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INSULTS—PRACTICAL JOKES—THREATS OF FUTURE HARM—HOW NEW AS TORTS?

By Reynolds C. Seitz

In two very recent and outstanding legal articles it was specifically suggested that enlightened courts have recognized a new tort which consists in intentional, outrageous infliction of mental suffering in an extreme form. The same thought, although not quite as pointed, has appeared within the pages of another contemporary source. The trend of all the articles indicates that more and more courts are expressing a philosophy which allows a plaintiff to make a direct recovery for emotional distress intentionally inflicted. It is disclosed that some forward looking courts are no longer straining to find a technical assault, battery, trespass to property, false imprisonment, malicious prosecution, or seduction to which they can attach parasitic damages for mental suffering. Honesty compels decisions which make no artificial distinctions based on the slightest of physical injuries. Such courts cannot see the logic in allowing a kiss, a spitting in the face, and a hug and a kiss to make the difference between no damages and recovery which mounts to a thousand or more dollars. In all the discussions, however, a note of reservation is sounded. Except within a few delineated patterns, recovery which is not attached to a technical "named" tort has been restricted to factual situations in which the emo-


3Recommendations and Studies of the State of New York Law Revision Commission (1936) at page 437 points out that an actual intent to cause emotional disturbance is not always necessary. As Professor Prosser says in 37 Mich. L. R. 874, intent means more than an actual desire to make a party suffer. It includes the thought that defendant must have believed that mental disturbance was substantially certain to follow. This can be inferred from the act done.

4Craker v. Chicago and N. W. Ry., 36 Wisc. 657 (1875).


7Infra, notes 19, 20, 21, 22, 23.
tional distress broke out into a physical, tangible illness or suffering. There has been the sentiment uttered in one breath that to allow recovery for an offense which produces only mental suffering is perhaps too new a tort, and in another breath that to shy away from the issue and refuse recovery will not be to heed logic.

It will be the thesis of this article that an award of damages to one who has suffered nothing but emotional distress as a result of an intentional act is not a new tort in essence even though it may be one in name and result. It is submitted that our courts have refused recovery for distress caused by offenses which do not produce physical effects because on the whole our judiciary has rightly been wary of accepting the prevalent modern maxim, "What is new is better." These pages will attempt to disclose reasoning which it is hoped will point to the fact that a recovery for causing only mental suffering is not based upon the new nearly so much as upon the old.

Any discussion in the field of emotional distress is made more difficult by the presence of artificial principles which have grown out of Lord Wensleydale’s famous dictum in *Lynch v. Knight* to the effect that “mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone.” Fortunately, however, the courts have progressed far in getting away from the restricting influence of this stereotyped legal phrase. They have frequently shown that they respected the logic inherent in Dean Green’s statement that it is dangerous to continue to lay down generalizations when they are allowed to parade under the sacrosanct banner of principles. The natural good sense of the courts led them away from the theory that in order to recover for emotional disturbance some “slight initial impact” must be found. But the greatest advance was made when Lord Wensleydale’s pronouncement, worn smooth through the years, bent under the friction of scientific influence. It could

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9 H. L. Cas. (1861).

9 Under the title *Duty and Foreseeability Factors in Fright Cases* (1933), 23 Marquette L. R. 103, the writer of the present article discussed at some length the intelligent results that can be reached in negligent fright cases by clearing the air of so called sacred principles or maxims.

10 Green, *Fright Cases* (1933) 27 Ill. L. R. 761.

not wholly withstand the medical testimony that fright, shock, anxiety, grief, rage, and shame are in themselves physical injuries producing well marked symptoms visible to the professional eye.  

In spite, however, of a generally forward looking judicial attitude and a feeling that the Lynch v. Knight\(^{13}\) utterance is not at all the substantial structure it purports to be, still continues to be a facade behind which courts deliberate. It is most effective in the particular area covered by this discussion—the area of intentional, outrageous infliction of mental suffering which does not result in bodily harm or illness.\(^{14}\) Its importance in the suggested factual pattern is reinforced by the most valid objections that it will be hard to protect against fraudulent claims, and that if recovery was allowed, the door would be opened wide to litigation in the field of trivialities and bad manners.

