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Sandra Davidson Scott

ABDUCTION OF CHILD BY NONCUSTODIAL PARENT: DAMAGES FOR CUSTODIAL PARENT'S MENTAL DISTRESS

Fenslage v. Dawkins[1]

Two parents divorce. The mother is awarded custody of the children, but she agrees to let them visit their father. He is to return the children but does not. Instead, he flees with them from the jurisidication of the court.

Child-snatching incidents are common, with estimates as high as 100,000 per year.[2] Also common is the mental distress suffered by the aggrieved, custodial parent, but tort actions to recover damages for this mental distress have been very rare. Such tort actions may increase, however, following the decision of the United States Court of Appeals for the Fifth Circuit in *Fenslage v. Dawkins*. The *Fenslage* court affirmed an award totalling $130,000 in actual and punitive damages for the mental distress inflicted on a custodial parent through child snatching.

In *Fenslage*, a mother and father were divorced in Texas, and custody of their two children was awarded to the mother. She moved to Arizona with the children, but agreed to let them visit their father in Texas during the summer. He was then to return them to her in Arizona. Instead, he fled with them to Canada. The jury in the United States District Court for the Northern District of Texas found that the father and some of his relatives had conspired to take and conceal the children outside of Texas, in knowing violation of the custody order, and that the relatives had given false testimony in proceedings in state court and had provided the father with financial and moral support. Following the jury's findings that these acts were intentional and that the resulting mental anguish to the mother was reasonably foreseeable, the district court entered a default judgment against the father and held the defendants jointly and severally liable for $65,000 in compensatory damages. In addition, the court awarded

1. 629 F.2d 1107 (5th Cir. 1980).

2. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978, 979 (1977).

punitive damages of $25,000 against the father, $15,000 against his parents, $15,000 against his brother, and $10,000 against his sister, for a total of $65,000 in punitive damages. The father's relatives appealed,[3] and the United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment.[4]

In its decision that a custodial parent can recover damages for mental distress from persons who wrongfully deprive that parent of the custody of the child, the court of appeals quoted the Restatement (Second) of Torts, section 700: "One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent."[5] That liability includes the parent's mental distress.[6]

Courts have applied section 700 infrequently, although it has been part of the Restatement of Torts since 1938.[7] It was applied in 1940 by the Michigan Supreme Court in *Oversmith v. Lake*,[8] when a jury awarded $150 to a father whose six children were taken into custody, without judicial intervention, by a welfare agent and a juvenile officer who thought the children were neglected.[9] The question of awarding damages for mental distress, however, was not reached.[10] The Michigan Supreme Court did reach that question in 1953 in *Brown v. Brown*.[11] Again applying section 700, the court said that a parent wrongfully deprived of custody may recover for emotional distress.[12] The mother in *Brown* filed suit against six of her in-laws, alleging, *inter alia*, a conspiracy to deprive her of the custody of her two children; the children's father had abducted the

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3. 629 F.2d at 1108-09.

4. *Id.* at 1111.

5. *Id.* at 1109 (quoting RESTATEMENT (SECOND) OF TORTS § 700 (1977)).

6. "'The parent can recover for the loss of society of his child and *for his emotional distress resulting from its abduction or enticement*.'" 629 F.2d at 1109 (quoting RESTATEMENT (SECOND) OF TORTS § 700, Comment g (1977)) (emphasis added by court). The parent also can recover any reasonable expenses incurred in regaining custody of the child or for treating medical conditions resulting from the abduction. 629 F.2d at 1109.

7. RESTATEMENT OF TORTS § 700 (1938) and RESTATEMENT (SECOND) OF TORTS § 700 (1977) and the comments that accompany both are similar.

8. 295 Mich. 627, 295 N.W. 339 (1940).

9. *Id.* at 629, 631, 295 N.W. at 340, 341.

10. "Defendants complain of the trial court's award of damages for plaintiff's 'great grief, worry, humiliation, and anxiety and pain of body and mind' and for the 'element of nervous shock.' We decline to consider this question, as no testimony is set forth in the record." *Id.* at 631-32, 295 N.W. at 341.

11. 338 Mich. 492, 61 N.W.2d 656 (1953).

12. *Id.* at 498, 61 N.W.2d at 659.

children to South Africa. The jury award of $150,000 for conspiracy to deprive her of the custody of her children[13] was affirmed.[14]

In 1963, the California Court of Appeals in *Rosefield v. Rosefield*[15] found that a cause of action did lie against a grandfather for conspiracy with the child's father to abduct and conceal the child. The complaint was brought by the mother and the child through a guardian ad litem.[16] The parents had separated before their daughter's birth, and the mother had physical custody of the baby until the abduction.[17] This child-abduction case is unusual because no divorce proceedings had been filed; thus legal custody of the child had been awarded neither to the mother nor denied to the father. Nevertheless, the court, without precedent, called it legally wrong for the father to abduct the child.[18] In this case, it was the defendant grandfather who cited comment c to section 700, which states that an action for abduction cannot be brought against one parent if the parents are jointly entitled to custody of the child.[19] The court responded that this passage does not deny that it is a legal wrong for a spouse to abduct the child, but only that interspousal immunity would prevent a cause of action. Further, the court said that interspousal immunity was no longer the rule in California and that even if it were, it would not protect a third party, such as a grandfather.[20]

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13. *Id.* at 494-95, 61 N.W.2d at 657. No divorce had been granted at the time of abduction, but after the abduction, an order nunc pro tunc gave the mother exclusive custody of the children. *Id.* at 497, 61 N.W.2d at 658.

