meadowmoor Dairies, Inc. v. Milk Wagon Drivers' Union*, 371 Ill. 377, 21 N.E.2d 308 (1939), *aff'd*, 312 U.S. 287 (1940); *Keith Theatre, Inc. v. Vachon*, 134 Me. 392, 187 A. 692 (1936); *Opera on Tour, Inc. v. Weber*, 285 N.Y. 348, 34 N.E.2d 349 (1941), *cert. denied*, 314 U.S. 615 (1941); (2) business competition undertaken for spite, *e.g.*, *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909); (3) inducement to breach contract without justification, *e.g.*, *Sorenson v. Chevrolet Motor Co.*, 171 Minn. 260, 214 N.W. 754 (1927); *Reichman v. Drake*, 89 Ohio App. 222, 100 N.E.2d 533 (1951); (4) countersuits for misuse of legal process, *e.g.*, *Church of Scientology v. Siegelman*, 475 F. Supp. 950 (S.D.N.Y. 1979) (applying New York law); *Roger v. McCloskey*, 305 N.Y. 75, 111 N.E.2d 214 (1953); and (5) utterance of a true statement intending to injure plaintiff, *e.g.*, *Huskie v. Griffin*, 75 N.H. 345, 74 A. 595 (1909).

Missouri had adopted the theory of punishing unjustified conduct in several specific torts including: (1) intentional interference with employment, occupation, or business, *e.g.*, *Saloman v. Crown Life Ins. Co.*, 399 F. Supp. 93 (E.D. Mo. 1975) (applying Missouri law), *aff'd in part, rev'd in part*, 536 F.2d 1233 (8th Cir.), *cert. denied*, 429 U.S. 961 (1976); *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 114 S.W. 997 (1908); and (2) intentional interference with contractual relations, *e.g.*, *Squirtco v. Seven-Up Co.*, 628 F.2d 1086 (8th Cir. 1980) (applying Missouri law); *Union Petrochem, Inc. v. Glore*, 498 F. Supp. 14 (W.D. Mo. 1980) (applying Missouri law).

10. MO. CONST. art. I, § 14.

11. 611 S.W.2d at 272.

12. Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 NW. U.L. REV. 563, 567 (1959); Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L.Q. 466, 475 (1957); Ward, *Schools as a Cause of Action*, 42 ORR-

to adopt the prima facie tort as a general theory of recovery for unjustified conduct.¹³ Adoption of the general theory, however, raises a number of specific questions that remain unanswered. For example, the decision leaves unclear the meaning of "lawful" in the "intentional lawful act" that prima facie tort plaintiffs must plead and prove. It also leaves unclear the requisite intent for a prima facie tort, the nature of the damages a plaintiff must suffer, and the amount of justification necessary to defeat a claim in prima facie tort.

Although *Porter* clearly requires prima facie tort plaintiffs to plead an intentional lawful act, the meaning of "lawful" is not certain. In some states, conduct that resembles a traditional intentional tort, such as defamation, slander, libel, or malicious prosecution, is unlawful and is not actionable as a prima facie tort.¹⁴ These jurisdictions reason that the prima facie tort doctrine should not undermine traditional tort elements designed to limit recovery. When prima facie tort is alleged for conduct that resembles a traditional tort but lacks an essential element, the complaint is dismissed. Restatement (Second) of Torts section 870¹⁵ advocates a less restrictive approach. Comment j to section 870 suggests that the prima facie tort doctrine may be used to avoid traditional tort elements that developed by historical accident or for reasons no longer significant.¹⁶ If the traditional requirement

NELL L. Q. 28, 52-53 (1956); Note, *supra* note 8, at 116-17; Note, *The Prima Facie Tort Doctrine In New York—Another Writ?*, 42 ST. JOHN'S L. REV. 530, 531-33 (1968).

13. RESTATEMENT (SECOND) OF TORTS § 870 (1979) is intended as a generalized category for tortious conduct involving harm inflicted intentionally. It purports to provide a unifying principle whereby older established torts are refined or new torts are established so that recovery is allowed, even if defendant's conduct does not fit within a traditional specific tort. *Id.*, comment a.

14. New York has long required that the act not fit within a traditional tort category. See *Long v. Beneficial Fin. Co.*, 39 A.D.2d 11, 14, 330 N.Y.S.2d 664, 668 (1972) (intentional infliction of mental distress); *Nationwide Carpets, Inc. v. Lenett Publications, Inc.*, 31 A.D.2d 911, 911, 298 N.Y.S.2d 95, 95-96 (1969) (libel); *Metromedia, Inc. v. Mandel*, 21 A.D.2d 219, 222, 249 N.Y.S.2d 806, 809 (abuse of process or malicious prosecution), *aff'd*, 15 N.Y.2d 615, 203 N.E.2d 914, 255 N.Y.S.2d 660 (1964); *Crosby v. Reilly*, 20 A.D.2d 561, 561, 246 N.Y.S.2d 59, 60-61 (1963) (defamation).

