INTENTIONAL INFLICTION OF MENTAL SUFFERING: A NEW TORT *

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It is time to recognize that the courts have created a new tort. It appears, in one disguise or another, in more than a hundred decisions, the greater number of them within the last two decades. Of course there is no necessity whatever that there should be separate torts, or that a tort must have a name; but if a name must be found for this one, we might do worse than to borrow a word from the vernacular of Kentucky and points south, and call it “orneriness.” It is something very like assault. It consists of the intentional, outrageous infliction of mental suffering in an extreme form.

“Mental anguish” has been an orphan child. Notwithstanding its early recognition in the assault cases, the law has been reluctant, and very slow indeed, to accept the interest in peace of mind as entitled to independent legal protection. This has been true even where the invasion has been an intentional one. It is not until comparatively recent years that there has been anything like a general admission that the infliction of mental distress, standing alone, may ever serve as the basis of an action. In this respect the law is clearly in a process of growth, the ultimate limits of which must be as yet only a matter of conjecture. *

* The substance of this paper was delivered at the Round Table on Torts of the meeting of the Association of American Law Schools, December 31, 1938. Anyone who deals with this subject cannot fail to acknowledge a great indebtedness to the very excellent article by Professor Calvert Magruder, “Mental and Emotional Disturbance in the Law of Torts,” 49 HARV. L. REV. 1033 (1936). The writer is also indebted, for many of the cases cited, to Mr. Joseph R. Parker, Associate Editor of the MINNESOTA LAW REVIEW, and the author of a Note in 22 MINN. L. REV. 1030 (1938).

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Various reasons have been advanced for this unwillingness to redress mental injuries, and it is an old story to repeat them. One is the difficulty of measurement of the damages. "Mental pain or anxiety," said Lord Wensleydale in the parent of a long line of decisions in 1861, "the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." Yet such mental suffering is scarcely more difficult of proof, and certainly no harder to estimate in terms of money, than the "physical" pain of a broken leg, which never has been denied compensation; nor is there any physiological reason for regarding "physical pain" as any less a "mental" phenomenon. The same courts have been entirely willing to allow large sums as damages for shock, fright, humiliation, and other forms of "mental anguish" itself, whenever they accompany a slight physical injury.


Bohlen, "Right to Recover for Injury Resulting from Negligence without Impact," 41 Am. L. Reg. (N. S.) 141 at 143 (1902), attributes this in part to the early rule that the parties themselves were not competent witnesses.

Lynch v. Knight, 9 H. L. C. 577 at 598, 11 Eng. Rep. 854 (1861), continuing: "though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested." As to the difficulty of distinguishing "mental" from "physical" suffering, see Nashville, C. & St. L. Ry. v. Stewart, 120 Ga. 453, 47 S. E. 959 (1904).
Again, it has been said that mental suffering and its consequences are so evanescent, intangible and peculiar, and vary to such an extent with the individual concerned, that they cannot be anticipated, and so lie outside the boundaries of any reasonably "proximate" causal connection with the act of the defendant—that they are, in short, "remote." It is not difficult to discover in the earlier opinions a distinctly masculine astonishment that any woman should ever be so silly as to allow herself to be frightened or shocked into a miscarriage. But medical men can do nothing but condemn such a point of view. Medical science has long recognized that not only fright and shock, but also anxiety, grief, rage and shame, are in themselves "physical" injuries, producing well marked changes in the body, and symptoms of major importance which are readily visible to the professional eye. Such consequences are the normal, rather than the unusual, result of a threat of physical harm, and of many other types of conduct, and are certainly not beyond anticipation in any situation which experience will recognize as likely to produce them. In any event, most courts have discarded "foreseeability" as the sole criterion of legal cause. And the very ones which talk of "remoteness" where mental suffering is concerned do not dispute, in the large number of cases in which a person or even an animal has been frightened by the defendant's conduct, and has sustained damage, or has inflicted damage upon others, in an effort to escape the threatened danger, that the mental reaction


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is as much a part of a recognized causal sequence as any "physical" effect might be, and that liability is to be imposed.

