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Torts -- Debtor and Creditor -- Intentional Infliction of Fright -- Liability for Resulting Mental and Physical Injury

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named groups from their operation have been held invalid.[27] However, it has been suggested that this does not necessarily preclude classification of different types of assemblies and the requiring of permits only for certain types if the classification is reasonable.[28] In two cases where permits were refused because of the fear of riot or disorder, the action of the issuing authority was upheld,[29] and the ordinance in the instant case was upheld in a state court mandamus proceeding.[30] However, in the light of the other permit cases, these three cases appear to be out of line.

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Torts—Debtor and Creditor—Intentional Infliction of Fright—Liability for Resulting Mental and Physical Injury.

A creditor gave to the defendant, a credit reporting agency, a debt for collection which was owed the creditor by the plaintiff, the operator of a dry-cleaning establishment. The plaintiff was suffering from high blood pressure, due to which he had lost, but was slowly recovering, his sight; to effect a recovery it was necessary that he be free from worry and excitement. The defendant sent the debtor three letters containing threats of action which would be taken by the defendant and the creditor if the debt were not paid; namely, the reporting by the defendant of the plaintiff's "poor pay" record to the members of its credit association, and the institution by the creditor of some of the various legal proceedings open to creditors. The plaintiff suffered a relapse upon receipt of the letters, and sued for damages, alleging malicious intent on the part of the defendant. The defendant's demurrer was sustained in the lower court, but overruled in the circuit court, on the ground that to indulge in conduct intended or likely to

[27] Anderson v. Wellington, 40 Kan. 173, 19 Pac. 719 (1888) (ordinance forbidding parades and assemblages on the streets without consent of mayor except funerals, fire companies, state militia, and United States troops); *In re* Frazee, 63 Mich. 396, 30 N. W. 72 (1886) (ordinance requiring a permit from mayor and councilmen to hold a parade with the exception of funeral and military processions); Commonwealth v. Mervis, 55 Pa. Super. 178 (1913) (ordinances forbidding parades and assemblages on the streets without notifying the police, except the National Guard, fire and police departments, and Grand Army of the Republic); *In re* Garrabad, 84 Wis. 585, 54 N. W. 1104 (1893) (ordinance forbidding marching on certain streets without written consent of the mayor except fire companies, state militia, and funeral processions, and providing that no permit could be refused to any political party having a regular state organization).

[28] People *ex rel.* O'Connor v. Smith, 263 N. Y. 255, 188 N. E. 745 (1934) (ordinance requiring permit only for public worship on the streets and not for other types of assemblages).

[29] Sullivan v. Shaw, 6 F. Supp. 112 (S. D. Cal. 1934) (however, this decision was based also on the fact that the parade for which the permit was requested might congest traffic); Coughlin v. Chicago Park Dist., 364 Ill. 90, 4 N. E. (2d) 1 (1936) (this decision was based partly on the ground that all parties were not properly before the court).

[30] Thomas v. Casey, 121 N. J. L. 185, 1 A. (2d) 866 (Sup. Ct. 1938).

cause physical illness is actionable. The majority of the court passed over the question of the effect of the demurrer as to the plaintiff's allegation of lack of justification, apparently assuming that the effect was to admit the truth of the allegation. However, the dissenting judge was of the opinion that lack of justification not only was not admitted, but that the facts which were admitted would not warrant such a conclusion.[1]

At common law, the only protection which was given to mental tranquillity itself was that afforded in the action for assault, a highly specialized form of intentional harm.[2] However, if the mental disturbance accompanied an independent tortious act, recovery would be allowed for the disturbance, as well as for any physical injury resulting therefrom.[3] Thus, when a creditor engages in conduct which constitutes a recognized tort, such as assault,[4] battery,[5] false imprisonment,[6] libel,[7] slander,[8] invasion of privacy,[9] etc., the primary question is whether the technical requirements of the particular tort alleged have been fulfilled. If so, the accompanying mental suffering may be considered in estimating the damages.[10]

[1] Clark v. Assoc. Retail Credit Men, 105 F. (2d) 62 (App. D. C. 1939).

[2] Braun v. Craven, 175 Ill. 401, 51 N. E. 657 (1898); Spade v. Lynn & B. R. R., 168 Mass. 285, 47 N. E. 88 (1897); Lehman v. Brooklyn City Ry., 47 Hun 355 (N. Y. 1888); Mitchell v. Rochester Ry., 151 N. Y. 107, 45 N. E. 354 (1896); Ewing v. Pittsburgh, C., C., & St. L. Ry., 147 Pa. 40, 23 Atl. 340 (1892); Lynch v. Knight, 9 H. L. Cas. 577 (1861); Victorian Ry. Comm. v. Coultas, 13 A. C. 222 (1888); see Gatzow v. Buening, 106 Wis. 1, 20, 81 N. W. 1003, 1009 (1900); I COOLEY, TORTS (3d ed. 1906) §94 (". . . mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health or reputation."); HARPER, LAW OF TORTS (1933) §§18, 67; RESTATEMENT, TORTS (1934) §46.