In recent years, New York seemed to have retreated from this position and allowed a plaintiff to plead an alternative cause of action in prima facie tort. See *Board of Educ. v. Farmingdale Teachers Ass'n Local 1889*, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975). Subsequent to *Farmingdale*, however, it has been held that a plaintiff may plead prima facie tort only if the traditional tort fails because of a "technicality" or an "unimportant shortcoming." *National Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374, 384 (S.D.N.Y. 1980) (applying New York law).

15. (1979).

16. RESTATEMENT (SECOND) OF TORTS § 870 comment j. In this way prima facie tort can be used to modify the elements of traditional torts. See Note, *Abstaining From Willful Injury—The Prima Facie Tort Doctrine*, 10 SYRACUSE L. REV. 53, 68 (1958). It has been suggested that allowing courts to ignore traditional tort elements

supports an important policy limiting recovery, however, a plaintiff cannot avoid it by pleading a prima facie tort. *Porter's* endorsement of section 870 may indicate that the court intends to apply the less restrictive definition of "lawful."

Regardless of which approach is followed, the prima facie tort may be a vehicle for expanding recovery of punitive damages in breach of contract cases. In Missouri, punitive damages generally are not recoverable for breach of contract. Punitive damages may be recovered, however, when the breach amounts to an independent willful tort and there is a proper allegation of malice.¹⁷ Before *Porter*, the plaintiff was required to prove a traditional intentional tort in order to collect punitive damages.¹⁸ Now, if a breach is malicious and unjustified and the plaintiff is injured, prima facie tort may qualify as the independent tort, entitling a plaintiff to punitive damages.¹⁹ It remains to be seen, however, whether policies disfavoring the award of punitive damages for breach of contract will deter development of the prima facie tort in this direction.

Uncertainty also surrounds the meaning of "intent to injure," announced in *Porter* as the second element of a prima facie tort. Three views have been expressed on this issue.²⁰ Under the first and least restrictive view, the plaintiff merely must plead and prove that the defendant intended to do a wrongful act that caused the plaintiff injury.²¹ Under the second and most restrictive view, the plaintiff must plead and prove that the defendant's sole motive for acting was to injure the plaintiff.²² Under the third and moderate

that they deem insignificant affords courts too much flexibility. See Haperns, *International Torts & the Restatement*, 7 BUFFALO L. REV. 7, 12 (1957); Note, *supra* note 8, at 129.

17. *Union Petrochem, Inc. v. Glore*, 498 F. Supp. 14, 15 (W.D. Mo. 1980) (applying Missouri law); *Sands v. R.V. McKelvey Bldg. Co.*, 571 S.W.2d 726, 733 (Mo. App., St. L. 1978). It is interesting to note that the malice required to recover punitive damages is almost identical to the definition of prima facie tort in RESTATEMENT (SECOND) OF TORTS § 870 (1979).

18. For example, a plaintiff may have brought an action in defamation for wrongfully dishonored checks, even though his claim was essentially for breach of contract, in order to recover punitive damages.

19. *Wright v. Owen*, 468 F. Supp. 1115, 1118 (E.D. Mo. 1979) (applying Missouri law); Ghiardi, *The Case Against Punitive Damages*, 8 FORUM 411 (1972).

20. Note, *supra* note 12, at 534.

21. See, e.g., *Morrison v. National Broadcasting Co.*, 24 A.D.2d 284, 286, 266 N.Y.S.2d 406, 408-09 (1965) (complaint alleged defendants intentionally misrepresented facts concerning plaintiff, but no allegation of intent to harm); *Gale v. Ryan*, 263 A.D.2d 76, 77, 31 N.Y.S.2d 732, 733-34 (1941) (complaint alleged defendants intentionally gave false information regarding plaintiff to revenue authorities, but no allegation of intent to harm).

22. See, e.g., *Korry v. International Tel. & Tel. Corp.*, 444 F. Supp. 193, 195 (S.D.N.Y. 1978) (applying New York law) (prima facie tort does not lie where defendant acted with four distinct motives); *Reinforce, Inc. v. Birney*, 308 N.Y. 164, 169, 124 N.E.2d 104, 106, 122 N.Y.S.2d 369, 371 (1954) (evidence was insufficient to prove intent to injure).
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view, the plaintiff must plead that the defendant's act was intentional and that he acted with an intent to injure the plaintiff.²³ The Restatement (Second) of Torts endorses the moderate approach. Comment j to section 870 indicates that the prima facie tort plaintiff must plead that the defendant intended the consequence of his act with certainty or substantial certainty that injury would result.²⁴ The *Porter* court's approval of section 870, combined with its express rejection in dictum of the sole motive requirement,²⁵ may portend a moderate interpretation of "intent to injure."