14. *Id.* at 504, 61 N.W.2d at 662.

15. 221 Cal. App. 2d 431, 34 Cal. Rptr. 479 (1963). *Rosefield* also is discussed at notes 62-65 and accompanying text *infra*.

16. For a discussion of a child's cause of action, see notes 62-66 and accompanying text *infra*.

17. 221 Cal. App. 2d at 432, 34 Cal. Rptr. at 480-81.

18. "The case seems to be without precedent, but this does not mean that what is obviously an invasion of a mother's legal right is not a legal wrong." *Id.* a 435, 34 Cal. Rptr. at 482.

19. RESTATEMENT OF TORTS § 700, Comment c (1938). RESTATEMENT (SECOND) OF TORTS § 700, Comment c (1977) is virtually identical.

20. 221 Cal. App. 2d at 436, 34 Cal. Rptr. at 483. Interspousal immunity is still recognized in Missouri. *See, e.g.*, Ebel v. Ferguson, 478 S.W.2d 334, 336 (Mo. En Banc 1972); Wyatt v. Bernhoester, 585 S.W.2d 130, 131 (Mo. App., E.D. 1979); Huff v. LaSieur, 571 S.W.2d 654, 655 (Mo. App., St. L. 1978). This immunity, however, applies only to torts committed during the marriage. Interspousal immunity would not preclude a tort action by a divorced custodial parent against a child-snatching ex-spouse, nor would it preclude an action to regain possession of a child when the parents are "living apart" and the custody action is still pending: "[P]ending such adjudication the father or mother who actually has the custody and control of said unmarried minor children shall have the sole right to the custody and control . . . of said unmarried minor children." RSMo § 452.150 (1978). *See also id.* § 452.310.3.

In 1970, the United States Court of Appeals for the District of Columbia found a cause of action for "harboring" against a grandmother in *Hinton v. Hinton*.[21] The plaintiff parents, who went to Europe, left their son with his grandmother. When the parents requested the child's return, he did not return, although it is not clear why. The court did not consider the grandmother's motives. Instead, it quoted section 700, on liability for inducing or preventing a child's return without a privilege to do so,[22] and comment b, which flatly states that "motive or purpose . . . is immaterial."[23] The court also rejected an old doctrine that it is necessary for a parent to suffer a loss of the child's services for an action to lie. Instead, the court said, "We hold with the Restatement . . . 'that the real cause of action is the interference with the relation . . . .'"[24]

The Oregon Supreme Court in 1978 in *McBride v. Magnuson*[25] also expressly rejected the service doctrine as a fiction that has been abandoned. The court cited comment e of section 700 in acknowledging that interference with custodial rights is sometimes necessary for a child's protection.[26] The court rejected a claim of immunity, however, and held that

21. 436 F.2d 211 (D.C. Cir. 1970).

22. *Id.* at 212.

23. *Id.* at 213 (quoting RESTATEMENT OF TORTS § 700, Comment b (1938)). The quoted comment continues, "Thus the actor may be inspired by motives of kindness and affection toward the child but none the less become liable for interfering with the interests of its lawful custodian." 436 F.2d at 213. This language is tempered, however, by comment a, which the court also quotes, which states that a cause of action will not lie against one who "merely gives shelter and sustenance to a child." *Id.* Comment e, which the court did not cite, also extends a limited privilege to rescue a child from physical violence inflicted by a parent. RESTATEMENT OF TORTS § 700, Comment e (1938). For a discussion of RESTATEMENT (SECOND) OF TORTS § 700, Comment e (1977), see note 26 *infra*.

24. 436 F.2d at 213. For an example of a case requiring loss of services as a prerequisite for damages for mental distress, see Magnuson v. O'Dea, 75 Wash. 574, 135 P. 640 (1913). For a history of the loss of services doctrine, see Pickle v. Page, 252 N.Y. 474, 476-82, 169 N.E. 650, 651-53 (1930).

The court in *Hinton* cited the Restatement positon that loss of services is unnecessary for a cause of action. 436 F.2d at 213. Comment d states, "[L]oss of service . . . is not a necessary element of a cause of action. . . . The deprivation to the parent of the society of the child is itself an injury that the law redresses." RESTATEMENT OF TORTS § 700, Comment d (1938).

25. 282 Or. 433, 578 P.2d 1259 (1978).

26. 282 Or. at 435-36, 578 P.2d at 1260. Comment e provides a privilege to rescue a child from parental physical violence. The immunity is limited, however, by the requirement that it seem reasonably likely to the actor that the child would suffer immediate harm and that the action be for the purpose of saving the child from that harm. While a person with legal authorization is privileged to take a child away from an "improper home," a private citizen does not have a privilege "to abduct or entice a child from its parent to save the child from what the actor

a cause of action brought by a parent against a police officer for interference with the parent's right to custody did lie.[27]

In *Oversmith, Brown, Rosefield, Hinton,* and *McBride*, the actions for interference with custodial rights were maintained against a police officer, a welfare agent, in-laws, and grandparents. Comment a to section 700 provides that a custodial parent has a cause of action against one who abducts a child or induces the child to leave the parent, knowing the parent has not consented.[28] This is broad language, providing broad coverage for parents. *Anyone* who interferes with their parental right to custody, regardless of loss of service or intent, is a potential defendant under section 700.

