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A RE-EXAMINATION OF THE BASIS FOR LIABILITY FOR EMOTIONAL DISTRESS

FOWLER V. HARPER AND MARY COATE MCNEELY

It may seem like threshing old straw to consider anew the problem of liability for emotional distress in the light of the very considerable learning that has developed around the subject.[1] Nevertheless, it may be that further analysis and synthesis will disclose a coherence in the constantly increasing body of material that has not yet been recognized.

It is true, of course, that all emotional disturbances are at the same time physiological so that the distinction between emotional distress and physical harm, as usually drawn by the courts, may not be strictly scientific.[2] And yet, for the practical business of the law, it is well taken. A difference in degree rather than kind, the distinction may well be the basis for different rules of recovery. Although emotional distress is a physiological harm, it sufficiently differs from physical harm, not primarily emotional, that it is not surprising to find courts still contrasting the two and it is quite likely that they will continue to do so.[3]

Most discussions of this problem have proceeded upon the assumption that the interest invaded has been the plaintiff's interest in peace of mind, emotional tranquillity, or freedom from emotional disturbances. This analysis, of course, consists largely in describing the interest in terms of its invasion. It is hardly to be supposed that an analysis of this character will make the decisions more intelligible. An interest has been described as an object of human desire.[4] The existence of an interest is a matter of fact. Whether an interest, ex-

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[1] Throckmorton, *Damages for Fright* (1921) 34 Harv. L. Rev. 260; Bohlen, *Right to Recover for Injury Resulting From Negligence Without Impact* (1902) 41 Am. L. Reg. (N.S.) 141; Goodrich, *Emotional Disturbance as Legal Damage* (1922) 20 Mich. L. Rev. 497; Wilson, *The New York Rule as to Nervous Shock* (1926) 11 Corn. L. Q. 512; Green, *"Fright" Cases* (1933) 27 Ill. L. Rev. 761; Bohlen and Polikoff, *Liability in New York for Physical Consequences of Emotional Disturbance* (1932) 32 Col. L. Rev. 409; Hallen, *Damages for Physical Injuries Resulting From Fright or Shock* (1933) 19 Va. L. Rev. 253; Magruder, *Mental and Emotional Disturbance in the Law of Torts* (1936) 49 Harv. L. Rev. 1033.

[2] See Goodrich, *Emotional Distress as Legal Damage* (1922) 20 Mich. L. Rev. 497.

[3] *Cf.* the able discussion in Hickey v. Welch, 91 Mo. App. 4 (1901), especially pp. 9, 10.

[4] Restatement of Torts (1934) §1.

isting in fact, is to receive legal protection is a matter of law. So too, whether an interest existing in fact is invaded is a matter of fact, although whether such a harm is to be regarded as a legal injury is a matter of law.[5] Interests may be invaded in several ways. One such way of invading certain interests is by conduct which induces emotional distress. Emotional distress may be the means of invading the interest or it may be the sole harm caused by the invasion. Very little attention has been paid to the interests invaded through emotional disturbances. Society places different values on different interests and therefore extends legal protection to many interests which it denies to others. It may be that a grouping of the cases according to the interest invaded will indicate definite tendencies, subject to satisfactory rationalization.

The Interest in Bodily Security

The interest in bodily security may be thought of as sufficiently broad to include not only the security of the physical person but also peace of mind with respect thereto. Thus, apprehension or fear of bodily harm is as much an invasion of this interest as is illness or other actual harm to the physical being. The emotional disturbance caused by physical danger is itself a violation of the interest in bodily security. This emotional distress, however, may and frequently does in turn produce illness or other bodily harm. In such cases the person actually suffers the same general type of harm, the fear or apprehension of which produced the emotional distress. Although perhaps escaping the precise sequence of events which was primarily anticipated, the person has been subjected to physical harm which in many instances a reasonable man might readily have foreseen as at least a secondary danger. In such a situation one who causes this two-fold risk is hardly in a position to demand immunity because the second, rather than the first aspect of the risk in fact materialized.

If the actor intentionally created the threat of fear or apprehension, or if he actually sought to inflict direct physical injury upon the other, the common law has for centuries allowed a recovery for the emotional disturbance under the formula of assault.[6] The intentional misconduct of the defendant, manifestly creating a risk of direct bodily harm to the other and normally causing an increased risk of apprehension thereof, coupled with the inevitable threat to the pub-

[5] *Id.* §7.

[6] 42 Edw. III, 7 pl. 25 (1368); 45 Edw. III, 24 pl. 35 (1371); Tombs v. Painter, 13 East 1 (1810); Lewis v. Hoover, 3 Blackf. 407 (Ind. 1834); Handy v. Johnson, 5 Md. 450 (1854).

lic peace and order constitutes one of the starting points of the common law of torts. As a result of the hardening into rigid form of the rules governing assault, the law did not readily give redress where the harm apprehended was not immediate. Today, however, it seems that the emotional disturbance resulting from deliberate and intentional threats of future bodily harm constitutes the basis for a recovery if the emotional distress is sufficiently acute and the defendant's conduct is wholly unreasonable. The requirement of immediacy of the threatened harm seems to have been an arbitrary condition imposed to insure the gravity of the situation. When a plaintiff's peace of mind for his personal safety is intentionally disturbed by conduct which, while not threatening instant harm, is equally outrageous, the plaintiff may recover although no physical injury is actually sustained.[7]

Where, however, the risk is unintentionally though unreasonably created, the law has been slow to crystallize. Less than fifty years ago respectable courts hesitated to allow the plaintiff to recover for negligence where illness and other bodily harm had been induced by fear for his personal safety, even though he had actually sustained a battery at the time of the mental or emotional disturbance.[8] The legal

[7] In Wilson v. Wilkins, 181 Ark. 137, 25 S.W. (2d) 428 (1930), the plaintiff recovered from defendants who, after accusing him of theft, threatened him with physical violence if he did not leave the community within ten days. The plaintiff with his family actually left. The jury returned the following verdict, "We, the jury, find for the plaintiff in the sum of $100 for mental suffering." The verdict and judgment were upheld. Said the court, "There was a willful intimidation of his right to personal security and right of private property by causing him to leave his home by threats and intimidation. Mental suffering forms the proper element of damages in actions for willful and wanton wrongs and those committed with the intention of causing mental distress."

In Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 171 S.E. 470 (1933), recovery for emotional disturbance was allowed against a defendant whose servants while seeking to collect a debt from the plaintiff used threatening and boisterous language and displayed a gun. The court pointed out that such conduct was likely to result in mental suffering, physical or mental impairment, in either case, subjecting the defendant to liability. So too, in American Security Co. v. Cook, 49 Ga. App. 723, 176 S.E. 798 (1934), recovery was allowed for mental suffering and embarrassment caused by the defendant's profane and boisterous demand for the payment of a debt. The court pointed out that while no recovery might be had for mental disturbances resulting from negligence, the rule was otherwise in the case of willful wrong or trespass.

In Whitsel v. Watts, 98 Kan. 508, 159 Pac. 401 (1916), the defendant came to the plaintiff's home in her husband's absence, in company with the constable, to take possession of hogs on which he held a mortgage. When the plaintiff refused to surrender the hogs, the defendant jumped from the buggy, shook his fist at the plaintiff and verbally abused her. She recovered for fright and ensuing illness. The court pointed out that the defendant's acts did not constitute a technical assault.

[8] Haile v. Texas & P. R.R., 60 Fed. 557 (C.A.A. 5th, 1894); Spade v. Lynn & B. R.R., 168 Mass. 285, 47 N.E. 88 (1897), 172 Mass. 488, 52 N.E. 747 (1899).

injury began and ended with the battery and its consequences.[9] Generally, however, there was a disposition near the beginning of the present century to permit recovery for all bodily harm, including that brought about by the emotional distress provided there was the technical peg of a physical impact upon which to hang recovery. More recently, perhaps influenced in part at least by cases allowing recovery for physical harm sustained through efforts to flee or otherwise escape a peril created by the defendant's negligence,[10] the requirement of an initial impact has been relaxed. The force of the reason, made classic by Justice Holmes, for denying recovery for emotional distress and its physical consequences unless it had been preceded or accompanied by some sort of physical contact with the plaintiff's person has steadily been losing ground.[11] It is now the definite weight of authority that a plaintiff who has been subjected to an unreasonable risk of physical injury to his own person by a negligent, reckless, or intentional wrongdoer may recover for physical illness induced by alarm or by fright thus negligently engendered even though the plaintiff escaped the harm directly threatened by the defendant's misconduct.[12] Recovery is based upon the unreasonableness

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[9] "The wrong to the plaintiff, if any, began with the battery; and it is for the consequences of the battery only that the defendant is liable . . ." Spade v. Lynn R.R., 172 Mass. 488, 490, 52 N.E. 747, 748 (1899).

[10] Tuttle v. Atlantic City R.R., 66 N.J.L. 327, 49 Atl. 450 (1901), in which the plaintiff fell and sustained injuries in attempting to escape from a runaway street car derailed by the defendant's negligence. Twomley v. Central P. R.R., 69 N.Y. 158 (1877), in which the plaintiff, a passenger in the defendant's car, injured himself by jumping from the car when the defendant's servant negligently drove it in front of an approaching train. Fahy v. Director General of R.R., 235 Mass. 510, 126 N.E. 724 (1920), in which the plaintiff was injured when he jumped from an automobile to save himself from injury by the defendant's train.

[11] ". . . recognizing as we must the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think that when the reality of the cause is guaranteed by proof of a substantial battery of the person there is no occasion to press further the exception to general rules." Homans v. Boston Elev. R.R., 180 Mass. 456, 458, 62 N.E. 737 (1902). Previously, it had been held in Massachusetts that visible physical illness resulting from nervous shock alone could not be the basis for recovery because of the "notion of what is practicable". Spade v. Lynn & B. R.R., 168 Mass. 285, 47 N.E. 88 (1897). See Restatement of Torts (1934) Caveat to §436.

[12] Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935); Purcell v. St. Paul C. R.R., 48 Minn. 134, 50 N.W. 1034 (1892); Mitnick v. Whalen Bros., 115 Conn. 650, 163 Atl. 414 (1932); Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933); Central of G. R.R. v. Kimber, 212 Ala. 102, 101 So. 827 (1924); Hanford v. Omaha & C. B. St. R.R., 113 Neb. 423, 203 N.W. 643 (1925); Sundquist v. Madison R.R., 197 Wis. 83, 221 N.W. 392 (1928); Netusil v. Novak, 120 Neb. 751, 235 N.W. 335 (1931), 122 Neb. 749, 241 N.W. 531 (1932); Chiuchiolo v. New England Tailors, 84 N.H. 329, 150 Atl. 540 (1930); Salmi v. Columbia & N. R.R., 74 Ore. 200, 146 Pac. 819 (1915); Sternhagen v. Kozel,

of the defendant's conduct in creating a risk of emotional disturbance of such a character as will be likely to result in physical illness or disability. If the defendant's acts were justifiable in view of the circumstances, determined by considering the social utility of his conduct and the triviality of the risk of emotional disturbance to others, there is no negligence.[13] Moreover, the emotional distress must be within the ambit of the risk thereof. A disturbance totally outside the area of apprehension of foreseeability is irrelevant and will not entail liability. Thus, in *Mahoney v. Dankwart*,[14] recovery was denied for the plaintiff's extreme fright and nervous disorder resulting

40 S.D. 396, 167 N.W. 398 (1918); O'Meara v. Russell, 90 Wash. 557, 156 Pac. 550 (1916); Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440 (1918).

It has been held that there may be a recovery for physical injuries sustained through fright induced by conduct of the defendant which subjects him to liability without fault. Thus, in Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935), the plaintiff recovered for injuries sustained in tripping and falling in an effort to escape from a baboon which the defendant kept in his private zoo. The court pointed out the common-law rule that one harbors a wild animal at his peril. This was combined with the rule, usually applied in negligence cases, that there may be recovery for emotional distress and resulting physical harm if the emotional disturbance was caused by the defendant's tortious conduct and if the distress was of character such as is likely to result in physical harm.

[13] In Cherry v. General Petroleum Co., 172 Wash. 688, 21 P. (2d) 520 (1933), the plaintiff sought recovery for nervous and physical impairment resulting from physical exertion in an attempt to remove her personal property including heavy articles of furniture from a building endangered by defendant's withdrawal of lateral support from the building. Recovery was denied on the ground that the facts disclosed no emergency reasonably demanding immediate removal of the furniture. The same court had previously allowed recovery for illness resulting from fright caused by the defendant's blasting operations which threw a stump against the plaintiff's house. The court distinguished the two cases on the difference in the gravity of the risk of emotional disturbance. "Respondent relies upon the case of O'Meara v. Russell, 90 Wash. 557, 156 Pac. 550, L.R.A. 1916E, 743, in which a recovery was allowed for damages resulting from fright occasioned by a blast which threw a stump a considerable distance and against the plaintiff's house. It was correctly held that pain and suffering resulting from fright constitute a proper element of damage, although no physical violence be done to the plaintiff's person, provided that 'the injury is the proximate result of the negligent act, or is the natural and probable consequence thereof.' The violent throwing of a stump against a house might well cause such a shock to the nervous system of a person standing nearby, and in apparent immediate danger of being struck, that serious damage might result, and the person who occasioned the injury should be held liable therefor. The plaintiff heard the blast and testified that she saw the stump coming in her direction. She thought it would strike her, and while it did not do so, it struck the house a few feet above her head. This situation constituted an immediate physical invasion of the plaintiff's personal security, which she could not avoid, an entirely different situation from that here presented. In the case cited, the shock to the plaintiff's nerves was practically simultaneous with the blast, the actions of the plaintiff (overexertion in leaving the place of danger) were spontaneous and not the result of deliberation or conscious volition, and were natural reactions to the situation". [172 Wash. at 697-698, 21 P. (2d) at 523-524]

Cf. Restatement of Torts (1934) §313.