Such objections are most weighty and real. However, it does not follow that they must go unanswered. Dean Green and Professor Prosser\(^{15}\) have, in connection with the first expressed fear, both pointed out that there exists a protection against fraud in the fact that the jury is still required (and as capable as always) to distinguish true claims from false. It will, say the two leading authorities, still be necessary to prove to the satisfaction of a jury that an intentional, outrageous act was committed which was capable of causing mental suffering. And as regards the second expressed fear Professor Prosser answers with a very keen comment. He says:

"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."


\(^{13}\) 9 H. L. Cas. (1861).

\(^{14}\) No attempt is made in this article to discuss the problem of fright negligently inflicted (as to which see citations, notes 9 and 10, supra) and emotional disturbance intentionally caused which results in bodily harm or illness (as to which see citations, notes 1 and 2, supra). Even in those fields, although enlightened courts are allowing more and more recovery, there is still much conflict.

\(^{15}\) Green, Fright Cases (1933), 27 Ill. L. R. 761.


\(^{17}\) Supra, note 16.
Still no one can deny that we do need to fear opening wide the door to litigation based upon trivialities and bad manners. Courts cannot be criticized when they hesitate to deal with a problem which presents so many variables. It is not surprising that they shrink back from a corner of jurisprudence which they fear is bound to require much day by day litigation.

It is the hope this article will bring out that the fears of the courts are not wholly justified—that recovery can be allowed, and yet tribunals can keep within bounds which are not as indefinite as is commonly supposed.

Although courts have been hesitant about heeding claims for mental distress which are not the outgrowth of a named tort or which do not manifest themselves through physical sickness, such recovery is not by any means an oddity existing in the law. To date, however, plaintiffs have been restricted within the limits of relatively clear-cut categories. They have succeeded in getting an award of damages only in cases involving employee insults to public utility customers or those who use premises which cater to the public, insults by collection agencies to debtors, practical jokes which cause deep humiliation or distress, and

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18 Professor Prosser emphatically admits the argument. However, as he puts it, "the courts ought to be able to cope with the situation with as much effectiveness as they now administer the concepts of the 'rule of reasons,' 'fair return,' and 'reasonable man of ordinary prudence.'"


threats of physical harm to be done in the future. And in none of the enumerated situations can it be said that the courts make much progress toward giving us a definite and clear insight into what might stand as a general qualification of the maxim that recovery will not be allowed for mental distress which did not produce tangible physical results.

Discussion during the remaining pages will be grouped under headings which will denote the type of intentional act involved. Attention will be paid to the all too apologetic reasoning of courts when permitting recovery, and analysis will be made with intent to show that many a recovery should rest upon the foundation of a sound general rule rather than the insecurity of what can conveniently become a shifting, elusive exception.

**Insults**

One explanation the courts give for allowing plaintiff to succeed is based upon a recognized exception to the strict rules of assault which lean so heavily upon the present apparent-intention and-ability-to-commit-a-battery theory. From the early days of the nineteen hundreds, authority has existed which has today been summarized by the Restatement of Torts pronouncement that there is a special liability which attaches to carriers for the insults of their servants to customers using transportation facilities. This attitude is based upon the feeling that a provision of an implied contract has been broken, and that the holding is necessary in order to keep the carrier in line so that it will insist upon a courteous attitude from employees. Under scrutiny this rationale does not appear too sound. It is the generally accepted axiom of contract law that recovery will not be allowed for mental distress arising out of breach of contract, and it would seem that municipal-government regulation, public disapprobation, and, in many instances, competition, could be relied upon to encourage a courteous attitude from carrier employees. As tending to prove that judicial bodies are not really worried about their role of teacher of good manners, courts are found to be extending their benediction upon an enlargement of the excep-

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24 Supra, note 19.

25 Sec. 48 (1932).

26 Supra, note 20.
tion so that it covers utilities—and quasi-utilities—which are outside the class of carriers. In many of these fields the existence of competition of a real sort would produce the decorous servant. Therefore, the real reason behind the Restatement rule seems to be the philosophy that public utilities, or concerns which cater to the general public, owe a greater duty to refrain from bringing about emotional distress than do other concerns or individuals.

If, however, we have in mind the victim of the humiliating conduct, it is hard to see how he or she suffers more from the harsh words of a utility servant than from those of a private corporation or individual. The harm is likely to be the same in the one case as in the other. Furthermore, it would appear that the possibility for fraud is no greater in the one instance than in the other. With such facts serving as a premise, it is reasonable to seek a sounder basis for allowing recovery for insults which cause only mental suffering.

