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Osborne M. Reynolds Jr.

TRANSFERRED INTENT: SHOULD ITS "CURIOUS SURVIVAL" CONTINUE?

OSBORNE M. REYNOLDS, JR.*

Introduction

Thirty years ago, Prosser referred to the tort doctrine of transferred intent as a "curious survival of the ancient law."[1] Though little examined by scholars,[2] this doctrine remains a generally recognized part of the basic law of tort. But is there any need for it? The rule, as usually applied, provides that where an intentional tort, such as battery, is attempted or committed against one person and is, instead of or in addition to being committed against that intended victim, committed against another person, the law will, as to the secondary victim, supply the missing element of intent so that the second victim can hold the attacker liable. Thus, if *A* throws a punch at *B* but misses *B* and hits *C* instead (or, for that matter, manages to hit both *B* and *C*), *A* will be held liable for hitting *C* despite *A*'s lack of intent to strike that person.[3] Factually, such a situation might be termed one of "transferred result," but analytically, it is the intent that is transferred. Thus, in the above example, if *C* sues *A* for battery, most of the elements are present:[4] There is physical contact with *C*; there may well be a result that is either physically harmful or reasonably offensive; and, if considered necessary to the plaintiff's case, there is probably a lack of consent on *C*'s part.[5] There is only one element missing: intent to cause

* Professor of Law and Maurice H. Merrill Distinguished Scholar, University of Oklahoma.

1. William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 650 (1967) [hereinafter Prosser, *Transferred Intent*].

2. *See id.* (stating that diligent research failed to reveal any scholarly discussion of the doctrine).

3. *See id.* (providing a similar example).

4. For a discussion on the elements of battery, see RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965). Section 13 defines the elements required for battery causing harmful contact and section 18 addresses the elements of battery causing offensive contact. *See also id.* § 20 (discussing transferred intent in assault and/or battery cases); Osborne M. Reynolds, Jr., *Tortious Battery: Is "I Didn't Mean Any Harm" Relevant?*, 37 OKLA. L. REV. 717 (1984) (considering the intent required for battery liability and concluding that most authority requires only intent to cause contact, not intent to cause harm or offense). *See generally* Charles E. Carpenter, *Intentional Invasion of Interest of Personality*, 13 OR. L. REV. 227 (1934) (stating general rule that, if a touching was consented to by a victim, it is not actionable).

5. The absence of consent is sometimes considered an element of assault or battery liability since it goes to negate the existence of the tort, but it is usually listed as a defense and is regarded as a matter for the defendant to plead and prove once the plaintiff has made a prima facie case as to the other elements. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 112-14 (5th ed. 1984) [hereinafter PROSSER & KEETON]. Consent is, however, assumed to normal social contacts, such as a tap on the shoulder to attract attention or a friendly grasp of the arm. *See id.* at 42; *see also* Marc Gary, Comment, *Tort Liability of Participants in Consensual Crimes*, 65 GEO. L.J. 1619 (1977) (urging that public policy considerations be determinative in suits arising out of consensual illegal conduct). *See generally* Francis H. Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COLUM.

contact. Even this element might sometimes be found if the situation involved substantial certainty that *A*'s conduct would result in a touching of *C*.[6] Or liability might be based on negligence toward *C* on *A*'s part. But since *A*'s conduct is usually regarded as antisocial, it is thought unnecessary for *C* to bear the burden of establishing such certainty or negligence. *C* can instead borrow the missing element of intent from the tort that *A* intended to commit against *B*.

History of and Reasons for the Doctrine

How did such a "peculiar idea"[7] become part of tort law, and is it really of value in achieving fair results? It is generally agreed that the doctrine originated in criminal law cases in which the criminal act, such as shooting, was directed at one person but caused injury to another, such as the common situation of an innocent bystander being hit by a bullet meant for someone else.[8] As often stated, "The intention follows the bullet."[9] Much of the modern tort law on intentional torts grew from the common-law action of trespass, which had criminal overtones. In actions based on the writ of trespass, damages were awarded the individual plaintiff if liability was found, but the court also often punished the defendant by levying a fine against him and subjecting him to imprisonment if the fine went unpaid.[10] Since the rule of transferred intent had become established in the English criminal law as early as 1553,[11] it was natural to apply the same principle in tort cases based on the writ of trespass, and this was seemingly done in a couple English cases.[12] English authority on this doctrine as part of tort law is, however,

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L. REV. 819 (1924) (discussing the effect of violation of a criminal law on the validity of consent and urging application of the general rule that consent bars liability).

6. *See* PROSSER & KEETON, *supra* note 5, at 33-37 (discussing "substantial certainty" as a form of intent).

7. *Id.* at 37.

8. For examples of 'innocent bystander" cases, see generally *State v. Ochoa*, 297 P.2d 1053 (N.M. 1956); *Coston v. State*, 190 So. 520 (Fla. 1939); *State v. Williams*, 97 N.W. 992 (Iowa 1904); *Dunaway v. People*, 110 Ill. 333 (1884).