[14] 108 Iowa 321, 79 N.W. 134 (1899).

not so much from the defendant's negligent blasting as from the alarm on the part of the plaintiff's aged mother caused thereby.

When fear or nervous shock is induced by a danger not to the plaintiff but to a third person, it seems that resulting physical illness may be made the subject of recovery if the defendant intended to inflict injury upon the third person or to threaten the third person under circumstances likely to cause serious emotional distress to the plaintiff, as, for example, if the threats or injuries were perpetrated in the plaintiff's presence.[15] If, however, the defendant's conduct was merely negligent toward the third person, the tendency seems to be to deny recovery unless there was also a threat to the plaintiff's physical

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[15] Recovery was allowed in Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890), where the defendant assaulted a negro in the plaintiff's presence; in Jeppsen v. Jensen, 47 Utah 536, 155 Pac. 429 (1916), where the defendant, with pistol in hand, threatened to kill the plaintiff's husband in the plaintiff's presence; in Lambert v. Brewster, 97 W. Va. 124, 125 S.E. 244 (1924), where the defendant attacked the plaintiff's father in the plaintiff's presence; in Watson v. Dilts, 116 Iowa 249, 89 N.W. 1068 (1902), where the defendant entered the plaintiff's home at night and the plaintiff, believing the defendant a burglar, witnessed an apparent assault on her husband; [*Contra*: Pettet v. Thompson, 33 Ga. App. 240, 125 S.E. 779 (1924); Logan v. Gossett, 37 Ga. App. 516, 140 S.E. 794 (1927)] in Alabama Fuel & Iron Co. v. Babadoni, 15 Ala. App. 316, 73 So. 205 (1916), where the defendant shot the plaintiff's dog in the plaintiff's presence; and in Rogers v. Williard, 144 Ark. 587, 223 S.W. 15 (1920), where the defendant engaged in a quarrel with a third person in the plaintiff's presence. On the other hand, in Phillips v. Dickerson, 85 Ill. 11 (1877), recovery was denied where the attack on the plaintiff's husband was not in her presence although she was within hearing distance. See also Ellsworth v. Massacar, 215 Mich. 511, 184 N.W. 408 (1921) (an action for loss of wife's services) where the acts directed against the husband alone did not take place in the wife's presence.

In Engle v. Simmons, 148 Ala. 92, 41 So. 1023 (1906), Brownback v. Frailey, 78 Ill. App. 262 (1898) and St. Louis S. R.R. of Tex. v. Alexander, 106 Tex. 518, 172 S.W. 709 (1915), defendants or their servants all came on the premises at night while the plaintiff's husband was absent. Fright and subsequent illness were caused the plaintiff by the character of the intrusion and by threats made against the absent husband. In the Alabama case, the court pointed out that the action was "a suit for injury to the plaintiff, and not for trespass to realty". In the Texas case, the court called the defendant a "trespasser", but it was clear that he was not a trespasser as against the plaintiff and the court based its decision on the "willful and wanton" conduct of the defendant and the likelihood of causing emotional distress. In the Illinois case, the court distinguished Phillips v. Dickerson, *supra*, (1) because here the defendant acted in the plaintiff's presence (2) with knowledge of her pregnancy. "In this case", said the court, "the abusive language and the threats of appellant were addressed to appellee, and his conduct was in her immediate presence."

Where the defendants merely used vile and abusive language to the plaintiff's husband in her presence, no recovery was allowed. The risk of physical illness to a plaintiff under such circumstances, the court thought, was too slight. Bucknam v. Great N. R.R., 76 Minn. 373, 79 N.W. 98 (1899). But where the defendant's abusive language toward the plaintiff's servant was accompanied by a trespass on the plantiff's premises, he was liable. Bouillon v. Laclede Gaslight Co., 148 Mo. App. 462, 129 S.W. 401 (1910).

safety.[16] The fact that a defendant intended to commit an injury rather than merely to act in a manner which is held to be negligent entitles him to less consideration in the process of shifting the responsibility for the harm which he has caused. The risk of physical harm to the plaintiff through nervous shock may be as great in the one case as in the other but courts are quicker to impose responsibility upon an intentional wrongdoer than upon a merely negligent one.

When the disturbance which resulted in illness to the plaintiff has been caused by conduct other than that which threatens physical harm to the plaintiff or to a third person, the test for liability again seems to be the unreasonable character of the risk of causing illness to the plaintiff through psychological and emotional reactions. If the defendant intends to cause an emotional disturbance so serious that it is likely to result in illness to a normally sensitive person, he is liable for such resulting illness if the risk thus created is unreasonable. An example of such a case is *Wilkinson v. Downton,*[17] where the defendant as a practical joke falsely told the plaintiff that her husband had been seriously injured in an accident. A more recent instance is that of a detective who for the purpose of obtaining certain information from a servant accused her of treason and threatened arrest therefor.[18] In both cases, the emotional distress was intended, though not its physical consequences. The latter, however, were clearly to be anticipated as the normal result of the disturbance. Again, where the defendants sought to obtain a confession of unchastity from a young school girl by threatening her with the reformatory, the court thought that such methods were likely to "shock a young girl and do harm to her nervous system", and that the plaintiff should recover for resulting impairment of health.[19] So too, the jesting groceryman who

[16] In Hambrook v. Stokes Bros., [1925] 1 K.B. 141, Lindley v. Knowlton, 179 Cal. 298, 171 Pac. 440 (1918), and Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933), recovery was allowed for physical harm resulting from nervous shock of a parent when both parent and child were exposed to direct risk of physical injury by the defendant's negligence. *Contra*: Southern R.R. v. Jackson, 146 Ga. 243, 91 S.E. 28 (1916). In Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935), recovery was denied where the parent was looking out of the window in her home when her child was killed by the defendant's negligence. See also, Nuckles v. Tennessee Elec. Power Co., 155 Tenn. 611, 299 S.W. 775 (1927); Mahoney v. Dankwart, 108 Iowa 321, 79 N.W. 134 (1899). The risk of physical harm to the parent may be greater in the first three cases than in the Waube case since in the former the parent was subjected to the danger of immediate bodily harm as well as the child. See Magruder, *Mental and Emotional Disturbance in the Law of Torts* (1936) 49 Harv. L. Rev. 1033, 1040.

[17] [1897] 2 Q. B. 57.

[18] Janvier v. Sweeney, [1919] 2 K. B. 316.

[19] Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926).

In Grimes v. Gates, 47 Vt. 594 (1873), the defendant wrote to plaintiff, intending to frighten her by threats of imprisonment. Recovery for fright and

sent a dead rat to the plaintiff was held liable for illness resulting from her fright and consternation on opening the package since illness is not unforeseeable as a result of such a disgusting sight under the circumstances.[20] If, however, the prank, although in poor taste, is not likely to induce a severe emotional or mental disturbance, the prankster will not be liable because a supersensitive plaintiff is so frightened as to suffer physical illness therefrom.[21] In all of these cases, the defendant acted for the very purpose of inducing the emotional distress although in most of them the motive was merely to perpetrate a hoax or to give expression to a somewhat juvenile sense of humor. Where recovery has been allowed, illness was to be anticipated, and the defendant's conduct in causing it was unreasonable under the circumstances.[22]

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resulting illness was allowed. *Cf.* Kramer v. Ricksmeier, 159 Iowa 49, 139 N.W. 1091 (1913) where recovery was denied against a defendant who used threatening and angry language over the telephone. In Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898), the plaintiff recovered from her sister's landlord who threatened legal proceedings if the sister moved without paying the rent. The threats were made in the plaintiff's presence and so unnerved her that she developed St. Vitus dance.

[20] Great Atl. & Pac. Tea Co. v. Roch, 160 Md. 189, 153 Atl. 22 (1931).

[21] Nelson v. Crawford, 122 Mich. 466, 81 N.W. 335 (1899), in which the defendant, robed in absurd clothing, presented himself at the plaintiff's door in the execution of what he conceived to be, and normally would have been, no more than a harmless prank. The supersensitive plaintiff, however, was so frightened that she suffered a miscarriage.

[22] It is clear that a definite knowledge of the plaintiff's physical condition is an important factor in determining whether the shock or emotional distress to which she is subjected is likely to cause physical illness. The situation here is to be distinguished from those in which the defendant committed an actionable tort against the plaintiff otherwise than by subjecting her to emotional distress likely to cause physical injury. In the latter case the defendant is liable for illness resulting from the emotional distress although he neither knew nor had reason to know of the plaintiff's pregnancy and, therefore, could not foresee physical illness as a result of the emotional distress. A tortfeasor must take his victims as he finds them and while it is true that he may have no reason to expect a particular woman to be pregnant, he knows that many women are often in such a condition, and therefore, that the particular plaintiff may be one of them. Thus, where a defendant commits a trespass to the plaintiff's person, the fact that she turns out to be one of the large class of pregnant women cannot mitigate the damages recoverable by her if she sustains a miscarriage. On the other hand, where the defendant's conduct is negligent solely because of the risk of causing emotional distress so acute as likely to result in physical harm, his knowledge or lack of knowledge and availability of knowledge as to the particular plaintiff's physical condition has an important bearing upon the actionable character of his conduct. Atlanta Hub Co. v. Jones 47 Ga. App. 778, 171 S.E. 470 (1933); Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Kirby v. Jules Chain Stores, 210 N.C. 808, 188 S.E. 625 (1936); Bouillon v. Gaslight Co., 148 Mo. App. 462, 129 S.W. 401 (1910); Rogers v. Willard. 144 Ark. 587, 223 S.W. 15 (1920); Pettit v. Thompson. 33 Ga. App. 240. 140 S.E. 794 (1924), with which compare Barbee v. Reese. 60 Miss. 906 (1883); Mann Boudoir Car Co. v. Dupre, 54 Fed. 646 (C.C.A. 5th, 1893); Brownback v. Frailey, 78 Ill. App. 262 (1898); Watson v. Rinderknecht, 82 Minn. 235, 84 N.W. 798 (1901).

It is to be observed, however, that there are occasions when it is not unreasonable to subject another even to such a severe emotional disturbance that it is not unlikely to cause serious physical consequences. The bearer of bad news which is *true* would normally not be acting improperly by communicating it, although it is as likely, if not more so, to cause harm to the recipient than if it were false. In *Wilkinson v. Downton,*[23] the defendant was held liable because it was unreasonable to subject the plaintiff to the shock of receiving bad tidings known by the defendant to be untrue. On the other hand, there may be exceptional circumstances which require some precautions before the communication of accurate information. The messenger may be liable for failing to break the news gently. Thus, in *Price v. Yellow Pine Mill Company,*[24] the defendant, forewarned by the injured husband of his wife's delicate health and nervousness, was held liable for taking the husband's maimed and bleeding body to the home after an accident, without taking measures to mitigate the shock to the wife. There seems less dissent than might be expected to the generalization made in the *Restatement of Torts* that—

> . . . if the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is the legal cause (a) although the actor has no intention of inflicting such harm, and (b) irrespective of whether the act is directed against the other or a third person.[25]

Even where the defendant unintentionally subjects the plaintiff to a risk of emotional or mental disturbance, he may be liable if the shock is likely to be such as to result in physical illness and if the defendant acted unreasonably in subjecting the plaintiff thereto. In *Herrick v. Evening Express Publishing Company,*[26] the defendant had negligently published a photograph of the plaintiff's son over an accurate news account of the death of a third person. The plaintiff was denied recovery. It may be that the risk of illness through shock in such a case is not sufficiently great to admit of recovery in view of the likelihood that the plaintiff would at once recognize the falsity

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[23] [1897] 2. Q. B. 57.
[24] 240 S.W. 588 (Tex. Civ. App. 1922).
[25] Restatement of Torts (1934) §312.
[26] 120 Me. 138, 113 Atl. 16 (1921).

of the implication by reason of definite knowledge to the contrary.[27] On the other hand, in *Bielitski v. Obadiak*,[28] the defendant was held liable for illness to the mother of a boy who, while absent from home to the defendant's knowledge, was reported by the defendant to have hanged himself.[29] In *Buckman v. Great Northern R. R.*,[30] no recovery was allowed for illness resulting from nervous shock caused by insulting and abusive language directed to the husband in the wife's presence. It may be that the risk of causing illness in such a case is not sufficiently great to justify liability. In *Erwin v. Milligan*,[31] where the defendant made improper advances to the plaintiff causing subsequent illness, she was allowed to recover. Here, although the defendant addressed his proposals to the plaintiff, he obviously did not intend to cause her any disagreeable or harmful emotional experience, since there was nothing to indicate that he did not act in good faith. He did, however, have reason to anticipate an unfavorable response with the risk of harmful emotional reactions. In *Kenny v. Wong Len*,[32] the plaintiff recovered for nervous shock and ensuing illness caused by the appearance of a dead mouse in the food served her at the defendant's restaurant. While the mouse here got into the food by reason of the defendant's negligence, whereas the dead rat was deliberately sent to the plaintiff in *Great Atlantic & Pacific Tea Company v. Roch*,[33] the appearance of a dead animal in prepared food seems more likely to cause nausea and physical illness than when wrapped in what was supposed to be a package of unprepared food. In *Koplin v. Louis K. Liggett Company*,[34] however, the plaintiff was denied recovery for the disgust experienced on the discovery of a centipede in her soup where she

[27] Similarly, in a recent case, Curry v. Journal Publ. Co. 68 P. (2d) 168, 174 (N.M. 1937), the defendant newspaper published a dispatch erroneously reporting the deatb of plaintiff's father which, it was alleged, caused nervous shock to the plaintiff and shock to his wife resulting in a miscarriage and injury to the child. The court dismissed the complaint, saying that there was no appreciable risk that the death of a seventy-year old father would so shock the son and particularly the daughter-in-law.

