1-1-1960

Rights of Defrauded Quiz Show Contestants

Robert A. Sedler
Wayne State University, rsedler@wayne.edu

Recommended Citation
Robert A. Sedler, Rights of Defrauded Quiz Show Contestants, 6 Wayne L. Rev. 225 (1960).
Available at: http://digitalcommons.wayne.edu/lawfrp/72
RIGHTS OF DEFRAUDED QUIZ SHOW CONTESTANTS

ROBERT A. SEDLER†

It appears that the great quiz show scandal has finally subsided. During the height of the controversy one point overlooked by most commentators is whether the contestants who were defrauded have any civil actions against the parties responsible. Some suits have been filed, but there does not seem to be any further mention of this aspect. At first blush, the layman would probably think that such contestants should have a legal right to recover damages; the lawyer, on the other hand, would probably tend to agree with the producers, networks, et al., that “they had done nothing wrong”—from a legal standpoint, the lawyer would hasten to add. Thus the layman’s sense of “moral wrong” would conflict, as it so often does, with the lawyer’s sense of “legal wrong.” It is suggested however that the courts may well find legal wrongdoing and that such wrongdoing is of the type that the law can compensate by the awarding of damages.

An innocent contestant, whose opponent had been supplied answers, should be permitted to recover for the value of his opportunity to win the prize money, any injury to his reputation as an expert, and the injury to his reputation because of the aura of fraud that can now be said to surround all contestants who participated in quiz shows. Even if a contestant did not actually receive answers, certainly it should be recognized that the public may impute dishonesty to all contestants. Recovery should be allowed against any party who acted with knowledge, which would include at least the producer.

† Teaching and Research Associate, Rutgers, The State University, School of Law. The author wishes to express his gratitude to Thomas A. Cowan, Professor of Law, Rutgers University, for his assistance and encouragement in the preparation of this article and the insights into the law of Torts which he has given the author.

1. It may be contended that the producer’s furnishing the opponent with answers was not the proximate cause of any injury to plaintiff’s reputation as an expert, since the plaintiff himself failed to answer his question. But as expertness is essentially a matter of degree, it would seem that the plaintiff’s reputation as an expert was injured by having someone appear more expert than he, i.e., answering a question when the plaintiff failed to answer his question. Even the interest of an amateur in his reputation as an expert on a particular subject may be of the type that the law should protect, since such a reputation could further one’s social and business relations today.

2. When the promoter furnished some participants with answers, he should be charged with the knowledge that upon the discovery of this deception by the public, it would possibly impute fraudulent conduct to all participants on the program. Therefore, even a contestant who was not eliminated from the program because his opponent was furnished with answers would suffer an injury to his reputation for integrity. If this interest is recognized as entitled to protection against this type of invasion, he would also have an action against the responsible parties.
of the program and the opponent who received the answers, and vicarious liability should also be imposed upon the advertising agency, the sponsor, and the network, even though it should be found that they were without knowledge of the giving of the answers and had no control over the conduct of the program. It is further submitted that damages are not too speculative to be allowed. All these points will be discussed in the article.

**SUIT AGAINST THE PRODUCER**

*Is There a Contractual Right?*

Since the producer invited the contestant to appear on the program, depending on the facts presented, the court may find that it was the intention of the parties to enter into an informal unilateral contract. Assuming, as is true in most contests, that there is no express agreement between the producer of the contest and the participants, it is the general rule that where a prize is the inducement for an entry into a contest, the entry by the contestant and his participation in the contest constitutes an acceptance of an offer for a unilateral contract. Seemingly, this rule also applies where two contestants are competing directly for a prize, as occurred on the quiz shows.

If such a contract is found, it is not difficult to find that the

---

3. The normal procedure appears to be one of “package deals,” that is, the sponsor engages an advertising agency to conduct his advertising over television. The advertising agency, in turn, engages a producer, who has complete control over the conduct of the program. The network merely leases its facilities to the producer. The various relations existing within the television industry are graphically described in Life, Nov. 16, 1959, p. 32. In certain instances the network produces its own programs. If this is the case, liability of the network would be based on the same considerations that, it is submitted, should govern the liability of the producer.

4. The discussion will attempt to separate the question of liability from the question of proof of damage. It is felt that the analysis of the problem will be more precise if consideration is first directed to whether the defendants have violated a legal right of the plaintiff, and secondly whether the plaintiff can prove the fact and extent of his damages resulting from such invasion.

5. We may assume that the plaintiff can show that the consideration for his appearance on the program was the opportunity to win the prize money rather than the opportunity to gain publicity.


7. Collatz v. Fox Wls. Amusement Corp., 239 Wis. 156, 300 N.W. 162 (1941). This case will be discussed more fully in the section of the article dealing with damages.
furnishing of answers to the contestant's opponent constituted a breach of the "duty of fair dealing," which is considered an implied condition of such contracts. Particularly, the courts are apt to find a breach of this condition where the acts of the promoter of the contest result in one contestant's receiving a direct preference over another. In *Butters v. Brawley Star*, the defendant newspaper conducted a subscription contest, under the rules of which a candidate received a certain number of votes for each subscription he secured. The employees of the sponsor secured votes on behalf of a contestant who had withdrawn and sold them her votes. They retained her name in the contest and solicited votes on her behalf; because of the additional votes she won the contest. The court held that these acts constituted a breach of the contract, as it was an implied condition of the contest that the sponsor's employees would not aid any contestant to the detriment of the others. The plaintiff, who had the second highest number of votes was held to be entitled to the value of the prize as against the sponsor.

In *Holt v. Rural Weekly Co.*, the contestants in a word-building contest were to try to find the highest number of dictionary words contained in a popular name. Due to a dispute as to the order in which obsolete words should have been placed in the contestant's list, the promoter counted the obsolete words of one contestant, but not those of the plaintiff. The court held that it was an implied condition of the contract that if the promoter counted certain kinds of words of one contestant, he was bound to count the same kind of words when submitted by the other.

The furnishing of answers to one's opponent is as flagrant a violation of fair dealing as were the acts of the promoters in these cases. It is true that here it is not certain that the defrauded contestant would have successfully answered his question even if the opponent failed to answer his. It is also not certain that the opponent would not have successfully answered the question even if he had not been furnished with answers. However, the probability of the
innocent contestant’s ultimate success goes only to the provability of
the fact of damage and not to the issue of whether the producer’s
action in furnishing the opponent with the answers constituted a
breach of the contract.\(^{11}\)

An interesting question is presented as to whether the contestant
can recover for any injury to his reputation as an element of damages
due to the breach of the contract. As stated previously, he could
allege both injury to his reputation as an expert and his reputation
for integrity. The few American cases on the subject have uniformly
denied recovery, generally on the theory that the injury to reputation
was not “within the contemplation of the parties” under the rule of
Hadley \textit{v.} Baxendale\(^{12}\) and thus could not be claimed as an item of
special damages. The leading case evidencing this approach is
\textit{Mastoras v. Chicago, Minneapolis \& St. P. Ry.},\(^{13}\) where the defendant
employed the plaintiff to procure foreign workmen among his country-
men. The plaintiff alleged that because of his wrongful discharge,
his reputation as an employment agent was injured. Although this
fact was not disputed, the court pointed out that by breaching the
contract the defendant was exercising a “legal right”\(^{14}\) and, therefore,
could not have contemplated that his option to pay damages would
render him liable for loss to plaintiff’s reputation as an employment
agent. Using the same rationale the court denied recovery in
\textit{Tousley v. Atlantic City Ambassador Hotel},\(^{15}\) where the plaintiff was wrong-
fully discharged as the managing director of a hotel. Recovery has
also been denied on the theory that such damages are too speculative.\(^{16}\)

\(^{11}\) Upon establishing a breach of this magnitude the plaintiff could elect to rescind,
so to speak, and recover the value of his services to the producer on the theory of
quantum meruit. However, if recovery is sought on this theory, there would be a
reduction of any amount that he received from the producer, i.e., partial winnings,
and there could be no recovery of expectancy damages. Nonetheless, he should be able
to recover the value of his services on the program as a minimum.