9. State v. Batson, 96 S.W.2d 384, 389 (Mo. 1936), *quoted in* Prosser, *Transferred Intent*, *supra* note 1, at 650, and PROSSER & KEETON, supra note 5, at 37; *cf.* Carpio v. State, 199 P. 1012, 1013 (N.M. 1921) (stating that "the malice followed the bullet").

10. *See* George E. Woodbin, *The Origins of the Action of Trespass*, 33 YALE L.J. 799 (1924), 34 YALE L.J. 343 (1925) (two-part article). *See generally* CECIL HERBERT STUART FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW ch. 3 (1949) (discussing development of actions for money damages).

11. *Regina v. Salisbury*, 75 Eng. Rep. 158 (1553), is recognized as the first case applying the rule. It was reaffirmed in *The Queen v. Saunders & Archer*, 75 Eng. Rep. 706 (1576).

12. *See* James v. Campbell, 172 Eng. Rep. 1015 (1832) (finding battery liability where the defendant swung at one person and unintentionally hit another); Scott v. Shepherd, 96 Eng. Rep. 525, 95 Eng. Rep. 1124 (1773) (known as "The Squib Case") (holding that trespass would lie where the defendant tossed a lighted firecracker into a markethouse, ultimately causing injury to the plaintiff, even though other persons intervened between the defendant's act and the plaintiff's harm by instinctively throwing the firecracker away from themselves).

exceedingly sparse;[13] and it is United States courts that have most often accepted and applied the rule in tort cases.[14]

In the United States, the rule has been justified, not so much on the basis of the shaky English precedents, as on the basis of policy. There is, in general, a tendency to impose liability more easily and more broadly on a defendant whose conduct was intended to do harm than on a defendant who was merely negligent.[15] Such extensive liability can be justified either on the basis of the possible violation of the criminal law involved or simply on the antisocial and immoral nature of a defendant's behavior.[16] Thus, where the defendant has intended to hit one person but has struck another person instead, liability to the unintended victim can be justified on the basis of the "strong social policy"[17] of encouraging obedience to the criminal law, one means of which is through imposing a kind of absolute civil liability on those who disobey that law. An intentional wrongdoer is not considered entitled to invoke the defense that the harm he caused was merely an unintended accident.[18] Thus, although the requirement of causation is basically the same in tort cases founded on wrongful intent as in cases based on negligence, the courts as a matter of policy will allow liability to be imposed for more remote consequences in the cases of wrongful intent.[19] No limit of *proximate* causation is imposed in the intentional tort situations, as it is in negligence; only a requirement of causation-in-fact is applied.[20] The perpetrator of the intentional tort is assumed to be somewhat morally blameworthy and is thus held to a higher degree of accountability than is a person whose conduct only unintentionally causes harm.[21] "For an intended injury the law is astute to discover even very remote causation."[22]

It has been said that imposition of extensive liability in intentional torts may serve as a warning to those contemplating such conduct and may thus help deter harm-producing behavior.[23] But the usefulness and appropriateness of such warning may be questioned:[24] Do potential wrongdoers really stop to consider the scope of *civil* liability? And should the extent of that liability not be measured by the plaintiff's

13. *See* Prosser, *Transferred Intent*, *supra* note 1, at 654 (noting the general silence of English courts and writers on the subject of transferred intent in tort).

14. *See id.* at 654-55.

15. *See* Derosier v. New England Tel. & Tel. Co., 130 A. 145, 152 (N.H. 1925); PROSSER & KEETON, *supra* note 6, at 37.

16. *See* Ralph S. Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586, 588-89 (1933). *See generally* Note, *The Tie That Binds: Liability of Intentional Tort-Feasors for Extended Consequences*, 14 STAN. L. REV. 362 (1962) (suggesting a combination of a direct-result test and a foreseeability test to determine the extent of liability for intentional torts).

17. Manning v. Grimsley, 643 F.2d 20, 22 (1st Cir. 1981).

18. *See* Bauer, *supra* note 16, at 588.

19. *See* LEON GREEN, RATIONALE OF PROXIMATE CAUSE 170 (1927).

20. *See* Bauer, *supra* note 16, at 589 (noting similarities in this respect between modern American law and Roman law).

21. *See id.* at 596.

22. Derosier v. New England Tel. & Tel. Co., 130 A. 145, 152 (N.H. 1925).

23. *See The Tie That Binds*, *supra* note 16, at 364-65 (citing Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1174 (1931).

24. *See The Tie That Binds*, *supra* note 16, at 365.

need for compensation rather than by what is necessary for deterrence and punishment of the defendant? Are deterrence and punishment not matters better left largely to criminal law? Thus, the philosophical argument behind transferred intent may, like the English precedents therefor, be challenged as giving only limited support to the doctrine. There is some modern tendency to keep transferred intent within narrow bounds and not, for instance, apply it when interpreting a statute requiring "intended" harm.[25] Even if a wide reach of liability is considered desirable as to intentional torts, the need for the transferred intent doctrine may be questioned. Could other doctrines serve the same purpose as well? In order to consider the need for and appropriateness of the transferred intent rule, it is well to survey the scope of and limitations on this rule and its overlap with other concepts.