[28] 65 D.L.R. 627 (Sask. 1922).

[29] The majority opinion in this case seems to treat the defendant as one who intended to subject the plaintiff to a severe emotional disturbance althougb the rumor reached the plaintiff's ears by repetition. As remarked by Professor Magruder, "It ought to have been enough that a prudent man would have realized the extreme probability of such repetition." See Magruder, *Mental and Emotional Disturbance in the Law of Torts* (1936) 49 Harv. L. Rev. 1032, 1047.

[30] 76 Minn. 373, 79 N.W. 98 (1899).

[31] 188 Ark. 658, 67 S.W. (2d) 592 (1934).

[32] 81 N.H. 427, 128 Atl. 343 (1925).

[33] 160 Md. 189, 153 Atl. 22 (1931).

[34] 185 Atl. 744 (Pa. Sup. 1936).

proved no substantial physical illness, her physician testifying that her "disturbed state was more mental than physical". In *Cashin v. Northern Pacific R. R.*,[35] the defendant was held liable for the plaintiff's illness induced by nervous shock caused by the defendant's blasting operations in the neighborhood. The defendant had knowledge of the plaintiff's susceptibility to shock and had set off a terrific blast without warning.

The course of recent decision tends to confirm the proposition set forth in the *Restatement of Torts* that—

> . . . if the actor unintentionally causes emotional distress to another, he is liable to the other for illness or other bodily harm of which the distress is the legal cause if the actor (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.[36]

Aside from conduct which places the plaintiff in peril of his own physical safety, there will be, of course, many situations on which the judgment will vary as to whether (a) the defendant created an unreasonable risk of causing emotional distress (b) so serious that physical illness would likely result therefrom. The standard by which liability is to be determined in such cases, however, seems reasonably uniform.

The Interest in Courteous Service and Decent Treatment from Public Utilities

There is an interest in decent and courteous, as well as efficient and safe, service from public utilities and similar business enterprises. The passengers on the train desire pleasant, as well as safe, transportation. The patron at the inn wants comfortable lodgings and decent service. The public desires civilized treatment and the prompt communication of messages by telegraph and telephone companies. These interests may be invaded by insulting and abusive language, false accusations, delayed and garbled messages, and other conduct which causes nervous shock, embarrassment, humilation, grief, and other forms of emotional distress. If the conduct which invades such interests in this way is unreasonable and if the emotional distress occasioned thereby is not too trivial, a substantial

[35] 94 Mont. 92, 28 P. (2d) 862 (1934).
[36] Restatement of Torts (1934) §313.

body of authority permits recovery although no more tangible harm is sustained. Thus, a number of decisions permit recovery against carriers for abusive language and other insulting conduct by their employees,[37] unless the passenger's own conduct provokes the abuse.[38] In such cases, however, the plaintiff is barred from recovery by reason of his own fault. In some cases it seems that the insults must be directed toward the plaintiff and it is not enough that the plaintiff has overheard such remarks addressed to others.[39] The risk of serious emotional distress in the former case is obviously greater than in the latter. In *Gulf, Colorado & Santa Fe R. R. v. Coopwood,*[40] the plaintiff was allowed a recovery for emotional distress caused by the defendant's negligence in failing to assist the plaintiff's daughter from the train at the station. The daughter was ill, and the delay made it difficult for the mother and daughter to secure suitable lodgings, the principal hotel having recently burned, to the defendant's knowledge. Here the discourteous conduct toward the daughter was also an invasion of the plaintiff's domestic interest in the child's health and welfare. This fact was not overlooked by the court. In many of these cases the courts put the recovery squarely on the carrier's duty to its passenger to provide decent service and courteous treatment.

> The carrier's obligation is to carry his passenger safely and properly and to treat him respectfully; and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. . . . To their care and fidelity are entrusted the lives and limbs and comfort and convenience of the whole traveling public, and it is certainly

[37] Cole v. Atlantic & W. P. R.R., 102 Ga. 474, 31 S.E. 107 (1897); Birmingham R.R. v. Glenn, 179 Ala. 263, 60 So. 111 (1913); Humphrey v. Michigan C. R.R., 166 Mich. 645, 132 N.W. 447 (1911); Chesapeake R.R. v. Francisco, 149 Ky. 307, 148 S.W. 46 (1912); Haile v. New Orleans R.R., 135 La. 299, 65 So. 225 (1914); Gillespie v. Brooklyn R.R., 178 N.Y. 347, 70 N.E. 857 (1904); Davis v. Tacoma R.R., 35 Wash. 203, 77 Pac. 209 (1904); Philips v. Atlantic Coast R.R., 160 S.C. 323, 158 S.E. 274 (1931); Cook v. Lusk, 186 Mo. App. 288, 172 S.W. 81 (1914); St. Louis R.R. v. Mackie, 71 Tex. 481 (1888); Rudor v. Quebec R.R., 41 Que. S.C. 19 (1911); Texas R.R. v. Tillman, 197 S.W. 1128 (Tex. Civ. App. 1917); Cave v. Seaboard R.R., 94 S.C. 282, 77 S.E. 1017 (1913), Ann. Cas. 1915A, 1065; Lake Erie R.R. v. Christison, 39 Ill. App. 495 (1891). *Contra*: Dobbins v. Little Rock R.R., 79 Ark. 85, 95 S.W. 794 (1906); Pierce v. St. Louis R.R., 94 Ark. 489, 127 S.W. 707 (1910).

[38] Binder v. Georgia R.R., 13 Ga. App. 381, 79 S.E. 216 (1913); Pullman Car Co. v. Ehrman, 65 Miss. 383, 4 So. 113 (1888).

[39] Georgia R.R. v. Baker, 1 Ga. App. 832, 58 So. 88 (1907); Pittsburgh R.R. v. Darwin, 86 Ill. 296 (1887); Louisville R.R. v. Scott, 141 Ky. 538, 133 S.W. 800 (1911); Bucknam v. Great N. R.R., 76 Minn. 373, 79 N.W. 98 (1899); Texarkana R.R. v. Anderson, 67 Ark. 123, 53 S.W. 673 (1899).

[40] 96 S.W. 102 (Tex. Civ. App. 1906).

> as important that these servants should be trustworthy as it is that they should be competent.[41]

The court thus indicates the policy in holding the carrier liable (although not necessarily the offending employee) by adding,

> It is not sufficient that they are capable of doing well, if in fact they do ill, that they can be as polite as a Chesterfield, if, in their intercourse with the passengers, they choose to be coarse, brutal and profane. The best security the traveler can have that these servants will be selected with care is to hold those by whom the selection is made responsible for their conduct.[42]

It is not every failure to give punctilious service, however, that will justify a recovery. "Indecorous treatment" or slight inattention is not enough.[43] The risk of emotional disturbance in such cases is trivial and serious results are not to be apprehended. In a few states there is liability if the carrier fails to use reasonable care to afford protection against insults by fellow passengers.[44]

Against telegraph companies a number of courts have allowed recovery, either in contract or tort, for grief and mental anguish caused by the negligent failure to deliver or the negligent delay in delivering messages of death or illness—provided the defendant knew or had reason to know of the character of the message.[45] In such

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[41] Goddard v. Railway Co., 57 Me. 202, 213 (1869), quoted with approval in Hanson v. Railway Co., 63 Me. 84 (1873) and in Cole v. Atlanta R.R., 102 Ga. 474, 31 S.W. 107 (1897).

[42] 57 Me. at 214.

[43] Louisville R.R. v. Ballard, 85 Ky. 307 (1887).

[44] Southern R.R. v. Lee, 167 Ala. 268, 52 So. 648 (1910); Louisville R.R. v. Bell, 166 Ky. 400, 179 S.W. 400 (1915); St. Louis R.R. v. Wright, 84 S.W. 270 (Tex. Civ. App. 1904); Lucy v. Chicago R.R., 64 Minn. 7 (1895).

[45] Western U. T. Co. v. Chapman, 90 Ky. 265 (1890); Barnes v. Western U. T. Co., 27 Nev. 438, 76 Pac. 931 (1904); Havener v. Western U. T. Co., 117 N.C. 540, 23 S.E. 457 (1895); Wadsworth v. Western U. T. Co., 86 Tenn. 695, 8 S.W. 574 (1888); Western U. T. Co. v. Crumpton, 138 Ala. 632, 36 So. 517 (1903); Relle v. Western U. T. Co. 55 Tex. 308 (1881); Mentzer v. Western U. T. Co., 93 Iowa 752, 62 N.W. 1 (1895); Green v. Telegraph Co., 136 N.C. 489, 49 S.E. 162 (1904); Graham v. Western U. T. Co., 190 La. 1069, 34 So. 91 (1903); Jones v. Western U. T. Co., 18 Fed. (2d) 650 (W.D. La. 1926); see (1925) 4 Tex. L. Rev. 270. *Contra*: Lewis v. Western U. T. Co., 57 S.C. 325 (1899); Curtis v. Western U. T. Co., 13 App. Div. 253, 42 N.Y. Supp. 1109 (1897); Cumberland Telephone Co. v. Jackson, 95 Miss. 79, 48 So. 614 (1909); Chapman v. Western U. T. Co., 88 Ga. 673 (1892); Corcoran v. Postal T. Co., 80 Wash. 570, 142 Pac. 29 (1914); Francis v. Western U. T. Co., 58 Minn. 252, 59 N.W. 1078 (1895); West v. Western U. T. Co., 39 Kan. 93, 17 Pac. 807 (1888); Morton v. Western U. T. Co., 53 Ohio St. 431, 41 N.E. 689 (1895); Summerfield v. Western U. T. Co., 87 Wis. 1, 57 N.W. 973 (1894); Western U. T. Co. v. Halton, 71 Ill. App. 63 (1897); Western U. T. Co. v. Ferguson, 157 Ind. 64, 60 N.E. 674, 1080 (1901); International R.R. v. Saunders, 32 Fla. 434, 14 So. 148 (1893); Western U. T. Co. v. Burris, 179 Fed. 92 (C.C.A. 8th, 1910). In some

a case, acute mental and emotional distress in the event of delay is foreseeable and if the delay in transmission is negligent, the risk of mental anguish is unreasonable. As in the case of carriers of person and property, recovery has been permitted for insulting conduct on the part of employees of telegraph companies.[46]

In some cases, recovery has been allowed against hotels for humiliation and insults at the hands of employees.[47] Here again the cases disclose situations in which the character of the defendant's conduct has been such as to constitute a recognizable risk of serious emotional distress to the guest. Although usually the improper conduct has been accompanied by an intrusion into the plaintiff's room or an eviction, it is apparent that the courts here, as well as in the cases against carriers, are affected by the notion that the relation of the parties is such that the guest is entitled, as a legal right, to "respectful and decent treatment".[48] A learned writer insists that "the interest in mental tranquility" is being directly and independently protected here, as in the analogous carrier-passenger relationship;[49] more accurately, it is the interest in "respectful and decent treatment" —an interest in pleasant and courteous service—that receives protection against conduct reasonably calculated to produce emotional distress.

The Interest in the Body of the Dead

There are a number of cases in which a recovery has been permitted for grief and mental anguish caused by intentional misconduct with respect to the body of a deceased relative. Thus, the unlawful interment or disinterment of a corpse,[50] the intentional interference

cases, it is even held that there can be no liability for physical illness resulting from mental anguish caused by the negligence of a telegraph company. Mees v. Western U. T. Co., 55 Fed. (2d) 691 (S.D. Fla., 1932).

[46] Dunn v. Western U. T. Co., 2 Ga. App. 845, 59 S.E. 189 (1907); Jeffries v. Western U. T. Co., 2 Ga. App. 853, 59 S.E. 192 (1907).

[47] Florence Hotel Co. v. Bumpus, 194 Ala. 69, 59 So. 566 (1915); Newcomb Hotel Co. v. Corbett, 27 Ga. App. 365, 108 S.E. 309 (1921); Moody v. Kennedy, 153 La. 1007, 97 So. 21 (1923); Frewen v. Page, 238 Mass. 499, 131 N.E. 475 (1921); Emmke v. De Silvia, 293 Fed. 17 (C.C.A. 8th, 1923); Dalzell v. Dean Hotel Co., 193 Mo. App. 379, 186 S.W. 41 (1916); McCartby v. Niskern, 22 Minn. 90 (1875); De Wolf v. Ford, 193 N.Y. 397, 86 N.E. 527 (1908). *Contra*: Malin v. McCutcheon, 33 Tex. Civ. App. 287, 76 S.W. 586 (1903).

[48] Emmke v. De Silvia, 293 Fed. 17 (C.C.A. 8th, 1923). See also De Wolf v. Ford. 193 N.Y. 397, 86 N.E. 527 (1908).

[49] Magruder, *Mental and Emotional Disturbance in the Law of Torts* (1936) 49 Harv. L. Rev. 1033, 1052.