The damages directly flowing from the breach would be the loss of the prize money,
both the money offered for the specific question on which he was eliminated and the
possible prize money he could have won had he remained on the program. If recovery
for these damages is to be denied, it must be because such damages are not susceptible
of proof, as will be discussed, infra, and not because they did not flow from the breach.
The court should always make it clear whether it is deciding against the plaintiff, because
he suffered no legal wrong, or because, although he did suffer such a wrong, his alleged
damage because of the wrong is not susceptible of proof.

\(^{12}\) 9 Ex. 341 (1834).

\(^{13}\) 217 Fed. 153 (W.D. Wash. 1914).

\(^{14}\) This was based on the supposition that by entering into a contract the defendant
reserved the right to breach and pay damages as an alternative to performance. For
an articulation of this viewpoint see Holmes, \textit{The Path of the Law}, 10 \textit{Harv. L. Rev.}
457 (1897). To the extent that equitable relief by way of specific performance of
contracts is recognized today, this right to breach is of significantly less importance.

\(^{15}\) 25 N.J. Misc. 88, 50 A.2d 472 (Sup. Ct. 1947).

\(^{16}\) Westwater \textit{v.} Rector of Grace Church, 140 Cal. 339, 73 Pac. 1055 (1903);
The British courts have not been as finicky in this respect. In *Marbe v. George Edwards*,\(^\text{17}\) the plaintiff was an actress who had a considerable reputation in the United States and was anxious to appear in London to enhance her reputation abroad. The defendant breached the contract under which she was to perform in its theater in London. The court had no difficulty in allowing damages for the harm to her reputation because of the breach despite the fact that under British law there can be no recovery for mental suffering because of a breach of contract.\(^\text{18}\)

It is suggested that where, as here, there is an intentional breach of the contract which may injure the "professional reputation" of the plaintiff as an expert (his degree of expertise, if any, goes to the measure of damages rather than to the existence of the fact of damage) and which, because of the manner of the breach may injure the personal reputation of the plaintiff as well, the fact that such harm "was not contemplated by the parties," should from a legal standpoint be immaterial. The "contemplation of the parties" test should be limited to economic harm resulting from the breach. Where an affirmative breach of the contract can injure the reputation of the plaintiff and the manner of the breach is very likely to injure it, the breaching party should not be permitted to aver that "the contract dealt with quiz show prizes and not reputation," or that "we never considered his reputation." Rather, where there is an affirmative breach of a contract and the breach is of the type clearly calculated to cause harm to the other party, the contractual relationship itself should be sufficient to give rise to liability for the harm to reputation. A case such as this affords the courts the opportunity to adopt the English rule and allow recovery for harm to reputation as an element of damages for breach of contract.

**Is There Deceit?**

If there was an affirmative representation that no answers would be given, then there obviously has been a misrepresentation of material fact, reliance and the like; thus a traditional action of deceit could be supported. However, more probably, nothing was said about this, so the question would most likely be whether there was a duty to reveal this fact to the plaintiff before he entered upon the program.

If the question is approached under the traditional concept of confidential relationship, then probably it is difficult to find a duty to disclose. But if the courts depart from that approach and consider other factors, as Dean Prosser and Professor Keeton suggest some

---

courts have done, then it will not be difficult to find actionable fraud present here. Dean Prosser suggests that the courts often find a duty of disclosure where (1) the defendant has special knowledge not open to the plaintiff and (2) he is aware that the plaintiff is acting under a misapprehension. 19 He concludes that "the law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it." 20 Professor Keeton has concluded that in certain circumstances the failure to disclose certain facts always imports the representation that they do not exist, which he calls a tacit or implied in fact representation. 21

Here is a proper situation for the application of these concepts. The producer had special knowledge of the "rigging of the shows" as his state of mind was involved. Also, it would seem that the plaintiff was entitled to assume that no answers would be given, since the shows were advertised as contests of ability and the giving of answers to one contestant would destroy the competitive aspect of the program. Even if the producer subsequently decided to supply answers to the contestant's opponent, it would seem that there was a duty to disclose this fact to the plaintiff at that point. 22

May Liability Be Founded on the Theory of Prima Facie Tort?

In a tort action not founded on the theory of deceit, 23 the plaintiff would be making the following allegations: (1) by giving my opponent the answers, you made it impossible for me to win the prize money;

20. Ibid.
22. Once the plaintiff establishes deceit, the question remains as to what damages he can recover. At a minimum, since presumably there is a contract, the plaintiff can rescind and recover the value of the services. Whether he can recover damages based on the deprivation of his opportunity to win the prize money depends on what rule of damages for deceit the particular jurisdiction whose law is applicable adopts. Where the jurisdiction adopts the out-of-pocket rule, it would seem that the plaintiff could recover no more than the value of his services, since this is the only loss he could show. If, however, it adopts the benefit of the bargain rule or that of proximate cause, then he could recover for loss of the anticipated prize money (we are not now considering the problem of provability of damage). For a discussion of the conventional rules and the development of the rule of proximate cause see Selman v. Shirley, 161 Ore. 582, 85 P.2d 384 (1938). However, even the proximate cause rule would not seem to allow recovery for injury to reputation. The tort of deceit as it now exists seems limited to recovery for economic loss, which is an essential element of the tort.
23. Here, although there may be a contract, the existence of a contract would not appear to bar a tort action, since, under the traditional rules, the defendant committed an act of misfeasance, and if there is tort liability, it would exist whether or not the defendant made a "promise supported by consideration." See Prosser, Torts § 87 (2d ed. 1955).
(2) by giving my opponent the answers you made it possible for him to defeat me, and thus interfered with my reputation as an expert; (3) by giving answers to my opponent, you interfered with my reputation for integrity, since upon discovery of the fraud (the possibility of which you are bound to foresee) an aura of suspicion and dishonesty may be imputed to all contestants who participated on the program.

The defendant would reply: assuming all you said is true, (1) your opportunity to win the prize cannot be classified as a business interest or a property interest, even though the latter has been extended to include some expectancies, and I commit no tort by the mere breach of my own contract; (2) I made no untrue statement of fact about you and thus have not interfered with your interest in reputation, since my acts did not constitute defamation. Therefore, you have not shown that I committed any tort, so at most my actions constitute damnum absque injuria.