That Missouri would recognize this cause of action if the right circumstances were presented is the conclusion drawn from *Kipper v. Vokolek*.[29] The father filed suit against the mother and stepfather for harboring or enticing from him his two daughters, who were taken to Honduras.[30] The Springfield Court of Appeals concluded that the mother had legal custody of the children and thus rejected the father's claim of a cause of action.[31] But the court said:

> The tort [of interference with custodial rights] may be actionable between parents of the child where, by proper judicial decree, the sole custody of the child has been awarded to one of the parents. In such instances, the parent not awarded custody may be liable to the other for the abduction of his own child, or may be liable to the other if, with knowledge that the child has left the home of the parent having custody against the latter's will, induces the child not to return thereto or prevents it from so doing. Restatement, Torts § 700.[32]

Besides allowing recovery by the custodial parent against the noncustodial parent, it appears that the court also would allow recovery against conspirators who interfered with custodial rights.[33]

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reasonably believes to constitute improper surroundings or immoral influences, nor to afford it advantages superior to those available in its home." RESTATEMENT (SECOND) OF TORTS § 700, Comment e (1977).

27. 282 Or. at 438, 578 P.2d at 1261.

28. RESTATEMENT OF TORTS § 700, Comment a (1938); RESTATEMENT (SECOND) OF TORTS § 700, Comment a (1977).

29. 546 S.W.2d 521 (Mo. App., Spr. 1977).

30. *Id.* at 523, 525.

31. *Id.* at 526-27.

32. *Id.* at 525.

33. The court cited Rosefield v. Rosefield, 221 Cal. App. 2d 431, 34 Cal. Rptr. 479 (1963), for the proposition that "[i]f one parent is guilty of the tort in question, a third person who aids, abets or conspires with the parent tortfeasor may also be liable to the parent who has been wronged." 546 S.W.2d at 525-26. For a discussion of *Rosefield*, see notes 15-20 and accompanying text *supra*.

Section 700 allows recovery for mental distress and other forms of liability in the limited circumstances when one interferes with the custodial rights of a parent. In its narrow range of application, section 700 does allow for broad coverage since "liability" can include, among other things, loss of the child's services, the costs of locating the child, and the child's medical expenses resulting from the abduction, as well as the mental distress of the parent or other lawful custodian.

But even without section 700, the Restatement of Torts still contains the essential machinery for a cause of action for mental distress. Section 46 provides for recovery for mental distress resulting from outrageous conduct: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . . ."[34] A much broader range of circumstances than child abductions, of course, is covered by section 46, although liability is limited to damages for mental distress. As a practical matter, however, costs incurred as a result of child abduction possibly can be recovered in an action incorporating mental distress brought by an aggrieved parent or other lawful custodian under section 46.[35] On the other hand, in the case of an abduction lasting for only a few moments, a custodial parent who was not even aware of the abduction at the time conceivably might be allowed a cause of action under section 700 for nominal damages arising from the abduction, whereas no recovery would be allowed under section 46 without severe mental distress resulting from outrageous conduct. In most child-abduction cases, however, either section 700 or section 46 could be pleaded separately or alternatively by the parent in an action for mental distress resulting from child abduction.

The section 46 cause of action for damages for mental distress stemming from outrageous conduct has been recognized since about 1930.[36] Thus it is not new, but what is new is the broad range of situations to which courts are increasingly applying it.[37] The fluidity of the standards for what

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34. RESTATEMENT (SECOND) OF TORTS § 46 (1965). Section 46 and the comments of the Restatement (Second) of Torts provide a significantly changed and expanded version of RESTATEMENT OF TORTS § 46 (1934) and comments.

35. *See* notes 46-49 and accompanying text *infra*.

36. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 56 (4th ed. 1971).

37. Morrison, *Outrage and Emotional Distress: New Directions In Tort Law*, 34 J. MO. B. 269, 272-73 (1978). *Accord*, Lambert, *Tort Liability for Psychic Injuries: Overview and Update*, 37 A.T.L.A. L.J. 1, 2 (1978). For cases and articles on the tort of outrageous conduct, see *id.* at 2-4; Morrison, *supra*, at 269 *passim*. No physical harm is required for recovery. W. PROSSER, *supra* note 36, at 60; Lambert, *supra*, at 2-4. Comment k says that § 46 is "not . . . limited to cases where there has been bodily harm; and if the conduct is sufficiently extreme and outrageous there may be liability for the emotional distress alone, without such harm." RESTATEMENT (SECOND) OF TORTS § 46, Comment k (1965). But

conduct is sufficiently outrageous to incur liability leaves the tort of mental distress open for expansion by the innovative.[38] Severe mental distress, of course, must be proved, but comment j lightens the burden of proof.[39] It states that the extreme and outrageous character of the defendant's actions is often significant evidence that the distress occurred.[40] Thus, in the case of child snatching, the child's wrongful abduction from the custodial parent could be significant evidence that the parent has suffered severe