[3] Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674 (1901); Holdorf v. Holdorf, 185 Iowa 838, 169 N. W. 737 (1918); Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759 (1868); Larson v. Chase, 47 Minn. 307, 50 N. W. 238 (1891); Beaulieu v. Great Northern Ry., 103 Minn. 47, 114 N. W. 353 (1907); Barbee v. Reese, 60 Miss. 906 (1883); Hickey v. Welch, 91 Mo. App. 4 (1901); Kurpgeweit v. Kirby, 88 Neb. 72, 129 N. W. 177 (1910); Davidson v. Lee, 139 S. W. 904 (Tex. Civ. App. 1911); Newell v. Whitcher, 53 Vt. 589 (1880); Summerfield v. Western Union Tel. Co., 87 Wis. 1, 57 N. W. 973 (1894); RESTATEMENT, TORTS (1934) §47(b); notes (1920) 6 A. L. R. 1062, (1926) 40 A. L. R. 297.

[4] Stockwell v. Gee, 121 Okla. 207, 249 Pac. 389 (1926). In Whitsel v. Watts, 98 Kan. 508, 159 Pac. 401 (1916), the facts would seem to constitute an assault, but the court does not so name it.

[5] Davis v. Lindsay Furniture Co., 19 La. App. 169, 138 So. 439 (1931).

[6] Davidson v. Lee, 139 S. W. 904 (Tex. Civ. App. 1911); Salisbury v. Poulson, 51 Utah 552, 172 Pac. 315 (1918).

[7] Holtz v. National Furniture Co., 57 F. (2d) 446 (App. D. C. 1932); McCravy v. Schneer's, 47 Ga. App. 703, 171 S. E. 391 (1933); Estes v. Sterchi Bros. Stores, 50 Ga. App. 619, 179 S. E. 222 (1935); McClain v. Reliance Life Ins. Co., 150 S. C. 459, 148 S. E. 478 (1929); notes (1919) 3 A. L. R. 1596, (1928) 55 A. L. R. 971.

[8] Galloway v. Cox, 172 S. C. 101, 172 S. E. 761 (1934).

[9] Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927); Judevine v. Benzies Montanye Fuel & Warehouse Co., 222 Wis. 512, 269 N. W. 295 (1936).

[10] Rogers v. Williard, 144 Ark. 587, 223 S. W. 15 (1920), 11 A. L. R. 1115

The problem presented by the principal case is that of intentional infliction of mental disturbance followed by physical injury, no independent tort action existing. *Wilkinson v. Downton*[11] is probably the root of the few pure cases of intentional infliction of mental suffering which are to be found, other than those in which there was an actual assault. It is usually treated as a case of intentional harm, but as is true of practically all of these cases, the physical injury for which recovery was sought was not actually intended, although some injury should have been anticipated by the defendant, and he did intend to do the act which caused the injury. The theory of *Wilkinson v. Downton* may be illustrated by the words of Justice Wright, who wrote the opinion: "The defendant has, as I assume for the moment, wilfully done an act *calculated to cause physical harm* to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, *there being no justification alleged for the act.*"[12] It will be observed that there are two important elements present in this formula: (1) whether there was an undue risk of serious *physical* consequences from the defendant's act, and (2) whether the act of the supposed wrongdoer was justified.[13]

Where the creditor's intentional acts do not constitute a tort in themselves and have resulted in fright alone, or fright followed by physical injury. the cases appear to be split. Those which have allowed recovery have done so not on the *Wilkinson v. Downton* theory, but on the basis that damages may be recovered for mental suffering itself when the defendant's conduct has been wilful, wanton, malicious, wrongful, with an utter disregard of consequences, and would naturally cause *mental*

(1921); Lyons v. Smith, 176 Ark. 728, 3 S. W. (2d) 982 (1928); Kitchens v. Williams, 52 Ga. App. 422, 183 S. E. 345 (1935); Duncan v. Donnell, 12 S. W. (2d) 811 (Tex. Civ. App. 1928); see note 3, *supra*.

[11] (1897) 2 Q. B. 57.