The most valid objection to the protection of "mental" interests lies in the "wide door" which might be opened, not only to fictitious and fraudulent claims, but to litigation in the field of trivialities and mere bad manners.14 It is easy to lie about what goes on inside the plaintiff's own head. It would be an absurd thing for the law to seek to secure universal peace of mind, and there are many interferences with it which must of necessity be left to other agencies of social control. If the plaintiff is to recover every time that her feelings are hurt, we should all be in court twice a week. "Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be."15 But this is a poor reason for denying recovery for any genuine, serious mental injury. It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation"; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do.16 And, in words which Chief Justice Holt made famous in another connection,17 "it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense."

Nevertheless, the danger of a host of claims without merit is a real one, and must be met. There are in reality two problems: to distinguish true claims from false ones, and to distinguish the trifling insult or annoyance from the serious wrong. The first is primarily a matter of proof, and of some adequate guarantee of genuine harm. Just as a substantial verdict for personal injuries or for "physical" pain will be reversed when the evidence of damage consists of purely subjective testimony on the part of the plaintiff, unsupported by any

17 In the historic case of Ashby v. White, 2 Ld. Raym. 938 at 955 (1703).
independent proof, the court may refuse to permit recovery for "mental" suffering unless there is some sufficient assurance of the genuineness of the claim, either in the nature of the defendant's act itself, or in other circumstances proved. So far as the elimination of trivialities is concerned, it calls for nothing more than the same common sense which decides that the ringing of a church bell is not a nuisance merely because it throws a hypersensitive individual into convulsions. There will of course be cases in which it is difficult to draw the line, and it will be impossible to state the difference in any terms of an absolute rule; but courts which do not hesitate to administer the "rule of reason," the "fair return," and the standard of conduct of the "reasonable man of ordinary prudence" should not shrink from the task.

There has been much more readiness to grant a remedy where mental suffering is inflicted intentionally than where it is the result of mere negligence. One reason, of course, is the natural tendency of the courts, which has been apparent elsewhere in the fields of torts, to extend liability as the moral guilt of the defendant increases. But perhaps more important is the fact that in such intentional misconduct there is an element of outrage, which in itself is an important guarantee that the mental disturbance which follows is serious, and that it is not feigned. Not only is there a normal social desire to compensate the victim at the expense of the more heinous offender whose conduct is subject to every moral condemnation, but the danger of imposition is lessened to a point where it becomes reasonably safe to grant the remedy. There are not lacking indications that not only the "wilful" wrongdoer, but also he who acts "wantonly" without regard to the consequences, will be subject to a more extended liability for mental suffering.


22 See Spade v. Lynn & Boston R. R., 168 Mass. 285, 47 N. E. 88 (1897);
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It is not the purpose of this paper to consider the limits of liability for mental disturbance in the field of negligence, but merely to deal with the "intentional" cases, which may conveniently be blocked off and treated as a separate group. As in the case of other torts, "intent" includes more than an actual desire to make the plaintiff suffer. It extends to the mental disturbance which the defendant must have believed to be a necessary incident of his act, and substantially certain to follow from it. The misguided humorist who playfully tells a woman that her son has hanged himself may not have desired to cause her violent suffering; but when she is thrown into hysteric, nervous prostration and a miscarriage, he is liable as if he had. What we are dealing with, in other words, is outrageous conduct, of a kind especially calculated to cause serious mental and emotional disturbance. It is the character of such conduct itself which provides the necessary assurance that genuine harm has been done, and that it is so important as to be entitled to redress.

THE DEFENDANT'S CONDUCT

The early cases, of course, refused all remedy for mental suffering, unless it could be brought within the scope of some already recognized tort. One instance of this was the rule that mere words, however violent, threatening or insulting, did not constitute an assault, and hence afforded no ground for redress. It might well be inquired why the trespass action for assault, which was a remedy designed to keep the peace, never was extended to words which were more insulting, unendurable, and generally provocative than blows. Perhaps it was thought that the law had enough on its hands to intervene at the first threatening gesture—or perhaps it was merely that the tough skins


24 Thus in Bielitski v. Obadisk, 15 Sask. L. Rep. 153, 65 Dom. L. Rep. 627, 2 W. W. R. 238, the defendant merely originated a false rumor to this effect, but was held liable because he must have known that it was sure to reach the plaintiff.

of merrie England in the days before Victoria were expected to be able to endure anything that the foul mouths of our ancestors could inflict. More probably it was the proximity of the criminal law, with its fixed notion that assault must always be something in the nature of an attempted battery. In any event, the result was a rule which permitted recovery for the movement of a hand that might frighten the plaintiff for a moment, and denied it for coldly menacing words that kept him in terror of his life for a month.

