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Insult and Outrage

William L. Prosser*

By the middle of this century, it appears to be quite generally recognized that the nameless wrong which, for lack of anything better, usually is called the intentional infliction of mental suffering, or mental anguish, or mental disturbance, or emotional distress, has such distinct and definite features of its own that it is entitled to be regarded as a separate tort.¹ Except for a recent decision in Ohio,² and one in Texas³ from which the

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¹ The classic article on the subject is Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936). See also Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); Vold, *Tort Recovery for Intentional Infliction of Emotional Distress*, 18 NEB. L.B. 222 (1939); Borda, *One's Right to Enjoy Mental Peace and Tranquillity*, 28 GEO. L.J. 55 (1939); Seitz, *Insults—Practical Jokes—Threats of Future Harm—How New as Torts?*, 28 KY. L.J. 411 (1940); Note, 25 SO. CALIF. L. REV. 440 (1952). Particularly valuable is Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950).

² *Bartow v. Smith*, 149 Ohio St. 301, 78 N.E.2d 735 (1948). Defendant, seeing plaintiff on a city street, reviled her at the top of his lungs in the presence of bystanders and others who assembled, calling her a God damned son of a bitch, a dirty crook, and other similar epithets, which he repeated many times. Plaintiff was seven months pregnant at the time, and her condition was sufficiently obvious to the defendant; and she claimed that the verbal attack was made for the purpose of causing her physical injury. Her mental disturbance did result in nervous illness, which lasted for a considerable time and required a doctor's attention, but did not interfere with the normal birth of her child. The action was dismissed on counsel's opening statement of these facts; and on appeal the dismissal was affirmed. The court said that there was no assault or slander per se, that plaintiff did not claim that she was terrified, or frightened for her safety, and that there could be no recovery for mere "opprobrious epithets" or "bad manners." It added, quoting from a Kentucky case: "The damages sought to be recovered are too remote and speculative. Being easily simulated and hard to disprove, there is no standard by which it can be justly, or even approximately, compensated." *Id.* at 311, 78 N.E.2d at 740. Three judges out of seven dissented, contending that the tort should be recognized as standing on its own feet, and that this was an appropriate case for recovery.

The case was viewed with a more or less jaundiced eye in Notes, 27 TEXAS L. REV. 730 (1949) ("distinctly and inexcusably retrogressive"), 1 ALA. L. REV. 121 (1948), 47 MICH. L. REV. 436 (1949), 9 OHIO ST. L.J. 545 (1948), 23 TUL. L. REV. 290 (1948), 17 U. CIN. L. REV. 413 (1948), 6 WASH. & LEE L. REV. 253 (1949). It was approved, not without some doubts, in Notes, 22 TEMP. L.Q. 359 (1949), 23 ST. JOHN'S L. REV. 361 (1949).

³ *Harned v. E-Z Finance Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953). Defendant, a usurious lender, repeatedly harassed plaintiff, its debtor, calling him at his place of business, and at his home when he was asleep, threatening and intimidating plaintiff and his wife, threatening to cause him to lose his job, and to take up a collection in the neighborhood to apply on the usurious payments claimed to be still due. Plaintiff claimed to have suffered great mental disturbance. The court refused to find a cause of action. Although recognizing that there was precedent for recovery in other jurisdictions, it said that any change in Texas must be for the legislature, in view of a Texas statute declaring that the "common law of England" should remain the law of the state until changed, as well as the unsatisfactory character of the damages, the "wide door" which might be opened to fictitious claims and litigation over trivialities and mere bad manners, and the uncertain limits of the "new tort."

The case was raked over the coals in Green, *"Mental Suffering" Inflicted by Loan Sharks No Wrong*, 31 TEXAS L. REV. 471 (1953).

court very promptly retreated,⁴ it is no longer disputed that in a proper case the action for such a tort will lie, without resort to any assault, defamation, or other traditional basis of liability. After the *Restatement of Torts* had rejected any such independent liability⁵ in 1934, it reversed its position in 1948 with a recognition in terms so broad⁶ as to suggest the need at some later date for limitation. As the *Second Restatement of Torts*⁷ gets under way, the Reporter and his Advisers are necessarily faced with the question whether it is by this time possible to define the liability for insult and outrage, and to set some boundaries to it, or at least to indicate the areas in which there is still uncertainty. This article is intended to offer some tentative conclusions reached in the course of that work.

Certain assumptions may be made at the outset. The history of the tort has been recounted a number of times,⁸ and it may be assumed that there is no necessity to repeat it. It encountered from the beginning the same objections which have been raised against any liability for mental disturbance negligently inflicted:⁹ the unsatisfactory character of the injury, "too

⁴ *In Duty v. General Finance Company*, 273 S.W.2d 64, 66 (Tex. 1954), where the conduct of the creditor was even more extreme and outrageous, and resulting physical illness was pleaded, the court executed a gymnastic volte-face and recognized the tort, explaining that its decision in the *Harned* case was to be limited to cases where "no question of damages for physical injury, loss of property or reputation was involved." The Texas statute providing for "the common law of England until changed," and the various objections to any recognition of the tort, were conveniently forgotten.

⁵ RESTATEMENT, TORTS § 46 (1934): "Except as stated in §§ 21 to 34 [assault] and § 48 [special liability of carriers for insult], conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability (a) for emotional distress resulting therefrom, or (b) for bodily harm unexpectably resulting from such disturbance."

⁶ RESTATEMENT, TORTS § 46 (Supp. 1948): "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it."

⁷ Work on the *Second Restatement of Torts* began in January 1955, with the writer serving as Reporter. The Advisers for this part of the work have included Judges Calvert Magruder, of the First Circuit, William H. Hastie, of the Third Circuit, and Roger B. Traynor, of California; Professors Warren A. Seavey, of Harvard, Fleming James, Jr., of Yale, Clarence Morris, of Pennsylvania, and Wex S. Malone, of Louisiana; Dean W. Page Keeton, of Texas; and Mr. Laurence H. Eldredge, of Philadelphia, formerly Professor of Law at Pennsylvania and Temple.

It should be made clear that at the time of writing the proposed sections of the *Second Restatement* are still in Tentative Draft form, and are subject to change at meetings of the Council of the American Law Institute and the Institute itself, still to be held; and that the opinions expressed in this article are those of the writer, and not those of the Institute.

⁸ See note 1 *supra*.

⁹ The progress of the law as to negligence may be traced through the following series of articles: Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 41 AM. L. REV. (n. s.) 141 (1902); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 57 AM. L. REV. 828 (1921); Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Bohlen and Polikoff, *Liability in Pennsylvania for Physical Effects of Fright*, 80 U. PA. L. REV. 627 (1932); Bohlen and Polikoff, *Liability in New York for the Physical*

subtle and speculative to be capable of admeasurement by any standard known to the law,"¹⁰ and so evanescent, intangible, peculiar and variable with the individual as to be beyond prediction or anticipation;¹¹ and the "wide door" which might be opened, not only to fictitious claims, but to litigation in the field of trivialities and mere bad manners.¹² The leading case which broke through the shackles in 1897 was *Wilkinson v. Downton*¹³ in England, in which a practical joker amused himself by telling a woman that her husband had been smashed up in an accident and was lying at The Elms at Leytonstone with both legs broken, and that she was to go at once in a cab with two pillows to fetch him home. The shock to her nervous system produced serious and permanent physical consequences, which at one time threatened her reason, and entailed weeks of suffering and incapacity. The court no doubt regretted that the defendant could not, like that other false informer Titus Oates, be whipped from Aldgate to Newgate and from Newgate to Tyburn; and as in many another hard case, the enormity of the outrage overthrew the settled rule of law.

As other outrageous cases began to accumulate, the courts continued to struggle to find some familiar and traditional basis of liability; and wherever it was possible without too obvious pretense, the recovery was rested upon a technical assault,¹⁴ battery,¹⁵ false imprisonment,¹⁶ trespass to

Consequences of Emotional Disturbance, 32 COLUM. L. REV. 409 (1932); Hallen, *Damages for Physical Injuries Resulting from Fright or Shock*, 19 VA. L. REV. 253 (1933); Hallen, *Hill v. Kimball—A Milepost in the Law*, 12 TEXAS L. REV. 1 (1933); Green, "Fright" Cases, 27 ILL. L. REV. 761, 873 (1933); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Harper and McNeeley, *A Re-examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426; ELDREDGE, MODERN TORT PROBLEMS 71 (1941); Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944). See also NEW YORK STATE LAW REVISION COMMISSION, STUDY RELATING TO LIABILITY FOR INJURIES RESULTING FROM FRIGHT OR SHOCK, LEG. DOC. NO. 65 (E) (1936).

¹⁰ Lord Wensleydale, in *Lynch v. Knight*, 9 H.L.C. 577, 11 Eng. Rep. 854 (1861).

¹¹ See *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222 (1888); *Mitchell v. Rochester Railway Co.*, 151 N.Y. 107, 45 N.E. 354, 34 L.R.A. 781, 56 Am. St. Rep. 604 (1896); *Braun v. Craven*, 175 Ill. 401, 51 N.E. 657, 42 L.R.A. 199 (1898); *Chittick v. Philadelphia Rapid Trans. Co.*, 224 Pa. 13, 73 Atl. 4, 22 L.R.A. (n.s.) 1073 (1909).

¹² See *Mitchell v. Rochester Railway Co.*, 151 N.Y. 107, 45 N.E. 354, 34 L.R.A. 781, 56 Am. St. Rep. 604 (1896); *Spade v. Lynn & Boston Railroad*, 168 Mass. 285, 47 N.E. 88, 38 L.R.A. 512, 60 Am. St. Rep. 393 (1897); *Ward v. West Jersey & Seashore R.R. Co.*, 65 N.J.L. 383, 47 Atl. 561 (1900).

¹³ [1897] 2 Q.B.D. 57.

¹⁴ *Atlanta Hub Co. v. Jones*, 47 Ga. App. 778, 171 S.E. 470 (1933); *Kurgeweit v. Kirby*, 88 Neb. 72, 129 N.W. 177 (1910); *Leach v. Leach*, 33 S.W. 703 (Tex. Civ. App. 1895).

¹⁵ *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881); *Interstate Life & Accident Co. v. Brewer*, 56 Ga. App. 599, 193 S.E. 458 (1937); cf. *Whitsel v. Watts*, 98 Kan. 508, 159 Pac. 401, 1917A L.R.A. 708 (1916).

¹⁶ *Salisbury v. Poulson*, 51 Utah 552, 172 Pac. 315 (1918).

land,¹⁷ nuisance,¹⁸ or invasion of the right of privacy.¹⁹ The independent cause of action served as a peg upon which to hang the mental damages; and there are many such cases which on their facts fall fairly within the scope of the "new tort." Gradually too many cases appeared in which no such traditional ground could be discovered; and somewhere around 1930 it began to be generally recognized that the intentional infliction of mental disturbance, at least by extreme and outrageous conduct, could be a cause of action in itself. It is assumed that all this is well enough known; and that, Ohio to the contrary notwithstanding, it is no longer necessary for anyone to argue it.

It may also be assumed that "mental anguish" requires no definition. By whatever name it passes, from nervous shock to emotional upset, it is familiar enough as an element of compensable damages in cases of personal injury, where the admitted difficulty of measuring its financial equivalent never has been regarded as an insuperable obstacle. The *Restatement* has called it emotional distress, which is as good a name as any, and may as well be used. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, anger, embarrassment, chagrin, disappointment, worry and nausea. It must of course be proved; and since it is easily feigned and difficult to deny, the courts have tended quite naturally to insist upon some guarantee of genuineness, either in the form of physical consequences which can be attested objectively,²⁰ or in the nature of the defendant's conduct and the circumstances of the case.