The problem then revolves around the analysis of tort liability. In this context, it can be limited to an analysis of liability for the infliction of intentional injury. Despite the various jurisprudential approaches it would seem that today we are still thinking in terms

24. Apart from the prospect of business gain, i.e., profits or employment, which now seems to be protected as a separate interest, see infra, the only expectancy interest presently protected apparently is that of receiving a bequest under a will. See, for example, Bohannon v. Wachovia Bank and Trust Co., 210 N.C. 679, 188 S.E. 390 (1936). Possibly the courts may try to fit the opportunity to win prize money into the tort of interference with prospective advantage. However, it is felt, as will be discussed in this section, that a sounder approach would be to apply the prima facie tort doctrine.

25. The defendant has made no statement of fact about the plaintiff; and it is difficult to see where the "publication" occurred. Because of these technical requirements, only with a great deal of torturing could the courts turn the acts of the defendant into a traditional defamation.

26. An analysis of tort liability based on negligent conduct and the relationship between it and that based on intentional conduct is necessarily beyond the scope of this article.

27. Professor Lewis has very neatly summed up the respective positions: "There has been plenty of controversy about the definition of tortious liability. There has also been a good deal about its foundation. Upon what principle does that foundation rest? Two competing theories have been put forward in answer to this question.

(1) All injuries done to another person are torts, unless there is some justification recognized by law.

(2) There is a definite number of torts outside which liability in tort does not exist.

According to the first theory, if I injure my neighbor, he can sue me in tort whether the wrong happens to have a particular name like assault, battery, deceit, slander, or whether it is no special title at all; and I shall be liable if I cannot prove lawful justification. On this view the law of tort . . . consists not merely of all those torts which have acquired specified names, but also includes the wider principle that all unjustifiable harm is tortious. . . . If we may draw a parallel from the Church Catechism, the first theory resembles 'my duty . . . to hurt nobody by word or deed'; the second theory resembles the ten commandments with their precise specification of
of intentional *torts* rather than in terms of liability for intentional wrongdoing. To recover for an intentional invasion today the plaintiff must show that (1) the interest invaded is of the type as to which the law affords protection and (2) that the defendant invaded that interest by a certain *means*, which the law recognizes as tortious.

Today we protect interests in freedom from apprehension of bodily harm, physical security, freedom from restraint, possession and use of property, reputation, contractual relations, business relations, family relations, freedom from wrongful criminal prosecution, privacy and to a more limited extent, mental suffering. Whenever a new interest seeks protection, we tend to create a *new tort* to protect it, as the development of the tort of invasion of privacy, for example, indicates.

Moreover, we tend to protect these interests only from certain *types* of invasion. Thus the defendant is liable for an invasion of the interest in freedom from apprehension of bodily harm only if he does "an act other than the speaking of words"; as any first year law student will tell you, "mere words cannot constitute an assault." If the plaintiff alleges an injury to reputation it must be an injury inflicted either by means of a defamation (with all its rules and restrictions) or by a malicious prosecution.

As a result of this approach we must create a new tort whenever either the interest of the plaintiff cannot be fitted into an existing interest (and the courts sometimes do amazing jobs of stretching) or the means of invasion are novel. Therefore, we have intentional torts of assault, battery, false imprisonment, trespass to land, trespass to chattels, conversion, libel, slander, malicious prosecution, invasion of privacy, deceit, alienation of affections, criminal conversation, interference with prospective advantage, inducing or effecting a breach of contract, trade libel, slander of title, unfair competition, patent and copyright infringement, intentionally causing emotional distress, and no doubt many others *each with individual rules and restrictions, intricacies, defenses, measure of damages, and the like.* If the plaintiff cannot prove the existence of one of these torts by showing that his interest is of the kind protected from *that type of invasion*, he cannot prevail. Is this a sound method of analyzing liability for the commission of intentional harm?

As a reaction against the "pigeonholing" approach (theoretically, at least) the doctrine of prima facie tort has developed. The basis in
this country is a famous dictum by Mr. Justice Holmes in *Aikens v. Wisconsin* 28 where he said as follows:

It has been considered that, prima facie, the intentional infliction of temporal damage is a cause of action, which is a matter of substantive law, whatever may be the form of the pleading, which requires a justification if the defendant is to escape.

The leading case applying the doctrine is that of *Advance Music Corp. v. American Tobacco Co.*, 29 with which all students of Torts are, no doubt, familiar. And yet, the development of the doctrine since *Advance* has not been particularly encouraging to those who wish to see a fundamental change in the analysis of liability for intentional invasions.

In the first place, the advocates of the doctrine have not sought to fundamentally alter the approach to liability for intentional invasions. Rather, the concept of prima facie tort has been proposed as a *supplement* to the existing categorization of torts. For example, Professor Ward, in speaking of the Tort Cause of Action (which he feels is the logical extension of the doctrine) does not even then advocate a fundamental change. He states as follows:

> The Tort Cause of Action . . . is not meant to be a competing system to 'torts' . . . Its purpose is not revolutionary, but evolutionary. The methodology of the Tort Cause of Action is not to attack 'torts' where it works, but where it doesn't work. 30

In speaking of the doctrine of prima facie tort, he says:

> This thesis presents certain underlying factors shaping liability in a particular section of the tort field. The factors thus described are:
> (1) damages
> (2) intent
> (3) justification

Absent any traditional compartment within which the injury complained of might fit, the prima facie tort has developed as a comprehensive method of analyzing intentional conduct. 31 (Emphasis supplied.)

Shortly after the *Advance* decision Professor Hale was not very optimistic about the widespread application of the doctrine. He stated:

> It is only where the economic motive for inflicting the damage is something more remote, like compelling a party to participate in a boycott of another with whom he has no controversy, or where there is no economic motive at all, but only a desire to do harm as an end in itself, that courts are apt to apply the *prima facie* tort doctrine at all and to inquire whether the particular end justifies the means. 32

28. 195 U.S. 194, 204 (1904).
31. Ibid.
32. Hale, Prima Facie Torts, Combination and Non-Feasance, 46 Colum. L. Rev. 196, 197 (1946).
In New York the doctrine has been expressly limited in its application to situations where, as Professor Ward suggests, there was no traditional compartment within which the injury complained of might fit. In *Rager v. McCloskey*, the plaintiff alleged harm to reputation. Although upholding the sufficiency of the complaint for slander, the court felt compelled to disabuse the plaintiff of his notion that he could rely on prima facie tort to recover for loss to reputation. It is said that to the extent the facts showed defamation, damage to reputation would be presumed; but if he relied on prima facie tort, he would have to prove economic loss, so that the only interest really protected by the prima facie tort doctrine was his economic interest rather than the interest in good reputation.

The Appellate Division of the New York Supreme Court expressly limited the doctrine in *Ruza v. Ruza*, where the complaint alleged a conspiracy to ruin the plaintiff's marriage. The Court said that the complaint really alleged the tort of alienation of affections, which was barred by statute. It then went on to explain prima facie tort:

The key to the prima facie tort is the infliction of intentional harm resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful. The need for the doctrine of prima facie tort arises only because the specific acts relied upon—and which it is asserted caused the injury—are not, in the absence of the intention to harm, tortious, unlawful and therefore, actionable. The remedy is invoked when the intention to harm, as distinguished from the intention merely to commit the act, is present, has motivated the action, and has caused the injury to the plaintiff, all without excuse or justification.