But if some independent tort could be made out, no matter how technical it might be, there was a cause of action; and with this cause of action as a peg upon which to hang the mental damages, recovery was freely permitted. Virtually from the beginning mental suffering has been a recognized element of damages in assault,26 battery,27 false imprisonment,28 malicious prosecution,29 and seduction.30 Very often in such actions the mental distress has been the only substantial damage sustained. As long ago as 1906, Street remarked upon this phenomenon. He called such damages "parasitic," and ventured a prediction which has proved to be prophetic, and may continue so to be:31

"The treatment of any element of damages as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability."

The intentional infliction of such damages is in process of becoming a cause of action in itself. The tendency remains, however, to find some other foundation for the action, however strained, and to disguise the real basis of recovery under some other name.32 Thus in a recent Georgia case,33 where an insurance adjuster insulted and bullied a sick woman in a hospital for a considerable period of time, and before

29 Price v. Minnesota, D. & W. Ry., 130 Minn. 229, 153 N. W. 532 (1915);
30 Anthony v. Norton, 60 Kan. 341, 56 P. 529 (1899); Haeissig v. Decker, 139 Minn. 422, 166 N. W. 1085 (1918).
31 1 STREET, THE FOUNDATIONS OF LEGAL LIABILITY 470 (1906).
32 22 MINN. L. REV. 1030 (1938).
departing scornfully threw a half dollar upon the bed, the court was sufficiently timid to lay emphasis upon the technical battery, but honest enough to say that recovery would have been allowed without it. There is no longer any reason or necessity for resorting to such subterfuges. It is high time to abandon them, and to rest the action upon its real ground.

One group of cases have allowed recovery for practical jokes of an unusually heartless kind, such as telling a woman that her husband is seriously hurt, or that her son has hanged himself, or burying a “pot of gold” to be dug up under extreme public humiliation. An extreme illustration is the Maryland case in which a very gory dead rat was wrapped up in a package for a sensitive soul to open. Such sardonic efforts at humor cannot be called assaults, within any present definition of the term, but they represent an extension of the principle underlying the action for assault to closely analogous situations.

In the field of mere insult, other cases have dealt with oppressive and outrageous conduct, such as verbal or written abuse, vituperation and threats, under circumstances peculiarly calculated to cause mental distress, and on the part of those in a special position to inflict it. As might be expected, public servants were the first defendants to be held liable. Carriers, who are under a special obligation to the public, and by the same token in an unusual position to wound its feelings, have been held responsible for the conduct of their employees who insult passengers, humiliate them in arguments over fares, or try to put

36 Nickerson v. Hodges, 146 La. 735, 84 So. 37, 9 A. L. R. 361 at 364 (1920) (the joke was turned upon the joker to the tune of $500, and Miss Nickerson got her pot of gold).
38 Knoxville Traction Co. v. Lane, 103 Tenn. 376 (1899); Lamson v. Great Northern Ry., 114 Minn. 182, 130 N. W. 945, Ann. Cas. 1914A 15 at 17 (1911); Bleecker v. Colorado & S. R. R., 50 Colo. 146, 114 P. 481 (1911); Lipman v. Atlantic C. L. Ry., 108 S. C. 151, 93 S. E. 714 (1917); 1 TORTS RESTATEMENT, § 48 (1934).
them into Jim Crow cars, all without justification. An “implied contract” to be polite is the crutch upon which the more timorous courts have been inclined to lean. But apart from any question as to whether such a term is really to be implied in a contract of transportation, this does not coincide very well with the prevailing view that damages for “mental anguish” are not recoverable in contract actions; and in any case, surely no such fanciful basis is required for such a tort. It should be enough to say that a carrier is liable for gross insults inflicting mental suffering.