With these assumptions, what are the limits of the tort?

1. *One who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from it.*²¹

Extreme and outrageous conduct. The first limitation which emerges from the decisions is that, except for the special liability of common car-

¹⁷ *Engle v. Simmons*, 148 Ala. 92, 41 So. 1023, 7 L.R.A. (n.s.) 96, 121 Am. St. Rep. 59, 12 Ann. Cas. 740 (1906); *American Security Co. v. Cook*, 49 Ga. App. 723, 176 S.E. 798 (1934); *Continental Casualty Co. v. Garrett*, 173 Miss. 676, 161 So. 753 (1935); *Watson v. Dilts*, 116 Iowa 249, 89 N.W. 1068, 57 L.R.A. 559, 93 Am. St. Rep. 239 (1902); *Bouillon v. Laclede Gas Light Co.*, 148 Mo. App. 462, 129 S.W. 401 (1910).

¹⁸ *Shellabarger v. Morris*, 115 Mo. App. 566, 91 S.W. 1005 (1905).

¹⁹ *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967, 55 A.L.R. 964 (1927); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942).

²⁰ Compare the holding that substantial verdicts for personal injuries will not be sustained where the evidence consists entirely of subjective testimony on the part of the plaintiff. *Johnson v. Great Northern Ry. Co.*, 107 Minn. 285, 119 N.W. 1061 (1909); *Sprogis v. Butler*, 40 Cal. App. 647, 181 Pac. 246 (1919); *Paderas v. Stauffer*, 10 La. App. 50, 119 So. 757, 120 So. 886 (1929); *City of Pawhuska v. Crutchfield*, 155 Okla. 222, 8 P.2d 685 (1932); and see *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814, 46 A.L.R. 772 (1926).

²¹ Tentative Draft of § 46(1), SECOND RESTATEMENT OF TORTS.

riers and other public utilities, which remains to be considered,²² the independent liability for the intentional infliction of emotional distress arises only in cases of what may be called extreme outrage. It has not been enough that the defendant has acted with the intention of causing the mental disturbance, or that he has intended to commit a tort, or even a crime, or that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages if another tort could be found. Liability has been imposed only in cases where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim 'Outrageous!'"²³

There are two obvious reasons for this. One is that our manners, and with them our law, have not yet progressed to the point where we are willing to afford a remedy in the form of tort damages for conduct which is still relatively trivial. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs 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.

Adoption of the suggested principle would open up a wide vista of litigation in the field of bad manners, where relatively minor annoyances had better be dealt with by instruments of social control other than the law. Quite apart from the question how far peace of mind is a good thing in itself, it would be quixotic indeed for the law to attempt a general securing of it. 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.²⁴

There is still, in this country, such a thing as liberty to express an unflattering opinion of another, however wounding it may be to his feelings; and in the interest not only of freedom of speech but also of the avoidance of other more dangerous conduct, it is still very desirable that some safety valve be left through which irascible tempers may blow off relatively harmless steam.

The other reason is that where there is petty insult, indignity, annoyance or threat, the case conspicuously lacks the necessary assurance that the asserted mental distress is genuine, or that if genuine it is serious and

²² See text at notes 92-109 *infra*.

²³ RESTATEMENT, TORTS § 46, comment g (Supp. 1948).

²⁴ Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1935 (1936).

reasonable. When a citizen who has been called a son of a bitch testifies that the epithet has destroyed his sleep, ruined his digestion, wrecked his nervous system and permanently impaired his health, other citizens who have on occasion been called the same thing without catastrophic harm may have legitimate doubts that he was really so upset, or that if he were his sufferings could possibly be so reasonable and justified under the circumstances as to be entitled to compensation. Somewhere the line must be drawn; and the courts have drawn it at the threshold of extreme outrage. Only one court²⁵ has ever doubted the practical possibility of making the distinction; and even that court arrived at the conclusion that at least there can be no cause of action merely because one man has hurt another's feelings.

Therefore, when a South Carolina gentleman, incensed at inability to get his telephone number, so far forgets his chivalry as to call the operator a God damned woman and to say that if he were there he would break her God damned neck, he may forfeit his standing as a gentleman, but she has no legal remedy even though the unprecedented experience may have left her a nervous wreck.²⁶ Mere profanity, obscenity or abuse,²⁷ which unhap-

²⁵ *Wallace v. Shoreham Hotel Corporation*, 49 A.2d 81, 83 (Mun. App. D.C. 1946): "Ordinarily the gravity of a defendant's conduct and the amount of injury caused are factors in arriving at the *amount* of recovery, and are not determinative of the *right* to recover. Under the rule proposed, however, it would be necessary to hold that not only the extent of recovery, but the existence of the cause of action is dependent upon the amount of damage sustained. If one has a cause of action for an insult only when that insult exceeds the trivial and goes beyond all bounds of decency, and only when such insult produces suffering of a genuine, serious and acute nature, then there must be some rules or standards by which a jury before reaching the realm of amount of recovery may first determine the right of recovery. The jury would have to have some instructions to guide them in determining the bounds of decency and some test to apply in distinguishing between trivial and serious. We know of no workable rule and the authorities furnish us none.

"In determining the right of recovery would the bounds of decency and the seriousness of the insult be the same in the cocktail room of 'an internationally known hostel,' as plaintiff asserts the defendant's hotel to be, and a 'beer joint' in an unsavory section of the city? Will the seriousness of the insult, and therefore the existence of the cause of action, depend on the social or business standing of either the one giving or receiving the insult? Will the acuteness of plaintiff's suffering, and therefore defendant's liability, depend on the sensitivity of the particular individual? Are all these matters to be left to the 'common sense' of the jury, with no rules for their guidance?"

The answer to these questions would appear to be that the factors suggested are, in a proper case, to be taken into account; that it is for the court, in the first instance, to decide whether the conduct in question may reasonably be regarded as extreme and outrageous, as the court properly did in this case, and whether the mental distress may reasonably be regarded as genuine, reasonable and serious; and that where reasonable men may differ, it is for the jury to decide whether they are in fact so, under instructions directing their attention to the question of degree. If this is difficult, the only alternative is to deny recovery in such cases as *Wilkinson v. Downton*, *supra*, text at note 13. It is not an alternative likely to commend itself to any one.

²⁶ *Brooker v. Silverthorne*, 111 S.C. 553, 99 S.E. 350, 5 A.L.R. 1283 (1919).

²⁷ *Ex parte Hammett*, 259 Ala. 240, 66 So.2d 600 (1953) (profanity over the telephone);

pily are not exactly uncommon in this benighted world, or the kind of reprehensible insult involved in accusing the patron of a cocktail lounge of demanding too much change,²⁸ afford no cause of action to the ordinary plaintiff against the ordinary defendant.²⁹ The plaintiff's only recourse, if he chooses not to retort in kind, is to withdraw, wrap himself in the mantle of his wounded dignity, and take consolation in the reflection that he is himself above such language, and that "sticks and stones may break my bones, but names will never hurt me."³⁰ It is only under the old statutes in Mississippi, Virginia and West Virginia,³¹ which had their origin as part of an antidueling code, and which provide an action for "all words which from their usual construction and acceptance are considered as insults, and lead to violence and breach of the peace," that such an action will lie. Even the dire affront of inviting an unwilling woman to illicit intercourse has been held by most courts³² to be no such outrage as to lead to liability, "the view being, apparently," in Judge Magruder's well known words, "that there is no harm in asking."³³ It may be remarked in passing,

Halliday v. Cienkowski, 333 Pa. 123, 3 A.2d 372 (1939) ("Scotch bitch," "bastard," and "bum"); Atkinson v. Bibb Mfg. Co., 50 Ga. App. 434, 178 S.E. 537 (1935) (foreman cursed discharged woman, with liberal use of "God damn"); Galvin v. Starin, 132 App. Div. 577, 116 N.Y. Supp. 919 (1909) (profanity and abuse); Kramer v. Ricksmeier, 159 Iowa 48, 139 N.W. 1091, 45 L.R.A. (n.s.), 928 (1913) (profanity and abuse over the telephone, with threats of future violence); Flowers v. Price, 190 S.C. 392, 3 S.E.2d 38 (1939) (cursing and abuse); Republic Iron & Steel Co. v. Self, 192 Atl. 403, 68 So. 328 (1915) ("liar," "dirty liar," and "no lady"). In accord is Bartow v. Smith, 149 Ohio St. 301, 78 N.E.2d 735 (1948), note 2 *supra*, where, however, plaintiff's known pregnancy should have led to the contrary conclusion. The only case allowing recovery for mere profanity, obscenity and abuse is Voss v. Bolzenius, 147 Mo. App. 375, 128 S.W. 1 (1910).

²⁸ Wallace v. Shoreham Hotel Corporation, 49 A.2d 81 (Mun. App. D.C. 1946).

²⁹ Otherwise in the case of carriers and other public utilities. See text at notes 110-31 *infra*. Also where the defendant knows that the plaintiff is ill or otherwise especially susceptible to injury from the verbal attack. See text at notes 60-63 *infra*.

³⁰ Appropriately quoted as a starting point by Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950).

³¹ MISS. CODE ANN. § 1059 (1942); VA. CODE ANN. § 8-630 (1950); W. VA. CODE ANN. § 5471 (1955). See Landrum v. Ellington, 152 Miss. 569, 120 So. 444 (1929); Michaelson v. Turk, 79 W. Va. 31, 90 S.E. 395 (1916); Huckabee v. Nash, 182 Miss. 754, 183 So. 500 (1938); Boyd v. Boyd, 116 Va. 326, 82 S.E. 110 (1914); Hodges v. Cunningham, 160 Miss. 576, 135 So. 215 (1931); Payne v. Tancil, 98 Va. 262, 35 S.E. 725 (1900); Mopsikov v. Cook, 122 Va. 579, 95 S.E. 426 (1918); Wright v. Cofield, 146 Va. 637, 131 S.E. 787 (1926); Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 82 (1950); Malone, *Insult in Retaliation—the Huckabee Case*, 11 MISS. L.J. 333 (1939); Note, 27 VA. L. REV. 405 (1941).

³² Reed v. Maley, 115 Ky. 816, 25 Ky. L. Rep. 209, 74 S.W. 1079, 62 L.R.A. 900, 2 Ann. Cas. 453 (1903); Prince v. Ridge, 32 Misc. 666, 66 N.Y. Supp. 454 (1900); Davis v. Richardson, 76 Ark. 348, 89 S.W. 318 (1905); Shepard v. Lamphier, 84 Misc. 498, 146 N.Y. Supp. 745 (1914). Cf. Clack v. Thomason, 57 Ga. App. 253, 195 S.E. 218 (1938) (solicitation to divorce husband and marry defendant).

³³ Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1055 (1936). It is worthy of note that there is at least one case in which the lady accepted the invitation and then sued for the insult. Dickinson v. Scruggs, 242 Fed. 900 (6th Cir. 1917).

however, that it is not altogether certain how long some of our highly moral tribunals will continue to stand the strain, and there are some indications of a tendency to allow recovery.³⁴

Extreme outrage obviously calls for more than all this. By and large it is not difficult to agree with the courts which have found it. The leading case of *Wilkinson v. Downton*³⁵ surely speaks for itself; and so does the recent Arizona case³⁶ where the police used a similar report, that the plaintiff's husband and child had been seriously injured in an accident and were lying in a hospital, to decoy her into confinement for supposed lunacy. Less extreme is the Maryland case³⁷ in which a playful grocer delivered a package containing a dead rat instead of a loaf of bread; but the rat may very possibly have been so gory or disgusting as to shock even a soul not unduly sensitive. No one is likely to dispute the liability of the Arkansas defendant³⁸ who brought a mob to the plaintiff's door at night and threatened to lynch him unless he left town, or that of the California association of rubbish collectors³⁹ who threatened, in an atmosphere reminiscent of the Capone days in Chicago, to beat the plaintiff up, destroy his truck and put him out of business, unless he paid over proceeds from a territory which they had allocated to one of their members.