[12] *Id.* at 58. Magruder, *Mental and Emotional Disturbance in the Law of Torts* (1936) 49 HARV. L. REV. 1033, at 1058: "We would expect, then, the gradual emergence of a broad principle somewhat to this effect: that one who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquillity of so acute a nature that harmful physical consequences, might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue."

[13] The formula proposed is really nothing more than the negligence formula with a safety valve tacked on in the way of "justification" to protect a defendant where his act was necessary for the protection of his rights or for the protection of the rights of another. There is need for such protection where the acts of the defendant are necessary, or have positive economic value, and the good to be achieved by the acts is greater than the harm apt to ensue therefrom. The court in *Wilkinson v. Downton*, after finding that the elements of the formula had been satisfied, then *imputed* to the defendant an intention to cause the physical injury.

and/or physical suffering.[14] This "wilful wrong" rule is applied regardless of the existence of physical injury resulting from the mental disturbance. Actually, however, there are very few collection cases where recovery was allowed in the absence of physical injury.[15] Usually there are threats of illegal action made by letter[16] or personally and in a violent manner.[17] One novel method used was the withholding of cremation of the corpse of plaintiff's son.[18] Many plaintiffs suffer miscarriage, or an aggravation of an existing condition easily apprisable by the actor, although the physical injury alleged in the cremation case was merely shock and a loss of weight.

Although some physical injury actually resulted in most of these cases, this rule carried to its logical conclusion, assuming it to mean that intentionally caused mental disturbance is actionable, would lead to ridiculous conclusions; the courts would be flooded with cases involving nothing more than hurt feelings. Therefore, as a practical matter, the rule must contain in it some place for drawing the line.

On the other hand, recovery has been denied in a number of cases even when physical injury has resulted as a direct consequence of the fright. One reason given is that the defendant could not reasonably be expected to have foreseen the *physical* consequences of the fright produced by his allegedly wrongful acts. In one of these cases a landlord used violent language while on the tenant's property, resulting in St. Vitus' dance, and in another a salesman tried to coerce the plaintiff to buy a vacuum cleaner she did not want, resulting in apoplexy.[19] One court places its decision squarely on the ground that there is no recov-

[14] Engle v. Simmons, 148 Ala. 92, 41 So. 1023 (1906); Herman Saks & Sons v. Ivey, 26 Ala. App. 240, 157 So. 265 (1934); American Security Co. v. Cook, 49 Ga. App. 723, 176 S. E. 798 (1934); Interstate Life & Acc. Co. v. Brewer, 56 Ga. App. 599, 193 S. E. 458 (1937); Barnett v. Collection Service Co., 214 Iowa 1303, 242 N. W. 25 (1932); Patapsco Loan Co. v. Hobbs, 129 Md. 9, 98 Atl. 239 (1916); LaSalle Extension University v. Fogarty, 126 Neb. 457, 253 N. W. 424, 91 A. L. R. 1491 (1934); Kirby v. Jules Chain Stores Corp., 210 N. C. 808, 188 S. E. 625 (1936); Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925).

[15] 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 (1934).

[16] Herman Saks & Sons v. Ivey, 26 Ala. App. 240, 157 So. 265 (1934); 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 (1934).

[17] Engle v. Simmons, 148 Ala. 92, 41 So. 1023 (1906); Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 171 S. E. 470 (1933); American Security Co. v. Cook, 49 Ga. App. 723, 176 S. E. 798 (1934); Interstate Life & Acc. Co. v. Brewer, 56 Ga. App. 599, 193 S. E. 458 (1937); Patapsco Loan Co. v. Hobbs, 129 Md. 9, 98 Atl. 239 (1916); Kirby v. Jules Chain Stores Corp., 210 N. C. 808, 188 S. E. 625 (1936).

[18] Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925).

[19] Braun v. Craven, 175 Ill. 401, 51 N. E. 657 (1898) (St. Vitus' dance); Oehler v. Bamberger & Co., 4 N. J. Misc. 1003, 135 Atl. 71 (1926), *aff'd*, 103 N. J. L. 703, 137 Atl. 425 (1927) (apoplexy); *cf.* Doherty v. Mississippi Power Co., 178 Miss. 204, 173 So. 287 (1937).

ery for fright without impact or precedent physical injury,[20] relying on the decision in a practical joke case[21] where the defendant was a half-wit. Another court[22] holds that the defendant did not intend to cause mental suffering, could not have foreseen the fright and physical injury which resulted, and was *justified* in making to the plaintiff a simple statement of purpose based on a clear legal right. In that case, the defendants personally told plaintiff, who was eight months advanced in pregnancy, that if her mortgaged furniture was not paid for they would move it out. This was done in a calm manner in plaintiff's living room. In all but one[23] of the cases denying recovery, on the facts, some justification for the defendant's acts might be found, satisfying the second element of the formula proposed. It would seem, also, that the courts *denying* recovery, by using the foreseeability test have treated the question of *physical injury* caused by fright in the same way that a negligence question would be treated, thus considering the first element of the formula.