Hotel keepers occupy a similar position. The house detective who bursts into a room crying that the occupants are unmarried and threatening jail makes his employer liable for the mental suffering which results. There is of course a technical trespass, or at least a technical breach of contract; but no one would suppose that the decision would be otherwise if the affront were offered at the hotel desk before the guests had registered. The same liability for outrageous insults has been imposed upon the owners of other premises who cater to the public—theatres, amusement parks, a circus, a telegraph office,

42 Magruder, “Mental and Emotional Disturbance in the Law of Torts,” 49 HARV. L. REV. 1033 at 1052 (1936). 1 TORTS RESTATEMENT, § 48 (1934), in excepting the carrier’s liability, makes no reference to contract, holding the carrier liable when the insulting servant is acting within the scope of his employment.
and a dancing school. In a recent decision involving a motion picture theatre which grossly affronted a schoolgirl with accusations of indecent conduct, the Mississippi court cast overboard all idea of any other technical ground, and held the defendant liable on the sole basis of insulting a customer. There is no apparent reason for limiting such liability to public utilities, and the same result might be reached, in a proper case, as to any storekeeper. The caution of the Restatement of Torts in this respect seems uncalled for.

Evicting landlords have offered a fertile field for liability for mental suffering. When they behave in outrageous fashion, tearing down the premises, smoking out the tenants, or throwing the furniture about, they have been held liable. Here again, of course, there is a technical trespass under the statutes of forcible entry in most jurisdictions; but it is greatly to be doubted that it plays any part in the cause of action. It would seem that even if the landlord were legally entitled to enter and to oust the tenant, he would still be liable for doing it in such a manner. The same trespass is found in the case of many other defendants who invade the plaintiffs' premises, or remain there after they have forfeited their privilege to do so, and offer violent threats, vituperative epithets and abuse, indecent pro-

49 Smith v. Leo, 92 Hun (N. Y.) 242, 36 N. Y. S. 949 (1895) (breach of contract).
50 Saenger Theatres Corp. v. Herndon, (Miss. 1938) 178 So. 86.
51 1 Torts Restatement, §§ 46-48 (1934). In Republic Iron & Steel Co. v. Self, 192 Ala. 403, 68 So. 328, L. R. A. 1915F 316 (1915), the court refused to find such liability on the part of a retail storekeeper, but the facts show considerable provocation on the part of the customer.
Contra: Stearns v. Sampson, 59 Me. 568 (1871); Smith v. Gowdy, 196 Ky. 281, 244 S. W. 678 (1922) (but distinguishable by obvious lack of outrageous conduct).
posals, \(^{55}\) or humiliating indignities to the premises. \(^{56}\) In one or two cases where "trespass" was not regarded as an adequate theory, the courts have fallen back upon that general catch-all, the concept of "nuisance." \(^{57}\) It seems quite evident that in all such cases the "legal right" invaded, which always is mentioned but seldom is stressed, and never plays any important part as an element of damages in itself, is nothing more than the barest excuse to permit recovery for the real mental injury, which is the only substantial damage to be found. \(^{58}\)

In recent years collecting creditors have come in for a great deal of attention. High pressure collection methods have not been received with any great degree of favor by the courts. \(^{59}\) The same is true of the very similar bullying tactics of insurance adjusters seeking to force a settlement. \(^{60}\) Wherever it can possibly be done without too obvious pretense, the effort has been to find a technical battery, \(^{61}\) an assault, \(^{62}\) a false imprisonment, \(^{63}\) a trespass in entering or remaining in the plaintiff's home, \(^{64}\) or an invasion of the "right of privacy," \(^{65}\) which itself seems to be in many cases nothing more than a right to be free from the intentional infliction of mental suffering. \(^{66}\) But in three

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\(^{55}\) Ford v. Schliessman, 107 Wis. 479, 83 N. W. 761 (1900).

