UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 39 | Number 1 Article 11

12-1-1960

Threats Inducing Emotional Reactions

Warren A. Seavey

NOTES AND COMMENTS

Threats Inducing Emotional Reactions.

Showing blackjacks, the defendants threatened the plaintiffs with physical harm, and because this offer to commit immediate bodily harm generated great fear and distress, the plaintiffs became ill. On demurrer to the complaint, of which the above is a paraphrase, the court held that: (1) there was no assault and (2) there was no action for the alleged illness.[1]

As to the assault, there are many statements in the books which seem to support the result since there was no allegation of an "overt act." "Mere words do not constitute an assault" has been stated frequently by text writers[2] and stated or implied by the courts. There appears to be no satisfactory explanation for such a result where the parties are face to face.[3] The plaintiffs believed that the defendants would carry out immediately their manifested intent of striking them unless their orders were obeyed. These facts spell civil assault at common law. There is in fact little judicial authority for the requirement of a threatening movement. In many of the cases, including the one cited by the court,[4] the statement that "mere words" are not sufficient is the merest dictum.[5] In some of the cases, it is said that there must be an offer of corporeal harm, an ambiguous expression taken from textbooks.[6] Again these statements are mostly dicta.[7] The largest number of cases in which the expression is used involve criminal assaults[8] and, despite an occasional case to the contrary,[9] it is generally recognized that the

[1] Cucinotti v. Ortman, 339 Pa. 26, 159 A.2d 216 (1950).

[2] 1 HARPER & JAMES, TORTS § 3.5 (1956); RESTATEMENT, TORTS § 31 (1934).

[3] See PROSSER, TORTS § 10 (2d ed. 1955).

[4] Bechtel v. Combs, 70 Pa. Super. 503 (1918) (telephone threat).

[5] Kramer v. Ricksmeier, 159 Iowa 48, 139 N.W. 1091 (1913) (telephone threat); Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926) (no force was threatened); Continental Cas. Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935) (threats by trespasser causing illness; recovery allowed).

[6] As in 1 COOLEY, TORTS § 95 (4th ed. 1932).

[7] Brown v. Crawford, 296 Ky. 249, 177 S.W.2d 1 (1943); Tinkler v. Richter, 295 Mich. 396, 295 N.W. 201 (1940); Jenkins v. Kentucky Hotel, 261 Ky. 419, 87 S.W.2d 951 (1935) (dictum).

[8] State v. Daniel, 136 N.C. 571, 48 S.E. 544 (1904), is typical; holding that it was incorrect for the trial court to charge that "if the defendant cursed the prosecutor, Alston, and ordered him to come to him and Alston obeyed through fear, the defendant was guilty of an assault," the court said: "Mere words, however insulting or abusive, will not constitute an assault, nor will a mere threat or violence menaced, as distinguished from violence begun to be executed. . . . [T]he defendant must have committed some act in execution of his purpose." State v. Daniel, *supra* at 573, 574, 48 S.E. at 544, 545.

[9] Texas Bus Lines v. Anderson, 233 S.W.2d 961 (Tex. Civ. App. 1950) (where plaintiff was denied entrance to a bus but refrained from getting near enough to be struck). See also Stark v. Exler, 58 Ore. 262, 117 Pac. 276 (1911), in which, in a civil action for a battery, the court gratuitously says that a civil assault is the intentional attempt to do violence to another.

two species of assault have quite different elements. At common law, criminal assault does not involve knowledge by the plaintiff of the defendant's conduct, as is true of civil assault; the latter, in turn, does not involve an attempt to commit a battery,[10] a usual requirement in criminal assault. It may be that the distinction commonly made in the criminal law between attempts and preparation, throws the cases involving only words into the latter category.[11] On the other hand, without making an exhaustive survey of the cases, I have found a few which support the position that activity by the defendant is evidence, but not the only evidence, of the defendant's intent to strike immediately and of the plaintiff's apprehension.[12] The Advisors for the *Restatement of Torts, Second,* have recommended a statement to that effect.[13]

The second issue involved a far more important matter than the question whether a contemporaneous movement by the defendant is a requirement for a technical assault. By its decision the court has placed itself squarely against the progress made by the courts in the last half century. There is here not merely an interference with the peace of mind for which some other courts allow an action under similar circumstances, even though not resulting in physical harm.[14] The action is not one based upon negligence or other tortious conduct directed towards third persons which causes a mental shock with resulting physical harm to the plaintiff who in some states is denied a cause of action.[15] This result is at least arguable, since otherwise an inadvertent defendant might become liable to a large number of spectators witnessing a catastrophe.