[50] Finley v. Atlantic Transp. Co., 220 N.Y. 249, 115 N.E. 715, L.R.A. 1917E 852 (1917) (burial at sea); Gostowski v. Roman Catholic Church, 262 N.Y. 320, 186 N.E. 798 (1933) (removal to another burial lot); Wright v. Beardsley, 46 Wash. 16, 89 Pac. 172 (1907) (burial in grave of another corpse); Louisville

with a burial,[51] the improper preparation for burial, if intentional or in reckless disregard of plaintiff's feelings,[52] the removal of the body of deceased from a vault,[53] the intentional mutilation of a corpse,[54] and even the negligent loss of the remains[55] have all been held a basis for recovery for the emotional distress occasioned thereby either in an action in tort or for breach of contract. So too, the "reckless" or "wanton" interment of a corpse in the absence of close relatives has been held actionable, their interest in the body to the extent of witnessing the burial being regarded as worthy of legal protection.[56] In a few cases, recovery has been allowed for the negligent delay in transporting the corpse.[57] The interest in immediate possession of a

Am. Ass. v. Dows, 241 Ky. 773, 45 S.W. (2d) 5 (1931) (burial in wrong lot and removal).

[51] Stephens v. Waits, 52 Ga. App. 806, 184 S.E. 781 (1936), where defendant, disputing plaintiff's right to bury her brother in the cemetery, delayed the burial for an hour by sitting on the coffin box.

[52] Boyle v. Candler, 3 Harr. 323 (Del.), 138 Atl. 273 (1927). In this case, plaintiff was permitted to recover from the defendant, who after preparing the body of the plaintiff's wife for burial and placing it in a casket purchased by the plaintiff, without the latter's consent removed the body therefrom and placed it in a different casket of cheaper material as a result of which removal the body was disfigured and distorted. The basis of the recovery was a finding by the jury that the acts of the defendant were "wanton, fraudulent, and malicious, or grossly negligent and in reckless disregard of the consequences to the plaintiffs". The jury were cautioned, however, that no liability should be imposed if the improper treatment of the body was "negligence or carelessness only." Accord: Hall v. Jackson, 24 Colo. App. 255, 134 Pac. 151 (1913).

[53] Renihan v. Wright, 123 Ind. 536, 25 N.E. 822 (1890); Louisville Cem. Assoc. v. Dows, 241 Ky. 773, 45 S.W. (2d) 5 (1931).

[54] Burney v. Children's Hospital, 169 Mass. 57, 47 N.E. 401 (1897) (unlawful autopsy); Koerber v. Patek, 123 Wis. 453, 102 N.W. 40 (1905) (unlawful autopsy); Lindh v. Great N. R.R., 99 Minn. 408, 109 N.W. 823 (1906) (willful exposure of casket to rains); Larson v. Chase, 47 Minn. 307, 14 L.R.A. 85 (1891) (dissection); Edmonds v. Armstrong Funeral Home, 1 Dom. L. Rep. 676 (1931) (unlawful autopsy); Philipps v. Montreal Hosp., 33 Que. S.C. 483 (1908).

In Long v. Chicago R.R., 15 Okla. 512, 86 Pac. 289, 6 Ann. Cas. 1005 (1905), recovery was denied where the mutilation was negligent. In Koontz v. Keller, 52 Ohio App. 265, 3 N.E. (2d) 694 (1936), the sister of a murdered woman sought to recover damages for mental anguish and resulting illness she suffered on the discovery of the mutilated body of the corpse. In a parallel case the brother-in-law of the decedent on whose premises the murder had been committed sought damages for the loss of his wife's services and for the annoyance and disturbance which he sustained by reason of the large crowds attracted to his property to satisfy their morbid curiosity by looking at the spot where the deceased had been murdered. The court denied a recovery in each case because the acts of the defendant had not been directed toward the plaintiff.

[55] Klumbach v. Silver Mut. Cemetery, 242 App. Div. 843, 275 N.Y. Supp. 180 (1934), *aff'd*, 268 N.Y. 525 (1935) (misplaced body of stillborn child). *Contra*: Kneuss v. Cremation Soc., 103 Wash. 521, 175 Pac. 172 (1918).

[56] Spiegel v. Evergreen Cemetery Co., 32 N.J.L. 90, 186 Atl. 585 (1936), (1936) 85 U. of Pa. L. Rev. 227.

[57] Hale v. Bonner, 82 Tex. 33, 27 Am. Rep. 850, 17 S.W. 605 (1891); Louisville R.R. v. Hull, 113 Ky. 561, 68 S.W. 433, 57 L.R.A. 771 (1902); Wells F. & Co. v. Fuller, 13 Tex. Civ. App. 616, 35 S.W. 824 (1896); Missouri R.R. v. Tinton,

corpse has been recognized in a case in which the defendant was held liable for unlawfully and intentionally withholding a death certificate without which plaintiff could not obtain the body. In consequence of the delay, there was insufficient time for the usual funeral ceremonies.[58] Courts have sought to recognize this interest as a property or quasi-property interest.[59] In one case, the interest has been associated with the interest in the fulfillment of a contract, the plaintiff being denied a recovery for the negligent delay in the transportation of the corpse of her husband because she was not a party to the contract. In most of the cases, however, it seems clear that the courts are giving a direct recognition to an interest which is as old as mankind, the interest of the living in the bodies of the dead. While all the cases cannot be reconciled, it seems possible to generalize from a distinct majority that where the defendant, not privileged by statute, intentionally or recklessly invades another's interest in the body of a deceased relative by conduct which it is highly probable will cause acute and poignant emotional distress, he becomes liable therefor although no other interest of the plaintiff is invaded.

The Interest in the Memory of the Dead

Although it has been held that there is available no legal protection for the reputation of the dead,[60] several cases have indicated that the interest in the memory of a deceased relative may not always be invaded with impunity. Emotional distress caused by intentional and unreasonable desecration of the decedent's memory constitutes a cause of action. In *Douglas v. Stokes*,[61] the Court of Appeals of Kentucky held that a photographer was liable to the parents of deceased Siamese twins for copyrighting and using for his own purposes a photograph which he had taken of them before death. The Supreme

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109 S.W. 942 (Tex. Civ. App. 1908), in all of which the plaintiff was a party to the contract of carriage. In Nichols v. Eddy, 24 S.W. 316 (Tex. Civ. App. 1893), the mother of the deceased was denied recovery because she was a stranger to the contract.

[58] Southern Health Ins. Co. v. Morgan, 21 Ala. App. 5, 105 So. 161 (1925). See also Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925) (refusal to surrender body until payment of debt).

[59] See Bogert v. Indianapolis, 13 Ind. 134 (1858); England v. Central Coal Co., 86 W. Va. 575, 104 S.E. 46 (1920). See (1911) 24 Harv. L. Rev. 315.

In Spiegel v. Evergreen Cemetery Co., 32 N.J.L. 90, 186 Atl. 585 (1936), the Supreme Court of New Jersey declared that "the right to bury the dead and preserve the remains is a quasi right in property, the infringement of which may be redressed by an action in damages".

[60] Bradt v. New Nonpareil Co., 108 Iowa 441, 79 N.W. 122 (1899); Wellman v. Sun Pr. Co., 66 Hun. 331 (N.Y. 1892).

[61] 149 Ky. 506, 149 S.W. 849 (1922).

Court of Georgia rendered a similar decision.[62] Both cases were regarded as involving the interest in privacy.[63] A negligent interference with this interest, however, was held not actionable in *Thomason v. Hockney & Moale Company,*[64] where the photographer carelessly lost the proofs of a photograph of the plaintiff's child who had died after the exposure had been made, and in *Plummer v. Hollis,*[65] where the defendant undertaker forgot to have the deceased child photographed as requested by its parents. In the *Stokes* case, the mental anguish of the parents at the dissemination of the picture of their children was, of course, dependent largely on the fact of the malformation.[66] Had the children lived, they no doubt would have

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[62] Basemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930) (publication in newspaper of picture taken with permission of hospital). See (1931) 31 Col. L. Rev. 175; (1931) 9 N. C. L. Rev. 325; (1931) 15 Minn. L. Rev. 610; (1931) 79 U. of Pa. L. Rev. 511.

[63] In Atkinson v. Doherty & Co., 121 Mich. 372, 80 N.W. 285 (1899), the Supreme Court of Michigan denied relief to a widow who sought to enjoin the defendants from using her deceased husband's picture on a cigar label. The court treated the problem as one involving an interest in privacy and squarely adopted a position declining to afford legal protection to such an interest on the ground that "the law cannot make a right of action depend upon the intent of the alleged wrong-doer or upon the sensitiveness of another". The opinion, by Mr. Justice Hooker, unfortunately, ably defends this position. "All men", he said, "are not possessed of the same delicacy of feeling, or the same consideration for the feelings of others. These things depend greatly upon the disposition and education. Some men are sensitive, some brutal. The former will suffer keenly from an act or a word that will not affect another." That no action lies for such suffering results from "a line of demarkation . . . which affords a practical balance" between the "liberties of men, upon the one hand" and "invasion of their liberties upon the other". [121 Mich. at 382-383, 80 N.W. at 289] The learned justice, it will be recalled, is remembered in the jurisprudence of Michigan for a similarly unsatisfactory "line of demarkation" in respect to the attractive nuisance doctrine. See Ryan v. Towar, 128 Mich. 463, 87 N.W. 644, 55 L.R.A. 310, 92 Am. St. Rep. 481 (1901).

[64] 159 N.C. 299, 74 S.E. 1022 (1912).

[65] 11 N.E. (2d) 140 (Ind. 1937).

[66] Where there was no exceptional reason for emotional distress at the publication of a likeness (in erecting a statue) of a deceased relative, relief has been denied. Schuyler v. Curtis, 147 N.Y. 434, 42 N.E. 22 (1895). This decision may be explained on the ground that the public had a legitimate concern with the memory of the decedent who had been prominent in rendering social service—a defense somewhat analogous to that of fair comment in actions for defamation. There was nothing in the erection of a statue to her memory which was calculated to cause emotional distress to any but the most abnormally supersensitive relative.

In Fitzsimmons v. Olinger Mortuary Ass'n, 91 Colo. 544, 17 P. (2d) 535 (1932), plaintiff was permitted to recover from the defendant for mental anguish caused by the "undue publicity or notoriety" resulting when the defendant photographed the body of the plaintiff's husband in an airplane in which it was transported for burial and used the picture for advertising purposes. The court regarded the act as one for breach of contract resulting in emotional distress. "If written contracts are sometimes made with morticians, they must be rare. These contracts are usually oral, and in them much is necessarily left to implication.

had an action for the invasion of an interest in privacy, a more sensitive interest by reason of their deformity.

The Interest in the Life of the Unborn

In a recent Texas case, plaintiffs sought to recover from the defendant whose servants had negligently injured the pregnant plaintiff causing her thereafter to give premature birth to twin babies, one of whom had been so injured that he died after living nineteen days. Recovery was denied[67] under the Texas wrongful death statute on the ground that the child could not have recovered for prenatal injuries had it lived.[68] The court was influenced apparently by the practical difficulties of proof of causation in such a case. The intermediate court had held that the plaintiffs were entitled to recover on the theory that the child, had it lived, would have been able to do so.[69] It based its decision, quite logically it would seem, on a previous decision of the Texas Supreme Court[70] that a posthumous child was entitled to recover under the death statute for the wrongful death of its father. Thus, in Texas, although the posthumous child may recover for the tortious death of its father, it may not recover

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There is neither the time nor the mental tranquility essential to negotiation. One who prepares a human body for burial and conducts a funeral usually deals with the living in their most difficult and delicate moments. Bereavement has, for the time being, obliterated the gross and sordid side of human nature and brought to the surface all its tenderness and sensitiveness. The exhibition of callousness or indifference, the offer of insult and indignity, can, of course, inflict no injury on the dead, but they can visit agony akin to torture on the living. So true is this that the chief asset of a mortician and the most conspicuous element of his advertisement is his consideration for the afflicted. A decent respect for their feelings is implied in every contract for his services. If this be not true, there is nothing to prevent the embalming of a body and the parading of it through city streets, exposed to the gaze of curious throngs, while a hired crier calls attention to it as an example of the undertaker's skill. Certainly no stipulation need be made in the contract of employment to protect relatives of the deceased from such an outrage. If those relatives have taken the precaution, as this complaint alleged, of demanding, or stipulating for, no 'undue publicity or notoriety,' no doubt of the bounden contractual duty to comply can remain. If defendant's contract of employment included, as the record before us justifies us in holding, an express or implied agreement that nothing would be done to outrage the feelings of an ordinary person, or unnecessarily inflict upon such person 'humiliation and mental suffering and agony,' and that contract was violated, then plaintiff's legal right of recovery is established by unquestioned authority." [91 Colo. at 548-549, 17 P. (2d) at 536-537]

[67] Magnolia Bot. Co. v. Jordan, 124 Tex. 347, 78 S.W. (2d) 944 (1935).

[68] Accord, as to prenatal injuries: Walker v. Great N. R.R., 28 L.R. Ir. 69 (1891); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638, 48 L.R.A. 225, 75 Am. St. Rep. 176 (1900); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567, 20 A.L.R. 1503 (1921).

[69] 47 S.W. (2d) 901 (Tex. Civ. App. 1932).

[70] Nelson v. Railway Co., 78 Tex. 621, 14 S.W. 1021, 11 L.R.A. 391, 22 Am. St. Rep. 81 (1890).

for a prenatal injury to itself, and consequently there can be no action by the parent under the wrongful death statute if death is caused to the child by the prenatal injuries. Similarly, decisions in Rhode Island and Alabama have denied recovery for the death of a child injured while still in its mother's womb.[71] In this way, the parents' interest in the health and safety of their unborn children is denied protection.

The Interest in the Domestic Relations

Some, but not all invasions of the domestic relations by causing emotional distress are actionable although they are accompanied by no material harm. In many instances, emotional disturbance is accompanied by tangible or potential loss—as where the parent is deprived of the services, or ability to render service, of his minor daughter by her seduction. Here he may recover both for the pecuniary loss and for the mental anguish and humiliation at her defilement.[72] In other situations, there is no interest invaded except the interest in the child and no harm sustained save emotional distress, as where his child of tender years is abducted.[73] On the other hand, there are certain situations which permit recovery only for the pecuniary interest invaded although it is accompanied by a serious invasion of the domestic interest causing, it may be, acute mental suffering. These are usually cases of physical harm caused to the child by the defendant's negligence or assault.[74] Although the wrong to the child may be intentional or even malicious, the defendant's conduct does

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[71] Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704 (1901); Stanford v. Railway Co., 214 Ala. 611, 108 So. 566 (1920).