\(^{56}\) St. Louis S. W. R. R. v. Alexander, 106 Tex. 518, 172 S. W. 709 (1915) (search); Lesch v. Great Northern Ry., 97 Minn. 503, 106 N. W. 955 (1906) (search); Hickey v. Welch, 91 Mo. App. 4 (1901) (blocking off privy).


\(^{58}\) Thus plaintiff is allowed to recover for mental suffering due to a "trespass" although the title to the property is in her husband. Lesch v. Great Northern Ry., 97 Minn. 503, 106 N. W. 955 (1906); Engle v. Simmons, 148 Ala. 92, 41 So. 1023 (1906); Watson v. Dilts, 116 Iowa 249, 89 N. W. 1068 (1902).

\(^{59}\) 66 U. S. L. Rev. 349 (1932).


\(^{63}\) Salisbury v. Poulson, 51 Utah 552, 172 P. 315 (1918).

\(^{64}\) Engle v. Simmons, 148 Ala. 92, 41 So. 1023 (1906); American Security Co. v. Cook, 49 Ga. App. 723, 176 S. E. 798 (1934).


\(^{66}\) Green, "The Right of Privacy," 27 Ill. L. Rev. 237 (1932); Kacedan, "The Right of Privacy," 12 Bost. Univ. L. Rev. 353, 600 (1932); Harper and
recent cases in Iowa,67 Nebraska68 and North Carolina,69 where nothing whatever was involved except outrageously insulting collection letters or verbal abuse, the courts were faced squarely with the issue, and proceeded to discard all such pretexts, and to hold the defendants liable for the real wrong.

Occasional cases have dealt with the misuse of authority in some flagrant manner—as where a detective, for purely personal reasons, falsely accused a woman of wartime espionage.70 Perhaps the outstanding decision among all those mentioned is Johnson v. Sampson,71 in which school officials summoned a high school girl to the office, accused her of unchastity, and threatened her with imprisonment. Neither assault nor slander could be made out upon the facts, but the Minnesota court had no hesitation in imposing liability for the intentional infliction of mental suffering. Unjustified assumptions of authority, such as mob threats to lynch the plaintiff or to run him out of town, obviously call for the same liability.72

A number of decisions have involved the mishandling of dead bodies, whether by mutilation,73 disinterment,74 interference with McNeely, "A Re-examination of the Basis for Liability for Emotional Distress," [1938] Wis. L. Rev. 426.

71 167 Minn. 203, 208 N. W. 814, 46 A. L. R. 772 at 775 (1926). Recovery was denied in Walker v. Tucker, 220 Ky. 363, 295 S. W. 138 (1927), where the insults are not set out in the opinion, and perhaps were not extreme. The same explanation would hold for Peoples Finance & Thrift Co. v. Harwell, 183 Okla. 413, 82 P. (2d) 994 (1938).
74 Gostkowski v. Roman Catholic Church, 262 N. Y. 320, 186 N. E. 798
burial,75 or other forms of intentional disturbance.76 In these cases the courts have talked of a somewhat dubious “property right”77 to the body—a “property” which did not exist while the decedent was living, which cannot be sold or conveyed, which can be used only for the one purpose of burial, and which not only has no pecuniary value but is a source of liability for funeral expenses. This right usually is said to be in a group of close relatives, or the next of kin,78 and serves as a foundation for the action for mental suffering. It seems reasonably obvious that this “property” is something evolved out of thin air to meet the occasion, and that it is in reality the personal interests of the survivors which are being protected, under a fiction likely to deceive no one but a lawyer. It would be much simpler to say merely that redress will be given for the mental disturbance substantially certain to follow from the intentional mistreatment of a corpse.

In short, in a wide variety of situations, including many kinds of outrageous misconduct which range from threats of violence or imprisonment through grossly insulting letters or words to acts not tolerated in any decent society, mental suffering, intentionally inflicted, has been redressed. Out of the array of technical assaults, batteries, imprisonments, trespasses, “implied contracts,” invasions of “privacy” (1933); England v. Central Pocahontas Coal Co., 86 W. Va. 575, 104 S. E. 46 (1920).