There are other cases in which the extreme and outrageous nature of the conduct arises not so much from what is done as from the abuse by the defendant of some relation with the plaintiff, or some position which gives him actual or apparent authority over the plaintiff, or power to damage his interests. The principle is much the same as that underlying our criminal statutes on extortion and blackmail, or the common law liability for abuse of process. An attempt to extort money by a threat of arrest may lead to liability where the arrest itself, or the threat alone, would not. Again the

³⁴ In *Erwin v. Milligan*, 188 Ark. 658, 67 S.W.2d 592 (1934), recovery was allowed without reference to the earlier Arkansas decision, and without mention of the technical battery which could have been found on the stated facts. In *Kurpgeweit v. Kirby*, 88 Neb. 72, 129 N.W. 177 (1910), the court found an "assault" where there was apparently no apprehension of force. In *Digsby v. Carroll Baking Co.*, 76 Ga. App. 656, 47 S.E.2d 203 (1948), the defendant was a creditor, and the case appears to fall in the class discussed *infra*, text at notes 42-49. There is of course liability where there is a real assault. *Newell v. Whitcher*, 53 Vt. 589, 38 Am. Rep. 703 (1880); *Johnson v. Hahn*, 168 Iowa 147, 150 N.W. 6 (1914); *Western Union Telegraph Co. v. Hill*, 25 Ala. App. 540, 150 So. 709 (1933). The plaintiff recovered under the Virginia actionable words statute in *Rolland v. Batchelder*, 84 Va. 664, 5 S.E. 695 (1888).

³⁵ [1897] 2 Q.B.D. 57, note 13 *supra*. In accord is *Bielitski v. Obadisk*, 15 Sask. 153, 61 D.L.R. 494 (1921), where the defendant spread the rumor that the defendant's son had hanged himself.

³⁶ *Savage v. Boies*, 77 Ariz. 355, 272 P.2d 349 (1954).

³⁷ *Great A. & P. Tea Co. v. Roch*, 160 Md. 189, 153 Atl. 22 (1930).

³⁸ *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (1930). Less clear is *Grimes v. Gates*, 47 Vt. 594, 19 Am. Rep. 129 (1873), involving a letter with threats of imprisonment; but the case came up on demurrer.

³⁹ *State Rubbish Collectors Assn. v. Silizoff*, 38 Cal.2d 330, 240 P.2d 282 (1952).

leading case is an English one, *Janvier v. Sweeney*,⁴⁰ where a private detective, representing himself to be a police officer, threatened to charge the plaintiff with espionage unless she surrendered private letters in her possession. Not far removed from this case is the Minnesota one of *Johnson v. Sampson*,⁴¹ where school authorities bullied and badgered a high school girl for upwards of an hour, threatening her with prison and with public disgrace for herself and her parents unless she confessed to immoral conduct with various men.

It is on this basis that the tort action has been used as a potent counter-weapon against the more outrageous high-pressure collection methods of collection agencies and other creditors. These are well enough known,⁴² ranging from violent cursing, abuse and accusations of dishonesty,⁴³ through a series of letters in lurid envelopes bearing a picture of lightning about to strike, which repeatedly threaten arrest, ruination of credit, or a suit which is never brought,⁴⁴ or attempts or threats to pile up the pressure by involving the plaintiff's employer, his relatives, his neighbors or the public in the controversy,⁴⁵ up to a call to a neighbor's telephone for an "emergency message" which will be a "great shock,"⁴⁶ and a proposal to a woman to "take it out in trade."⁴⁷ It is seldom that any one such item of conduct is found alone in a case,⁴⁸ and the liability usually has rested on a

⁴⁰ [1919] 2 K.B. 316.

⁴¹ 167 Minn. 203, 208 N.W. 814, 46 A.L.R. 772 (1926). In *Walker v. Tucker*, 220 Ky. 363, 295 S.W. 138, 53 A.L.R. 547 (1927), recovery was denied where the action was for slander.

⁴² Birkhead, *Collection Tactics of Illegal Lenders*, 8 LAW & CONTEMP. PROB. 78 (1941), gives a good summary. See also Borda, *One's Right to Enjoy Mental Peace and Tranquillity*, 28 GEO. L.J. 55 (1939); Notes, 66 U.S.L. REV. 349 (1932), 34 ILL. L. REV. 505 (1939).

⁴³ *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936); *American Security Co. v. Cook*, 49 Ga. App. 723, 176 S.E. 798 (1934). Cf. *Davidson v. Lee*, 139 S.W. 904 (Tex. Civ. App. 1911), where there was false imprisonment and assault.

⁴⁴ *Barnett v. Collection Service Co.*, 214 Iowa 1303, 242 N.W. 25 (1932); *LaSalle Extension University v. Fogarty*, 126 Nev. 457, 253 N.W. 424, 91 A.L.R. 1091 (1934). Cf. *Clark v. Associated Retail Credit Men*, 70 App. D.C. 183, 105 F.2d 62 (1939), where there were threatening letters to a plaintiff known to be ill.

⁴⁵ *Quina v. Robert's*, 16 So.2d 558 (La. App. 1944); *Barnett v. Collection Service Co.*, 214 Iowa 1303, 242 N.W. 25 (1932); *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424, 91 A.L.R. 1491 (1934). Cf. *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967, 55 A.L.R. 964 (1927) (invasion of privacy by publication of the debt). Liability for invasion of privacy was denied in *Judevine v. Benzies-Montanye Fuel & Warehouse Co.*, 222 Wis. 512, 269 N.W. 295, 106 A.L.R. 1443 (1936).

⁴⁶ *Bowden v. Spiegel, Inc.*, 96 Cal. App.2d 793, 216 P.2d 571 (1950).

⁴⁷ *Digsby v. Carroll Baking Co.*, 76 Ga. App. 656, 47 S.E.2d 203 (1948).

⁴⁸ An exception is *Herman Saks & Sons v. Ivey*, 26 Ala. App. 240, 157 So. 265 (1934), holding that more than nominal damages must be awarded for a single threatening letter, undescribed. This is the only case found in which the jury's decision as to the amount of damages was disturbed.

prolonged course of hounding by a number of extreme methods.⁴⁹ There are indications that the very similar bullying tactics of insurance adjusters seeking to force a settlement will meet with the same redress.⁵⁰ Evicting landlords who behave in outrageous fashion, screaming abuse,⁵¹ tearing up the premises, smoking out the tenants, or throwing the furniture about,⁵² have been subjected to the same liability.

It must be repeated that the defendant is held liable only in cases where there is outrage, and it is extreme. Even where he has some special power to damage the plaintiff's interests, his mere insolence or rudeness of tone is not enough.⁵³ In particular, he is never liable for doing no more than he has the legal privilege to do, even though he may do it with very bad manners, and in doing it cause acute mental distress. The landlord who tells a sick woman that he will evict her because she cannot pay her rent,⁵⁴ or the

⁴⁹ The defendant omitted very little in *Duty v. General Finance Company*, 273 S.W.2d 64, 65 (Tex. 1954): "The harassments alleged may be summarized as follows: Daily telephone calls to both Mr. and Mrs. Duty, which extended to great length; threatening to blacklist them with the Merchants' Retail Credit Association; accusing them of being deadbeats; talking to them in a harsh, insinuating, loud voice; stating to their neighbors and employers that they were deadbeats; asking Mrs. Duty what she was doing with her money; accusing her of spending money in other ways than in payments on the loan transaction; threatening to cause both plaintiffs to lose their jobs unless they made the payments demanded; calling each of the plaintiffs at the respective places of their employment several times daily; threatening to garnishee their wages; berating plaintiffs to their fellow employees; requesting their employers to require them to pay; calling on them at their work; flooding them with a barrage of demand letters, dun cards, special delivery letters, and telegrams both at their homes and their places of work; sending them cards bearing this opening statement: 'Dear Customer: We made you a loan because we thought you were honest.'; sending telegrams and special delivery letters to them at approximately midnight, causing them to be awakened from their sleep; calling a neighbor in the guise of a sick brother of one of the plaintiffs, and on another occasion as a stepson; calling Mr. Duty's mother at her place of employment in Wichita Falls long distance, collect; leaving red cards in their door, with insulting notes on the back and thinly-veiled threats; calling Mr. Duty's brother long distance, collect, in Albuquerque, New Mexico, at his residence at a cost to him in excess of \$11, and haranguing him about the alleged balance owed by plaintiffs."

⁵⁰ Liability was found in *Continental Casualty Co. v. Garrett*, 173 Miss. 676, 161 So. 753 (1935), where the plaintiff was known to be ill. In accord are *Pacific Mutual Ins. Co. v. Tetrick, Gdn.*, 185 Okla. 37, 89 P.2d 774 (1938); *National Life & Accident Ins. Co. v. Anderson*, 187 Okla. 180, 102 P.2d 141 (1940). Cf. *Curnutt v. Wolf*, 244 Iowa 683, 57 N.W.2d 915 (1953), where defendant threatened to have plaintiff discharged unless he dismissed a suit.

⁵¹ *Emden v. Vitz*, 88 Cal. App.2d 313, 198 P.2d 696 (1948); *Nordgren v. Lawrence*, 74 Wash. 305, 133 Pac. 436 (1913); *Duncan v. Donnell*, 12 S.W.2d 811 (Tex. Civ. App. 1928); *Levine v. Trammell*, 41 S.W.2d 334 (Tex. Civ. App. 1931); *Stockwell v. Gee*, 121 Okla. 207, 249 Pac. 389 (1926).

⁵² *Wood v. Young*, 20 Ky. L. Rep. 1931, 50 S.W. 541 (1899); *Preiser v. Wielandt*, 48 App. Div. 569, 62 N.Y. Supp. 890 (1900); *Louisville & N. R. Co. v. Roberts*, 207 Ky. 310, 269 S.W. 333 (1925); *Richardson v. Pridmore*, 97 Cal. App.2d 124, 217 P.2d 113 (1950). In *Stearns v. Sampson*, 59 Me. 568, 8 Am. Rep. 442 (1871), the court held that causing physical discomfort by removing the doors and windows was not an assault.

⁵³ *Maze v. Employees' Loan Soc.*, 217 Ala. 44, 114 So. 574 (1927); *Peoples Finance & Thrift Co. v. Harwell*, 183 Okla. 413, 82 P.2d 994 (1938).

⁵⁴ *Smith v. Gowdy*, 196 Ky. 281, 244 S.W. 678 (1922). Cf. *Bechtel v. Combs*, 70 Pa. Super. 503 (1918) (threat to call police to remove plaintiff from premises).

conditional seller who threatens to repossess the furniture,⁵⁵ may be a heartless wretch, but he commits no tort. There is no liability for a refusal to admit a Negro to the defendant's school or restaurant or shop,⁵⁶ in the absence of some applicable civil rights statute,⁵⁷ or for a call on the plaintiff to remonstrate against his treatment of a horse,⁵⁸ or to give him not unfriendly advice to leave town.⁵⁹

Still another basis on which extreme outrage may be found lies in the defendant's knowledge that the plaintiff is especially sensitive, susceptible and vulnerable to injury through mental distress at the particular conduct. A California case two or three years ago, which never reached the courts, may serve as an illustration. The defendant was a landlady, a battleship of the first class of the termagant navy, who had for a tenant an invalid with a heart condition so precarious that, as she was informed, the two or three steps at the entrance were actually a menace to his life. When he told her that he was leaving for other quarters where he could enter on the level, she shouted epithets at him, calling him a God damned old son of a bitch and other choice terms, and continued, in spite of the frantic protests of his wife, for two or three minutes until he suddenly dropped dead at her feet. Few will have any doubt that the defendant's counsel were well advised to settle. Any California court, or jury, could be expected to do only one thing with the case.