It is suggested that such a sounder basis can be derived from a study of all the cases brought against utility or quasi-utility interests which sanction the award of damages for mental distress unconnected with bodily harm or physical results. An inspection reveals a common pattern. The irritating remarks are addressed to the victim in the presence of third persons. The victim, for example, is publicly and profanely accused of not paying a fare, of being a "dead beat," or of being indecent.

In the face of such facts, it is not strange that judges would readily believe that a person could suffer acute distress as a result of extreme humiliation. Reflection surely induces the feeling that very few people would pass through such life contacts without definitely suffering. Hence the fear of fraud diminishes. This becomes more realistically true when it is remembered that it must be recognized that a substantial minority of men have emotional make-ups which would place them below the average man.

27 Supra, note 19.
28 Supra, note 20.
31 Saenger Theater Corp. v. Herndon, 178 So. 86 (Miss. 1938).
32 Restatement, Torts (1934), sec. 312, comment c.
Our tribunals, if they take such a position, are doing no more than reiterating the thought, borrowed from the law of libel, that harm has been done when a person is exposed to ridicule, disgrace, contempt, hatred or contumely. The only thing new about the approach is the candor with which the courts avoid making distinctions of the type which separates slander from libel. They simply treat the matter as a liability *per se* situation.

This attitude should not be too startling when compared with the recommendation of the leading English judges of the late eighteen hundreds. An inspection of their committee report reveals the expression that since the distinction between slander and libel rested on a historical rather than a solid foundation, the law of defamation should be reformed. Professor Bohlen has reiterated the same opinion in a recent writing. Consequently, it is not radical to suggest that courts are sensible when they see a need for *per se* liability when a person is exposed to ridicule, disgrace, contempt, hatred or contumely. For them to realize that a person may suffer acute mental distress and yet none of the special damages which are required to bring a case within the rules of slander seems logical. And once judicial bodies recognize that a wrong has been done, even though no special damage of the type required under the rules of slander can be proved, it is not new law to refuse to draw the line at nominal damages. The Restatement of Torts and decided cases specifically take the stand that once a defamation *per se* situation is found to exist, liability extends to such emotional distress as normally results from such a publication.

Viewed at such a perspective, it would seem that there should be no hesitation or alarm about modifying Lord Wensleydale's dictum to the extent of ruling that many times recovery should be allowed for emotional suffering unconnected with bodily harm. Plaintiffs should succeed when they can prove insults that are

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34 Bohlen, *Fifty Years of Torts* (1937) 50 Har. L. R. 725, where it is remarked that the radio is doing much to break down the artificial distinctions between the law of slander and libel.
37 *Supra*, note 8.
analogous to the kind which under other circumstances might give rise to an action for libel. This would require that heed be given to mental disturbance when it is the outgrowth of humiliation over insult delivered in the presence of a third party. It would seem that "common sense" would dictate that we cannot allow awards for all insults. In the face of the many and varied everyday contacts of life, we must presume that individuals will cultivate a minimum defense mechanism. They should be relied upon to emotionally repel and forget private insults which reach no other ear but their own. Such a situation does not seem to afford the same stimulus toward mental discomfort. This may be one explanation as to why the courts, with only one apparent exception, have refused to allow women to recover for the private affront involved in inviting them to participate in illicit intercourse.

That the courts are unconsciously aware of the submitted common sense formula is further borne out by their approach in collection-of-debt cases. An analysis of the facts involved in LaSalle Extension University v. Fogarty makes it appear reasonable that the deciding body found the conduct of the defendant outrageous and overstepping the bounds of business practice because it observed that compulsion had been brought to bear through the technique of actually informing neighbors and his employer that plaintiff owed a debt and would not pay it. It is easy to agree with the judges and see that the disclosure to third parties is calculated to cause extreme humiliation and mental discomfort. There is no real difference in essence between calling a man a dead beat in front of listeners and informing readers through the medium of letters or circulars. The case of Barnett v. Collection Service Company points the way to a further logical extension of the suggested rule for allowing recovery for

38 Professor Harper's utterance in 10 Ind. L. J. 494 serves as precedent for setting up the rule of common sense to mark out the limits of recovery in certain phases of tort law.

39 Erwin v. Milligan, 188 Ark. 658, 67 S. W. (2d) 592 (1934). But the explanation for allowing recovery here may be that the court felt there was a threat of future harm lurking in the invitation.