77 See 18 MINN. L. REV. 204 (1934).

78 Apparently there is only one right of action, shared by the surviving members of the family. Thus it has been held that all may join in one action. Boyle v. Chandler, 3 W. W. Harr. (33 Del.) 323, 138 A. 273 (1927). Cf. Stephens v. Waits, 53 Ga. App. 44, 184 S. E. 781 (1936). But recovery by the husband has been held to bar an action by the son. Gostkowski v. Roman Catholic Church, 262 N. Y. 320, 186 N. E. 798 (1933).

See, generally, Green, “Relational Interests,” 29 Ill. L. Rev. 460 at 489
or of doubtful "property rights," the real interest which is being protected stands forth very clearly. And in some dozen recent cases, at least, it has been recognized as the only interest or right involved.

LIMITATIONS OF THE TORT

Conceding that the sum of all these cases means that a new basis of tort liability is to be recognized, what are its limitations? There still remain fictitious claims, vexatious suits, and trivialities which can only be dismissed as petty and frivolous. Liability still cannot be extended to every trifling indignity. The rough edges of our society still are in need of a great deal of filing down, and the plaintiff in the meantime must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene with balm for wounded feelings in every case where a flood of billingsgate is loosed in an argument over a back fence. There is still, in this nation at least, such a thing as freedom to express an unflattering opinion; and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.79

There is an obvious difference between the threat of a group of self-appointed vigilantes to string the plaintiff up to a sour apple tree, and the mere statement to his face that they think that he is the meanest man in town. There is a difference between an infuriated railroad conductor raucously bellowing opprobrious epithets at humiliated passengers, and the mild discourtesy of "Hurry up! Do you think we've got all night?" There is a difference between violent and vile profanity addressed to a lady, and the same language to a Butte miner and a United States marine.80 It is all a matter of drawing the line. There will of course be difficulties, and doubtful cases, and the distinction cannot be stated in any formal rule; but it is not essentially more troublesome to make than that between negligence and reasonable care.

Thus far the courts have indicated that they are quite competent to deal with the problem. With few exceptions, the cases in which recovery has been allowed have been extreme cases, in which it would be difficult not to agree that there is a real wrong entitled to redress.

80 An excellent illustration of this is the case of Fort Worth & R. G. Ry. v. Bryant, (Tex. Civ. App. 1919) 210 S. W. 556, where a distinction was made between a man accustomed to profanity and a child who was not.
No case has been found permitting recovery in the absence of evidence that the plaintiff's mental disturbance was extreme, with convincing objective testimony to attest its genuineness. Nearly all of the plaintiffs have been women, usually in that delicate condition whose standardized consequences have typified mental suffering cases with the "customary miscarriage." How far there has been perjury, it is of course impossible to say; the opportunity certainly is there, but so far as the opinions indicate, the harm suffered has been real and serious. It is impossible to set such a limitation where no court has attempted to fix one; but so far as the cases thus far decided indicate, recovery is permitted only when there has been damage of importance and gravity, established by convincing evidence.

With the exception of a recent Texas case, which seems to have attached quite undue importance to the fact that a street car conductor shook a ticket punch under a passenger's nose, no case allowing the plaintiff to recover has been found where the defendant's conduct was anything but flagrant and outrageous. The courts have refused, very properly, to compensate the silly, hysterical fright of a woman at the approach of a man dressed up in feminine clothing, or the rage, humiliation, or even shock resulting from ordinary rough language, profanity, or abuse, in the absence of circumstances of aggravation. In each case the defendant who has been held liable has been in a special position to inflict mental suffering, and his behavior has been especially calculated to inflict it. There is no recovery for threats, insults or indignities which amount to nothing more than annoyances.

Green, "'Fright' Cases," 27 ILL. L. REV. 761 (1933).
Even here the evidence was that the woman was so disturbed that she fell from a street car and broke her leg.
Perhaps the extreme case denying recovery is Atkinson v. Bibb Mfg. Co., 50 Ga. App. 434, 178 S. E. 537 (1935), where defendant's foreman publicly cursed a discharged workman, with an open knife in his hand. But as between individuals undoubtedly accustomed to such language, it is not clear that the case is wrong.
Taft v. Taft, 40 Vt. 229 (1867); Beck v. Luers, (Iowa 1910) 126 N. W. 811; Stratton v. Posse Normal School, 265 Mass. 223, 163 N. E. 905 (1928); State Nat.
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Such “mental suffering,” even if it be genuine, is regarded as exaggerated, unreasonable, and beneath the notice of the law. Thus far it has been held that no action will lie for the insult and humiliation involved in inviting a woman to illicit intercourse, upon the ground that no sufficiently serious harm has been done, but it is not altogether certain how long the chivalry of the southern courts will stand the strain.