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Missouri has required bodily harm for a cause of action to be stated under § 46. *See, e.g.*, Leonard v. Pioneer Fin. Co., 568 S.W.2d 937, 940 (Mo. App., K.C. 1978). The context, however, was not child abduction, which comes replete with its own built-in limitations. *See* note 41 and accompanying text *infra*. Section 46 also dispenses with an intent requirement. Chopin, *Emotional Distress Caused By Outrageous Conduct: A New Tort in Florida*, 54 FLA. B.J. 262, 264 (1980). Reckless conduct is enough to warrant liability. RESTATEMENT (SECOND) OF TORTS § 46, Comment i (1965). Prosser says that in cases allowing recovery, however, there usually is intent either in the sense that the defendant wanted to cause the result or knew the result was substantially certain to follow. But Prosser recognizes that "extreme outrage is broader than intent," thus encompassing recklessness. W. PROSSER, *supra*, at 60. Reckless conduct occurs when a defendant knows there is a high degree of probability, as opposed to substantial certainty, that his action will cause mental distress, but nonetheless acts in conscious disregard of this probability. *Id.*; RESTATEMENT (SECOND) OF TORTS § 46, Comment i (1965). At least one commentator maintains that negligence is enough for liability. *See* Theis, *The Intentional Infliction of Emotional Distress: A Need for Limits on Liability*, 27 DEPAUL L. REV. 275, 290 (1978).

The court ascertains the level of outrageousness that clearly justifies or clearly does not justify recovery, and the jury decides cases on which reasonable people could differ. RESTATEMENT (SECOND) OF TORTS § 46, Comment h (1965).

38. "The law is still in a stage of development, and the ultimate limits of this tort are not yet determined." RESTATEMENT (SECOND) OF TORTS § 46, Comment c (1965). This amorphousness concerns those who prefer well-defined limits. *See, e.g.*, Theis, *supra* note 37. Comment d does provide some limits, as it says that liability has been imposed only when the conduct is "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." In other words, liability is not imposed for petty annoyances. The Restatement depends on the reaction of the average citizen to distinguish the outrageous from the petty. The situation is outrageous, says the Restatement, if on hearing the facts recited the citizen would be so aroused with resentment that he would exclaim, "Outrageous!" RESTATEMENT (SECOND) OF TORTS § 46, Comment d (1965). Theis criticizes comment d as presenting a circular definition of "outrageous." *See* Theis, *supra*, at 288-89. The policy of section 46 is perhaps summed up in comment j, which states, "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965). *See* Morrison, *supra* note 37, at 271.

39. *See* Chopin, *supra* note 37, at 264.

40. RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965).

mental distress. Built-in limitations on recovery for mental distress exist in the case of child snatching, however, because of the limited number of persons who are potential plaintiffs. Only the custodial parent or other lawful custodian may maintain this cause of action; furthermore, the action brought by the lawful custodian is not merely for mental distress, but is also for the rupture of the relationship with the child.[41]

New York has been a leader in allowing parents or other persons with legal custody to recover for mental distress. In 1930 in *Pickle v. Page*,[42] grandparents, who had legal custody of their grandson after their daughter had abandoned him, recovered against a sheriff who, at the daughter's behest, abducted the child.[43] The New York Court of Appeals quoted an old South Carolina opinion in reaching its decision: "The true ground of action is the outrage and deprivation; the injury the father sustains in the loss of his child; the insult offered to his feelings; the heart-rending agony he must suffer in the destruction of his dearest hope . . . ."[44] Damages for "wounded feelings" and punitive damages could be awarded.[45]

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41. Because of these limitations, parental causes of action are "not subject to the objection of innumberable actions based upon mental distress." 1 F. HARPER & F. JAMES, LAW OF TORTS § 8.6, at 627 (1956).

42. 252 N.Y. 474, 169 N.E. 650 (1930).

43. *Id.* at 475-76, 169 N.E. at 650-51.

44. *Id.* at 480, 169 N.E. at 652 (quoting Kirkpatrick v. Lockhart, 3 S.C.L. (1 Brev.) 654 (1807)). The court rejected loss of service as necessary for recovery, holding that "a direct recovery may be had without resort to the fiction that a loss of service has been occasioned." 252 N.Y. at 482, 169 N.E. at 653.

45. 252 N.Y. at 483, 169 N.E. at 653. In Lisker v. City of New York, 72 Misc. 2d 85, 338 N.Y.S.2d 359 (1972), a mother sued the City of New York. Her husband had taken their infant and had given him to the New York Bureau of Child Welfare, which had instructed its home to place the infant under foster care without the mother's consent or an order from the family court. She sought $25,000 for the resulting mental distress. *Id.* at 85-86, 338 N.Y.S.2d at 360-61. The Supreme Court of Queens County said that allowing her to sue for mental distress would not "open the floodgates of litigation" and held that the facts of this case fell within the "spirit of the rules" enunciated in *Pickle*. *Id.* at 88-89, 338 N.Y.S. at 363-64.