40 Davis v. Richardson, 76 Ark. 348, 89 S. W. 318 (1905); Bennett v. McIntire, 121 Ind. 231, 23 N. E. 78 (1889); Reed v. Marley, 116 Ky. 316, 74 S. W. 1079 (1903); Prince v. Ridge, 32 Misc. 666, 66 N. Y. S. 454 (N. Y. 1900); State v. Williams, 186 N. C. 627, 120 S. E. 224 (1923).

41 126 Nebr. 457, 253 N. W. 424 (1934).

42 214 Iowa 1308, 242 N. W. 25 (1932).
insults. In the Barnett case the defendant had done no more than threaten to tell third parties that plaintiff would not pay a debt. But the judiciary seemed quick to realize that a threat to tell third persons is as likely to cause emotional upset as an actual utterance. Reason convinces that such a threat is well designed to keep a person constantly worrying. Consequently, to give protection against such offenses does not by any means open the door wide to unlimited recovery for all affronts.

For confirmation of the feeling that the philosophy of tribunals in the field of insult is molded around the idea that a person has an interest in not being embarrassed in the presence of third parties, the decision of Peoples Finance and Thrift Company v. Harwell is enlightening. There the collection concern made emphatic and businesslike declarations that they would take the household furniture and plaintiff’s bed. The threats, however, were not made in the presence of those who had no right to hear. A holding was handed down which acknowledged that all threats were not insults and that a party had a legal right to enforce collection of a debt.

A recognition that there is made a distinction between improper and proper business methods will serve as a starting point for an analysis of the place of truth as a defense to an intentional insult action. At first glance it may seem that a theory which has drawn an analogy between insult and defamation litigation would of necessity have to take complete cognizance of the fact that truth would be a good defense. However, the analogy drawn cannot be said to have made an action for insult synonymous with one for defamation. It was only meant to convey the thought that it is the presence—real or imminent—of third persons which is almost certain to cause an affronted person great mental anguish. There was no conscious attempt to suggest that one is impelled to insult for the same reason that one is influenced to defame. When this is understood, it is clear that truth can be a good defense to a slander or libel action, and should not always be a bar to an insult action.

183 Okla. 459, 82 Pac. (2d) 994 (1938).
Kirby v. Jules Chain Stores Corporation, 210 N. C. 808, 188 S. E. 625 (1936) is not in conflict. There the declarations, while producing a like physical result (a premature birth) to that of the Peoples Finance and Thrift Company case, were not businesslike but rough and profane.
Theoretically, it is felt that for the good of mankind in general individuals should not be censored because they respond to the natural urge to warn the public of antisocial members of the community. Reasons of social desirability have caused tribunals to make truth a good defense to a defamation action. Within the insult field, however, persons are induced to act for purposes of self-interest. They do not insult with a view to giving the public a form of warning. Consequently, the mere truth of their statements should not always afford them protection.

A Kentucky case brings the fact out quite forcefully. There we had an attempt on the part of a garage owner to secure payment of a bill owed him. He made such effort by posting a large statement to the following effect in his window:

"Doctor Morgan owes an account here of $49.67, and if promises would pay an account, this account would have been settled long ago. This account will be advertised as long as it remains unpaid."

The Kentucky court viewed such an advertisement as a violation of the right of privacy and specifically said that truth is no bar to an action for the invasion of such right. However, on the theory which has been worked out in this article, it would not be necessary to fall back upon the right to privacy to justify such a decision. It would be more consistent, and would avoid the treacherous doctrines of the rules in respect to privacy, to admit that one has a right not to be insulted in the presence of third persons when the purpose of such affront is to further the interests of the utterer.

But on the basis of language found in a number of the holdings involving conductor insults to passengers, it becomes apparent that at times the truth of an utterance might have some bearing in an action for insult. Several of the decisions imply that if plaintiff had not paid his fare, a rather strong accusation on the part of the conductor could be overlooked because of the feeling that he was goaded into using strong language. In other

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*This theory is expressed by Professor Harper at page 523 of his work on Torts (1933).
words, we cannot accuse him of speaking improperly or roughly out of sheer meanness or for purposes of pure self-interest.

And now that insult as a new tort has been exposed under the searching light of inquiry, is it so new a tort? Or does it merely represent a sane extension and interpretation of already well-founded doctrines?

**Practical Jokes**

The ideology which this article has woven out of insult cases can serve as a bridge to lead into the field of practical jokes. It can explain the result in *Nickerson v. Hodges*, where the seeker after legendary buried treasure was conspicuously humiliated by a defendant who buried a pot of earth and rock for her to find, containing directions, between its double lids, that it was to be opened with due ceremony between an entire gathering of relatives and others.