This language indicates that not only must traditional "torts" be unavailing, but that personal malice may be required. Finally, the Court of Appeals expressly held that there would be no cause of action on the theory of prima facie tort for injury to reputation and that the plaintiff could recover for such injury only if he established defamation.

It appears then that the doctrine, where applied at all, will be applied only to supplement the existing law of torts. In the area of trade relations, once the plaintiff has shown that his interest in the

33. 305 N.Y. 75, 111 N.E.2d 214 (1953).
34. The court said: "But except insofar as the facts pleaded amount to actionable defamation, in which event damage to plaintiff's reputation would be presumed, plaintiff has no right of action, unless the complaint makes a showing that actual damage has resulted." 111 N.E.2d at 218.
36. 146 N.Y.S.2d at 811.
carrying on of his business or employment has been intentionally invaded, some courts tend to find prima facie liability irrespective of the means of the invasion.\textsuperscript{38} The only improvement indicated by this approach is that here the means of invasion become immaterial; however, there will still be no application of the doctrine unless the plaintiff shows this interest can be labelled as a "business" one. It has also been suggested that where there is an intentional invasion of the interest in bodily integrity, there will be liability irrespective of whether the means used constitute a technical battery, false imprisonment, or the like.\textsuperscript{39} With the possible exception of two cases, to be discussed later, the courts do not appear to have made the prima facie tort doctrine the underlying basis of liability for all intentional invasions. The plaintiff must show that his interest can be fitted into one of the traditional interests the law recognizes and then must show that the invasion was by a presently recognized means, except that a business interest may be protected against any type of intentional invasion and there is good reason to believe that the interest in bodily integrity would similarly be protected.

It is submitted that a fundamental reexamination of liability for intentional invasions should be made in a case such as this. The first test of the prima facie tort doctrine is, as indicated previously, damage. But, damage to what? Since nothing further is said, presumably this means damage to a presently recognized interest. But what if the interest cannot be fitted into one of these? Must we create a new tort to protect the interest? Or, would a sounder approach be to look at the particular interest alleged to be invaded? Is the opportunity to win prize money in a contest, for example, a substantial interest, that is, is it the type of interest to which the

\textsuperscript{38} See, for example, Kelite Products, Inc. v. Binzel, 224 F.2d 131 (5th Cir. 1955); Owen v. Williams, 322 Mass. 356, 77 N.E.2d 318 (1948); Newark and Hardware Plumbing Supply Co. v. Stove Manufacturers Corp., 136 N.J.L. 401, 56 A.2d 605 (1948). In the Kelite case the defendant induced the postmaster to withhold mail going to the plaintiff's business address. In the Owen case a physician wrongfully caused a nurse to be barred from a hospital, which had the effect of depriving her of employment as a nurse. In the Newark case a competitor wrongfully sold property consigned to the plaintiff. The plaintiff was permitted to recover his lost profits due to the deprivation.

\textsuperscript{39} Judge Halpern lists the following examples of situations where he feels the defendant will be liable for any bodily harm his acts cause the plaintiff, though technically they may not constitute a trespass.

(1) The defendant threatens bodily harm at a future time ("if it were not Assize time"), knowing that as to this victim any threat will precipitate physical illness, and it in fact does.

(2) The defendant shouts "fire" to a known heart patient, who suffers an attack because of the shock.

(3) The defendant with the intent to injure the plaintiff, removes much-needed medicine from the reach of the plaintiff, who is bedridden.

law should afford protection from intentional invasion? If so, why not protect it, irrespective of whether we can label it, "property," "business," or the like? The courts can develop standards to determine the sufficiency of the interest; policy considerations will no doubt be relevant. Since we like to think that justice is meted out on an individual basis, why not look to the particular interest of the individual plaintiff and decide whether that interest, *per se*, is entitled to legal protection, rather than merely looking to see if he can fit it in one of the traditional categories, and then automatically extend protection?

Once we find that a particular interest is entitled to legal protection, then why are the means of invasion significant in determining the existence of a wrong? If we look primarily to compensation of the plaintiff, what relevance do the means of injury have? If good reputation is such an interest, why should the defendant be liable if he says, "Plaintiff is dishonest," and escape liability if he does an act that causes the public to believe the plaintiff may be dishonest, but makes no "publication"? If the means of invasion have relevance, then it is submitted that this should be only *by way of defense*, when the defendant seeks to show justification.

The following is suggested as the method of analyzing liability for intentional invasions:

1. Is the particular interest invaded substantial, so as to entitle it to legal protection?
2. Has the defendant intentionally invaded that interest by any means whatsoever?
3. Can the defendant show justification for the invasion in that (a) the invasion was for a proper purpose and (b) proper means were used?

As indicated previously, this approach may now be followed with respect to points (2) and (3) in the case of business relations, at least, by some courts. Why should it not be extended to all substantial interests? Moreover, the substantial interest test can prevent frivolous claims from achieving fruition.

The present body of law will not be obliterated. It will serve the purpose of enabling the courts to create standards, particularly in the area of justification. For example, where plaintiff alleges an injury to reputation by means of a statement of fact that would tend to lower him in the estimation of a substantial and respectable minority

---

40. There are perhaps three main objectives to tort liability: (1) compensate the plaintiff; (2) deter anti-social activity; (3) raise standards of conduct (primarily in the area of negligence law). It is suggested that the emphasis should be placed on the first object and that the realization of the other two objects be left essentially to the criminal law.
of the community in which he resides,\textsuperscript{41} it may, \textit{under the circumstances presented}, be justification for the defendant to show the truth of the statement. The result of this approach will be that all questions will be decided truly on the basis of policy—by a balancing of the conflicting interests of the particular plaintiff and defendant—rather than by categorization or by categorization with policy overtones.

There have been two cases which may have extended the doctrine to cover injuries to reputation. However, in both cases the injury was to business or professional reputation, so that the court may have merely been extending protection to another business interest. In \textit{Pendleton v. Time, Inc.},\textsuperscript{42} the plaintiff alleged that he had painted the first portrait of President Truman and that the defendant published in its magazine a portrait painted by another, stating that it was the first portrait of the President. The plaintiff also alleged malice, since he and \textit{Time} had dickered unsuccessfully for the publication of his portrait. The plaintiff sought recovery for the injury to his reputation as an artist rather than for the impaired vendability of his portrait. No attempt was made to find a defamation or a trade libel or the like, but the court, citing \textit{Advance}, found liability on the theory of \textit{prima facie tort}. This approach would easily support an action for injury to personal reputation, should the court be disposed to extend the doctrine to protect that interest.

In \textit{Page v. Layne-Texas Co.},\textsuperscript{43} the defendant, a subcontractor, filed a false claim against the contractor's bonding company. The court found that this injured the contractor's reputation and credit standing, and held the defendant liable on the theory of \textit{prima facie tort}. It expressly stated that it was allowing recovery despite the fact that the defendant's acts did not constitute a technical defamation. Again, however, the injury was to the plaintiff's business reputation rather than his personal reputation and the court stressed his business interest, although it did not rule out this approach in the case of an injury to personal reputation. Since we protect the interest in personal reputation from invasions by actions such as defamation, it is difficult to see why we should not protect it from any type of intentional invasion.