So far as it is possible to generalize from the cases, the rule which seems to be emerging is that there is liability only for conduct exceeding all bounds which could be tolerated by society, of a nature especially calculated to cause mental damage of a very serious kind.

ACTS DIRECTED AT A THIRD PERSON

Some troublesome problems of legal theory arise when the act of the defendant which has caused the plaintiff’s mental suffering was not intended to affect the plaintiff, but was directed at a third person. There are much the same difficulties as in the case of the defendant’s negligent conduct. The obstacle to recovery lies in the


Bennett v. McIntire, 121 Ind. 231, 23 N. E. 78 (1889); Reed v. Maley, 115 Ky. 816, 25 Ky. L. Rep. 209, 74 S. W. 1079 (1903); Prince v. Ridge, 32 Misc. 666, 66 N. Y. S. 454 (1900); Davis v. Richardson, 76 Ark. 348, 89 S. W. 318 (1905). Cf. Clack v. Thomason, 57 Ga. App. 253, 195 S. E. 218 (1938) (making love to married woman and soliciting her to divorce her husband). If the defendant’s conduct is such as to justify reasonable fear of attack, it may amount to an assault. Newell v. Whitcher, 53 Vt. 589 (1880); State v. Williams, 186 N. C. 627, 120 S. E. 224 (1923).

“The view being, apparently,” as Professor Magruder has so pungently put it, “that there is no harm in asking,” Magruder, “Mental and Emotional Disturbance in the Law of Torts,” 49 Harv. L. Rev. 1033 at 1055 (1936).

Recovery was permitted in Erwin v. Milligan, 188 Ark. 658, 67 S. W. (2d) 592 (1934), without reference to the assault and battery which could have been found in the defendant’s conduct.

See, denying recovery: Southern Ry. v. Jackson, 146 Ga. 243, 91 S. E. 28 (1916); Nuckles v. Tennessee Elec. Power Co., 155 Tenn. 611, 299 S. W. 775 (1927); Waube v. Warrington, 216 Wis. 603, 258 N. W. 497 (1935); The Rigel, [1912] Prob. 99. A fortiori, recovery is denied in jurisdictions which do not allow recovery where the fear is for the plaintiff’s own personal safety, in the absence of impact.

fact that no harm was intended to the plaintiff, and some violation of a legal obligation to the plaintiff must be found before there can be liability.

If some theory justifying recovery is indispensable, no reason is apparent to prevent the application of the rather anomalous doctrine of "transferred intent," found in the battery cases, where A throws a stick at B, or shoots at B, and unexpectedly hits C.90 Whether this doctrine is a peculiarity carried over from criminal law into tort cases, or merely a freak survival from an earlier law of strict liability without fault toward the plaintiff, or whether it is a recognition of a sound fundamental principle that an act intentionally directed at injury to another is an absolute wrong to anyone who may be damaged as a result—it is in any case well established. There seems to be no reason to apply it when the plaintiff suffers physical harm, and to reject it where there is mental damage. It is a strange distinction which allows recovery when the plaintiff is struck by a bullet aimed at another, and denies it when she is frightened into serious illness.91 It is still more startling to find the Ohio courts recognizing a cause of action in mental disturbance at the mistreatment of household furniture, and none in shock at the sight of the mutilated body of a murdered sister.92 But thus far only one West Virginia case93 seems to have adopted the "transferred intent" theory as a basis of recovery.