New York courts have not reacted favorably, however, to parents seeking damages for violations of visitation rights. In McGrady v. Rosenbaum, 62 Misc. 2d 182, 308 N.Y.S.2d 181 (1970), *aff'd mem.*, 37 A.D.2d 917, 324 N.Y.S.2d 876 (1971), a father sued his ex-wife and her parents because her parents induced and aided her to leave with his son and establish residence in Israel. He asked for, in part, $1,000,000 for mental anguish and $5,000 to compensate him for the money he spent looking for his son. 62 Misc. 2d at 183-84, 308 N.Y.S.2d at 183-84. The Supreme Court of New York County said it was a case of "novel impression," but that a parent wrongfully deprived of his child may recover damages for mental anguish. *Id.* at 186-87, 308 N.Y.S.2d at 186. But in this case, the mother had lawful custody, although the father had weekly visitation rights. *Id.* at 183, 308 N.Y.S.2d at 183. The court concluded that there could be no

In 1978 in *Kajtazi v. Kajtazi*,[46] damages were awarded for mental distress caused by the outrageous conduct of child abduction. The mother, who was seeking a divorce in California, was awarded custody of her son while the divorce action was pending. Her husband, Fabian, abducted their child, who needed surgery for a neurological condition, and fled first to his parents' home in New York and then to Yugoslavia. The mother sought a writ of habeas corpus in the New York Supreme Court of Queens County against Fabian, his brother, and his stepfather. In an initial appearance by Fabian's brother and stepfather, they stated that they did not know where Fabian and the child were; the brother, under oath in a subsequent appearance, admitted he lied. A proceeding for civil and criminal contempt followed, during which the brother announced that Fabian and the child would never return to the United States. The mother then filed an action in the United States District Court for the Eastern District of New York to recover damages for the false imprisonment of her son and for mental suffering.[47] Applying New York law, the court said:

> It is difficult to conceive of intentional conduct more calculated to cause severe emotional distress than the outrageous conduct of the defendant Fabian in surreptitiously abducting the infant, from his mother who had legal custody, and falsely imprisoning him in Yugoslavia. This outrageous conduct constitutes the distinct tort of intentional infliction of mental suffering under New York decisional law.[48]

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damages for violated visitation rights. *Id.* at 188, 308 N.Y.S.2d at 187-88. Nor was the reaction favorable when a parent brought an action only against the other parent. In Friedman v. Friedman, 79 Misc. 2d 646, 361 N.Y.S.2d 108 (1974), the Supreme Court of Queens County dismissed an action brought by a parent for damages for mental distress resulting from violated custody provisions and visitation rights. The court pointed out that *Pickle* and *Lisker* involved both parents and third parties. *Id.* at 647, 361 N.Y.S.2d at 110. The court said, "'The remedy against a spouse who violates a court order respecting custody or visitation by removing the child from the State is by way of contempt or by precluding her standing to challenge the order or to enforce its support provisions, not by an action for damages.'" *Id.* at 647, 361 N.Y.S.2d at 109 (quoting *McGrady*).

In Vermont, however, a cause of action for intentional infliction of severe mental distress under RESTATEMENT (SECOND) OF TORTS § 46 (1965) was recognized for a mother deprived of any contact or communication with her daughter. Sheltra v. Smith, 136 Vt. 472, 475, 392 A.2d 431, 432 (1978). In Illinois, a father was awarded $150,000 under § 46 for the severe mental distress he suffered when intentionally denied visitation rights. Johannes v. Sloan, No. 79-L-169 (Kankakee Cty. Cir. Ct. Mar. 25, 1981).

For the position of RESTATEMENT OF TORTS § 700 (1938) and RESTATEMENT (SECOND) OF TORTS § 700 (1965) on actions between parents, see note 19 and accompanying text *supra*.

46. 488 F. Supp. 15 (E.D.N.Y. 1978).

47. *Id.* at 17-18.

48. *Id.* at 20.

The mother was awarded total damages of over $181,000 for herself and her son from the father, his brother, and his stepfather. Of this award, $14,950 ($50 a day) was for her mental suffering.[49]

Section 46 of the Restatement, like section 700, rarely has been employed. But both sections of the Restatement are available to the aggrieved custodial parent in child-snatching cases to recover damages for mental distress. This remedy has been available in child-snatching cases for more than fifty years, but now with the $130,000 award for actual and punitive damages for the custodial parent's mental distress in *Fenslage v. Dawkins*,[50] perhaps this remedy has come of age.

At a time when tort actions for mental distress are raising the ante in child-snatching cases, the federal government also is entering the child-snatching area. Congress has enacted the Parental Kidnaping Prevention Act of 1980.[51] One of the express purposes of the Act is to deter parental child abduction.[52] Among the features of the Act are: (1) the giving of full faith and credit between state jurisdictions to child custody determinations,[53] and (2) use of the "Parent Locator Service" to enforce child custody determinations.[54] The effect of the Parental Kidnaping Prevention Act on recovery for mental distress is serendipitous. The Act was not passed to enable the custodial parent to collect damages for mental distress, but the Parent Locator Service, which locates fugitive parents, increases the threat of a large damage suit for mental distress.

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49. *Id.* at 20-21. The court awarded the son $10,980 actual damages for false imprisonment and $50,000 punitive damages. The mother was awarded $14,950 for loss of services and wounded feelings, $500 for personal expenses, $5,000 for legal expenses incurred while trying to regain her son, and $100,000 in punitive damages for the abduction. *Id.* at 21-22.