The gist of the outrage is the defendant's knowledge of the plaintiff's vulnerability, and where there is no such knowledge, conduct which is not otherwise sufficiently extreme leads to no liability, even though the plaintiff may in fact suffer serious injury because of it.⁶⁰ The leading case allowing

⁵⁵ Peoples Finance & Thrift Co. v. Harwell, 183 Okla. 413, 82 P.2d 994 (1938). Cf. McKinzie v. Huckaby, 112 F. Supp. 642 (W.D. Okla. 1953), where the creditor brought along a policeman, who was seen by the plaintiff, but remained in the creditor's car.

⁵⁶ Stratton v. Posse Normal School, 265 Mass. 223, 163 N.E. 905 (1928) (school, breach of contract); Nance v. Mayflower Tavern, 106 Utah 517, 150 P.2d 773 (1944) (restaurant). Cf. Mann v. Roosevelt Shop, 41 So.2d 894 (Fla. 1949) (shop), and Larson v. R. B. Wrigley Co., 183 Minn. 28, 235 N.W. 393 (1931), where the action was for slander.

⁵⁷ Amos v. Prom, 115 F. Supp. 127 (N.D. Iowa 1953).

⁵⁸ Beck v. Luers, 126 N.W. 811 (Iowa 1910).

⁵⁹ Meck v. Harris, 110 Miss. 805, 71 So. 1 (1916).

⁶⁰ Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898) (nervous temperament, St. Vitus dance at threat of arrest); Carrigan v. Henderson, 192 Okla. 254, 135 P.2d 330 (1943) (hypertension, threat of arrest); Haas v. Metz, 78 Ill. App. 46 (1898) (hysteria, boisterous conduct); Kramer v. Ricksmeier, 159 Iowa 48, 139 N.W. 1091, 45 L.R.A. (n.s.) 928 (1913) (profanity, abuse, and threats of future violence; no liability "unless it be that the condition of the plaintiff was so enfeebled that she could not endure such speech, and that defendant knew it"); McKinzie v. Huckaby, 112 F. Supp. 642 (W.D. Okla. 1953) (policeman brought along in car; no liability where there was no knowledge of any "peculiar susceptibility to mental strain"). See Pacific Mutual Life Ins. Co. v. Tetrick, Gdn., 185 Okla. 37, 89 P.2d 774 (1938) (sick in bed, boisterous conduct); National Life & Accident Ins. Co. v. Anderson, 187 Okla. 180, 102 P.2d 141 (1940) (sick in bed, abuse).

recovery is *Nickerson v. Hodges*,⁶¹ in 1920. The plaintiff was an eccentric and mentally deficient old maid, who had the delusion that a pot of gold was buried in her back yard, and was always digging for it. Knowing this, the defendant buried a pot with other contents for her to find, and when she dug it up caused her to be escorted in triumph to the city hall, where she opened the pot under circumstances of public humiliation. The experience caused her great emotional distress, and apparently further unsettled her reason and contributed to her early death. The pot of gold came at last, in the form of five hundred dollars in damages, but only to her heirs. In line with this case, there are a number of decisions in which sick people⁶² and pregnant women⁶³ have recovered, on the basis of the defendant's knowledge of their condition, for threatening letters, profanity and abuse, or other conduct which apparently would not otherwise have been sufficient to constitute a tort.

Finally, there are a great many cases involving the mishandling of dead bodies, whether by mutilation,⁶⁴ disinterment,⁶⁵ interference with burial,⁶⁶

⁶¹ 146 La. 735, 84 So. 37, 9 A.L.R. 361 (1920).

⁶² *Clark v. Associated Retail Credit Men*, 70 App. D.C. 183, 105 F.2d 62 (1939) (hypertension, threatening letters); *Continental Casualty Co. v. Garrett*, 173 Miss. 676, 161 So. 753 (1935) (sick in bed, abuse); *Patapsco Loan Co. v. Hobbs*, 129 Md. 9, 98 Atl. 239 (1916) (illness after operation; forcing way into sickroom and abuse); *Interstate Life & Accident Co. v. Brewer*, 56 Ga. App. 599, 193 S.E. 458 (1937) (sick in bed with heart trouble, abuse). See *Pacific Mutual Life Ins. Co. v. Tetrick, Gdn.*, 185 Okla. 37, 89 P.2d 774 (1938) (sick in bed, boisterous conduct); *National Life & Accident Ins. Co. v. Anderson*, 187 Okla. 180, 102 P.2d 141 (1940) (sick in bed, abuse). *Cf. Urban v. Hartford Gas Co.*, 139 Conn. 301, 93 A.2d 292 (1952) (diabetic condition; "negligence" in manner of repossessing water heater).

⁶³ *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916) (shooting dog near child in presence of mother); *Richardson v. Pridmore*, 97 Cal. App.2d 124, 217 P.2d 113 (1950) (evicting plaintiff and mishandling her furniture). *Contra, Bartow v. Smith*, 149 Ohio St. 301, 78 N.E.2d 735 (1948), *supra* note 2.

Compare with the *Baladoni* case *Allen v. Camp*, 14 Ala. App. 341, 70 So. 290 (1915), where the defendant shot the plaintiff's dog, without the added circumstances of her presence and the pregnancy, and it was held that there could be no recovery for mental disturbance.

⁶⁴ *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238, 14 L.R.A. 85, 28 Am. St. Rep. 370 (1891); *Burney v. Children's Hospital*, 169 Mass. 57, 47 N.E. 401 (1897); *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40 (1905); *Alderman v. Ford*, 146 Kan. 698, 72 P.2d 981 (1937); *Hill v. Travelers' Ins. Co.*, 154 Tenn. 295, 294 S.W. 1097 (1927); *Aetna Life Ins. Co. v. Burton*, 104 Ind. App. 576, 12 N.E.2d 360 (1938); *Patrick v. Employers Mut. L. Ins. Co.*, 233 Mo. App. 251, 118 S.W.2d 116 (1938); *Kirksey v. Jernigan*, 45 So.2d 188, 17 A.L.R.2d 766 (Fla. 1950); *Crenshaw v. O'Connell*, 235 Mo. App. 1085, 150 S.W.2d 489 (1941).

⁶⁵ *Gostkowski v. Roman Catholic Church*, 262 N.Y. 320, 186 N.E. 798 (1933); *England v. Central Pocahontas Coal Co.*, 86 W. Va. 575, 104 S.E. 46 (1920). *Cf. Boyle v. Chandler*, 33 Del. 323, 138 Atl. 273 (1927) (removal from casket).

⁶⁶ *Finley v. Atlantic Transport Co.*, 220 N.Y. 249, 115 N.E. 715, 1917E L.R.A. 852, 1917D Ann. Cas. 726 (1917) (burial at sea); *Spiegel v. Evergreen Cemetery Co.*, 117 N.J.L. 90, 186 Atl. 585 (1936) (burial in absence of relatives); *Kirksey v. Jernigan*, 45 So.2d 188, 17 A.L.R.2d 766 (Fla. 1950) (holding unburied).

or other forms of intentional⁶⁷ disturbance.⁶⁸ In most of these cases the courts have talked of a somewhat dubious "property right" to the body. This right usually is held to belong to the surviving spouse, or to a group of close relatives, or the next of kin; and there has been considerable difficulty in some cases in determining in just whom it lies.⁶⁹ It is at best an unsatisfactory kind of property, which cannot be sold or conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. In *Gadbury v. Bleitz*,⁷⁰ where the body was held without burial until another debt was paid, the Washington court avoided all these difficulties by recognizing what is sufficiently obvious, that the tort is in reality the infliction of mental distress upon the survivors by extreme outrage. There are, incidentally, quite a few cases which have allowed recovery for invasion of the right of privacy,⁷¹ which might very well have been decided upon the same basis.

Emotional distress and physical illness. It was assumed at the beginning that emotional distress needs no definition. It must in fact exist, and it must be severe. If the plaintiff is not impressed by the defendant's threatening letter, and is only sufficiently concerned to make an effort to discover who wrote it, the minor annoyance and the affront to his dignity are too trivial to support a tort action.⁷² Furthermore, except in the cases where the defendant has knowledge of the plaintiff's peculiar susceptibility and

⁶⁷ Recovery usually is denied for mere negligence, where aggravated conduct is lacking. *Beaulieu v. Great Northern Ry. Co.*, 103 Minn. 47, 114 N.W. 353 (1907); *Kneass v. Cremation Society of Washington*, 103 Wash. 521, 175 Pac. 172 (1918); *Nichols v. Central Vermont Ry. Co.*, 94 Vt. 14, 109 Atl. 905, 12 A.L.R. 333 (1919); *Hall v. Jackson*, 24 Colo. App. 225, 134 Pac. 151 (1913). It was allowed, where the circumstances were extreme, in *Owens v. Liverpool Corp'n.*, [1938] 4 All E.R. 727; *Clemm v. Atchison, T. & S.F. Ry. Co.*, 126 Kan. 181, 268 Pac. 103 (1928).

⁶⁸ *Sworski v. Simons*, 208 Minn. 201, 293 N.W. 309 (1940) (unauthorized embalming); *Wilson v. St. Louis & S.F. R.R.*, 160 Mo. App. 649, 142 S.W. 775 (1912) (mishandling); *Sanford v. Ware*, 191 Va. 43, 60 S.E.2d 10 (1950) (misburial); *Brownlee v. Pratt*, 77 Ohio App. 533, 68 N.E.2d 798 (1946) (burial of intruder in lot); *Lindh v. Great Northern Ry. Co.*, 99 Minn. 408, 109 N.W. 823, 7 L.R.A. (n.s.) 1018 (1906) (mishandling). Cf. *Classen v. Benfer*, 144 S.W.2d 633 (Tex. Civ. App. 1940); *Price v. Yellow Pine Paper Mill Co.*, 240 S.W. 588 (Tex. Civ. App. 1922).

⁶⁹ See generally Green, *Relational Interests*, 29 ILL. L. REV. 460, 489 (1934); Notes, 18 MINN. L. REV. 204 (1934), 19 CORNELL L.Q. 108 (1933), 74 U. PA. L. REV. 404 (1926).

⁷⁰ 133 Wash. 134, 233 Pac. 299, 44 A.L.R. 425 (1925). In accord is *Stephens v. Waits*, 53 Ga. App. 44, 184 S.E. 781 (1936).

⁷¹ See, for example, *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931); *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930); *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967, 55 A.L.R. 964 (1927); *Douglas v. Stokes*, 149 Ky. 506, 149 S.W. 849 (1912); *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942).