[10] RESTATEMENT, TORTS §§ 21, 28 (1934).

[11] As in Fennell v. State, 164 Ga. 54, 137 S.E. 762 (1927); Merritt v. Commonwealth, 164 Va. 653, 180 S.E. 395 (1935) (not an attempt to point a pistol at plaintiff).

[12] Republic Steel & Iron Co. v. Self, 122 Ala. 402, 68 So. 328 (1915) (stated that whether language constitutes an assault depends upon the manner and tone of the speaker); Haup v. Evenson, 125 Iowa 634, 101 N.W. 520 (1904) (instruction found not bad which stated that assault is a menace by word or act, where there was evidence of an apparent intent to carry ont the threat); Cressey v. Republic Creasoting Co., 108 Minn. 342, 122 N.W. 484 (1909) (instruction that a wrongful threat to do bodily violence with present ability is good).

[13] RESTATEMENT (SECOND), TORTS § 31 (Tent. Draft No. 1 1957): "Words do not make the actor liable for assault unless, together with other acts or circumstances, they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person."

[14] State Rubbish Collectors v. Silignoff, 38 Cal.2d 330, 240 P.2d 282 (1952), in which both compensatory and punitive damages were awarded for the mental suffering with facts similar to the ones here dealt with. To avoid useless litigation, recovery is properly limited to outrageous conduct. Gillianss v. Eastern Air Lines, 194 F.2d 774 (5th Cir. 1952); Wallace v. Shoreham Hotel Corp., 49 A.2d 81 (Munic. Ct. App. D.C. 1946).

[15] Waube v. Warrington, 276 Wis. 603, 258 N.W. 497 (1935) (as a matter of social expediency). The courts are more apt to find liability where the defendant's act, although directed against a third person, is intentionally wrongful. Rogers v. Willard, 144 Ark. 587, 223 S.W. 15 (1920) (assault on plaintiff's husband in plaintiff's presence).

Again, our principal case is not one in which the defendant has been negligent to the plaintiff but has not caused an impact, in which situation the Pennsylvania courts have consistently denied damages for the physical harm resulting from the fear suffered by the plaintiff.[16] Again the result is arguable. Negligence does not necessarily connote personal fault; it may result from a momentary inadvertence, to which all are subject, or from ingrained stupidity, from which one cannot escape. There is danger of fake testimony which, with the aid of partisan expert witnesses, may mislead jurors into making a mountain out of a molehill. Further, if there has been no impact upon the plaintiff, the defendant may not even be aware of the incident for some time and hence be unable to recall it or to get witnesses. It is clear that such cases require careful and expert handling by the courts. But most courts have reached the conclusion that an action should be allowed if the proof is clear.[17]

Whatever we may think about the negligence cases, it is obvious that they afford no precedent for denying recovery in such a case as the present in which the defendants deliberately set about disturbing the plaintiffs' minds for the purpose of causing them serious worry. Beginning at least in 1897, the courts have allowed recovery where a defendant did an act or said words, intended by him to distress the plaintiff and which he should have realized might affect the plaintiff's health. Many of the cases involve misguided "practical jokers."[18] There are also the many cases, involving the recently protected right of privacy, where there may be only bad judgment as to the proper limits to publicizing facts about the plaintiff[19] or the overzealous acts of creditors who exceed the bounds of propriety and whom the debtor can hold liable although he has suffered only chagrin or embarrassment.[20] This type of conduct is bad but certainly far less so than threats with blackjacks. It is arguable that mere threats without resulting physical harm should not be the subject of a civil action. But where the plaintiffs have become ill from the threats (as we must assume from the pleading that they did), the court should not leave them without redress. In fact the court in

[16] This is true even though the evidence of the plaintiff's physical deterioration as a result of the fear is beyond question, as in Bosley v. Andrews, 303 Pa. 161, 142 A.2d 263 (1958), where plaintiff suffered a heart attack caused by fear of defendant's trespassing and threatening bull (a case mentioned by Mr. Justice Musmanno in hopelessly dissenting).