50. For a discussion of the facts in *Fenslage*, see notes 3-6 and accompanying text *supra*.

51. Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3568-73 (1980). This is the federal version of the Uniform Child Custody Jurisdiction Act (U.C.C.J.A.). In Missouri the U.C.C.J.A., RSMo §§ 452.440-.550 (1978 & Cum. Supp. 1980), was adopted in 1977. *See* Krauskopf, *Child Custody Jurisdiction under the U.C.C.J.A.*, 34 J. MO. B. 383, 385 (1978). Forty-six states have adopted the U.C.C.J.A., most within the last few years. S. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 15 (1981). This book provides an extended discussion of the U.C.C.J.A.

52. Pub. L. No. 96-611, § 7(c)(6), 94 Stat. 3568 (1980).

53. *Id.* at § 8, 94 Stat. 3569-71.

54. *Id.* at § 9, 94 Stat. 3571-73. The Act also makes clear the congressional intent that 18 U.S.C. § 1073 (1976), which makes interstate or international flight in order to avoid prosecution a federal offense, applies to parental kidnaping where state law makes it a felony. Pub. L. No. 96-611, § 10, 94 Stat. 3573 (1980). For a brief evaluation of the Act, see Shutter, *Parental Kidnaping Prevention Act—Panacea or Toothless Tiger?* 55 FLA. B.J. 479 (1981).

Other possibilities for combating child snatching are available. As *Kajtazi*[55] demonstrates, an action for false imprisonment of the child is one possibility. An action for the mental distress of the custodial parent can combine with other tort actions, such as false imprisonment, to enhance damages. An ever-present danger for child-snatching parents is contempt proceedings for violating court custody orders. In response to the increasing problem of child snatching, many jurisdictions have passed or stiffened laws making parental child snatching a crime;[56] Missouri law makes interference with custody a crime.[57]

Unusual circumstances in child-abduction cases may lend themselves to unusual possibilities for causes of action available to the innovative advocate. For example, in *McEvoy v. Helikson*,[58] the Oregon Supreme Court allowed an action for malpractice and negligence against an attorney brought by a client's ex-husband. The plaintiff father was awarded custody of his child by a divorce decree, but the mother, a citizen of Switzerland, was in possession of the child because of a subsequent court order giving her temporary custody. Under court order, the defendant attorney held the mother's passport in escrow and agreed not to return it until she returned the child. He gave the passport to the mother without her returning the child, and she fled to Switzerland, child in tow.[59] The court concluded that a factfinder could find that the mother's conduct was reasonably foreseeable. Citing *Pickle v. Page*,[60] the court said that the infringement of the father's legal right to custody was the subject of the action, and that, if he established his allegations, he would be entitled to recover for mental distress.[61]

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55. For a discussion of *Kajtazi*, see notes 46-49 and accompanying text *supra*.

56. Some states have felony provisions for parental child abduction. *See, e.g.*, CAL. PENAL CODE §§ 278.5, 280 (West Cum. Supp. 1981); ILL. ANN. STAT. ch. 38, § 10-5 (Smith-Hurd 1979); N.Y. PENAL LAW § 135.50 (McKinney 1975); VA. CODE § 18.2-47 (Cum. Supp. 1981). For a table of the criminal statutes in the fifty states and their text, see S. KATZ, *supra* note 51, at 155-94. In 1978, legislation did pass the United States Senate that would have made child snatching a federal offense. S. 1437, 95th Cong., 2d Sess. § 1624 (1978). *See also* Evaschuk, *Abduction of Children by Parents*, 21 CRIM. L.Q. 176, 191-93 (1978). The Parental Kidnaping Act of 1980, however, does not contain such a provision. For a discussion of the Act, see notes 51-54 and accompanying text *supra*.

57. RSMo § 565.150 (1978). The purpose of § 565.150.2, which makes removing an abducted child from Missouri a felony, presumably was to permit extradition. *See* Krauskopf, *supra* note 51, at 392 nn.6-7. For the effect of state felony statutes under the Parental Kidnaping Prevention Act of 1980, see note 54 *supra*.

58. 277 Or. 781, 562 P.2d 540 (1977).

59. *Id.* at 783-85, 562 P.2d at 541-42.

60. For a discussion of *Pickle*, see notes 42-45 and accompanying text *supra*.

61. 277 Or. at 789, 562 P.2d at 544.

In *Rosefield v. Rosefield*,[62] the California Court of Appeals held that a child, represented by her guardian ad litem, did have a cause of action against her grandfather who, along with her father, abducted her from her mother.[63] The plaintiff child was "entitled to the society and care, and protection and affection of her mother," the court said.[64] The child's cause of action was for deprivation of motherly care.[65]

An action such as that maintained by the child in *Rosefield* would perhaps fall into the category of a more amorphous tort sometimes called a "prima facie" tort. Section 870 of the Restatement (Second) of Torts states, "One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability."[66] In states where interspousal immunity is not a bar,[67] this cause of action could be used by a parent, such as the mother in *Rosefield*,

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62. 221 Cal. App. 2d 431, 34 Cal. Rptr. 479 (1963). For more on *Rosefield*, see notes 15-20 and accompanying text *supra*.

63. The court said that for a "willful and malicious tort," a child does have a cause of action, even against a parent. If there is no parental immunity, then *a fortiori* there is no immunity for a third party. 221 Cal. App. 2d at 437, 34 Cal. Rptr. at 484.