⁷² *Taft v. Taft*, 40 Vt. 229, 94 Am. Dec. 389 (1867). It is suggested that in *Wilkinson v. Downton*, [1897] 2 Q.B.D. 57, *supra* note 13, there would have been no cause of action if the plaintiff had not believed the report that her husband was injured, and had been only sufficiently disturbed to send a messenger to find out whether it could possibly be true.

works upon it, the distress must be such as a reasonable man would undergo under the circumstances. The Michigan court quite properly refused to allow recovery for the silly fright of an hysterical woman at the sight of a man dressed in female clothing,⁷³ and New Jersey, by an equal division, declined to regard a stroke of apoplexy as a normal consequence of a threat to have the plaintiff arrested for failure to pay for a vacuum cleaner.⁷⁴

In the great majority of the cases allowing recovery the genuineness of the emotional distress has been evidenced by resulting physical illness of a serious character, and both the mental and the physical elements have been compensated. Texas has said flatly that physical illness or some other non-mental damage is essential to the existence of the tort,⁷⁵ and there are other cases which look as if it were considered indispensable.⁷⁶ On the other hand, there are a substantial number of decisions which have found liability for mere mental disturbance without any evidence of physical consequences,⁷⁷ and which apparently have regarded the extreme outrage of the defendant's conduct as in itself a satisfactory guarantee. The mere recital, for example, of the fact that a mob came to the plaintiff's house at night with a threat to lynch him unless he left town, leaves no doubt at all that the emotional upset to which the plaintiff testifies was real.⁷⁸ The change in the *Restatement*⁷⁹ in 1948 rejected any absolute necessity for physical results. Probably the conclusion to be reached is that where physical harm is lacking the courts will properly tend to look for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious; but that if the enormity of the outrage itself carries conviction that there has in fact been severe and serious emotional distress, which is neither feigned nor trivial, bodily harm is not required.

⁷³ *Nelson v. Crawford*, 122 Mich. 466, 81 N.W. 335, 80 Am. St. Rep. 577 (1899).

⁷⁴ *Oehler v. L. Bamberger & Co.*, 103 N.J.L. 703, 137 Atl. 425 (1927), *affirming* 4 N.J. Misc. 1003, 135 Atl. 71 (1926).

⁷⁵ *Duty v. General Finance Co.*, 273 S.W.2d 64 (Tex. 1954), distinguishing on this basis *Harned v. E-Z Finance Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953). See notes 3 and 4 *supra*.

⁷⁶ *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936); *Carrigan v. Henderson*, 192 Okla. 254, 135 P.2d 330 (1943); *Clark v. Associated Retail Credit Men*, 70 App. D.C. 183, 105 F.2d 62 (1939).

⁷⁷ *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (1930) (mob threat to lynch plaintiff); *Savage v. Boies*, 77 Ariz. 355, 272 P.2d 349 (1954) (police decoying plaintiff into confinement by report that her husband and child had been injured and were in the hospital); *Barnett v. Collection Service Co.*, 214 Iowa 1303, 242 N.W. 25 (1932) (extreme collection letters); *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424, 91 A.L.R. 1491 (1934) (same); *Quina v. Robert's*, 16 So.2d 558 (La. App. 1944) (creditor involving employer of plaintiff); *Herman Saks & Sons v. Ivey*, 26 Ala. App. 240, 157 So. 265 (1934) (single undescribed threatening letter); *State Rubbish Collectors Assn. v. Siliznoff*, 38 Cal.2d 330, 240 P.2d 282 (1952) (threats of violence in gangster atmosphere); *Curnutt v. Wolf*, 244 Iowa 683, 57 N.W.2d 915 (1953) (threat to have plaintiff discharged unless he dismissed suit).

⁷⁸ *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (1930).

⁷⁹ *RESTATEMENT, TORTS* § 46 (Supp. 1948).

Recklessness. In the great majority of the cases the emotional distress has been inflicted intentionally, either in the sense that the defendant desired to cause it and acted for that purpose, or in the sense that he knew that it was certain, or substantially certain, to follow from his conduct.⁸⁰ There are, however, a few cases which indicate that the liability for extreme outrage is broader than intent, defined in either sense, and that it extends to situations where there is no certainty but merely a high degree of probability that the mental disturbance will follow, and the defendant goes ahead in conscious disregard of it. This is the type of conduct which commonly is given the name of wilful or wanton misconduct, or wilful or wanton negligence, or sometimes recklessness, which is the *Restatement's* word for it.⁸¹

The most striking of these is *Blakeley v. Estate of Shortal*,⁸² in which the decedent, a visitor at the plaintiff's home, decided while she was absent that it would be a good idea to commit suicide by cutting his throat in her kitchen. On her return the plaintiff opened the door and was confronted with his corpse, with blood all over the premises. She suffered a severe shock, and resulting serious illness. It was held that she might recover if the jury found that the act of suicide was "willful" toward the plaintiff, which was defined as including a conscious indifference to the consequences. Another such case is the Canadian one⁸³ where the defendant deliberately spread the rumor that plaintiff's son had hanged himself, with full knowledge of the great probability that the report would reach her. There are two other cases in which a dead body was removed from the casket,⁸⁴ and an injured husband was brought home in very shocking condition and delivered abruptly to his wife,⁸⁵ which come to the same conclusion. There are other cases in which the conduct has looked like reck-

⁸⁰ Cf. RESTATEMENT, TORTS § 13, comment *d* (1934).

⁸¹ RESTATEMENT, TORTS § 500 (1934).

⁸² 236 Iowa 787, 20 N.W.2d 28 (1945). The grisly case of *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951), is apparently to be classed as one of intent. Plaintiff was a child approaching the age of five. Her father murdered her mother, kept the child with the corpse for a week, and then killed himself, splattering the child with blood. His estate was held liable. The mental shock could scarcely be regarded as anything but absolutely certain.

⁸³ *Bielitski v. Obadisk*, 15 Sask. 153, 61 D.L.R. 494 (1921).

⁸⁴ *Boyle v. Chandler*, 33 Del. 323, 138 Atl. 273 (1927). The jury was told that defendant was liable if the acts were "wanton, wilful, fraudulent or grossly negligent and done in reckless disregard of the consequences to the plaintiff." Apparently in accord is *Lindh v. Great Northern Ry. Co.*, 99 Minn. 408, 109 N.W. 823, 7 L.R.A. (n.s.) 1018 (1906).

⁸⁵ *Price v. Yellow Pine Paper Mill Co.*, 240 S.W. 588 (Tex. Civ. App. 1922). *Contra*, *Alexander v. Pacholek*, 222 Mich. 157, 192 N.W. 652 (1923), where an undertaker returned a body for failure to pay charges, and did it in a manner which was at least reckless.

lessness but the question has not been discussed;⁸⁶ and quite a few of the decisions dealing with mental disturbance resulting from acts directed at a third person,⁸⁷ which remain to be considered, apparently fall into the same category.

The question arises whether mere negligence, creating the risk of emotional distress but falling short of extreme outrage or of reckless or wanton conduct, can ever be enough for the tort with which we are dealing. It is a question beyond the scope of this discussion; and actually there appears to be very little law on it. Some of the cases already mentioned⁸⁸ have talked of negligence where it seems clear on the facts that the defendant proceeded outrageously in conscious disregard of a high degree of risk, and there was in reality recklessness in the case. Beyond this, the *Restatement*, in two sections, has taken the position that where the defendant intentionally⁸⁹ or negligently⁹⁰ inflicts emotional distress upon another, and realizes or should realize that such emotional distress is likely to result in illness or other bodily harm, he is liable for such consequences. The illustrations given are situations in which the defendant proceeds in conscious disregard of the plaintiff's illness or unusual susceptibility to injury; and again they look like recklessness. In support of these sections there are, however, a small number of cases in which negligent conduct, not amounting to wantonness or extreme outrage, has led to liability where physical injury was threatened and resulted only as the effect of the emotional distress.⁹¹ As-

⁸⁶ Thus most of the cases involving interference with dead bodies, *supra* notes 64-68, where a preoccupation with the "property right" in the body has prevented discussion. Also several of the cases where the plaintiff was known to be ill or pregnant, *supra*, notes 62-63.

In *Urban v. Hartford Gas Co.*, 139 Conn. 301, 93 A.2d 292 (1952), the defendant repossessed a water heater in a manner which badly upset a woman with an arrested diabetic condition, and was held liable on the basis of "negligence." The case looks like one of recklessness. See the discussion in Gregory, Toelle and Sykes, *The Interest in Freedom from Mental Disturbance: A Discussion of the Urban Case*, 27 CONN. B.J. 65-91 (1953).

⁸⁷ See text at notes 92-100 *infra*.

⁸⁸ *Price v. Yellow Pine Paper Mill Co.*, 240 S.W. 588 (Tex. Civ. App. 1922); *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916); *Lindh v. Great Northern Ry. Co.*, 99 Minn. 408, 109 N.W. 823 (1906); *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890). *Cf.* *Young v. Western & Atlantic Railroad*, 39 Ga. App. 761, 148 S.E. 414 (1929); *Duncan v. Donnell*, 12 S.W.2d 811 (Tex. Civ. App. 1928).

⁸⁹ RESTATEMENT, TORTS § 312 (1934).

⁹⁰ RESTATEMENT, TORTS § 313 (1934). Both sections are still to be considered in the revision of the *Second Restatement*.

⁹¹ In *Chiuchiolio v. New England Wholesale Tailors*, 84 N.H. 329, 150 Atl. 540 (1930), a glass pressure gauge on defendant's boiler broke with a loud noise and an escape of steam, frightening the plaintiff and causing her serious illness. The gauge had broken on past occasions, and women working in the vicinity had been badly frightened. The defendant was held liable. The court said that it might reasonably foresee that the fright would cause bodily harm to some one with a weak heart or other vulnerability.

In *Coca Cola Bottling Co. of Ark. v. Langston*, 198 Ark. 59, 127 S.W.2d 263 (1939), the plaintiff drank the defendant's beverage and swallowed glass. The only injury he suffered

suming that this is right, it would seem that any such liability is more conveniently treated as a part of the ordinary law of negligence, rather than being introduced as a complication of the "new tort."

2. *Where the extreme and outrageous conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress to another who is present at the time.*⁹²

Where the defendant's conduct is not directed at the plaintiff, but at some third person, other problems arise. There are much the same difficulties as in the case of the defendant's negligent conduct,⁹³ as to which, in general, recovery is denied. However extreme and outrageous the conduct may have been toward the third person, in the absence of any direct intention to affect the plaintiff some violation of a legal obligation to him must be found before there can be liability. There is only one case⁹⁴ which ap-

resulted from fright. Evidence was offered that the glass itself would have been harmless. The court held that this made no difference, and that the defendant was under a duty to protect the plaintiff from fright which might have serious consequences.

In *Kaufman v. Western Union Telegraph Co.*, 224 F.2d 723 (5th Cir. 1955), the defendant negligently mishandled a death message, and was held liable for physical illness resulting from emotional disturbance. In the absence of a decision from the Supreme Court, the federal rule denying liability for the mental damages in such cases was construed to be limited to cases where no physical consequences result. There are several federal cases contrary to this in the lower courts. Both the majority of the state courts which deny recovery, and the minority which allow it, appear not to have made the distinction made in this case.

See also *Mitnick v. Whalen Bros. Inc.*, 115 Conn. 650, 163 Atl. 414 (1932) (plaintiff frightened by automobile collision), and *Urban v. Hartford Gas Co.*, 139 Conn. 301, 93 A.2d 292 (1952), which talks negligence, but is by no means clear.

⁹² Tentative Draft of § 46(2), SECOND RESTATEMENT OF TORTS.