[72] Blogge v. Ilsley, 127 Mass. 191 (1879); Barbour v. Stephenson, 32 Fed. 66 (C.C. Ken. 1887); Rollins v. Chalmers, 51 Vt. 592 (1879); Tillotson v. Currin, 176 N.C. 479, 97 S.E. 395 (1918); Haessig v. Decker, 189 Minn. 422, 166 N.W. 1085 (1918); Every v. Gowen, 4 Greenl. 33 (Me. 1826); Middleton v. Nicbols, 62 N.J.L. 636, 43 Atl. 575 (1900); Bedford v. McKowl, 3 Esp. 119, 170 Eng. Repr. 560 (1800).

[73] Idleman v. Groves, 89 W. Va. 91, 108 S.E. 385 (1921); Vaughn v. Rhodes, 2 McCord 227, 13 Am. Dec. 713 (S.C. 1822); Pickle v. Page, 252 N.Y. 474, 169 N.E. 650 (1930), (1930) 15 Iowa L. Rev. 506.

[74] Seligman v. Hollady, 154 So. 481 (La. Ct. of App. 1934); Bube v. Birmingham P. Co., 140 Ala. 276, 37 So. 285 (1903); Covington St. R.R. v. Packer, 9 Bush. 455 (Ky. 1872); Black v. Carrollton R.R., 10 La. Ann. 33 (1885); Hartford County v. Hamilton, 60 Md. 340 (1883); Gilligan v. New York R.R., 1 E. D. Smith 453 (N.Y. Ct. of Com. Pl. 1852); Oakland R.R. v. Fielding, 48 Pa. 320 (1864); St. Louis R.R. v. Gregory, 73 S.W. 28 (Tex. Civ. App. 1903); Kalleg v. Fassio, 125 Cal. App. 96, 13 P. (2d) 763 (1932); Flemington v. Smithers, 2 Car. & P. 292 (1826). The same rule is applied in actions for wrongful death. Morgan v. Southern P. R.R., 95 Cal. 510, 30 Pac. 603 (1892); Chicago v. Major, 18 Ill. 349 (1857); Ohio R.R. v. Tindall, 13 Ind. 366 (1859); Oakes v. Maine C. R.R., 95 Me. 103, 49 Atl. 418 (1901).

not directly affect the domestic relation between the parent and child, and for this reason, perhaps, the parent is confined to a recovery for the pecuniary loss which he sustains.[75] If the wrong to the child is of such a character as to be more than ordinarily likely to cause extraordinary emotional distress to the parent, in Texas, at least, it seems the parent may be entitled to recover.[76]

Although in cases involving interference with the marital relation, the fiction of loss of service still prevails, it is clear that in many situations the only harm suffered is emotional distress of one sort or another. This is particularly true in the action for criminal conversation where, unless the wife becomes pregnant or the home disrupted, the harm is exclusively the plaintiff's mental distress at the defilement of the marital bed.[77] So, too, in the actions for alienation, the affection which the plaintiff has lost may be the only basis for recovery.[78] Although breach of contract to marry may not properly be regarded as a tort, an unprivileged inducement by a third person whereby the engagement is broken may result only in emotional distress to the plaintiff.[79]

The Multiplicity of Interests in Privacy

There are many interests in privacy. The term is generic rather than specific. All interests in privacy are conventional, that is, cultivated or acquired. They depend upon standards of decent conduct and social and aesthetic values. Manners and morals are the bases

[75] In Sperier v. Ott, 116 La. 1087, 41 So. 323 (1906), a parent was denied recovery for mental distress caused by the unlawful arrest and prosecution of minor children.

[76] Gulf, C. & S. F. R.R. v. Coopwood, 96 S.W. 102 (Tex. Civ. App. 1906), stated *supra*, p. 437.

[77] Merritt v. Cravens, 168 Ky. 155, 181 S.W. 970 (1816); Barlow v. Barnes, 172 Cal. 98, 155 Pac. 457 (1916); Wood v. Mathews, 47 Iowa 409 (1877); Bigaonette v. Paulet, 134 Mass. 123 (1883); Ferguson v. Smithers, 70 Ind. 519 (1880); Yundt v. Hartrunft, 41 Ill. 9 (1866). See Restatement, Torts (Tent. Draft No. 15, 1937) §1303.

[78] See Woodhouse v. Woodhouse, 99 Vt. 91, 130 Atl. 758 (1925); Adams v. Main, 3 Ind. App. 232, 29 N.E. 792 (1891); Lavigne v. Lavigne, 80 N.H. 559, 110 Atl. 869 (1923). Restatement, Torts (Tent. Draft No. 15, 1937) §1391. A number of cases hold that if the other spouse had no affection for the plaintiff, there can be no recovery for alienation. Cutter v. Cooper, 235 Mass. 307, 125 N. E. 634 (1924); Smith v. Rice, 178 Iowa 673, 160 N.W. 6 (1916); Servis v. Servis, 172 N.Y. 438, 65 N.E. 270 (1902).

[79] Lord Holt is reported to have observed that "if a man is in treaty with a woman to marry, and another tells him she is under a pre-contract, this does not import a scandal, but yet, if it is false, an action will lie". Anonymous, 11 Mod. 99 (1706). Loss of marriage constitutes "special damage" sufficient to support an action of defamation for a slander not actionable per se. Mathews v. Crass, Cro. Jac. 323 (1791); Holwood v. Hopkins, Cro. Eliz. 781 (1790).

of refinements in taste, modesty, personal dignity, honor, and self respect. As civilization becomes more complex and varied, many new interests emerge and not the least of these are interests in privacy. These interests may be invaded in a number of different ways, the most common of which is by acts which annoy and induce varying forms of emotional distress. Thus, as new interests in privacy develop, new sources of emotional distress are created.

It is not every invasion of a privacy interest that is actionable, of course. The mere fact of living in a social order implies certain annoying contacts with others which even the least fastidious member of the community may on occasion resent. Nevertheless, such experiences are the price of social intercourse. It is only when these annoyances become unreasonable by offense against prevailing standards of taste and propriety that the law takes cognizance thereof. With age and refinements in civilization comes a rise in the level of decency. One may be expected to tolerate less in a society which has improved its manners over hundreds of years than in a new and crude social order. Plain men pay little attention to conduct which proves highly annoying in a cultured community.

A. The Interest in Seclusion

Perhaps the most obvious of the interests in privacy which may be invaded solely by inducing some form of emotional or mental disturbance is what may be described as the interest in seclusion. This interest has two aspects: first, the interest in preventing others from obtaining information about one's strictly private affairs through the physical senses; second, the interest in avoiding information about others through the physical senses. Thus, one desires much of his conduct to be unobserved and much of his conversation on personal matters not to be overheard. At the same time, he desires to escape the necessity of seeing much of the conduct of others and to avoid the necessity of listening to much of the conversation of others. In other words, one desires both to live alone and to be let alone. In many situations, he neither wants third persons to see or hear what he does and says, nor does he want to see or listen to what other persons do and say. It is as distasteful to him to suffer the intrusion of an unwelcome guest with whom he desires no social relations as it is to discover the spy or eavesdropper. Thus, a woman's distress may be as great at the sight of another making to her an indecent exposure of his person as by the discovery that the third person has observed her person without the protection which conventional dress gives it.

Emotional distress and annoyance may result not only from discovery of the fact that some third person has penetrated his seclusion by silently observing or listening to the intimacies of his private life, but as well by the third person disturbing his solitude by uninteresting and distasteful conversation or intrusions within his range of vision. For example, a plaintiff who had licensed defendant's servants to come on her land was equally outraged by having to listen to their loud, profane language and lewd songs[80] as was another plaintiff who discovered that his intimate telephone conversations had been overheard for some time by defendants who had tapped the wires.[81]

However, one may not expect to be free from all disagreeable and annoying sounds. He may be required to endure usual and ordinary noises, such as those incident to living in a crowded neighborhood, no matter how unpleasant they are. As an English court put it,

> If my neighbour builds his house against a party wall next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery or his music room, it does not follow (even if I am nervously sensitive or in infirm health) that I can bring an action or obtain an injunction.[82]

Thus, if the noise is only slight and the inconvenience fanciful, or such as would only be complained of by people of "elegant and dainty modes of living", and inflicts no serious or substantial discomfort, a court will not take cognizance of it.

> No one has a right to complain that his next-door neighbor plays upon the piano at reasonable hours, or of the cries of children in his neighbor's nursery, nor of any of the ordinary sounds which

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[80] May v. Western U. Tel. Co., 157 N.C. 416, 157 N.E. 416, 37 L.R.A. (N.S.) 912 (1911).

[81] Rhodes v. Graham, 238 Ky. 225, 38 S.W. (2d) 44 (1931). See also dissenting opinions in State v. Behringer, 19 Ariz. 502, 172 Pac. 660 (1918), and Olmstead v. United States, 277 U.S. 438, 475, 48 Sup. Ct. 564, 571 (1928), where Mr. Justice Brandeis said, "The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone wire is tapped, the privacy of the persons at both ends of the line is invaded and all the conversations between them on any subject, and although proper, confidential, and privileged may be overheard."

In a very recent decision, Nardone v. United States, 58 Sup. Ct. 275 (1937), the United States Supreme Court has held that the provision in the Federal Communications Act, prohibiting interception by anyone not authorized by the sender of the communication, must be construed to include federal agents who had heretofore secured evidence in criminal cases by wire tapping, and that Congress has thereby expressed the policy that "it is less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty", which is, of course, the view taken by the dissent in the Olmstead case.

[82] Gaunt v. Fynney, 27 L.T. Rep. (N.S.) 569, 571, 8 Ch. App. 8, 12 (1872).

> are commonly heard in dwelling-houses. On the other hand, if unusual and disturbing noises are made, and particularly if they are regularly and persistently made, . . . a court of equity will stretch out its strong arm to prevent the continuance of such injurious acts.[83]

Also, if the distressing noises are maliciously made for the purpose of annoying the plaintiff,[84] or if they would be an intolerable annoyance to an ordinarily sensitive person, relief may be granted. For instance, where hospitals have been located so close to a person's home that the cries of the suffering, the moans of the dying, and other offensive noises, even the frequent visits of ambulance and hearse, have caused mental disturbance to persons of normal sensibilities, courts have recognized this as an actionable harm.[85] And it may be just as offensive for plaintiff to be compelled to look out upon some hideous view or unsightly obstruction of his view as it is to be peered at by snooping neighbors. The mental disturbance aroused by having to look out on an ugly, unpainted board fence, built for spite,[86] may be just as intolerable as was that of the high

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[83] Ladies' Decorative Art Club's Appeal, 10 Sad. (Pa.) 150, 13 Atl. 537, 538 (1888).

[84] In Christie v. Davey, [1892] 1 Ch. 316, the defendant, annoyed by the practicing and drilling of his next-door neighbor and her music pupils, countered with his own racket, beating on trays, shrieking, whistling, imitating the sounds he overheard. The court enjoined the defendant's uproar, saying it was done deliberately and maliciously to annoy the plaintiff, while the noises from her side of the house were merely incidental to her business.

[85] In Deaconess Hospital v. Bontjes, 207 Ill. 553, 69 N.E. 748, 64 L.R.A. 215 (1904), a cancer hospital was enjoined because of the offensive noises, the smell of antiseptics, and the annoyance which the mere presence of such an institution (even though there was no danger of infection) would cause—the neighborhood thus being made less desirable for residence purposes even to normally sensitive persons.

In Kestner v. Hospital, 245 Pa. 326, 91 Atl. 659 (1914), the hospital was enjoined from using a room in its building close to the plaintiff's dwelling because the cries of pain disturbed the plaintiff. See also Emrich v. Marcucilli, 196 Ky. 495, 244 S.W. 865 (1922).

[86] There is substantial authority that a person may not from sheer malice and for no useful purpose erect an obstruction to an adjoining owner's view, or shut off light and air. While none of the cases relies entirely nor even chiefly on the ugliness of the structure, most of them stress that as one of the objectionable features of such an obstruction. See Flaherty v. Moran, 81 Mich. 52, 45 N.W. 381 (1890); Kirkwood v. Finegan, 95 Mich. 543, 55 N.W. 457 (1893); Peck v. Roe, 110 Mich. 52, 67 N.W. 1080 (1896); Barger v. Barringer, 151 N.C. 433, 66 S.E. 439 (1909); Sankey v. Academy, 8 Mont. 267, 21 Pac. 23 (1889); Havens v. Klein, 49 How. Prac. 95 (N.Y. 1875).

Probably the numerical weight of authority denies relief in such cases, however, on the theory that there is no right of prospect, no easement of light or of privacy, and, in this country, no doctrine of ancient lights. Hawkins v. Sanders, 45 Mich. 491, 8 N.W. 98 (1881); Koblegard v. Hale, 60 W. Va. 37, 53 S.E. 793 (1906); Rideout v. Know, 148 Mass. 372, 19 N.E. 391, 2 L.R.A. 81 (1889);

caste Hindu when defendant built his house so that its windows and veranda looked out upon plaintiff's premises where ladies of his family had been accustomed to walk unveiled—secure in the privacy of their garden.[87] One writer suggests that it may become actionable to insult a person even by the use of property.[88] Would it not be intolerably disturbing to a person of reasonable sensitivities to have constructed across adjoining premises, on which his porch and windows looked out, a garish and vulgar display sign advertising a burlesque show?