64. *Id.* at 436, 34 Cal. Rptr. at 483.

65. *Id.* at 437, 34 Cal. Rptr. at 484. In a related matter concerned with children's rights, in Burnette v. Wahl, 284 Or. 705, 588 P.2d 1105 (1978), the Supreme Court of Oregon held that a minor child cannot sue a parent who abandons the child for the mental distress that results. *See Minor Child Has No Cause of Action Against Parent for Emotional Harm Caused by Abandonment*, 58 WASH. U. L.Q. 189 (1980); *Intentional Acts and Omissions of a Parent Amounting to Criminal Abandonment and Nonsupport of a Minor Child Do Not Give Rise to a Cause of Action in Tort on Behalf of a Child Against his Parent for Purely Psychological Injuries*, 48 U. CIN. L. REV. 940 (1979). In Strode v. Gleason, 9 Wash. App. 13, 510 P.2d 250 (1973), the Washington Court of Appeals held that a parent does have a cause of action against third parties who maliciously alienate a minor child's affections, and in dictum, the court also stated that a minor may sue a third person who wrongfully induces a parent to desert the child. *Id.* at 19-20, 510 P.2d at 254. Thus, some courts will not allow a child to sue a parent for the mental distress suffered from abandonment, while other courts allow the child to sue a third person who induces the parental abandonment.

Missouri rejects alienation of affection suits by children against third parties. In Hale v. Buckner, 615 S.W.2d 97 (Mo. App., E.D. 1981), the court held that a four-year-old boy failed to state a cause of action against a third party who allegedly alienated the affections of his father. The court said that rejection is the majority rule and cited 13 decisions in accord and 4 contrary decisions from other states. *Id.* at 97-98.

66. RESTATEMENT (SECOND) OF TORTS § 870 (1977).

67. For a brief discussion of interspousal immunity in Missouri, see note 20 *supra*.

who wanted to maintain an action against a child-snatching spouse even though no divorce proceedings had commenced. Also, if joint custody had been awarded to divorced spouses and one parent abducted a child, an action for prima facie tort could lie.[68]

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68. States differ widely in their attitudes on joint custody. In California, joint custody is now preferred: "There shall be a presumption . . . that joint custody is in the best interest of a minor child where the parents have agreed to an award of joint custody . . . ." If the court fails to award joint custody, it must state its reasons. CAL. CIV. CODE § 4600.5(a) (West Cum. Supp. 1981). In Michigan, joint custody is acceptable. Wilcox v. Wilcox, 100 Mich. App. 75, 83-84, 298 N.W.2d 667, 670 (1980). In Florida, the law is "well settled" that "split custody provisions . . . are strongly disfavored and ordinarily may not be sustained." Bienvenu v. Bienvenu, 380 So. 2d 1164, 1165 (Fla. Dist. Ct. App. 1980). In Missouri, joint custody awards have been held void. Cradic v. Cradic, 544 S.W.2d 605, 607 (Mo. App., Spr. 1976). Further, without an award of custody to one parent or the other, divorce decrees in Missouri have been held not to be a final judgment and hence unappealable. *See, e.g., In re* Marriage of Allen, 570 S.W.2d 352, 353 (Mo. App., Spr. 1978). *See generally* Freed & Foster, *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229, 233-37 (1981).

The phrase "joint custody," however, may be used in at least two different senses, and a jurisdiction may accept one sense of the phrase while rejecting another. Joint "legal" custody does not necessarily mean joint "physical" custody. In California, joint custody is defined as "an order awarding custody of the minor . . . children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the . . . children of frequent and continuing contact with both parents." But the law adds that the court "may award joint legal custody without awarding joint physical custody." CAL. CIV. CODE § 4600.5(c) (West Cum. Supp. 1981). In Michigan in *Wilcox*, an award of joint legal custody was upheld, while an award of "alternate or joint physical custody," which provided that parents would exchange minor children every Friday, was overturned. 100 Mich. App. at 86, 298 N.W.2d at 671.

Even with an award of joint custody, a parent may be found guilty of violating laws against child abduction. In People v. Harrison, 82 Ill. App. 3d 530, 402 N.E.2d 822 (1980), a father who abducted his children to Mississippi was found guilty of child abduction under ILL. ANN. STAT. ch. 38, § 10-5 (Smith-Hurd 1979). He had been awarded joint custody of his children, with physical custody of the children granted to the mother and reasonable visitation rights granted to him. The Illinois Court of Appeals said that joint custody gives "equal powers, rights, and duties" to parents and that "neither party could remove the children without infringing on the powers, rights, and duties of the other." 82 Ill. App. 3d at 530-31, 402 N.E.2d at 823-24.

RESTATEMENT (SECOND) OF TORTS § 700, Comment c (1977) states, "When the parents are by law jointly entitled to the custody and earnings of the child, no action can be brought against one of the parents who abducts or induces the child to leave the other." It makes no distinction between legal and physical custody. But section 870 could be used when joint custody was awarded if the abducting parent's injurious action was "generally culpable and not justifiable."