⁹³ Where the plaintiff himself is not threatened with physical harm, and his shock or fright is due solely to concern for the safety of the third person, the great majority of the cases deny recovery. *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497, 98 A.L.R. 394 (1935); *Cote v. Litawa*, 96 N.H. 174, 71 A.2d 792 (1950); *Resavage v. Davies*, 199 Md. 479, 86 A.2d 879 (1952); *Curry v. Journal Pub. Co.*, 41 N.M. 318, 68 P.2d 168 (1937); *Herrick v. Evening Express Publishing Co.*, 120 Me. 138, 113 Atl. 16, 23 A.L.R. 358 (1921); *Angst v. Great Northern Railway Company*, 131 F. Supp. 156 (D. Minn. 1955); *All v. John Gerber Co.*, 36 Tenn. App. 134, 252 S.W.2d 138 (1952); *Hay or Bourhill v. Young*, [1943] A.C. 92; *Mahoney v. Dankwart*, 108 Iowa 321, 79 N.W. 134 (1899); *Southern R. Co. v. Jackson*, 146 Ga. 243, 91 S.E. 28 (1916). See Goodhart, *The Shock Cases and Area of Risk*, 16 MODERN L. REV. 14 (1953); Goodhart, *Emotional Distress and the Unimaginative Taxicab Driver*, 69 L.Q. REV. 347 (1953); Notes, 31 N. C. L. REV. 233 (1953), 10 WASH. & LEE L. REV. 267 (1953). *Contra*, *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927 (1912); *Gulf, C. & S.F. Ry. Co. v. Coopwood*, 96 S.W. 102 (Tex. Civ. App. 1906); *Cohn v. Ansonia Realty Co.*, 162 App. Div. 791, 148 N.Y. Supp. 39 (1914); *Id.*, 162 App. Div. 794, 148 N.Y. Supp. 41 (1914); *Rasmussen v. Benson*, 133 Neb. 449, 275 N.W. 674, 122 A.L.R. 1468 (1937); *Id.*, 135 Neb. 232, 280 N.W. 890, 122 A.L.R. 1475 (1938).

Where the plaintiff is himself threatened with physical injury, recovery for mental disturbance at the peril of another has been allowed. *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141; *Bowman v. Williams*, 164 Md. 397, 165 Atl. 182 (1933); *Frazee v. Western Dairy Products Co.*, 182 Wash. 578, 47 P.2d 1037 (1935).

⁹⁴ *Lambert v. Brewster*, 97 W. Va. 124, 125 S.E. 244 (1924).

pears ever to have applied to mental distress at the peril of a third person the doctrine of "transferred intent," found in the battery cases where *A* shoots at *B* and unexpectedly hits *C*;⁹⁵ and that case is not too clear.

It seems clear to begin with that the defendant's conduct must amount to extreme outrage, and that there can be no recovery where the third person is merely insulted, abused or cursed,⁹⁶ arrested,⁹⁷ or otherwise disturbed in a relatively minor way. It is clear also that the plaintiff's emotional distress must be real and severe.⁹⁸ Where there is the outrage and the severe distress, as where a husband is murdered before the eyes of his wife, some of the courts apparently have regarded the distress as so substantially certain to follow, under the circumstances, that it is to be treated as intended, and have allowed recovery on that basis.⁹⁹ In others stress is laid upon the foreseeability of the effect upon the plaintiff, and it seems to have been concluded that there was some kind of negligence toward her,¹⁰⁰ although there is little discussion of the basis of recovery. On the facts of all of these cases it would appear that there was a very high degree of probability that the mental disturbance would follow, and that the defendant proceeded in conscious and deliberate disregard of it, so that his conduct was properly to be called wilful, wanton or reckless. There is thus no clear decision as to whether there may be recovery on the basis of ordinary negligence, and the question remains open, although the decisions where there is only negligence toward the third person¹⁰¹ may indicate that there will not. Where

⁹⁵ *Talmage v. Smith*, 101 Mich. 370, 59 N.W. 656, 45 Am. St. Rep. 414 (1894); *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81 (1877); *Davis v. Collins*, 69 S.C. 460, 48 S.E. 469 (1904); *Bannister v. Mitchell*, 127 Va. 578, 104 S.E. 800, 16 A.L.R. 768 (1920); *Carnes v. Thompson*, 48 S.W.2d 903 (Mo. 1932); *Morrow v. Flores*, 225 S.W.2d 621 (Tex. Civ. App. 1949). As to the application to mental disturbance, compare *Renner v. Canfield*, 36 Minn. 90, 30 N.W. 435 (1886), where the defendant shot at a dog and frightened the plaintiff, *with* *Corn v. Sheppard*, 179 Minn. 490, 229 N.W. 869 (1930), where the plaintiff was hit.

⁹⁶ *Bucknam v. Great Northern Ry. Co.*, 76 Minn. 373, 79 N.W. 98 (1899) (violent language to husband); *Sanderson v. Northern Pacific Ry. Co.*, 88 Minn. 162, 92 N.W. 542, 60 L.R.A. 403, 97 Am. St. Rep. 509 (1902) (putting children off of train); *Fort Worth & R.G. Ry. Co. v. Bryant*, 210 S.W. 556 (Tex. Civ. App. 1918) (profanity before child in presence of father); *Beck v. Luers*, 126 N.W. 811 (Iowa 1910) (remonstrating with husband about his treatment of horse).

⁹⁷ *Ellis v. Cleveland*, 54 Vt. 437 (1882); *Id.*, 55 Vt. 358 (1883); *Sperier v. Ott*, 116 La. 1087, 41 So. 323, 7 L.R.A. (n.s.) 518, 114 Am. St. Rep. 587 (1906).

⁹⁸ *Wyman v. Leavitt*, 71 Me. 227 (1880) (worry over safety of child due to defendant's blasting); *cf.* *Keyes v. Minneapolis & St. Louis Ry. Co.*, 36 Minn. 290, 30 N.W. 888 (1886).

⁹⁹ *Jeppsen v. Jensen*, 47 Utah 536, 155 Pac. 429 (1916) (assault upon husband treated as "assault" upon plaintiff); *Purdy v. Woznesensky*, [1937] 2 West. Weekly R. (Sask.) 116 (same); *Rogers v. Williard*, 144 Ark. 587, 223 S.W. 15, 11 A.L.R. 1115 (1920) (quarrel with associate in presence of pregnant woman).

¹⁰⁰ *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890) (assault upon Negroes in presence of pregnant woman); *Young v. Western & Atlantic Railroad*, 39 Ga. App. 761, 148 S.E. 414 (1929) (battery upon husband); *Duncan v. Donnell*, 12 S.W.2d 811 (Tex. Civ. App. 1928) (abuse of husband in presence of wife).

¹⁰¹ See note 93 *supra*.

recovery has been denied, it usually has been upon the ground that the result was not reasonably to be anticipated,¹⁰² but there are a few decisions¹⁰³ refusing a remedy where it seems clear that it was foreseeable.

Another difficult question is whether the recovery is to be limited to plaintiffs who are present at the time of the defendant's conduct. The decisions indicate that it is,¹⁰⁴ and that the wife who discovers five minutes afterward that her husband has been shot has no cause of action. One reason is that where the plaintiff is not present, or the defendant does not know she is there,¹⁰⁵ the requisite element of the defendant's wilfulness, wantonness or recklessness, or even negligence, toward her may be lacking. Apart from this, however, it is obviously necessary to draw the line somewhere, even against foreseeable damage. No one would suppose that we are to attempt to compensate every distant listener on the radio for whatever mental disturbance he may undergo at the news of an assassination of the President; or that if the defendant murders John Doe with an ax he should be liable for the successive miscarriages suffered by his sisters and his cousins and his aunts at the delayed news of John Doe's and one another's misfortunes, however devoted a family they may have been. The grief of the woman who learns after the lapse of ten years that she is a widow¹⁰⁶ may be lacking in any guarantee that it is genuine or extreme. There is certainly a high degree of artificiality in the Ohio distinction between the plaintiff who discovers her ransacked furniture¹⁰⁷ and the one

¹⁰² *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607 (1877); *Hutchinson v. Stern*, 115 App. Div. 791, 101 N.Y. Supp. 145 (1906); *Ellsworth v. Massacar*, 215 Mich. 511, 184 N.W. 408 (1921); *Reed v. Ford*, 129 Ky. 471, 112 S.W. 600 (1908); *Goddard v. Watters*, 14 Ga. App. 722, 82 S.E. 304 (1914).

¹⁰³ *McGee v. Vanover*, 148 Ky. 737, 147 S.W. 742, 1913E Ann. Cas. 500 (1912); *Gaskins v. Runkle*, 25 Ind. App. 584, 58 N.E. 740 (1900); *Logan v. Gossett*, 37 Ga. App. 516, 140 S.E. 794 (1927) (apparently misinterpreting *Goddard v. Watters*, *supra*, note 102).

¹⁰⁴ There is no case allowing recovery where the plaintiff was not present. It was denied in *Koontz v. Keller, Admx.*, 52 Ohio App. 265, 3 N.E.2d 694 (1936) (discovery of body of murdered sister); *Ellsworth v. Massacar*, 215 Mich. 511, 184 N.W. 408 (1921) (later discovery of attack on husband); *Knox v. Allen*, 4 La. App. 223 (1926) (attack on child, apparently discovered afterward). See also the cases cited in note 105. Compare, as to negligence, *Kelly v. Fretz*, 19 Cal. App.2d 356, 65 P.2d 914 (1937); *Kalleg v. Fassio*, 125 Cal. App. 96, 13 P.2d 763 (1932); *Clough v. Steen*, 3 Cal. App.2d 392, 39 P.2d 889 (1934).

¹⁰⁵ *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607 (1877) (plaintiff in another room); *Hutchinson v. Stern*, 115 App. Div. 791, 101 N.Y. Supp. 145 (1906) ("present and nearby," but apparently not in sight); *Reed v. Ford*, 129 Ky. 471, 112 S.W. 600 (1908) (near, but not known to be there); *Goddard v. Watters*, 14 Ga. App. 722, 82 S.E. 304 (1914) (plaintiff ran out to see what was happening). In *Bunyan v. Jordan*, 57 Commw. L.R. 1 (Austr. 1936), the defendant pretended to commit suicide for the purpose of frightening A, and B, who overheard but was not known to be present, was not allowed to recover.

¹⁰⁶ This suggests the well-known dialogue: "Is this the widow Murphy?" "I am Mrs. Murphy, but I'm not a widow." "The hell you ain't."

¹⁰⁷ *M. J. Rose Co. v. Lowery*, 33 Ohio App. 488, 169 N.E. 716 (1929).

who finds the body of her murdered sister;¹⁰⁸ but in the absence of any other definite point at which to draw the line, presence on the spot may well be required.

There is the further question, whether the recovery should be limited to near relatives of the person attacked, or at least to close associates, where there is some additional guarantee that the emotional distress is real and extreme. Nearly all of the cases allowing recovery have involved such plaintiffs, but there are one or two¹⁰⁹ which have not. It may be suggested that when a stranger is asked for a match on the street and the individual who asks for it is suddenly shot down before his eyes, the mental disturbance may be entirely genuine and severe, and that a pregnant bystander who witnesses a bloody battery may suffer an injury entitled to compensation. The language of the cases does not suggest any such arbitrary limitation, and it does not appear to be called for.

3. *A common carrier or other public utility is subject to liability to patrons utilizing its facilities for gross insults which reasonably offend them.*¹¹⁰

This special rule as to the liability of the common carrier and others who undertake to serve the public had its origin in 1823, with the decision of Mr. Justice Story in *Chamberlain v. Chandler*,¹¹¹ where the master of a ship insulted and mistreated his passengers. The defendant was held liable on the ground that he had contracted not only for transportation and a room, but also for "decency of demeanor." The cases which followed tended to repeat this explanation, and to regard the action as one for breach of contract, or to explain the defendant's tort duty as based on the contract.¹¹² With the passage of time the emphasis was shifted to the carrier's undertaking to serve the public, which was held to carry to an equal extent the obligation of courtesy;¹¹³ and recovery has been allowed where there was no contract, as in the case of a prospective passenger in a waiting room who had not yet bought a ticket.¹¹⁴ It has also been allowed where the insult

¹⁰⁸ *Koontz v. Keller*, Admx., 52 Ohio App. 265, 3 N.E.2d 694 (1936).