By and large, the courts have been most reluctant to give an action either to prevent the privacy of one's gardens from being molested by curious onlookers or to prevent unsightly obstructions to one's view. The quaint dictum of Chief Justice Wray in 1611 probably remains true today,

> . . . for prospect, which is a matter of delight and not of necessity, no action lies for the stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect; but the law does not give an action for such things of delight.[89]

In modern dress,

> The law of this state does not recognize any legal right to an unobstructed view of scenery over and across the lands of others . . . nor does the law recognize as a cause of action the annoyance caused by the proximity or ugliness of otherwise harmless structures upon the land of another. The pleasure of an unobstructed view and a prospect free from unsightly objects may be great, but, in the present state of the law, it is too refined for legal cognizance.[90]

So, too, although most courts before whom the question has arisen recognize that there is an invasion of seclusion by the snooper, it has not generally been considered an actionable wrong.[91] Even where the defendant built an open staircase from the garden to an up-

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Letts v. Kessler, 54 Ohio St. 73, 42 N.E. 765, 40 L.R.A. 177 (1896); Camfield v. United States, 167 U.S. 518, 42 L. ed. 260 (1897); Mahan v. Brown, 13 Wend. 261, 23 Am. Dec. 461 (N.Y. 1835).

[87] Gokol Prasad v. Roho, Indian Law Rep. 10 Allahabad 358 (1888).

[88] Terry, *Advertising Signs on Property* (1914) 24 Yale L. J. 1.

[89] William Aldred's Case, 9 Co. Rep. 57b, 58b, 77 Engl. Repr. 816, 821 (1611).

[90] Whitmore v. Brown, 102 Me. 47, 59-60, 65 Atl. 516, 521 (1906). See also Houston Gas & Fuel Co. v. Harlow, 297 S.W. 570 (Tex. Civ. App. 1927); Lane v. City of Concord, 70 N.H. 485, 49 Atl. 687 (1901).

[91] Dalton v. Angus, 44 L.T. Rep. 844, at 855, 6 App. Cas. 746 (1881); Tapling v. Jones, 12 L.T. Rep. 555, 11 H.L.C. 290 (1865); Cherrington v. Abney Mil, 2 Vern. 648, 23 Engl. Repr. 1022 (1709).

stairs apartment, between two ground floor windows of the plaintiff's bedrooms, the Chancellor said that the only interference with the plaintiff's premises was interference with their comfort and privacy, a personal annoyance, and not actionable.[92] But where defendants' elevated railway station was built just opposite plaintiff's windows, and employees and passengers could peer in, an American court allowed damages for the invasion of privacy.[93] There is the distinguishing point, however, that the plaintiff in this latter case alleged a loss in rentals, while in the former, plaintiff, occupying the apartment herself, could, the court said, put up blinds and still use the premises as before.

Here again, however, courts have been less reluctant to grant relief where the conduct of the defendant would interfere with the physical comfort of an ordinary, sensible person. In granting an injunction against brickmaking on land adjoining plaintiff's house and garden (because of offensive vapors and heavy smoke) the court said,

> . . . the important point for decision may . . . be thus put: ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people.[94]

In the same vein is the opinion of a California court in refusing to enjoin a proposed cemetery. The injunction could rest only—

> . . . on the ground that it may endanger life or health, either by corrupting the surrounding atmosphere, or the waters of wells, or springs in the vicinity. . . . Such prohibitions could not be upheld on the ground that they are not pleasant to the eye, or that they are not agreeable subjects of contemplation, or they are a source of annoyance to nervous or superstitious persons, or that they make the vicinity less attractive.[95]

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[92] Browne v. Flower, [1911] 1 Ch. 219.

[93] Moore v. Elevated Railway Co., 130 N.Y. 523, 29 N.E. 997, 14 L.R.A. 731 (1892).

[94] Walter v. Selfe, 4 De G & Sm. 315, 322, 64 Engl. Repr. 849, 852 (1851).

[95] Laurel Hill Cemetery v. San Francisco, 152 Cal. 472, 93 Pac. 70, 27 L.R.A. (N.S.) 260 (1907). Accord: Monk v. Packard, 71 Me. 309, 36 Am. Rep. 315 (1880); Barnes v. Halhorn, 54 Me. 124 (1866); Clark v. Lawrence, 59 N.C. 86, 78 Am. Dec. 241 (1860); Lake View v. Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71 (1873); Westcott v. Middleton, 43 N.J.Eq. 484, 11 Atl. 490 (1887); Woodstock Burial Ground Association v. Hager, 68 Vt. 488, 35 Atl. 431 (1896); Dean v. Powell Undertaking Co., 55 Cal. App. 545, 203 Pac. 1015 (1921); Stod-

On the other hand, where persons of ordinary sensibilities are mentally depressed by having a mortuary or hospital on adjacent property, there is substantial authority in favor of injunctive or other relief, even though there is no injury to health or offense to the physical senses.[96] The emotional distress in such cases is more likely to be serious than in other situations where the interest in seclusion is invaded, which suggests that where the invasion is likely to cause grave and acute emotional disturbance, as distinguished from mere annoyance, legal redress is available.

B. The Interest in Personal Dignity and Self-respect

Another important interest in privacy may be described as the interest in self-respect and personal dignity. This interest is, perhaps, the most obvious example of the conventional character of all privacy interests. Its intensity and social value are therefore matters of great variability. The interest is offended by insulting and abusive language, by proposals that offend the sense of decency and by the creation of situations which expose the person to ridicule or embarrassment. Many so-called practical jokes constitute affronts to the interest in personal dignity. This interest differs materially from the interest in seclusion or isolation. It is not the mere presence of a person which constitutes the invasion of the interest in personal dignity; it is the conduct of such person normally in the plaintiff's presence. While frequently the interest in personal dignity is associated with one's relations with others, it is not always so. Emotional distress results from an invasion of this interest when one is insulted in the presence of a third person and when no one other than the defendant is present. Indeed, the defendant himself may not even be present, as when he writes an abusive letter to the plaintiff.[97]

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dard v. Snodgrass, 117 Ore. 262, 241 Pac. 73 (1925); Pearson and Son v. Bonnie, 209 Ky. 307, 272 S.W. 375 (1925); Rea v. Tacoma Mausoleum Ass'n, 103 Wash. 429, 174 Pac. 961, 1 A.L.R. 541 (1918).

[96] Densmore v. Evergreen Camp No. 147, 61 Wash. 230, 112 Pac. 255, 31 L.R.A. (N.S.) 608 (1910); Goodrich v. Starrett, 108 Wash. 437, 184 Pac. 220 (1919); Saier v. Joy, 198 Mich. 295, 164 N.W. 507 (1917); Cunningham v. Miller, 178 Wis. 22, 189 N.W. 531 (1922); Streett v. Marshall, 316 Mo. 698, 291 S. W. 494 (1927); Osborn v. Shreveport, 143 La. 932, 79 So. 542, 3 A.L.R. 955 (1918); Leland v. Turner, 117 Kan. 294, 230 Pac. 1061 (1924); Higgins v. Bloch, 213 Ala. 209, 104 So. 429 (1925); Tureman v. Ketterlin, 304 Mo. 221, 263 S.W. 202 (1924); Beisel v. Crosby, 104 Neb. 643, 178 N.W. 272 (1920); Everett v. Paschall, 61 Wash. 47, 111 Pac. 879 (1910); Stotler v. Rochelle, 83 Kan. 86, 109 Pac. 788 (1910).

[97] See Grimes v. Gates, 47 Vt. 594 (1873), where the plaintiff recovered for emotional distress caused by receipt of a letter written by the defendant in which threatening and abusive language had been employed. See also La Salle Ex. U.

While the interest in personal dignity has long been respected, the courts have traditionally recognized it mostly where there was an invasion, even though a merely technical one, of some more tangible interest, such as a property interest, or the interest in reputation, or where the affront to dignity is made obvious and dramatized by contact with the person. For instance, the "least touching of another in anger",[98] or in an insolent, rude manner,[99] or any unreasonably or intolerably offensive touching[100] has been said to be a battery and actionable, although in reality the injury is the affront to the victim's dignity rather than the mere physical contact.

In *Christy Brothers Circus v. Turnage*,[101] the plaintiff recovered substantial damages for humiliation, embarrassment and similar emotional distress sustained while attending a performance of the defendant's circus when a performing horse, negligently backed by its rider into close proximity to her, evacuated its bowels in the plaintiff's lap. Damages were allowed for the humiliation not only because the incident occurred in public but for the additional reason that the plaintiff's servants were present to witness her humiliating experience. The court based its decision on the physical impact although the plaintiff sought no damages for this aspect of the situation. Again, emphasis was placed on a trespass to the person where the plaintiff, believing she was accompanying the defendant to a neighbor's, was subjected to fright and humiliation at the gossip she anticipated, when she was taken beyond the supposed destination.[102] The only touching was when the defendant took her arm, but the court used this as the substantial wrong and the mental

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v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934); Barnett v. Collection Service, 214 Iowa 1302, 242 N.W. 25 (1932).

[98] Holt, C.J. in Cole v. Turner, 6 Mod. Rep. 149, 87 Engl. Repr. 907 (1704), and United States v. Ortega, 4 Wash. C.C. 531, Fed. Cas. No. 15971 (1825).

[99] Seigel v. Long, 169 Ala. 79, 53 So. 753, 33 L.R.A. (N.S.) 1070 (1910); Wilson v. Orr, 210 Ala. 93, 97 So. 133 (1923); Forde v. Skinner, 4 Car. & P. 239, 172 Engl. Repr. 687, 34 Rev. Rep. 791 (1830); Fort Wayne Trac. Co. v. Ridenour, 71 Ind. App. 263, 123 N.E. 720 (1919); Crosswhite v. Barnes, 139 Va. 471, 124 S.E. 242, 40 A.L.R. 54 (1924); Respublica v. DeLong Champs, 1 Dall. (Pa.) 111, 1 L.ed. 59 (1784).

[100] Richmond v. Fiske, 160 Mass. 34, 35 N.E. 103 (1893); Hatchett v. Blacketer, 162 Ky. 266, 172 S.W. 533 (1915); Wilson v. Orr, 210 Ala. 93, 97 So. 133 (1923); Piggly Wiggly Alabama Co. v. Rickles, 212 Ala. 585, 103 So. 860 (1925); Liljegren v. United Rys., 227 S.W. 925 (Mo. App. 1921); Ragsdale v. Ezell, 20 Ky. Law Rep. 1567, 49 S.W. 775 (1899).

[101] 38 Ga. App. 581, 144 S.E. 680 (1928).

[102] Kurpgeweit v. Kirby, 88 Neb. 72, 129 N.W. 177 (1910). See also Small & Co. v. Lonergan, 81 Kan. 48, 105 Pac. 27, 25 L.R.A. (N.S.) 976 (1909); Cooper v. Hopkins, 70 N.H. 271, 48 Atl. 100 (1900).

suffering, humiliation and emotional disturbance as "matter of aggravation". The court said,

> We consider the peculiar circumstances of this case to place it within the reason of another class of cases, where by an active and wilful or wanton act one has been injured in his personal rights and privileges, . . . or outraged and humiliated in his personal self-respect or in the finer sentiments of his nature.[103]

Another court grants damages for mental distress and humiliation in a similar case against a defendant who was, as the court said, "a wilful violator of woman's most sacred right of personal security", even though there was no touching "except by his foul breath and speech".[104] It is evident from the very language of the court that the real harm was not this fictitious "touching", but the insult and offense to the plaintiff's pride and self-esteem.

Compensation has been allowed for the mortification, indignity, disgrace, and dishonor resulting from an accusation, either by words or conduct, of shoplifting. The theory of recovery may vary: assault, defamation, battery. The gist of the wrong is the affront to pride and dignity. Although no physical injury, no battery, no slander was found, the court in one case awarded substantial damages for "a wanton insult and indignity" and a "direct invasion of the appellee's right of personal security".[105] Similarly, recovery may be allowed for humiliation caused by being wrongfully ordered out of an amusement park,[106] an office,[107] a theatre,[108] or by wrongful eviction from one's dwelling place.[109]

When the invasion of the interest in personal dignity is accompanied by an interference with some property interest, the earlier cases emphasized the injury to property, no matter how fictional that might be. For instance, the defendant who stood in the public thoroughfare in front of the plaintiff's house and yelled insults or vile epithets at

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[103] 88 Neb. at 76, 129 N.W. at 179.

[104] Leach v. Leach, 11 Tex. Civ. App. 699, 33 S.W. 703 (1895).

[105] Small v. Lonergan, 81 Kan. 48, 105 Pac. 27, 25 L.R.A. (N.S.) 976 (1909); Cooper v. Hopkins, 70 N.H. 271, 48 Atl. 100 (1900); McDonald v. Franchere Bros., 102 Iowa 496, 71 N.W. 427 (1897); Perkins Bros. Co. v. Anderson, 155 S.W. 556 (Tex. Civ. App. 1913). *Contra*: Sisler v. Mistrot, 192 S.W. 565 (Tex. Civ. App. 1917) (slanderous words not set out in complaint).

[106] Davis v. Tacoma R. & P. Co., 35 Wash. 203, 77 Pac. 209, 66 L.R.A. 802 (1904).

[107] Sechrist v. Jahn, 11 Pa. Super. Ct. 59 (1899).

[108] Ayres v. Middleton Theatre Co., 210 S.W. 911 (Mo. App. 1919).