[17] The prevailing view is presented in Orlo v. Connecticutt Co., 128 Conn. 231, 21 A.2d 402 (1941). See the review of cases in 2 HARPER & JAMES, TORTS § 18.4 (1956).

[18] Wilkinson v. Downton, [1897] 2 Q.B. 57 (a "practical joker" told plaintiff that her husband had been badly injured); Bielitzki v. Obadisk, 65 D.L.R. 627 (1922) (similar).

[19] Leverton v. Curtis Publishing Co., 192 F.2d 974 (3d Cir. 1951) (photograph of plaintiff in disheveled clothes, two years after the accident of which she was the victim).

[20] Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956) (said to be an invasion of privacy).

effect is telling the modern highwaymen how to ply their trade without civil liability,[21] except for their plunder. The formula is simple: "Show your blackjacks, but don't move them or touch your victims."

WARREN A. SEAVEY*

Conflict of Laws—Tort and Partial "Release" in Different Jurisdictions—What Law Governs Construction of Instrument.

At common law a release of one joint tort-feasor results in the release of all others. It makes no difference whether the respective acts of the several tort-feasors were in concert, merely concurrent, or even successive;[1] it matters only that the combined acts produced a single, indivisible injury.[2] The reason generally assigned for this result is that a single injury represents a single cause of action, which cannot be split by being released as to one tort-feasor while being preserved as to another. A release is thus regarded as an absolute, unconditional extinction of a cause of action.[3] This reasoning gave rise to the judicial presumption that a release, even if granted to less than all who were (allegedly) jointly responsible for the injury, was executed only in exchange for a complete satisfaction of the claim. It was the view of the courts, therefore, that to allow the injured party to release one joint tort-feasor and subsequently to recover a judgment from another theoretically would permit the victim to recover more than he had lost.[4] Assuming the soundness of this reasoning at the time at which it evolved, it is nevertheless highly questionable whether the use of this irrebuttable presumption is a just method of preventing excessive recoveries now.

[21] I assume that the defendants might have been bound over to keep the peace or been charged with an attempt at extortion.

* Babcock Professor of Law, Wake Forest College. Professor of Law *emeritus*, Harvard University.

[1] Intentional torts by their very definition at common law must have been concurrent in order to give rise to joint tort-feasorship. See Garrett v. Garrett, 228 N.C. 530, 46 S.E.2d 302 (1948); PROSSER, TORTS § 46, n. 29 (2d ed. 1955).

[2] Sheppard v. Atlantic States Gas Co., 72 F. Supp. 185 (E.D. Pa. 1947); Morris v. Diers, 134 Colo. 39, 298 P.2d 957 (1956); PROSSER, *op. cit. supra* note 1, § 46. A few American jurisdictions have attempted to make a common-law distinction (both in negligent and intentional torts) between tort-feasors who act in concert and those whose acts are merely concurrent. Husky Refining Co. v. Barnes, 119 F.2d 715 (9th Cir. 1941) (Idaho law); Bee v. Cooper, 217 Cal. 96, 17 P.2d 740 (1932). There is a considerable variance between the laws of the several jurisdictions as to the effect of a release given to one who is subsequently adjudged not to have been jointly liable with those charged with the injury. See, *e.g.*, Bolton v. Ziegler, 111 F. Supp. 516 (N.D. Ind. 1953); Pellett v. Sonotone Corp., 26 Cal.2d 705, 160 P.2d 783 (1945); Holland v. Southern Pub. Util. Co., 208 N.C. 289, 180 S.E. 592 (1935); Howard v. J. H. Harris Plumbing Co., 154 N.C. 225, 70 S.E. 285 (1911); Harris v. City of Roanoke, 179 Va. 1, 18 S.E.2d 303 (1942); Papenfus v. Shell Oil Co., 254 Wis. 233, 35 N.W.2d 920 (1949).

[3] Roper v. Florida Pub. Util. Co., 131 Fla. 709, 179 So. 904 (1938); PROSSER, *op. cit. supra* note 1, § 46.

[4] Lysfjord v. Flintkote Co., 135 F. Supp. 672 (S.D. Cal. 1955); Morris v. Diers, 134 Colo. 39, 298 P.2d 957 (1956).