For varying perspectives on the desirability of joint custody, see Gouge, *Joint*

Missouri has recognized prima facie tort as a cause of action in *Porter v. Crawford & Co.*[69] The Missouri Court of Appeals for the Western District concluded in *Porter* that Missouri should adopt the prima facie tort doctrine, observing that the doctrine is consistent with the Missouri Constitution, article I, section 14, which provides for a "'certain remedy for every injury to person, property or character.'"[70] Citing section 870 repeatedly, the court said that "Missouri has not been reluctant to adopt new forms of action in tort based on Restatement principles."[71] The court rejected the view that adopting this tort would precipitate a flood of litigation.[72] It set forth these elements, gleaned from case law as well as the Restatement, for liability under prima facie tort theory: "(1) Intentional *lawful* act by the defendant. (2) An intent to cause injury to the plaintiff. (3) Injury to the plaintiff. (4) An absence of any justification or an insufficient justification for the defendant's act."[73] The requirements of this tort could be met by a child in Missouri abducted from one parent by the other when no divorce proceedings between the parents have commenced. The abduction would be a lawful act in that both parents would be entitled to custody of the child. As prima facie tort is an intentional tort, parental immunity may not apply in Missouri; the law on parental immunity is not clear.[74] Interspousal immunity, however, would prevent a parent from bringing a prima facie tort action against an abducting spouse in Missouri.[75]

Custody: A Revolution in Child Custody Law?, 20 WASHBURN L.J. 326 (1981); Koenig, *Joint Custody: A Viable Alternative*, 60 MICH. B.J. 170 (1981); Levy & Chambers, *The Folly of Joint Custody*, 3 FAM. ADVOCATE 6 (1981); Trombetta, *Joint Custody: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes*, 19 J. FAM. L. 213 (1981).

69. 611 S.W.2d 265 (Mo. App., W.D. 1980).

70. *Id.* at 269, 272 (quoting MO. CONST. art. I, § 14).

71. *Id.* at 272.

72.

> The concern implicit or expressed, that the creation of a new theory of tort liability pursuant to the guideline of Section 870 Restatement (Second) of Torts, will result in a flood of litigation, is unfounded. The burden of proof upon the plaintiff to show an intent to injure, not merely an intentional act, as well as the preservation of the right of the defendant to plead and prove a justification for the act, make it unlikely that the theory will be subject to abuse.

Id.

73. *Id.* at 268 (emphasis added).

74. For a discussion of Missouri's confused law on parental immunity, see Kohler v. Rockwell Int'l Corp., 600 S.W.2d 647, 648-49 (Mo. App., W.D. 1980).

75. For a brief discussion of interspousal immunity in Missouri, see note 20 *supra*.

When parents are living apart and a divorce action is pending, a prima facie tort action would not be available as the parent in possession of the child would have a legal right to the child; abduction of the child, therefore, would be an unlawful act. *See id.*; note 57 and accompanying text *supra*. A prima facie tort

For a custodial parent or other person with a legal right to a child's custody, an action for mental distress can be an effective means for seeking damages from a child-snatching parent or conspirator. Mental distress as a cause of action can work in tandem with other proceedings and causes of action—contempt proceedings, criminal proceedings where available, false imprisonment actions on behalf of the child, perhaps prima facie tort actions by the child against the abducting parent, and possibly more exotic causes of action made available by unusual circumstances. Of course, when the abducting parent cannot be located and when there are no conspirators to be reached, an injured parent will simply suffer a wrong without a remedy. Even when damages can be collected from conspirators, the plaintiff parent may get the money but not the child if the abducting parent and abducted child cannot be located. Perhaps with the passage of the Parental Kidnaping Prevention Act of 1980,[76] instances of unlocated parents and children will decrease.[77] Problems for recovery of both damages and children will remain most serious when the parent leaves the country with the child.[78] But for a child-snatching parent who can be located, an action for damages for the mental distress inflicted on the custodial parent should be sobering. Most imporant, the threat of large damage awards, both punitive as well as actual, combined with the increased threat of discovery provided by the Parent Locator Service in the Parental Kidnaping Prevention Act of 1980, should deter future child snatchers.[79] In turn, this deterrence can promote peace of mind for the custodial parents and for the children.

SANDRA DAVIDSON SCOTT

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action requires as an element that the act be *lawful. See* note 73 and accompanying text *supra.*

76. For a discussion of the 1980 Act, see notes 51-54 and accompanying text *supra.*

77. For information on private organizations dedicated to helping parents locate their abducted children, see Davidson, *When Parents Kidnap Their Own Children*, U. S. NEWS & WORLD REP., Mar. 30, 1981, at 67.

78. On international conferences to help solve problems caused by international child abductions, see Comment, *Law and Treaty Responses to International Child Abductions*, 20 VA. J. INT'L L. 669, 688-97 (1980).

For the problems of aliens seeking custody of children in the United States, *see, e.g.*, Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978) (Vietnamese grandmother and uncle seeking custody of "Operation Babylift" children in foster home); Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (Lebanese father seeking custody of daughter).

79. "Although the remedy of a tort action has been sparingly used in child custody cases where one party wrongfully takes a child . . . , it may become an effective sanction under favorable circumstances. The chance that punitive damages may be obtained should have a deterrent effect upon people of means." Foster, *Tortious Interference with Parent-Child Relation*, 13 TRIAL LAW. Q., Spr. 1979, at 93.