There are, however, other types of practical jokes which can bring about mental distress even though no one is caused public embarrassment. Illustrations of such jokes can be found in the reports. In a Maryland case, the plaintiff fainted when she found a dead rat in a wrapped grocery package which a mischievous delivery boy handed to her, in a Canadian case, the plaintiff was shocked and became ill as a result of hearing the false report, purposely circulated, that her son had committed suicide, and in an English case, a wife was frightened and made ill when she received an erroneous report intended to fool her into believing that her husband had broken two legs in an accident. Since in the three last named decisions the plaintiff suffered physical as well as emotional results, the judges did not have to face the issue raised by this article. But would it be startling if a court determined that such described acts would produce mental distress of such serious proportions as to warrant the giving of a money judgment? Such a conclusion would not seem to present a really radical theory. Would it not merely be an adaptation of Professor Harper's "common sense" guide?

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46 La. Ann. 735, 84 So. 37 (1920).
48 Great Atlantic and Pacific Tea Co. v. Roch, 160 Md. 189, 153 Atl. 22 (1931).
52 *Supra*, note 38.
to tort decisions? Surely it is common sense to believe that the woman who finds a dead rat in what she thought was a package of meat, who is told her son committed suicide, or who is informed that her husband is seriously injured will suffer great agony of mind. And on the matter as to whether emotional distress did actually result, the jury has full control. It can decide to believe the word of the victim after it has heard proof of the act, or it can demand corroborating evidence from other parties as to the plaintiff's reaction at the instant the joke was perpetrated.

**Threats of Future Harm**

As was the case in connection with the transition from the field of insults to practical jokes, much of what has been said makes it easy to move into another division of the general topic. The path of common sense seems to lead right to the case of *Wilson v. Wilkins.*\(^5\) In the face of threats made to put a rope around plaintiff's neck if he did not leave the community within ten days, a holding which would not award damages for mental suffering would seem untenable. Surely the usual (perhaps almost universal) experience of mankind bears witness to the fact that people do worry about threats of future harm. Since that is a known fact of every day life, it is frankly surprising that the logic behind allowing recovery is not widely recognized. The theories growing out of the law of assault actions seem weakest at the very point of failing to give relief to those who suffer mental disturbance because of threats of future harm. The law of assault worked on the assumption that unless a man was threatened by the immediate application of force, he had no cause to fear because if he were allowed an interval, he could take steps to protect himself from the actual consummation of a battery. This theory is sound if scrutiny is centered upon whether or not such threats of future harm give rise to a right to attack on the excuse of provocation. But it appears unsound in the face of actual knowledge that most people who are threatened suffer mental torment. Even the fact that the utterer might be apprehended and punished by the law would not remove the fear of possible reprisal engendered by the original threat. It would seem, therefore, that there is need for permitting recovery. To do

so seems sane, and would not in any respect retard proper business activity. The latter statement is supported by the implications coming out of *Beck v. Luers*, where it is brought out that all threats are not improper threats. For instance, a declaration that one will prosecute, if made in good faith and in a businesslike manner, cannot be construed as a threat of future harm.

If recovery is allowed for the mental unrest caused by threats of future harm, it would not be in conflict with the time honored phrases that no recovery can be had if the threat is so indecisive as to indicate no threat at all. For to justify awarding of damages for mental discomfort a real threat must be established.

**Conclusion**

It remains only to make explicit the premises upon which this discourse has proceeded. Reasoning has had as its objective to block off and focus attention upon a new tort which seeks to give independent legal protection to an individual's interest in his peace of mind. The veil of tradition was consciously lifted so that a new tort should stand forth, not as a symbol of what is so euphemistically called "progress," but as a tool fashioned in response to the imperative demands of justice and common sense—as a tool made out of the respectable, tried ideas of the past. Viewed in such a light, the change in dress from the old to the new can be recognized as superficial and not fundamental.

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54 126 N. W. 811 (Iowa 1910).
55 Tuberville v. Savage, 1 Mod. Rep. 3 (1669) (where a party put his hand to his sword and said, "If it were not assize time, I would not take such language from you").
56 Brooker v. Silverthorne, 111 S. C. 553, 99 S. E. 350 (1919) where an exclamation over the telephone to the exchange operator of "If I were there, I would break your damned neck" was held not a threat.