Other courts seem to have regarded the plaintiff's mental distress as so substantially certain to follow, under the circumstances, from the defendant's attack upon another, that it may be considered as intended,94 or at least as foreseeable, so that the defendant's conduct becomes negligence toward the plaintiff.95 Still other courts have

91 Compare Corn v. Sheppard, 179 Minn. 490, 229 N. W. 869 (1930), with Renner v. Canfield, 36 Minn. 90, 30 N. W. 435 (1886).
93 Lambert v. Brewster, 97 W. Va. 124, 125 S. E. 244 (1924).
denied any recovery at all; and it may be significant that the ground most often stated is that the result was not one which reasonably might have been foreseen. Thus the question whether the defendant knew or should have known of the plaintiff’s presence, or of the likelihood of fright or shock to her, may prove decisive.

Perhaps it is not so important to determine the precise theory upon which recovery is to be allowed, as to set the limitations which are necessary if it is to be allowed at all. It has been contended that a defendant who sets out to commit a battery should always reasonably anticipate that others in the vicinity, and particularly near relatives of the person attacked, may suffer serious mental disturbance. But some boundary short of such foreseeability must necessarily be set. No one would suppose that we are to attempt to compensate every listener on the radio for whatever mental distress he may undergo at the news of an assassination of the President; or that if the defendant murders John Smith with an ax, he should be liable for the successive miscarriages suffered by his sisters and his cousins and his aunts at the news of John Smith’s and one another’s misfortunes, however devoted a family they may have been.

It is again a question of drawing the line. There seems to be no absolute necessity for limiting recovery to near relatives of the person attacked, since an innocent bystander who is frightened out of her wits by a murder committed before her eyes may suffer an equally serious and genuine shock. There is perhaps more reason, as a practical necessity, to limit it to those who are more or less immediately


See Phillips v. Dickerson, 85 Ill. 11 (1877); Collier, “Shock as Being Actionable in Negligence,” 79 CENT. L. J. 204 at 207 (1914); 25 COL. L. REV. 107 (1925).


Cf. Hill v. Kimball, 76 Tex. 210, 13 S. W. 59 (1890) (two negroes on premises occupied by plaintiffs); Rogers v. Williard, 144 Ark. 587, 223 S. W. 15, 11 A. L. R. 1115 at 1119 (1920) (landlord). In neither of these cases, however, was the plaintiff a total stranger to the person attacked. See also the opinion of Atkin, L. J., in Hambrook v. Stokes Bros., [1925] 1 K. B. 141 at 152. Contra, the early unreported case of Smith v. Johnson, referred to in Wilkinson v. Downton, [1897] 2 Q. B. 57.
connected with the attack, either by their presence at the time and place, or through prompt discovery afterward. However, perhaps there is no real distinction to be made, however great our tendency to find one, between the wife who sees her husband killed and the widow who learns the news six months later; but there must be a terminus somewhere. Here again the limits to be set are a matter for the practical common sense of the court, and probably are incapable of reduction to any definite rule. In any case, it seems quite clear that there can be no recovery where the peril in which the defendant has placed the third person is not one calculated to cause any extreme mental disturbance on the part of the plaintiff, or where there has in fact been no serious harm.

All of these problems could be dealt with in far more intelligent fashion if we were to jettison the entire cargo of technical torts with which the real cause of action has been burdened, and recognize it as standing on its own feet. There is every indication that this will henceforth be done, and that the intentional infliction of extreme mental suffering by outrageous conduct will be treated as a separate and independent tort.

102 Thus recovery was denied in Bucknam v. Great Northern Ry., 76 Minn. 373, 79 N. W. 98 (1899) (violent language addressed to plaintiff's husband); Sanderson v. Northern Pac. Ry., 88 Minn. 162, 92 N. W. 542 (1902) (putting plaintiff's children off train without danger to children); Ellis v. Cleveland, 55 Vt. 358 (1883) (wrongful arrest of husband); Sperier v. Ott, 116 La. 1087, 41 So. 323 (1906) (wrongful arrest of son); Fort Worth & R. G. Ry. v. Bryant, (Tex. Civ. App. 1919) 210 S. W. 556 (profanity before child in presence of father).
103 Keyes v. Minneapolis & St. L. Ry., 36 Minn. 290, 30 N. W. 888 (1886); Wyman v. Leavitt, 71 Me. 227 (1880).