In the quiz show cases there is an opportunity for the courts to apply the \textit{prima facie tort} test to the fullest extent. With respect to the opportunity to win the prize money, the court could, instead of trying to find an expectancy interest (which thus far appears only to extend to anticipated testamentary bequests), appraise the interest

\begin{itemize}
  \item \textsuperscript{41} See Restatement, Torts § 559 (1932).
  \item \textsuperscript{42} 339 Ill. App. 188, 89 N.E.2d 435 (1949).
  \item \textsuperscript{43} 258 S.W.2d 366 (Tex. Civ. App. 1954).
\end{itemize}
of the individual plaintiff on the merits and determine whether it was substantial. Perhaps the result should depend on the particular plaintiff; i.e., is the court convinced that the opportunity to win the prize money was a significant factor in the particular plaintiff's decision to enter the contest? By the same token, is the interest of the particular plaintiff in his reputation as an expert on the particular subject substantial? There would doubtless be no dispute as to whether the plaintiff's reputation for honesty was entitled to legal protection. 44

The defendant could contend by way of justification that it was necessary for the success of his program to furnish some contestants with answers. The purpose—to insure the success of his program—would certainly be justifiable, and the dispute would center over the suitability of the means used, that is, the furnishing of answers to the questions to more popular contestants. It is highly doubtful, however, that a court would recognize such means as proper, as they contravene our ideas of elementary fairness.

By adopting such an approach, it is submitted that the court would be facing the problem realistically and make a policy determination as to which of the conflicting interests would prevail. After a series of such cases, standards would be inductively developed as to what constituted substantiality, justification, and the like. Much of the confusion and inconsistency which presently surround the law of intentional torts would be eliminated, and standards of conduct would emerge. The law would more realistically conform to human experience rather than be hopelessly mired in conceptual niceties. In this area the quiz show cases furnish a most significant opportunity for legal innovation. It is submitted that such an approach should be adopted, and that in the majority of cases, the interest of the plaintiff should be found substantial; and since the defendant cannot show justification, the plaintiff should prevail.

44. If this approach is to be followed as to tort liability, it may be asked whether all contractual interests should be enforced, even when they are not against the amorphous public policy. Once we find a contractual interest, it is enforced; the courts do not consider the substantiality of the interest of the plaintiff which was harmed by the defendant's breach. The fact that the interest was sufficiently important to him that he "contracted with respect to it" is sufficient to provide him with the full panoply of the law's protection. A halo of sacredness is attached to the contract once its existence is determined. How significant should it be that the interest was created by the "will of the parties" (albeit its difficulty of determination)? Perhaps the law will eventually look to each factual interest on its merits and decide whether it is entitled to legal protection. Perhaps the law is moving toward the recognition of obligations irrespective of their source. See Cowan, Contracts and Torts Should Be Merged, 7 J. Legal Ed. 377 (1955).
SUIT AGAINST THE OPPONENT

*The Duty of Fair Dealing*

Since the contestants were not members of an association or the like, it is doubtful whether it can be said that there was a contract between them when they entered the competition. Because of the absence of any contractual relationship the court in *Harrison v. Jones*, held that the unsuccessful contestant in a newspaper subscription contest could not maintain an action against the first prize winner to recover the value of the prize, which the latter allegedly obtained by fraud.

However, why do not the courts recognize a duty of fair dealing between contestants with respect to the obtaining of the prize irrespective of the existence of a contract between them? When a contestant has acted improperly, why not a conclusive presumption (and hence a rule of law) that the contestant who came closest to winning (in a two-man competition there is no difficulty, but the rule should be extended to cases where there are multiple contestants) would have been victorious? Thus, it can be said that the money paid to the guilty contestant was "paid by mistake," and recovery can be allowed under traditional theories of quasi-contract.

Actually, there is no need to label the theory of recovery as quasi-contract or tort, but merely to recognize the existence of the duty of fair dealing between contestants and to hold the guilty contestant liable. Thus the plaintiff would be able to recover at least the value of the prize money offered for the specific question upon which he was eliminated. The opponent may then be called a constructive trustee for that amount.

Assuming that the defendant did not affirmatively assure his opponent that he was not receiving any answers from the producer, the question arises as to whether a contestant receiving improper assistance has a duty to disclose this fact to his opponent. If the court applies the tests indicated in the consideration of the deceit action against the producer, there is no reason why they should not do likewise in the case of the opponent. If the prima facie tort approach is followed, the opponent's actions would subject him to liability to the same extent as the producer.

---


46. It is submitted that this approach should not be followed in order to hold the opponent liable for the additional money he had won. This was due either to his ability to answer the questions, or possibly to the fact that he was furnished additional answers. The plaintiff was not involved in his opponent's subsequent appearances; therefore, the opponent's winnings in those appearances are neither a logical nor equitable measure of damages.
From a tort standpoint the really interesting question that could be presented in this case, if courts did not apply the broad prima facie tort approach, is whether they would apply that approach within the area of interference with contractual relations, as is done by some courts with interference in business relations.\footnote{We are assuming that the court will find that a contractual relationship existed between the contestant and the producer. See the discussion, supra.}

We will assume that it was the producer who first suggested the giving of answers, which was the breach of the producer's contract with the contestant, as was probably the case. Traditionally, there is liability for intentionally inducing a breach of contract without justification\footnote{As there has been since Lumley v. Gye, 2 El. & Bl. 216, 1 Eng. Rul. Cas. 706 (1853).} or by forcing a willing promissor not to perform,\footnote{See, for example, Phez Co. v. Salem Fruit Union, 103 Ore. 514, 205 Pac. 970 (1922), and Wilkinson v. Powe, 300 Mich. 275, 1 N.W.2d 539 (1942).} and when inducement or force is shown, some courts, from that point, apply the prima facie tort approach.\footnote{See, for example, Hope Basket Co. v. Product Advancement Corp., 187 F.2d 1008 (6th Cir. 1951).}

However, here the question is raised as to whether the interest in contractual relations is protected from all means of intentional interference. For the contestant did not induce the promotor to breach the contract or prevent him from carrying it out; rather, the inducement came from the promotor himself. But without the assistance and cooperation of the opponent, there could have been no effective breach resulting in harm. The issue then is where one actively assists a party to a contract to breach the contract, without which assistance there could have been no harmful breach, is the one furnishing assistance liable for interference with the other party's contractual interest?

It is hoped that if the courts will not apply the broad theory of prima facie tort, it will at least employ that approach in the area of contractual relations, as it sometimes does in the area of business relations. Perhaps the doctrine will really be employed this way in an interest-by-interest approach and ultimately, the courts will begin to protect every substantial interest. In any event, this case furnishes an opportunity to protect contractual interests from any intentional interference irrespective of the means that are used. The imposition of liability on that theory would be a step in the direction toward a sounder analysis of liability for intentional interference.

**SUIT AGAINST THE ADVERTISING AGENCY AND SPONSOR**

Thus far we have dealt with the guilty parties; we are assuming that the agency and the sponsor are innocent of actual wrongdoing,
so that if they are to be liable, it is solely on the theory of vicarious liability for the acts of the producer.