¹⁰⁹ *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890); *Rogers v. Williard*, 144 Ark. 587, 223 S.W. 15, 11 A.L.R. 1115 (1920).

¹¹⁰ Tentative Draft of § 48, SECOND RESTATEMENT OF TORTS.

¹¹¹ 3 Mason 242, 5 Fed. Cas. 413, No. 2,575 (C.C. Mass. 1823).

¹¹² See for example *Bleecker v. Colorado & Southern Ry. Co.*, 50 Colo. 140, 114 Pac. 481, 33 L.R.A. (n.s.) 386 (1911); *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S.W. 557, 46 L.R.A. 549 (1899); *Gillespie v. Brooklyn Heights R.R. Co.*, 178 N.Y. 347, 70 N.E. 857, 66 L.R.A. 618 (1904); *Keene v. Lizardi*, 5 La. 431, 25 Am. Dec. 197 (1833).

¹¹³ See for example *Cole v. Atlanta & West Point R.R. Co.*, 102 Ga. 474, 31 S.E. 107 (1897); *Goddard v. Grand Trunk Railway*, 57 Me. 202, 2 Am. Rep. 39 (1869); cf. *Boyce v. Greeley Square Hotel Co.*, 228 N.Y. 106, 126 N.E. 647 (1920) (hotel).

¹¹⁴ *Texas & Pacific Ry. Co. v. Jones*, 39 S.W. 124 (Tex. Civ. App. 1897). *Accord*: *St. Louis-San Francisco Ry. Co. v. Clark*, 104 Okla. 24, 229 Pac. 779 (1924); *Jones v. Atlantic C. L. R. Co.*, 108 S.C. 217, 94 S.E. 490 (1917) (man coming to freight depot to pick up package); *Moody v. Kenny*, 153 La. 1007, 97 So. 21 (1923) (hotel guest who had not registered).

is offered by a third person, on the basis of the carrier's duty of reasonable care to protect the passenger from such conduct.¹¹⁵ It is now quite clear that the action is essentially one in tort, and that any contract is merely a side issue. The liability is recognized by the *Restatement of Torts*;¹¹⁶ and only in old cases in Missouri and Arkansas,¹¹⁷ now discredited, has its existence ever been denied.

The basis of this special rule is obviously the responsibility undertaken by the carrier toward the public, which carries with it an obligation of courtesy that does not rest upon ordinary defendants; the unusual power and opportunity afforded the carrier to wound the feelings of those entrusted to its care; and the interest of the public in freedom from insult at the hands of those with whom it must come in contact, and on whom it must rely for essential help. The rule was soon extended to innkeepers,¹¹⁸ who always have gone along in the same basket with carriers; and there are a few cases which have applied it to telegraph companies.¹¹⁹ It undoubtedly would apply also to other public utilities, if the cases should arise. The insult need not be offered on the premises of the defendant,¹²⁰ although it will of course normally occur there. The plaintiff must, however, qualify as a patron who is entitled to and does make use of the facilities provided by the defendant in its capacity of public servant; and the woman who enters the lobby of a hotel for the sole purpose of meeting a friend has no right to complain of mere insult.¹²¹

¹¹⁵ *Louisville & N. R. Co. v. Bell*, 166 Ky. 400, 179 S.W. 400 (1915); *Payne v. McDonald*, 150 Ark. 12, 233 S.W. 813 (1921); *Texas & Pacific Ry. Co. v. Jones*, 38 S.W. 124 (Tex. Civ. App. 1897); *Seaboard Air Line Railway Co. v. Mobley*, 194 Ala. 211, 69 So. 614 (1915); *Quinn v. Louisville & Nashville R. Co.*, 98 Ky. 231, 32 S.W. 742 (1895).

¹¹⁶ RESTATEMENT, TORTS § 48 (1934).

¹¹⁷ *Grayson v. St. Louis Transit Co.*, 100 Mo. App. 60, 71 S.W. 730 (1903); *Pierce v. St. Louis, I.M. & S. Ry. Co.*, 94 Ark. 489, 127 S.W. 707 (1910).

¹¹⁸ *Emmke v. De Silva*, 293 Fed. 17 (8th Cir. 1923); *De Wolf v. Ford*, 193 N.Y. 397, 86 N.E. 527, 21 L.R.A. (n.s.) 860, 127 Am. St. Rep. 969 (1908); *Dixon v. Hotel Tutwiler Operating Co.*, 214 Ala. 396, 108 So. 26 (1926); *Boyce v. Greeley Square Hotel Co.*, 228 N.Y. 106, 126 N.E. 647 (1920); *Frewen v. Page*, 238 Mass. 499, 131 N.E. 475 (1921); *Moody v. Kenny*, 153 La. 1007, 97 So. 21 (1923); *Milner Hotels, Inc. v. Dougherty*, 195 Miss. 718, 15 So.2d 358 (1943); *cf. McCarthy v. Niskern*, 22 Minn. 90 (1875). In some of these cases the conduct was sufficiently outrageous and extreme to make an ordinary defendant liable; but the decisions do not rest on that ground.

¹¹⁹ *Dunn v. Western Union Telegraph Co.*, 2 Ga. App. 845, 59 S.E. 189 (1907); *Buchanan v. Western Union Tel. Co.*, 115 S.C. 433, 106 S.E. 159, 18 A.L.R. 1414 (1920); *Magouirk v. Western Union Telegraph Co.*, 79 Miss. 632, 31 So. 206 (1902); *cf. Western Union Telegraph Co. v. Watson*, 82 Miss. 101, 33 So. 76 (1902); *Butler v. Western Union Telegraph Co.*, 62 S.C. 222, 40 S.E. 162 (1901).

¹²⁰ *Buchanan v. Western Union Tel. Co.*, 115 S.C. 433, 106 S.E. 159, 18 A.L.R. 1414 (1920) (indecent proposal by messenger at home).

¹²¹ *Jenkins v. Kentucky Hotel, Inc.*, 261 Ky. 419, 87 S.W.2d 951 (1935); *cf. Wallace v. Shoreham Hotel Corporation*, 49 A.2d 81 (Mun. App. D.C. 1946) (customer in cocktail lounge). On the other hand an unregistered guest who actually occupied a room was held to be entitled to recover in *Moody v. Kenny*, 153 La. 1007, 97 So. 21 (1923).

On this basis liability has been imposed in a great many cases for conduct which does not amount to extreme outrage. Profane and indecent language,¹²² abusive and insulting epithets,¹²³ indecent proposals,¹²⁴ accusations of dishonesty¹²⁵ or immoral conduct,¹²⁶ insinuations as to poverty or

¹²² *Bleecker v. Colorado & Southern R. Co.*, 50 Colo. 140, 114 Pac. 481, 33 L.R.A. (n.s.) 386 (1911) (profane and indecent insults); *Jones v. Atlantic C. L. R. Co.*, 108 S.C. 217, 94 S.E. 490 (1917) (cursing, with epithets "too vile and opprobrious to repeat"); *Birmingham Ry., L. & P. Co. v. Glenn*, 179 Ala. 263, 60 So. 111 (1912) ("G— d— you, I am running this car" to plaintiff's husband in her presence); *Fort Worth & R. G. Ry. Co. v. Bryant*, 210 S.W. 556 (Tex. Civ. App. 1918) (profanity and obscenity in presence of child); *Georgia Ry. & El. Co. v. Baker*, 1 Ga. App. 832, 58 S.E. 88 (1907) ("Damn her, if she don't move I am a good notion to throw her through the window"); *Milner Hotels, Inc. v. Dougherty*, 195 Miss. 718, 15 So.2d 358 (1943) ("God damn son of a bitch," "liar," and "damn liar"); *Dunn v. Western Union Telegraph Co.*, 2 Ga. App. 845, 59 S.E. 189 (1907) ("Go to hell with your God damn message"); *St. Louis-San Francisco Ry. Co. v. Clark*, 104 Okla. 24, 229 Pac. 779 (1924) ("Get the hell out of the depot"); *Chesapeake & O. Ry. Co. v. Francisco*, 149 Ky. 307, 148 S.W. 46, 42 L.R.A. (n.s.) 83 (1912) (cursing and abuse); *Houstou, E. & W. T. Ry. Co. v. Perkins*, 52 S.W. 124 (Tex. Civ. App. 1899) (profane and indecent language); *Southeastern Greyhound Corp. v. Graham*, 69 Ga. App. 621, 26 S.E.2d 371 (1943) ("God damned baldheaded son of a bitch"); *St. Louis Southwestern Ry. Co. of Texas v. Wright*, 84 S.W. 270 (Tex. Civ. App. 1904) (profane and indecent language); *St. Louis Southwestern Ry. Co. of Texas v. Granger*, 100 S.W. 987 (Tex. Civ. App. 1907) ("shut up her God damn mouth, if she did not he would cut her throat"); *Binder v. Georgia Ry. & Elec. Co.*, 13 Ga. App. 381, 79 S.E. 216 (1913) ("None of your God damn business," and "God damn liar").

¹²³ *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S.W. 557, 46 L.R.A. 549 (1899) ("whore"); *Gillespie v. Brooklyn Heights R.R. Co.*, 178 N.Y. 347, 70 N.E. 857, 66 L.R.A. 618 (1904) ("deadbeat" and "swindler"); *Lipman v. Atlantic C. L. R. Co.*, 108 S.C. 151, 93 S.E. 714, 1918A L.R.A. 596 (1917) ("lunatic"); *Barbknecht v. Great Northern R. Co.*, 55 N.D. 104, 212 N.W. 776 (1927) (opprobrious epithets); *McCarthy v. Niskern*, 22 Minn. 90 (1875) (abuse and insult, with breach of hotel's contract); *Cole v. Atlanta & West Point R.R. Co.*, 102 Ga. 474, 31 S.E. 107 (1897) (opprobrious words and abuse); *Illinois Central R.R. Co. v. Dacus*, 103 Miss. 297, 60 So. 324 (1913) (insult); *Huffman v. Southern R.R.*, 163 N.C. 138, 79 S.E. 307 (1913) ("cheap, common scalawag"); *San Antonio Traction Co. v. Lambkin*, 99 S.W. 574 (Tex. Civ. App. 1907) (insult).

¹²⁴ *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S.W. 557, 46 L.R.A. 549 (1899); *Strother v. Aberdeen & A. R.R.*, 123 N.C. 158, 31 S.E. 386 (1898); *Southern R. Co. in Miss. v. Walker*, 55 So. 362 (Miss. 1911); *Buchanan v. Western Union Tel. Co.*, 115 S.C. 433, 106 S.E. 159, 18 A.L.R. 1414 (1920).

¹²⁵ *Gillespie v. Brooklyn Heights R.R. Co.*, 178 N.Y. 347, 70 N.E. 857, 66 L.R.A. 618 (1904) ("swindler"); *Cincinnati, N.O. & T.P. Ry. v. Harris*, 115 Tenn. 501, 91 S.W. 211, 5 L.R.A. (n.s.) 779 (1905); *Knoell v. Kansas City C. C. & St. J. Ry. Co.*, 198 S.W. 79 (Mo. App. 1917); *Texas & P. Ry. Co. v. Tarkington*, 27 Tex. Civ. App. 353, 66 S.W. 137 (1901).