The types of damage that must be sustained to present a submissible prima facie tort claim is another issue raised in *Porter*. New York courts distinguish general damages, which naturally and necessarily flow from the defendant's acts, from special damages, which naturally but not necessarily flow from defendant's acts. In New York, pleading and proof of special damages are essential to recovery in prima facie tort.²⁶ Section 870 does not limit prima facie tort recovery to situations involving special damages. Comment e of section 870 suggests that damages must amount only to the invasion of a "legally protected interest."²⁷ Although the issue of general ver-

cient to establish defendant acted solely to injure plaintiff); *Beardsley v. Kilmer*, 236 N.Y. 80, 90, 140 N.E. 203, 206 (1923) (defendants acted in own self-interest to gain profits, therefore acts were not solely motivated by malice and were not actionable). Although the *Porter* court suggests that New York no longer requires sole motivation of intent to injure, the requirement has been imposed in recent cases. See *Korry v. International Tel. & Tel. Corp.*, 444 F. Supp. 193, 195 (S.D.N.Y. 1978); *Demuth Dev. Corp. v. Merek & Co.*, 432 F. Supp. 990, 994-95 (E.D.N.Y. 1977).

23. See, e.g., *Aikens v. Wisconsin*, 195 U.S. 194, 205-06 (1904) (defendant's acts must be calculated to cause temporal damage); *Ruza v. Ruza*, 286 A.D.2d 767, 769, 146 N.Y.S.2d 808, 811 (1955) (defendant must intend to do harm rather than merely intend to do the act).

24. RESTATEMENT (SECOND) OF TORTS § 870 comment e (1979) also recognizes that there may be circumstances where courts will require that the defendant act with the purpose of injuring the plaintiff, as opposed to acting with certainty that injury will occur.

25. 611 S.W.2d at 270 (dictum).

26. See *ATI, Inc. v. Ruder & Finn*, 42 N.Y.2d 454, 458, 368 N.E.2d 1230, 1232, 398 N.Y.S.2d 864, 866 (1977); *Cunningham v. Hagedorn*, 72 A.D.2d 702, 704, 422 N.Y.S.2d 70, 73 (1979); *Brandt v. Winchell*, 283 A.D. 338, 342, 127 N.Y.S.2d 865, 868 (1954), *aff'd*, 3 N.Y.2d 628, 148 N.E.2d 160, 170 N.Y.S.2d 828 (1958).

The *Porter* court indicated that the requirement of pleading special damages has been troublesome in New York because special damages have often been confused with pecuniary damages. The court suggested that this requirement is designed to prevent a flood of meritless claims and has no sound analytical basis. 611 S.W.2d at 271.

27. RESTATEMENT (SECOND) OF TORTS § 870 comment e (1979).

sus special damages was not dispositive in *Porter*,²⁸ the court supported the restatement position.

A final question raised but not resolved by *Porter* is the amount of justification necessary to defeat a prima facie tort claim. In *Porter*, the court declared that a prima facie tort plaintiff must plead and prove intent to injure and that the defendant may plead and prove justification for his acts as an affirmative defense.²⁹ Once justification is properly asserted, the court must balance social values to determine if the defendant's acts were so clearly justified as to require a directed verdict.³⁰ If the case goes to the jury, the jury must use a similar balancing test to determine liability.³¹ Although use of a balancing test to determine justification seems straightforward, precisely what the court and the jury are expected to balance is uncertain. *Porter* speaks of social values and balancing the bad motivation of the defendant against the claimed justification for defendant's acts.³² Other authorities speak of balancing the interest of the plaintiff in being free from injury against the interest furthered by the defendant's actions.³³ Comment e to section 870 sets forth a complicated balancing process in which the nature and seriousness of the harm to the plaintiff, the nature and significance of interest promoted by the defendant's conduct, the means used by the defendant to harm the plaintiff, and the defendant's motive in harming the plaintiff are considered.³⁴

Each of the foregoing issues in *Porter*—the proper standard for assessing justification, the meaning of "lawful," the requisite intent for a prima facie tort, and the type of damage necessary for a submissible claim—await judicial resolution. It remains to be seen whether Missouri, like New York,³⁵ will congeal prima facie tort into a narrow tort category by imposing restrictive requirements. By expressly endorsing the flexible restatement approach, the court of appeals may have signaled its intention to employ the prima facie tort doctrine in a form best calculated to achieve the goal of the Missouri

28. In *Porter*, the plaintiff pleaded pecuniary loss by reason of service charges. Because such charges satisfy the narrowest view of special damages, the court did not have to decide whether either nonpecuniary special damages or general damages are sufficient to plead prima facie tort. 611 S.W.2d at 272.

29. *Id.* at 272-73.

30. *Id.* at 270.

31. *Id.*

32. *Id.* Although the court refers to the restatement in its use of this test, the restatement approach is not this simplistic. See note 34 and accompanying text *infra*.

33. See *Masoni v. Board of Trade*, 119 Cal. App. 738, 742, 260 P.2d 205, 208 (1953) (balancing objective advanced by defendant's acts and plaintiff's interest in being free from interference); Note, *supra* note 12, at 538.

34. See RESTATEMENT (SECOND) OF TORTS § 870 comment e (1979).

35. In contrast, many authorities see prima facie tort as a general and flexible theory that, if not unduly restricted, can be used to fill in the gaps between traditional intentional torts. See Note, *supra* note 8, at 124; Note, *The Prima Facie Tort Doctrine*, 52 COLUM. L. REV. 503, 513 (1952); Note, *supra* note 12, at 543.

Constitution provision that guarantees a certain remedy for every injury to person, property, or character.³⁶

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36. *See* MO. CONST. art. I, § 14.