In practically all the decided cases dealing with intentionally caused fright, whether collection cases or not, the need for applying the *Wilkinson v. Downton* formula has not arisen. This is because the defendant's conduct has been so apt to cause serious physical consequences that the need for considering justification has been subjugated to the more important duty of the courts to protect the plaintiff's interest in freedom from bodily harm caused by fright. This is probably the reason that the "wilful wrong" rule has been satisfactory in most instances where it has been applied. But in a close case, such as the principal one, where the defendant's conduct is not so clearly "wilful", the question of justification deserves more consideration. The very existence of a debt should give rise to this consideration in the collection cases.

The principal case, although it professed to follow the doctrine of *Wilkinson v. Downton,* failed to consider the question of justification, and held the defendant liable on the grounds of intentional infliction of mental harm which should have been expected to result in serious physical consequences, i.e., the old "wilful wrong" rule. As a matter of fact, however, the debt was not disputed, the threats were merely of legal action, and the tone of the letters was very mild, so that it would seem that the defendant was justified in taking this course of action.

Just how far a creditor may go in dunning a debtor has not yet

[20] Alexander v. Pacholek, 222 Mich. 157, 192 N. W. 652 (1923).
[21] Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335 (1899).
[22] Peoples Finance & Thrift Co. v. Harwell, 82 P. (2d) 994 (Okla. 1938).
[23] Oehler v. Bamberger & Co., 4 N. J. Misc. 1003, 135 Atl. 71 (1926), *aff'd,* 103 N. J. L. 703, 137 Atl. 425 (1927).

been specifically decided: The principal case, although doing lip-service to the right of a creditor to inflict some worry and concern, would seem to restrict the field of action considerably. It is to be hoped that the question of whether the creditor has acted justifiably, for which inquiry there is already precedent,[24] will be given more weight in the future.

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Wills—Compromise of Caveat Proceedings—Right to Share in Proceeds of Compromise.

Plaintiffs and defendants were heirs-at-law of one Smith who died leaving a will under which a $35,000 note was bequeathed to one Brawley, a stranger to the blood. Defendants notified plaintiffs of their intention to contest the will and upon being informed by plaintiffs that they would have nothing to do with the proceedings, filed a caveat. Defendants then effected a secret compromise with the legatee whereby they received $15,000 from him in consideration of their withdrawal from the contest. Plaintiffs brought this action to recover $5,000 claiming that they would have been entitled to one-third of the estate had the will been set aside. *Held,* a contract to compromise a caveat proceeding is valid, and as defendants received the money by virtue of their contract with Brawley, and not by virtue of the laws of descent and distribution, the plaintiffs were not entitled to a share therein.[1]

It is the majority rule that a contest of a will may be compromised by the parties to the proceedings[2] if there is no fraud or collusion involved,[3] and if the parties compromise nothing beyond their own interests.[4] The courts supporting this rule base their holdings on the ground that they do not wish to encourage litigation, and, since the legatees under a will cannot be made to accept their legacy, they are entitled to settle disagreements with parties having a valid claim to a caveat, before a will is probated in solemn form. These courts hold that since caveat proceedings are *in rem,* and there are actually no adverse parties, any

[24] Peoples Finance & Thrift Co. v. Harwell, 82 P. (2d) 994 (Okla. 1938); Barnett v. Collection Service Co., 214 Iowa 1303, 1312, 242 N. W. 25, 28 (1932): ". . . the door to recovery should be opened but narrowly and with due caution. A creditor or his agent has a right to urge payment of a just debt and to threaten to resort to proper legal procedure to enforce such payment."

[1] Bailey v. McLain, 215 N. C. 150, 1 S. E. (2d) 372 (1939).

[2] Dunham v. Slaughter, 268 Ill. 625, 109 N. E. 673 (1915); Baxter v. Stephens, 209 Mass. 459, 95 N. E. 854 (1911); Schoonmaker v. Gray, 208 N. Y. 209, 101 N. E. 886 (1913); Callaghan v. Corbin, 255 N. Y. 401, 175 N. E. 109 (1931); *In re* Seip's Estate, 163 Pa. 423, 30 Atl. 226 (1894).

[3] *In re* Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076 (1903).

[4] *In re* Seip's Estate, 163 Pa. 423, 30 Atl. 226 (1894).