We are assuming that neither exercised any degree of control over the producer and let us further assume that neither had any reason to believe that the producer would resort to such practices. Therefore, under standard tests of agency law the producer was an independent contractor as was the advertising agency, and an independent contractor insulates the principal from vicarious liability subject to certain exceptions that do not seem relevant in our factual situation. Moreover, earlier considerations of the problem of insulation of liability through the use of independent contractors were concerned with the financially irresponsible independent contractor, which issue does not seem to be in point here.

Yet, it may be asked whether the producer, the sponsor and the agency were engaged in a joint adventure, so that they would be liable for each other's acts in the manner of partners. The law of joint adventure originally appeared as an extension of partnership law, where a formal agreement of partnership was lacking, but the substantive elements of a partnership were present.

Traditionally, the essential elements of a joint adventure were (1) intent of the parties; (2) a contract, express or implied; (3) contribution of each co-adventurer of something promotive of the enterprise; (4) joint proprietorship and control, and (5) an express or implied agreement for the sharing of profits resulting from the enterprise.

The leading case is that of *Stroher v. Elting*, where the agreement provided that one party would furnish a team and wagon for the purpose of carrying passengers and the other was to carry the passengers, the proceeds to be divided in stated proportions. Other cases where joint adventures have been found have included the building

---


52. See the discussion of this point in Rae v. Cameron, 112 Mont. 159, 114 P.2d 1060, 1064 (1941). See also Taubman, What Constitutes a Joint Venture, 41 Cornell L.Q. 640 (1956); Mechem, The Law of Joint Adventures, 15 Minn. L. Rev. 644 (1931); Nichols, Joint Ventures, 36 Va. L. Rev. 425 (1950).

53. It is sometimes called a joint venture or joint enterprise as well. The concept is also used in negligence law to impute contributory negligence to the passenger where he and the driver are engaged in a common undertaking, usually of a commercial nature. See, for example, Eagle Star Ins. Co. v. Beam, 134 F.2d 755 (9th Cir. 1943). See generally, Prosser, Torts § 65.

54. Rae v. Cameron, supra note 52.

55. 97 N.Y. 102 (1894).
and sale of houses, the development of mining operations, and theatrical productions.

All of these cases have involved the sharing of profits, thus differentiating them from our case. This seems to be a fundamental requisite, even where the court is willing to overlook the exercise of control. However, in one case the court took a more realistic approach and looked to the degree of interrelationship between the activities of the parties and on that basis found a joint adventure. In Martin v. Weaver, the arrangement was as follows: a transportation company owned no taxicabs, but operated a taxicab station; it dispatched orders to drivers operating out of the station, which cabs were privately owned; in order to use the facilities of the station the cabs had to have certain identification and the drivers had to be approved by the company, wear designated uniforms, and pay an initial fee and a daily one for the use of the station, which fee did not depend on the amount of their collections; the cab involved in the accident was owned by a private individual, who divided the receipts with the driver.

The court found that not only was the owner engaged in a joint adventure with the driver, but found that the transportation company was engaged in a joint adventure with the driver and the owner despite the absence of any agreement for the sharing of profits from the enterprise. The court said that the joint adventure was the transportation of passengers by motor vehicles, from which all parties ultimately benefited.

It is submitted that this rationale justifies a finding that the producer, the agency, and the sponsor were engaged in the joint adventure of the advertising of the sponsor's products via television. The test for the finding of joint adventure should be a relationship

57. Rae v. Cameron, supra note 52.
59. Oakley v. Rosen, supra.
60. 161 S.W.2d 812 (Tex. Civ. App. 1941).
61. This clearly constituted a joint adventure under the rule of Stroher v. Elting, as the arrangement was identical.
62. In Dean v. Keller, 328 Ill. App. 206, 65 N.E.2d 572 (1946), the court refused to hold the owner of a taxicab liable for the negligence of the driver where the driver paid the owner a flat sum per mile driven, supplied his own gasoline and could refuse or accept calls as he chose. The court said that he was either a bailee for hire or an independent contractor. The question of joint adventure was not considered, possibly because they did not share the profits from the enterprise. And yet the amount of money the owner received was dependent on the miles driven, so that the volume of the driver's business, in effect, determined the compensation of the owner.
between parties directed toward a specific act which produces direct economic gain for all. The source of the economic gain should not necessarily have to come from the enterprise itself, as long as the reason for the enterprise was ultimate economic gain. Again, the finding of a joint adventure should be approached on a case-to-case basis.

Here, it is suggested that there is a sufficient interrelationship between the parties' activities and interests as to justify the finding of a joint adventure. The show was geared to the advertising of the sponsor's product; such advertising presumably resulted in economic gain to the sponsor through increased sales and the agency and producer received economic benefit by way of compensation for their work. The sponsor chose the advertiser, knowing the advertiser would have to choose a producer, and the advertiser, in fact, chose the producer. Both the sponsor and advertiser could have entered into agreements by which they exercised control over the producer's conduct.

Most significantly, the risk can be distributed among the sponsor's customers and under the circumstances it is reasonable to do so, since the harm to the plaintiff occurred while the sponsor's product was being advertised to them. Since the public enjoyed the programs, it does not seem unreasonable that they ultimately should bear the loss for harm caused to one on the program, particularly since the individual cost to each consumer is quite negligible.

It is hoped that the special relationship involved here will be considered as a joint adventure. If so, it would largely eliminate the possibility of insulation by the independent contractor in the case of a commercial enterprise. Where there is mutual economic benefit because of the related activities of two or more parties, it seems that any party injured because of the act of one of them should be entitled to recover against all. If this approach is followed, then vicarious liability is well on the way to be determined by considerations of economic policy rather than by the application of fictions and conceptions. It is finally submitted that since vicarious liability has a significant effect on economic relations, the economic relations themselves should be considered in determining whether vicarious liability should be imposed in a particular case.

SUIT AGAINST THE NETWORK

The liability of the network should not be founded on its participation in a joint venture, although it has been submitted that the liability of the sponsor and agency be founded on that basis. In the first place this would open the way to liability for every wrong com-
mitted by every user of the network's facilities in connection with the program, i.e., the independent producer failed to pay the salary of the girl who typed the script. Because of such liability the expense of television time to independent producers and sponsors might be too high to justify the use of television as an advertising medium. In addition, this might discourage the use of independent producers by the network and the public would thus be deprived of the benefit of their programs. From a policy standpoint, it is unwise to include the network in on the joint venture merely because its facilities are used.

Moreover, it will serve no purpose to consider the cases involving the liability of the network as lessor for defamation committed over its facilities, since such liability is hopelessly involved with the question of "publication." If liability is to be founded on economic considerations, as it is submitted it should be, particularly in this area, then it is suggested that the network is held liable to performers for wrongs committed to them by independent producers in connection with a television program produced over the network's facilities.

The lifeblood of any entertainment industry consists of those who entertain and it is immaterial that the entertainers are amateurs or professionals. It is in the interest of the network that these persons be protected while they are using the facilities of the network. It has been found desirable by the networks that shows be produced by others than itself. Since it enjoys the benefits of such productions, it would seem that it should also bear the burden of harm suffered by persons appearing on such productions.

To the extent that the network is responsible for wrongs done to the entertainers, the loss can be distributed among all the producers and sponsors and ultimately the public. Where a producer continually commits such wrongs, he can be refused the network's facilities, which, insofar as tort law is still concerned with deterrence, should prove a more effective sanction against wrongs than the imposition of tort liability upon him.