[109] Nordgren v. Lawrence, 74 Wash. 305, 133 Pac. 436 (1913); Moyer v. Gordon, 113 Ind. 282, 14 N.E. 476 (1887); Fillebrown v. Hoar, 124 Mass. 580 (1878).

the plaintiff was held liable for the trespass to plaintiff as abutting owner of the road.[110] Had defendant stood nearby but in front of a neighbor's premises and employed the same insults in plaintiff's hearing, it is obvious that the plaintiff would have suffered the same emotional distress and wounded pride as a result of defendant's conduct.

Similarly, where a man intruded into the plaintiff's home to solicit her favors, the court, in deciding in behalf of plaintiff, laid great stress upon the unlawful invasion of the home, although the more serious harm unquestionably was the humiliation and insult suffered from the defendant's unwelcome solicitations.[111] Recovery was granted on the same basis where the plaintiff was a guest in a hotel and the proprietor or his agents came into her room uninvited and used rude and abusive language, the court calling it an "unjustified intrusion and trespass on his (the guest's) rights incident to occupancy".[112] An even more fictitious trespass was found by one court in a case where the defendant had entered a bedroom in his own home and made improper proposals to a music teacher who was spending the night there, judgment being rendered for the plaintiff in an action of trespass quare clausum fregit.[113] It is quite apparent that the court, shocked at defendant's indecent behavior, seized upon the highly technical trespass concept in order to be able to grant relief to the plaintiff. It is equally apparent that the identical wrong results from similar conduct even though no technical trespass to person or property can be found.

There are, however, decisions which have denied protection to this interest even where there was available some orthodox ground for allowing it. Thus, a woman to whom an improper solicitation was made was denied recovery for the shame because, even though the defendant took her by the arm as she was about to board a street car and urged her to have sexual intercourse, there was not an assault, nor was there trespass to property.[114] It is difficult to understand why the plaintiff should not have recovered for the offensive and insulting touching. Similarly, where the proposal was made while

[110] Adams v. Rivers, 11 Barb. 390 (N.Y. 1851).

[111] Johnson v. Hahn, 168 Iowa 147, 150 N.W. 6 (1914).

[112] Newcomb Hotel Co. v. Corbett, 27 Ga. App. 365, 108 S.E. 309 (1921). See also Frewen v. Page, 238 Mass. 499, 131 N.E. 475 (1921); De Wolfe v. Ford, 193 N.Y. 397, 86 N.E. 527, 21 L.R.A. (N.S.) 860 (1908); Moody v. Kenny, 153 La. 1007, 97 So. 21 (1923); Boyce v. Greeley Square Hotel Co., 168 N.Y.Supp. 191, 181 App. Div. 61 (1917); Lehnen v. Hines, 88 Kan. 58, 127 Pac. 612, 42 L.R.A. (N.S.) 830 (1912).

[113] Newell v. Whitcher, 53 Vt. 589 (1880).

[114] Prince v. Ridge, 32 Misc. 666, 66 N.Y.Supp. 454 (1900).

plaintiff was a customer in defendant's store and later at a third person's residence, recovery was denied because, the court said, there was no attempt to carry out the defendant's purpose.[115] In this case, also, there was a touching, but the plaintiff did not make that the theory of her action. In *Reed v. Maley*,[116] the plaintiff was seated inside the window of her own home when the defendant approached and made an indecent proposal. The plaintiff was denied recovery for the insult and indignity because there was no physical impact, no assault and no trespass. In the dissenting opinion it was said,

> The actual injury that may be done to a virtuous woman by a wrong of this description is incalculable. If the plaintiff had suffered a miscarriage or sustained some direct pecuniary loss as the proximate result of the wrong, it would hardly be doubted that she might maintain an action for the damages thus sustained by her. But where she is crushed under the insult and unnerved and made sick, the damage, though different in a degree, is none the less actual than in the case supposed.[117]

Again, where a man sued in trespass, alleging that defendant had with force and arms entered his home and attempted to persuade his wife to have illicit relations with him, it was held that since defendant had entered under plaintiff's license, the trespass allegation failed, and the conduct after entering was "by way of aggravation" and not the ground of the action.[118] Apparently the court did not consider that by abuse of the license the defendant became a trespasser.[119] Another rationale resorted to in many older cases involving the interest in personal dignity and self-respect is that of libel or defamation. For instance, if a creditor employs some method of

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[115] Davis v. Richardson, 76 Ark. 348, 89 S.W. 318 (1905). But see Leifermann v. Daniels, 44 N.D. 76, 176 N.W. 9 (1919).

[116] 115 Ky. 816, 74 S.W. 1079, 62 L.R.A. 900 (1903). See also Western U. Tel. Co. v. Hill, 227 Ala. 454, 150 So. 709 (1933), where the court, although mentioning the assault and trespass considerations, bases its decision mainly on the nonliability of the principal for the act of its agent which is purely personal and not referable to the employer. This seems to be out of harmony with the line of common carrier and innkeeper cases involving tortious conduct of employes toward passengers and guests.

[117] 115 Ky. at 830, 74 S.W. at 1083-1084.

[118] Bennett v. McIntire, 121 Ind. 231, 23 N.E. 78, 6 L.R.A. 736 (1889). See also Davenport v. Russell, 5 Day 145 (Conn. 1811); Taylor v. Cole, 3 T.R. 292, 100 Engl. Repr. 582 (1789); Anonymous, Minor (Ala.) 52, 12 Am. Dec. 31 (1821); Donohue v. Dyer, 23 Ind. 521 (1864); West & Wife v. Forrest, 22 Mo. 344 (1856), where the mental suffering and wounded feelings of Mrs. West were considered in assessing damages against defendant for beating plaintiff's slave in her presence.

[119] Compare Dixie Const. Co. v. McCauley, 211 Ala. 683, 101 So. 601 (1924) and Louisville & N. R.R. v. Bartee, 204 Ala. 539, 86 So. 394 (1920).

forcing collection which is likely adversely to affect the debtor's standing in the community, redress is usually granted on the ground of libel.[120] However, in some collection cases there cannot, by any technicality, be found the necessary element of publication,[121] and yet the debtor has suffered a serious loss of self-esteem and wounded pride from the receipt of one or a series of abusive and harassing letters, or from some other conduct of the creditor known to the debtor alone. In such a case, several courts have awarded damages to the debtor, where the creditor has acted for the purpose of annoying and harassing the plaintiff until he paid, whether the claim was justly due or not.[122] The New York court has even suggested that an injunction might be given to restrain the sending of letters sent solely to annoy.[123]

It is indicated, then, by substantial authority that the interest in self-respect is entitled to protection and a survey of the later cases shows a growing tendency to recognize such an interest without regard to the more usual well-established rights of property or person. This is illustrated by cases which present a factual situation involving the necessary elements of trespass, or assault, or defamation, but in which the court overlooks the possible technical reason and grants relief for an invasion of the plaintiff's interest in his self-esteem or personal dignity. Thus, the Georgia court asserts that a defendant must respond in damages for the plaintiff's mental suffering even though his conduct is something less than assault and not quite a trespass to the person or to property.[124] It is true that under the facts of this case an assault and battery had, in fact, been committed, defendant having entered plaintiff's stateroom for the purpose of committing rape, torn off the bed linens and laid hold of the plaintiff. However, she sought to recover not for the assault nor the physical impact, but for mental suffering, humiliation and distress, and the court, in holding for plaintiff, based its opinion upon

[120] Thompson v. Adelberg, 181 Ky. 487, 205 S.W. 558 (1918); Muetze v. Tuteur, 77 Wis. 236, 46 N.W. 123, 9 L.R.A. 86 (1890); Gault v. Babbitt, 1 Ill. App. 130 (1878); Keating v. Conoiser, 127 Misc. 531, 217 N.Y.Supp. 117 (1926).

[121] Houston v. Woolley, 37 Mo. App. 15 (1889) holds that there is publication by the mere sending of a libelous letter to the addressee, but this case stands almost alone.

[122] Saks v. Ivey, 26 Ala. App. 240, 157 So. 265 (1934); People v. Loveless, 84 N.Y.Supp. 1114 (1903); La Salle Extension U. v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934); Barnett v. Collection Service Co., 214 Iowa 1302, 242 N.W. 25 (1932). See also Davidson v. Lee, 139 S.W. 904 (Tex. Civ. App. 1911), where the defendant kept plaintiff in his room, threatening him with a gun and using abusive language.

[123] Williams v. O'Shaughnessy, 172 N.Y.Supp. 574 (1918).

[124] Byfield v. Candler, 33 Ga. App. 275, 125 S.E. 905 (1924).

the right of privacy, and suggested that had there been no assault and battery, it would reach the same conclusion, for the defendant's conduct would create an equally unreasonable risk of mental distress. Similarly, on the ground of invasion of privacy, damages were awarded for the humiliation and indignity suffered by the plaintiff as a result of the unwarranted intrusion of defendant's servants into the plaintiff's hotel room and the removal of his luggage.[125] And where the defendant posted a large sign in front of his place of business advertising that the plaintiff owed him $49 and "if promises would pay an account, this one would have been settled long ago", the defendant was held liable in damages for the humilation, mortification and indignity the plaintiff suffered.[126] After ruling that by statute truth constitutes a complete defense in libel cases, the court said, "We are content to hold there is a right of privacy, and the unwarranted invasion of such right may be made the subject of an action in tort".[127] This court, unlike others, did not seek to circumvent the defense of truth by regarding the defamatory publication as capable of the innuendo that the plaintiff had fraudulently refused to pay the account.[128] Another court awarded judgment to the relatives of a plaintiff (who had died after instituting the action) for the humiliation she suffered at being made an object of ridicule before the whole community by reason of a mean prank.[129] She had been led to believe that a pot of gold was cached in a certain field and, later, that a pot put there by the pranksters and unearthed by her should be opened in the presence of many witnesses. This she did, with great excitement, only to find she had been tricked and humiliated. Usually, however, relief has been granted in practical joke cases only where some physical injury or pecuniary loss was suffered.[130] This rule may be defended where the emotional distress is not severe. It is not too much to require that a member of the community be able to take a joke so long as it is not in too bad taste. Where the "joke", however, becomes a serious hoax, likely to cause extreme embarrassment and humiliation, the loss of personal dignity may well be a sufficient basis for recovery. And this is no less so be-

[125] Florence Hotel Co. v. Bumpas, 149 Ala. 69, 69 S.E. 566, Ann. Cas. 1913E 252 (1915).

[126] Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

[127] *Id.* at 774, 299 S.W. at 971.

[128] See Gault v. Babbitt, 1 Ill. App. 130 (1878); Muetze v. Tuteur, 77 Wis. 236, 46 N.W. 123, 9 L.R.A. 86 (1890); Thompson v. Adelberg, 181 Ky. 487, 205 S.W. 558 (1918).

[129] Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

[130] Parker v. Enslow, 102 Ill. 272 (1882); Wartman v. Swindell, 54 N.J.L. 589 (1892).

cause the plaintiff has not actually been harmed in his reputation by the publication of matter which contains false imputations.

C. The Interest in Privacy of Name, Likeness, and Life History

The interests in one's name, likeness and life history are closely akin.[131] There is something obviously personal about one's likeness. Curiously, perhaps, one's name is invested with similar characteristics. More than either, the life history of an individual is exclusively his own. These things more than anything, other than his physical being, constitute vital aspects of his personality. The name, the likeness, and the individual history of a man represent his objective existence. In many particulars these aspects of personality cannot be exposed or used by others without causing acute mental and emotional suffering. It is not surprising, therefore, that the great bulk of case law on the subject of privacy has arisen out of situations where there has been an unauthorized use of the plaintiff's photograph or name. While various rationales have been adopted, such as the property right one is said to have in his name or likeness,[132] or the interest in reputation,[133] or even the right to the pursuit of happiness unmolested by offensive publicity,[134] most courts have seen fit to grant relief against any unprivileged publication of name, likeness or biography.

Here again, not every invasion of these interests is actionable. It may be that a man has by his own choice entered upon a career or profession of public interest, so that he cannot be heard to complain of publicity. This is discussed by a federal court in *Corliss v. Walker*,[135] where the plaintiff asked damages for the unauthorized publication of a photograph of her deceased husband. In awarding judgment to the defendant, the court said,

> He was a public character and as such, had waived whatever rights of privacy he had. A statesman, author, artist, or inventor, who asks for and desires public recognition, may be said to have

[131] Compare Green's analysis of these interests in *The Right of Privacy* (1932) 27 Ill. L. Rev. 237.

[132] Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); Brown v. Meyer, 139 U.S. 540 (1891); Edison v. Edison Polyform Co., 73 N.J.Eq. 136, 67 Atl. 392 (1907).

[133] Peck. v. Tribune Co. Adv. Ops., 214 U.S. 185, 53 L. ed. 960 (1908); Atkinson v. John E. Doherty Co., 121 Mich. 372, 80 N.W. 285 (1899); Monson v. Tussaud [1894] 1 Q. B. 671; Sweenek v. Pathe, 16 Fed. Supp. 746, (E.D. N.Y. 1936); Merle v. Sociological Research Film Corp., 166 App. Div. 376, 152 N.Y.Supp. 829 (1915).

[134] Melvin v. Reid, 122 Cal. App. 285, 297 Pac. 91 (1918).

[135] 64 Fed. 280 (C.C. Mass. 1894), 31 L.R.A. 283 (1894).