¹²⁶ *Frewen v. Page*, 238 Mass. 499, 131 N.E. 475 (1921); *Moody v. Kenny*, 153 La. 1007, 97 So. 21 (1923); *Boyce v. Greeley Square Hotel Co.*, 228 N.Y. 106, 126 N.E. 647 (1920); *Emmke v. De Silva*, 293 Fed. 17 (8th Cir. 1923); *De Wolf v. Ford*, 193 N.Y. 397, 86 N.E. 527, 21 L.R.A. (n.s.) 860, 127 Am. St. Rep. 969 (1908); *Dixon v. Hotel Tutwiler Operating Co.*, 214 Ala. 396, 108 So. 26 (1926); *Texas & Pacific Ry. Co. v. Jones*, 39 S.W. 124 (Tex. Civ. App. 1897); *Keene v. Lizardi*, 5 La. 431, 25 Am. Dec. 197 (1833).

stinginess,¹²⁷ threats of violence,¹²⁸ the attempt to put a white man into a Jim Crow car,¹²⁹ shaking a ticket punch under a passenger's nose,¹³⁰ and other assorted varieties of unpleasantness,¹³¹ all have resulted in liability for substantial sums as solace for wounded feelings and offended dignity. Not only is physical illness or other resulting injury not required, but cases are quite infrequent in which it even appears. If the suggestion of the supreme court of Maine¹³² that all this will lead to an improvement in the manners of carrier employees has not been borne out, it is not because the courts have not tried.

There is little indication in the decisions of any limitation on this recovery for hurt feelings; and yet it must obviously exist. In all of the cases in which there has been recovery the insult has been a gross one, of a kind highly offensive to the ordinary reasonable man.¹³³ It has been held in a few cases that there is no liability for a mere rude or insolent tone of voice,¹³⁴ where what is said is proper in itself; and the refusal of a conductor, without other discourtesy, to accept an unusual coin which is legal tender,¹³⁵ or

¹²⁷ *Meeder v. Seaboard Air Line R.R.*, 173 N.C. 57, 91 S.E. 527 (1917); *Southern Railway Co. v. Carroll*, 14 Ala. App. 374, 70 So. 984 (1915); *Humphrey v. Michigan United Railway Co.*, 166 Mich. 645, 132 N.W. 446 (1911).

¹²⁸ *Goddard v. Grand Trunk Railway*, 57 Me. 202, 2 Am. Rep. 39 (1869); *Lamson v. Great Northern Ry. Co.*, 114 Minn. 182, 130 N.W. 945, 1914A Ann. Cas. 15 (1911).

¹²⁹ *Wolfe v. Georgia Railway & Electric Co.*, 2 Ga. App. 499, 58 S.E. 899 (1907); *May v. Shreveport Traction Co.*, 127 La. 420, 53 So. 671, 32 L.R.A. (n.s.) 206 (1910).

¹³⁰ *El Paso Electric Co. v. De Nunez*, 118 S.W.2d 914 (Tex. Civ. App. 1938).

¹³¹ *Magouirk v. Western Union Telegraph Co.*, 79 Miss. 632, 31 So. 206 (1902) (telegram forged as practical joke by agent); *Western Union Telegraph Co. v. Watson*, 82 Miss. 101, 33 So. 76 (1902) (wilful failure to deliver death message); *Butler v. Western Union Telegraph Co.*, 62 S.C. 222, 40 S.E. 162 (1901) (same).

¹³² "Careful engineers can be selected who will not run their trains into open draws; and careful baggagemen can be secured, who will not handle and smash trunks and handboxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences called corporations; and that is, the pocket of the moneyed power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before." *Walton, J.*, in *Goddard v. Grand Trunk Railway*, 57 Me. 202, 224, 2 Am. Rep. 39, 50 (1869).

¹³³ The mildest insult found was in *Haile v. New Orleans Ry. & Light Co.*, 135 La. 229, 65 So. 225, 51 L.R.A. (n.s.) 1171, 1916C Ann. Cas. 1233 (1914): "A big fat woman like you." Even this might be expected to be highly offensive to a big fat woman like her.

¹³⁴ *New York, L. E. & W. Ry. Co. v. Bennett*, 50 Fed. 496 (6th Cir. 1892); *Crutcher v. Cleveland, C.C. & St. L. R.R.*, 132 Mo. App. 311, 111 S.W. 891 (1908) (contradiction and argument); *Daniels v. Florida, C. & P. R.R.*, 62 S.C. 1, 39 S.E. 762 (1901). But the tone may be considered as an aggravation where the words are sufficiently offensive. *Dixon v. Hotel Tutwiler Operating Co.*, 214 Ala. 396, 108 So. 26 (1926); *Lamson v. Great Northern Ry. Co.*, 114 Minn. 182, 130 N.W. 945, 1914A Ann. Cas. 15 (1911).

¹³⁵ *Campopiano v. Rhode Island Co.*, 39 R.I. 105, 97 Atl. 597, 1916E L.R.A. 911 (1916).

his threat to eject the plaintiff if she does not pay her fare,¹³⁶ is no basis of liability. The manager of a hotel is certainly privileged to do his public duty by making polite and reasonable inquiry as to whether the guests are married.¹³⁷ The conclusion to be drawn is probably that recovery is to be limited to cases where the conduct, although falling short of extreme outrage, still rises above the level of petty and trivial offensiveness. The personality of the plaintiff is to be taken into account, and a man hardened to rough language may be expected and required to endure more than a lady or a child.¹³⁸ Provocation by the plaintiff has been considered in mitigation of damages;¹³⁹ and by analogy to cases under the southern actionable words statutes¹⁴⁰ might well, in a proper case, prevent any recovery.

Other premises open to the public. The question arises whether this special rule of liability of carriers and public utilities is to be extended to owners of ordinary places of business and other premises open to the public. Where the defendant is merely an invitor and the plaintiff no more than an invitee, the special undertaking of the carrier is lacking; and the problem becomes one of whether the ordinary invitor's duty as to his premises and conduct includes the obligation of reasonable courtesy, and whether the public interest in receiving it entitles the public to demand it. As to this it is believed that no very definite answer can yet be given.

There are a few cases¹⁴¹ in which plaintiffs have recovered against theatres and other places of amusement for conduct which appears obviously to have amounted to extreme outrage, sufficient to make any defendant liable. In Texas a white woman recovered from the owner of an office building when she was ordered into an elevator reserved for Negroes;¹⁴² but it is

¹³⁶ See cases cited in note 133 *supra*.

¹³⁷ *Hurd v. Hotel Astor Co.*, 182 App. Div. 49, 169 N.Y. Supp. 359 (1918).

¹³⁸ In *Fort Worth & R.G. Ry. Co. v. Bryant*, 210 S.W. 556 (Tex. Civ. App. 1918), profane and obscene language, not addressed to them, was used in the presence of a ten-year-old girl and her father. The child was allowed to recover, but the father, who was accustomed to such language and used it himself, was not. *Cf. Dickinson v. Scruggs*, 242 Fed. 900 (6th Cir. 1917) (indecent proposal later accepted); *Kinney v. Louisville & Nashville Railroad Co.*, 99 Ky. 59, 34 S.W. 1066 (1896) (carrier not liable where one intoxicated person insulted another).

¹³⁹ *Binder v. Georgia Ry. & Elec. Co.*, 13 Ga. App. 381, 79 S.E. 216 (1913); *San Antonio Traction Co. v. Lambkin*, 99 S.W. 574 (Tex. Civ. App. 1907); *Strother v. Aberdeen & A. R.R.*, 123 N.C. 158, 31 S.E. 386 (1898) (passenger's immodest remarks led to indecent proposal).

¹⁴⁰ *Huckabee v. Nash*, 182 Miss. 754, 183 So. 500 (1938); *Chaffin v. Lynch*, 83 Va. 106, 1 S.E. 803 (1887); *cf. Gilardino v. Patorno*, 127 La. 255, 53 So. 556 (1910). See *Malone, Insult in Retaliation—the Huckabee Case*, 11 Miss. L.J. 333 (1939).

¹⁴¹ *Saenger Theatres Corp. v. Herndon*, 180 Miss. 791, 178 So. 86 (1938) (motion picture theatre; schoolgirl bullied and threatened with arrest, with accusations of immoral conduct); *Interstate Amusement Co. v. Martin*, 8 Ala. App. 481, 62 So. 404 (1913) (plaintiff called up on stage of theatre and publicly humiliated); *cf. Boswell v. Barnum & Bailey*, 135 Tenn. 35, 185 S.W. 692, 1916E L.R.A. 912 (1916) (insult and abuse in argument over seats; "the weight of the testimony indicates that the conduct of the circus employees was outrageous").

¹⁴² *O'Connor v. Dallas Cotton Exchange*, 153 S.W.2d 266 (Tex. Civ. App. 1941).

at least not clear that this was not at the time considered to be an extreme outrage in Texas. There are other cases in which the plaintiff was expelled from the premises, and a clear breach of contract¹⁴³ or other independent tort¹⁴⁴ was involved. There are two decisions¹⁴⁵ which have allowed recovery for mere insult, where apparently no such other element was present. On the other hand, there are three cases¹⁴⁶ which have denied recovery for insulting conduct falling short of extreme outrage, and three more¹⁴⁷ which perhaps look in that direction.

The conclusion to be drawn is probably that there is some tendency to extend the carrier's liability for insult to the owners of premises open to the public; but that it is not yet so clear and well established as to call for anything more than a caveat.

¹⁴³ *Weber-Stair Co. v. Fisher*, 119 S.W. 195 (Ky. 1909) (theatre); *Planchard v. Klaw & Erlanger New Orleans Theatres Co.*, 166 La. 235, 117 So. 132 (1928) (theatre); *Aaron v. Ward*, 203 N.Y. 351, 96 N.E. 736, 38 L.R.A. (n.s.) 204 (1911) (bathhouse); *Smith v. Leo*, 92 Hun. 242, 36 N.Y. Supp. 949 (N.Y. Sup. Ct., Dec. T. 1895) (dance hall).

¹⁴⁴ In *Karl v. Philadelphia Quick Lunch*, 47 Dauph. Co. Rep. 279 (Pa. 1939), the waitress snatched plaintiff's coffee cup from her hand (battery), motioned to strike her (assault), and ordered her out (apparently breach of contract).

¹⁴⁵ *Davis v. Tacoma R. & Power Co.*, 35 Wash. 203, 77 Pac. 209, 66 L.R.A. 802 (1904) (amusement park; plaintiff was ordered out, with imputation of immoral conduct; there was prompt withdrawal and apology); *Malczewski v. New Orleans Ry. & Light Co.*, 156 La. 830, 101 So. 213, 35 A.L.R. 553 (1924) (free parking lot maintained in connection with amusement park; insulting language).

¹⁴⁶ *Flowers v. Price*, 190 S.C. 392, 3 S.E.2d 38 (1939) (tobacco warehouse; profanity and abuse); *Wallace v. Shoreham Hotel Corporation*, 49 A.2d 81 (Mun. App. D.C. 1946) (cocktail lounge, insinuation of dishonesty in demanding too much change); *Republic Iron & Steel Co. v. Self*, 192 Ala. 403, 68 So. 328, 1915F L.R.A. 516 (1915) (shop; "liar," "dirty liar," and "no lady"; plaintiff offered considerable provocation).

¹⁴⁷ *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P.2d 773 (1944) (restaurant refused to serve plaintiff, which it was privileged to do); *Mann v. Roosevelt Shop*, 41 So.2d 894 (Fla. 1949) (similar refusal by shop; no action for slander); *Larson v. R. B. Wrigley Co.*, 183 Minn. 28, 235 N.W. 393 (1931) (similar refusal by restaurant because plaintiff was "too dirty"; no action for slander).