Because of the importance of performers to the network, the network should not be able to insulate itself from liability for wrongs committed to them by independent producers. The defrauded quiz contestants performed on a program produced over the network's facilities. To the extent the program was successful, the network is benefited; because of the high ratings of the shows, the network could lease the time before and after the shows more readily and probably for higher rentals. Therefore, from an equitable as well as an economic standpoint, it seems proper to impose vicarious liability upon the
networks for wrongs committed to performers on programs produced over the facilities of the network.

THE PROBLEM OF DAMAGES

As indicated previously, the question of proof of damages must be kept distinct from that of liability. Due probably to our mistrust of juries, even if the plaintiff can show a wrong committed by the defendant and alleges harm, he cannot recover if his proof of the fact or the extent of damage is too "speculative". Courts often fail to make it clear whether they are ruling against the plaintiff because he has shown no wrong or because, although he has shown a wrong, his proof of damage is too speculative.

Here, with respect to the injury to reputation, there is precedent, at least where defamation is shown, to presume harm and thus avoid the problem of speculative damages. There may be some reluctance to allow this where plaintiff alleges harm to his reputation as an expert, but since harm to reputation is so difficult of proof in any event, there is no reason why the courts should not apply the same tests they use in case of defamation, as they appear to be satisfied with those tests then.

The most interesting problem appears when the plaintiff seeks to recover damages based on his loss of the prize money, since it cannot be known that he would have won the contest had no answers been furnished to his opponent. Furthermore, can the plaintiff recover damages based on the additional sums he could have won had he stayed on the program? We are assuming that had he not been eliminated, there was no limit to the amount he could have won, as was true on most of the programs involved.

Perhaps a case such as this will cause the courts to review their entire approach to the problem of speculative damages. In certain areas such as reputation or pain and suffering the courts admit that damages are impossible of proof, but allow recovery in spite of this. The jury has great discretion subject only to review by the court in

63. Professor McCormick summarizes the doctrine as follows: "A collection of the instances of the use in judicial opinions of the word, 'certainty,' in connection with problems of damages would doubtless disclose a wide variation of meaning. One use seems most common and most practical, that is, to employ the term, 'certainty,' to denote a standard of provability. In other words, the claim must be such that from its statement there seems no reason that rational proof could not be furnished that the damage claimed did result from the wrong and the actual evidence must be such that reasonable men acting upon inference and not from guess, can find therefrom that damage did thus result, and can derive therefrom substantial data for fixing the amount." McCormick, Damages § 26 (1935).

64. For the measure of damages in the case of defamation see, Restatement, Torts §§ 620-623 (1932).
the case of excessiveness or inadequacy. Why should not the same considerations prevail in the case of harm to any legally protected interest? It may be asked whether the rule of speculative damage is merely the court's way of refusing protection to a particular interest, i.e., winning prize money, that it feels is unworthy of legal protection. If this is the court's reason for denying relief, then it should say so and not hide behind the cloak of speculative damages.

In the cases involving fair dealing between contestants, the problem of whether the plaintiff would have won the prize was not relevant, since the winner was determined by a mathematical formula, i.e., how many words did he build. In two cases where it was impossible to determine whether the plaintiff would have won the contest, the courts denied recovery on the ground of speculative damages. In *Phillips v. Pantages Theater*, the plaintiff was an entrant in a beauty contest who survived the first elimination, but was not permitted to enter the final round. The court assumed that the act of the contest manager constituted a breach of contract, but denied recovery on the ground of speculative damages, since everything would depend on whether the plaintiff won the final round. In *Collatz v. Fox Wis. Amusement Corp.*, the plaintiff entered a contest in guessing the number of beans in a jar. Plaintiff and another contestant both survived the eliminations and both missed a question, when the defendant terminated the contest and awarded the prize to plaintiff's opponent. The court again assumed a breach of contract but said that it could not be assumed, nor was it susceptible of proof that the plaintiff would have won had the contest proceeded to a proper finish.

It is hoped that the court will be more ingenious in our case and allow some measure of recovery. In the first place it was the wrongful act of the defendant in furnishing answers to the opponent that made proof of damage impossible, since it prevented the contest from proceeding to a proper ending. Where the acts of the defendant were responsible for the difficulty of proof, there is a tendency to require less proof of damage on the part of the plaintiff. Moreover, as was suggested in the case of liability of the opponent, why not apply a conclusive presumption that the plaintiff would have defeated his opponent and thus enable him to recover at least the prize money offered for the specific question on which he was eliminated?

65. 163 Wash. 704, 300 Pac. 1048 (1931).
66. 239 Wis. 156, 300 N.W. 162 (1941).
67. Story Parchment Co. v. Paterson Co., 282 U.S. 555, 563 (1930). This factor was not considered in the Pantages and Fox cases.
68. See discussion, supra at p. 4.
However, the most significant contribution to the question of damages that the court could make would be the recognition of the principle that the plaintiff should recover the *value of the chance*. The court in the *Pantages* and *Fox* cases proceeded on the theory that the plaintiff could not prove that he could have won the contest, but failed to consider whether he could prove damage by showing the value of his chance to win. Recovery need not be predicated on an all or nothing basis.

Professor McCormick has stated the matter as follows:

Where the damage claimed by the plaintiff is the deprivation of an opportunity (not amounting to a reasonable certainty) to gain a specific prize . . . the courts have been slow to allow recovery for the value of a mere chance. If the amount of the prize is fixed, and the plaintiff's chances of receiving it were fairly calculable on a reasonable estimate of probabilities, the jury should be allowed to assess and award the value of the chance.  

Here, at least as to the initial prize money, Professor McCormick's test is satisfied. Moreover, only two contestants were involved, so the assessment of the value of the chance is somewhat easier than where there are multiple contestants.

The value of the chance approach has been followed in England in a case involving a popularity contest. In *Chaplin v. Hicks*, a theatrical manager sponsored a contest whereby readers of a newspaper were to select twelve ladies by their votes. The winners were to receive roles in theatrical productions. The plaintiff was one of fifty women eligible for the final selection, but due to the defendant's negligence in notifying her, she did not appear and thus could not be chosen. The court allowed her to recover the value of her chance to be chosen; i.e., how much could she have received for her chance to win the prize on the open market?