> surrendered this right to the public. . . . Such characters may be said, of their own volition, to have dedicated to the public the right of any fair portraiture of themselves.[136]

Similarly, there was no infraction of the right of privacy where the picture of the professional public entertainer appeared in a single issue of a weekly paper,[137] or where a famous detective was portrayed in a news reel and her picture used on display posters to advertise the film,[138] or where a public institution objected to the use of its name in connection with a bakery product,[139] or where a newspaper was publishing the picture and a life story of a famous pugilist.[140]

So too, one, although not following a career of public interest, may participate even unwillingly in some event of such public concern that he cannot complain if he is involved in the attendant publicity. In *Jones v. Herald Post Company,*[141] the plaintiff was walking along a city street accompanied by her husband when he was attacked by ruffians and stabbed to death. A newspaper published her picture along with an account of the tragedy and plaintiff's hysterical threats of vengeance on the slayers. The court, in refusing her claim for damages, said that the event had transpired in a public place, was a matter of public concern, and that the publication was not calculated to expose the plaintiff to ridicule. Similarly, the defendant was not held liable in damages for photographing the equipment of a North Pole expedition, since it was of a public nature.[142] Madame Tussaud had set up a wax replica of the plaintiff who had gained notoriety through a murder charge against him, resulting in the verdict "Not proven". He was held to have no cause of action against Tussauds.[143] Nor could another plaintiff who appeared briefly and casually among other persons, all unnamed, in a street scene of a film entitled, "Sightseeing in New York City".[144] Even where a newsreel with humorous comment showed plaintiff and other stout women exercising in a gymnasium with novel apparatus, the court said that the publication of matters of public interest in newsreels is not within a statute prohibit-

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[136] *Id.* at 282.
[137] Colyer v. Fox Pub. Co., 162 App. Div. 297, 146 N.Y.Supp. 999 (1914).
[138] Humiston v. Universal Film Mfg. Co., 167 N.Y.Supp. 98 (1917).
[139] Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982 (W.D. Mo. 1912).
[140] Jeffries v. New York Evening Journal, 124 N.Y.Supp. 780 (1910).
[141] 230 Ky. 227, 18 S.W. (2d) 972 (1929).
[142] Smith v. Suratt, 7 Alaska 416 (1926).
[143] Monson v. Tussaud, [1894] 1 Q. B. 671.
[144] Blumenthal v. Picture Classics, 235 App. Div. 570, 257 N.Y.Supp. 800 (1932).

ing unauthorized use of portraits for commercial purposes.[145] It is worth noting that there is here a rather close analogy to the privilege of fair comment in defamation cases. If the plaintiff has by his own choice entered into public life, or placed himself in a situation of public interest, it is not reasonable for him to complain merely because his likeness is seen by all men. Where a man voluntarily engages in public affairs, or if he is a participant in an event of public interest, he may be said to have submitted his private life to any fair criticism and to have waived the right to privacy.[146]

Another consideration which may be of weight in determining whether the publication is unreasonable is the purpose or motive behind it. This is covered by statute in some states.[147] If the defendant intended to profit commercially by the publication, it is usually held that the plaintiff has a cause of action. This may be true even though the plaintiff was in a public event, or is a public character. For example, a photograph of a courtroom during a murder trial disclosing the plaintiff seated on the witness bench was published—accompanied by a lurid inscription—to illustrate a story in a detective magazine.[148] The court held that the publication was for a purely commercial purpose, to increase circulation by picturing scandalous and sordid occasions, and not for any educational use nor for the dissemination of news. And where defendant, a grocer, surreptitiously took movies of the plaintiff while she was a customer in his store and then projected them at a theatre to advertise his business, the plaintiff recovered for the humiliation she suffered from the unwelcome publicity.[149] While there is nothing disgraceful or contemptible about buying groceries, it is not an exaggerated sense of the fitness of things that takes offense at the wide publication, for advertising purposes, of one's picture taken while so engaged.

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[145] Sweenek v. Pathe, 16 F. Supp. 746 (E.D.N.Y. 1936). See also, Moser v. Press Publishing Co., 59 Misc. 78, 109 N.Y.Supp. 963 (1908); Humiston v. Universal Film Mfg. Co., 101 Misc. 3, 167 N.Y.Supp. 98 (1917).

[146] In O'Brien v. Hamill, 264 N.Y.Supp. 557, 559, 147 Misc. 709, 711 (1933), the court said: "Character and public reputation are priceless possessions and are not good hunting-ground simply because a person holds public office. While fair comment and just criticism, especially of the acts and life of a public official are rights acknowledged and upheld by the law, the comment must be fair and honest to receive the law's protection." Also, Pattangall v. Mooer, 113 Me. 412, 94 Atl. 561 (1915); Putnam v. Browne, 162 Wis. 524, 155 N.W. 910 (1916); Corliss v. Walker, 64 Fed. 280 (C.C. Mass. 1894), 31 L.R.A. 283 (1894).

[147] See N.Y. Laws 1903, c. 132, p. 308.

[148] Martin v. New Metropolitan Fiction, Inc., 139 Misc. 290, 248 N.Y. Supp. 359 (1931). See also, Binns v. Vitagraph Co., 210 N.Y.Supp. 51, 103 N.E. 1108 (1913); Elliot v. Jones, 66 Misc. 95, 120 N.Y.Supp. 989 (1910).

[149] Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918).

Of course, if a person consents to the publication, he cannot complain of an intolerable mental anguish resulting from such an invasion of his interest in his name or likeness. One court found that a woman by posing for a snapshot waived her right of privacy to such an extent that she could not recover against a newspaper which published the picture after obliterating parts of it and attaching a sensational caption.[150] But even the plaintiff's consent to the use in advertisements of photographs for which he has posed may not preclude his maintaining an action under certain circumstances, as where the finished picture was not shown to plaintiff before publication and was calculated with the captions to make the plaintiff an object of ridicule, even though it was patently an optical illusion.[151] No doctrine of privacy was invoked in that case although it seems strikingly appropriate. Recovery was allowed in libel. Most courts have no difficulty in finding an invasion of an interest in privacy if the publication is libelous.[152] This, of course, adds nothing to the technical development of the law of privacy, but it discloses a recognition of the value of this type of interest. So, where a defendant innocently published the plaintiff's picture, mistaking identities, with the story of a young girl trying to save her father from the gallows, damages were allowed for libel although the publication actually imputed nothing disparaging to the plaintiff's character.[153] It is certainly not an unnatural or ignoble act to assist a parent to escape capital punishment. The embarrassment to which the plaintiff was subjected, however, is obvious and the emotional distress which she suffered was no doubt acute.

However, there is a substantial authority protecting these interests in personality, in one's likeness, name or life history, entirely apart from any considerations as to defamation, libel or property rights.[154] The Baltimore Superior Court[155] scoffs at the "groping for precedent" in the older cases, saying,

> Examination of the cases leads me to the conclusion that for some 200 or more years relief has been given against certain in-

[150] Thayer v. Worcester Post Co., 284 Mass. 160, 187 N.E. 292 (1933), criticised in (1934) 32 Mich. L. Rev. 1172.

[151] Burton v. Crowell Publishing Co., 82 Fed. (2d) 154 (C.C.A. 2d, 1936).

[152] Peck v. Tribune Co. Adv. Ops., 214 U.S. 185, 29 Sup. Ct. 554 (1908); Reed v. Washington Times, 55 Wash. Law Rep. 182 (1927); Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); Atkinson v. John E. Doherty & Co., 121 Mich. 372, 80 N.W. 285 (1899).

[153] Van Wiginton v. Pulitzer Publishing Co., 218 Fed. 795 (C.C.A. 8th, 1914).

[154] Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Foster v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

[155] Graham v. Baltimore Post, reported in (1932) 22 Ky. L.J. 108.

> vasions of one's right of privacy. It is a matter of small moment that the juristic mind, cautious and conservative, ever groping for precedent in granting relief, based its reason on some then recognized legal ground, no matter how far-fetched the fiction might be on which it was supported. Hence cases may be grouped into those which found in it some *property* right, to support equity jurisdiction, for restraint against invasion. Others bolstered up their jurisdiction on the fiction of "breach of trust" (often present as an incident of the invasion of the right of privacy.) Still others were able to grant relief at law under fact, or fiction, of "breach of contract." Stripped of all legal fiction, it was essentially right of privacy which was being protected. Called by any other name, it proved just as sacred.[156]

In a recent California case where the defendants, using the plaintiff's maiden name, made a motion picture showing her past life—that of a prostitute who had been tried for murder—the court, in awarding substantial damages to her, relied on the right of privacy.[157] In that case most severe distress (through the consequent disgrace and humiliation and loss of respect) had been suffered by the plaintiff who had reformed and was living a pleasant and respectable life in a new community. There was no property right in her maiden name, or in her past life, and whatever claim of libel or defamation she might have made could have been defeated by the plea of truth. However, the court recognized that the plaintiff had suffered this shocking loss of mental peace and that the conduct of the defendants in creating that risk for her was obviously unreasonable. Here the interest in keeping her life history to herself was given frank and direct protection.

D. The Interest in the Privacy of Sentimental Associations

Many associations with others are dear to the memory primarily by reason of their sentimental value. It is a common desire to keep such associations to oneself and those who have shared them. In many cases the desecration of the memory of such relations by publicity is closely akin to sacrilege and may cause the most poignant emotional suffering. So it is that if a private letter is published wrongfully, its author may have damages even though he suffers no pecuniary loss and there is no literary value in the writing. The right of privacy is not expressly relied on by most courts to prevent publication or to redress wrongful publication, but it nevertheless seems

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[156] (1932) 22 Ky. L.J. at 120.

[157] Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1918).

to be the underlying basis. Thus, where a husband sought to get possession of letters he had written to his wife, now deceased, the court, while denying him possession, admitted that he could prevent their publication and that her property in them was the "exclusive right to read them and keep them for their enduring memories and sentiments".[158] The dissenting justice indignantly said,

> Then, in the name of every husband and wife of the Commonwealth, and as I regard the sacred, secret privacy of the family relation, and its security against the prying eye of the curious, I dissent from the recognition of any legal rule which will expose these sacred relations and private affairs to the gaze of the world.[159]

Cases restraining publication of private letters have generally relied on the property right of the sender.[160] However, it is quite clear that such a right is almost negligible in value when compared with the interest in the privacy of friendly or family associations, and most courts, while paying lip service to the property idea, are really protecting this interest.[161]

E. Unanimity of Interests in Privacy

It will be seen from this survey of the cases that while the character of the invasion may differ, and different courts may follow different lines of reasoning, various interests in privacy are slowly coming into general recognition. Common to all these cases is the dis-

[158] Grigsby v. Breckinridge, 65 Ky. 480, 92 Am. Dec. 509 (1867). See also Denis v. LeClerc, 1 Mart. (O.S.) 297, 314 (La. 1811), "A brother may correspond with his brother . . . on the distresses of the family, occasioned by the misconduct of their father, and devise the means of alleviating the consequences of it. With secrecy he may succeed; hut if a gazetteer, in whose hands accident or knavery may place his letter, cannot be compelled to respect the privacy of these family secrets, the writer will innocently incur the odium of the conduct of the younger son of Noah."

[159] 65 Ky. at 512.

[160] Pope v. Curl, 2 Atk. 342 (1741); Woolsey v. Judd, 4 Duer 379 (N.Y. 1855); Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912); Gee v. Pritchard, 2 Swanst. 402 (1818); Thompson v. Stanhope, Ambler 737, 27 Engl. Repr. 476 (1774); King v. King, 25 Wyo. 275, 168 Pac. 730 (1917); Folsom v. Marsh, 2 Story 100, Fed. Cas. No. 4, 901 (1841); Philip v. Pennell, 2 Ch. 577 (1907); Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912). In Prince Albert v. Strange, 2 De. Gex & Sm. 652 (1848), at 695, the motive underlying the property rationale is thus expressed, "Upon the principle, therefore, of protecting Property, it is that the common law, in cases not aided or prejudiced by statute, shelters the privacy and seclusion of thought and sentiments committed to writing, and desired by the author to remain not generally known."

[161] "It seems to me that in cases of this kind the property in a thing like a letter may be mainly valuable because it gives the plaintiff the right to keep it private." Thurston v. Charles, 21 T.L.R. 659, 660 (1905).

turbance of plaintiff's emotional and mental tranquility. Of course, not every emotional upset or mental disturbance is actionable. Even the most fastidious person entering a crowded elevator must endure with equanimity brushing elbows with coarser folk. Being a member of society, he must curb his sensibilities to a reasonable degree. However, let the intrusion become intolerable, so that he may be expected to suffer serious mental pain or humiliation, and the intruder must answer for it. There is a growing tendency to recognize such interests regardless of other interests traditionally protected by law if the defendant has intended to cause acute mental suffering or if he has unreasonably created a likelihood thereof.

The determination of the reasonableness of the risk must depend upon a number of factors, such as the defamatory nature of defendant's act, or the purpose or motive behind that act, whether to further defendant's pecuniary advantage at plaintiff's expense, or for some more justifiable end, whether the plaintiff has by his own choice submitted his private life to be publicized, either by his professional activities, or by appearing in public places, or taking part in some event of general public interest. The judicial process in these cases is working out, according to current standards of propriety, good taste, and decency, the proper balance between individualism and the price of social contacts. Intrusions upon interests in these aspects of life are becoming actionable over a constantly widening area.

Conclusion

If the foregoing discussion is of any value it is because it suggests that the problem of emotional distress and recovery therefor should be considered in relation to the character of the interest invaded by the emotional disturbance. Since these interests are varied and their value to the individual, and consequently their significance for society, graduated, there should be recovery for emotional distress in some situations and not in others. The technique indicated in solving these problems is an evaluation of the interest invaded and a consideration of the unreasonableness or justification of the threat of invasion involved in the defendant's conduct. Necessarily there will be conflict in the judgment of courts on these issues. If the problem is thoroughly understood and the issues clearly drawn, liability patterns may be expected to crystallize which will be capable of manipulation by an intelligent judiciary to produce satisfactory results.