The value of a chance has been allowed to be recovered in some cases in this country. In *Kansas City, M. & O. Ry. v. Bell*, suit was brought to recover damages for delay in the transportation of hogs for exhibition purposes. The jury allowed the plaintiff the full value of the prizes he alleged he could have won if the hogs had arrived when due. The court reversed on the grounds that the proper measure of damages was the value of the chance to win the prize. In discussing the propriety of this approach the court said:

---

70. In England, as this case indicates, the courts are not as concerned about the problem of speculative damages as we are, and generally considers it a jury question.
71. [1911] 2 K.B. 786.
It is true that it is difficult to determine the value of this chance, but ordinarily difficulty in ascertaining the amount of damages resulting from the violation of the right is not an insuperable obstacle to recovery. The chance might be worth, under the circumstances, the full amount of the premium. . . . In such a case evidence as to all such matters as would tend to show the probability that the plaintiff would be successful in the competition would be admissible.\textsuperscript{73}

In McPeek v. Western Union Tel. Co.,\textsuperscript{74} where plaintiff sued to recover the value of a reward he lost by failure of the defendant to deliver a message, the court stated that the question of whether he would have succeeded in making the arrest was for the jury.\textsuperscript{76}

A more specific guide for the jury was set forth in Wachtel v. National Alfa\textsuperscript{I}a Journal Co.,\textsuperscript{76} where a magazine wrongfully discontinued a magazine subscription contest in the plaintiff’s district. A prize was offered in each district to the contestant who secured the highest number of subscriptions in each district. The court allowed recovery based on the value of the right to compete, saying:

\begin{quote}
recoverable damages are often incapable of exact determination, i.e., damages for pain and suffering, permanent injuries, loss of profits. The measure of plaintiff’s damages was the value of the contract, the value of the right to compete for one of the prizes offered. In estimating the damages to be allowed, the jury would have a right to take into consideration the number, character and value of the prizes offered, the number of contestants, the extent of territory covered by the contract, the standing of plaintiff at its termination, her reasonable probability, if shown, of winning some of the prizes.\textsuperscript{77}
\end{quote}

A recognition of the doctrine, even where a large number of contestants may be involved, was seen in Mange v. Unicorn Press,\textsuperscript{78} where it was alleged that the defendant breached his contract with the plaintiff in a puzzle building contest. The case came up on a motion for summary judgment and the court did not actually pass on the value of the chance rule, though it indicated it might adopt it. The defendant pointed out that over 23,000 contestants entered the final stages and that only 210 prizes were involved. In meeting this contention, the court said:

Furthermore, with respect to whether actual damages can be awarded to plaintiff, although there is substantial authority denying recovery . . . there appears to be a liberal trend towards allowing the jury to

\textsuperscript{73} Id. at p. 323.
\textsuperscript{74} 107 Iowa 356, 78 N.W. 63 (1899).
\textsuperscript{75} But see Western Union Tel. Co. v. Crall, 39 Kan. 580, 18 Pac. 719 (1888), where the court held that damages based upon the possibility of a horse’s winning a race were too remote.
\textsuperscript{76} 190 Iowa 1293, 176 N.W. 801 (1920).
\textsuperscript{77} Id. at p. 805.
\textsuperscript{78} 129 F. Supp. 727 (S.D.N.Y. 1955).
The rationale behind the cases [allowing recovery] is that plaintiff’s chances of success would have had some market value especially since there was no risk of out of pocket loss offsetting the possibility of gain. The question of speculative damages in contest cases does not seem to have been definitely decided in New York.79

It is submitted that the court should adopt the value of the chance approach. The purpose of speculative damages as a defense is to protect the defendant and where his acts made proof of damage impossible, the court should be lenient in allowing the plaintiff to prove them as best as he can. Can it be doubted that a quiz contestant could have sold his opportunity to win the prize money for a sum of money on our fictitious open market? Why not let the jury consider the respective merits of the two contestants and appraise the value of the plaintiff’s chance?

Furthermore, if this principle is recognized, the jury should also be permitted to consider the value of the plaintiff’s chance to win additional prize money had he been able to remain on the program. While the verdict may not be an accurate measure of what he could have won, it must be remembered that most damages are at best only rough approximations of the actual loss. The court can supervise the verdict of the jury and set it aside in case of excessiveness or require the plaintiff to file a remittitur. If the defendant has committed a wrong to the plaintiff, the plaintiff should be able to prove his damages by the most suitable means available and since the defendant himself has made exact proof of damage impossible, he is in no position to object.

Whether the court recognizes the value of the chance rule may well depend on the extent to which it trusts juries.80 It is suggested that such mistrust as exists is largely unwarranted in view of the court’s power to supervise verdicts. Recovery should be denied on the ground of speculativeness of damages only where there are no standards whatsoever by which the jury can be guided. The value of the chance rule supplies such standards and thus should be adopted so as to prevent a denial of recovery because of speculativeness of damages.

CONCLUSION

Suits by defrauded quiz show contestants may furnish the courts an opportunity to adapt the processes of the law to achieve what most laymen would probably believe to be a desirable result. It is

79. Id. at p. 730.
80. Professor McCormick suggests that the distrust of juries has been the underlying consideration in the development of the rule of certainty. McCormick, Damages § 26 (1935).
through cases such as this that the public can become educated to the operations of the judicial process. In deciding such a case the court has a grave responsibility, because it is the type of case in which the public is interested; it is the type of case in which the question is squarely poised—does the legal process insure the result that coincides with the result that most people believe is just? When the two do not coincide, then it is time for the courts to examine the bases of its decisions and ask whether new principles are necessary to balance and adjust conflicting interests. To meet the challenge of growth the law must be flexible and vital; it must be given to experiment; it must take into account various considerations of economic and social policy. And it must not be ashamed to consider lay notions of moral right and wrong.

It is submitted that contestants defrauded on such programs have been legally wronged. Assuming that they were unaware of the deceptive practices, they in good faith entered into a contest of ability with the hope of obtaining financial rewards. Due to the conduct of the promoters and their opponents they have been denied a fair chance to win the prize money and it is believed that their reputations have been injured as a result of the tactics employed. Although their claims may not be as psychologically appealing as those of persons injured in industrial or automobile accidents or the like, nonetheless, it is felt that they have been wronged—can the law, to use traditional expressions, afford a remedy for such a wrong?

The answer should be in the affirmative. If a contract can be found, it is clear that the acts of the promoters constituted a breach of that contract; in this case damages should also be allowed for injury to reputation because of the breach. The failure to disclose such tactics to the innocent contestants should be treated as fraud, giving rise to an action of deceit. Most important of all, the recognition of the prima facie tort doctrine would serve to support liability here. It is hoped that cases such as this—where there may be no wrong within the meaning of the existing separate torts—will induce the courts to unqualifiedly accept the prima facie tort doctrine as the underlying basis of liability for the infliction of intentional injury.

These cases also afford the courts the opportunity to extend vicarious liability to commercial enterprises where there is a high degree of interrelationship between the activities of the parties. By frank and full recognition of the doctrine of joint adventure, the use of the independent contractor device as an insulation against liability can be severely limited in areas of commercial enterprise. Moreover, the imposition of liability can then be done primarily on the basis of economic considerations rather than the technical forms the parties
have adopted. So, too, as exemplified by the approach to liability of the network, will economic considerations be taken into account as regards all attempts to find vicarious liability.

Finally, these cases squarely raise the question as to what extent considerations of provability of damages may affect the recognition of a legal right. By applying the "value of the chance" approach speculativeness of damages as a defense to liability will also be limited.

All in all, it is submitted that a finding of liability here will be evidence of the progress of the law. The law will show that its process is suitable to resolve any type of controversy and to protect any substantial interest against any type of invasion. It is hoped that should such cases be carried to the highest courts of the states, these courts will boldly accept the challenge, as it is by cases of this type that the law shows its capacity for growth. 81

81. For an interesting proposal as to criminal sanctions for the conduct examined in this article see the Model Penal Code § 223.9, comment (Tent. Draft No. 11, 1960) in which the American Law Institute has framed a statute to cover quiz show rigging.