Assault and Battery Cases

Generally, the doctrine of transferred intent has been applied only to torts growing out of the old writ of trespass, because it was that writ which covered torts having criminal overtones, which have in turn been considered to justify a policy of widespread liability.[26] That writ gave rise to five modern tort actions: assault, battery, false imprisonment, trespass to chattels, and trespass to land.[27] By far the greatest use of the transferred intent rule in the United States has occurred in cases involving the torts of assault and/or battery. It has thus been recognized that both at common law and under statutes, an unintentional hitting of a third person when a defendant is attempting to hit his intended victim amounts to an "assault and battery," growing out of the old action of trespass.[28] Anyone substantially participating in an attempted battery of one person can therefore be held liable for the striking of anyone else, however accidental, that results from the attempt.[29] This is true even if the attempt to cause contact to the intended target is performed in jest or sport and the defendant had no intention of harming anyone.[30] And it is true regardless of whether the intended victims are hit: in either case, the doctrine of transferred intent will, as to the accidental victim, supply the missing element of

25. *See* Rivera v. Safford, 377 N.W.2d 187 (Wis. Ct. App. 1985). In *Rivera*, an exception to the workers' compensation statute allowed one police officer to sue a fellow officer for "assault intended to cause bodily harm". The court would not read the doctrine of transferred intent into the statutory exception, which seemed clearly to require intent to cause harm to the injured employee. *See id.* at 189.

26. *See* Prosser, *Transferred Intent*, *supra* note 1, at 655-56.

27. *See id.* (providing illustrations of how the doctrine applies to these five torts). Both the primary and secondary tort must have been among these five, though the primary and secondary torts do not have to be the same tort. For instance, an assault could be committed against the primary victim and a battery against the secondary victim.

28. *See* Anderson v. Arnold's Executor, 79 Ky. 370, 373 (1881).

29. *See* Keel v. Hainline, 331 P.2d 397, 399 (Okla. 1958) (finding liability where junior high school students were engaged in throwing blackboard erasers at one another and one eraser struck the plaintiff in the eye).

30. *See* Peterson v. Haffner, 59 Ind. 130, 133 (1877) (assigning liability when young boys were throwing pieces of mortar at one another in horseplay and part of the thrown mortar hit the victim and another boy).

intent so that the assailant may be held liable.[31] Liability depends merely on the intention to hit *someone*.[32]

In a leading and typical case, *Carnes v. Thompson*,[33] the defendant and the plaintiff's husband were having an argument. The defendant struck at the husband but managed merely to brush his coat sleeve, while hitting the plaintiff, who was standing nearby, with considerable force, injuring her. The plaintiff was not required to prove substantial certainty that she would have been struck by the defendant's action or to prove negligence toward her on the defendant's part.[34] Liability could simply be based on the intentional striking at the husband, even though the contact with the wife was an accident.[35] The rule, of course, applies to throwing an object or shooting a gun,[36] and applies even if a defendant just aims into a crowd and then throws or shoots, with no specific intent to injure anyone, so long as there is the required intent, including substantial certainty, to cause contact with someone.[37] The doctrine can apply to bizarre situations of unlikely results, as where an unprivileged attempt is made to shoot a customer in a bar and a bullet goes out the door and strikes a passerby in the street.[38]

As applied to battery cases, the doctrine was recognized in the English law at least as early as 1832.[39] It has been applied in numerous battery cases in the United States.[40] There is authority that the rule of transferred intent can also apply where the alleged tort to the unintended victim is assault rather than battery, as where the contact necessary to battery is missing.[41] Thus, if the defendant attempts or commits either an assault or a battery, or both, on the primary target, and in addition causes the secondary victim to have apprehension of imminent physical contact, there can be assault liability to that secondary victim.[42] There is even

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31. *See id.*

32. *See* Talmage v. Smith, 59 N.W. 656, 657 (Mich. 1894).

33. 48 S.W.2d 903 (Mo. 1932).

34. *See id.* at 904.

35. *See id.*

36. *See* Morrow v. Flores, 225 S.W.2d 621, 622 (Tex. Civ. App. 1949, no writ) (defendant shot at one person and hit another).

37. *See id.* at 624 (citing 4 AM. JUR. *Assault & Battery* § 6, at 130 (1936) (now 6 AM. JUR. 2D *Assault & Battery* §§ 114-15, at 98 (1963)) and 5 C.J.S. *Assault & Battery* § 9, at 624-25 (1916) (now 6A C.J.S. *Assault & Battery* § 9, at 329-30 (1975))).

38. *See* Davis v. McKey, 167 So. 2d 416, 417-18 (La. Ct. App. 1964).

39. *See* James v. Campbell, 172 Eng. Rep. 1015 (1832) (finding liability when the defendant, while fighting with another man, accidentally struck the plaintiff).

40. *See* PROSSER & KEETON, *supra* note 5, at 38.

41. *See* Jeppsen v. Jensen, 155 P. 429, 431-32 (Utah 1916) (applying the rule when a bullet intended to hit one person frightened another). Similarly, there is liability for battery if the defendant shoots intending to frighten one person and accidentally hits the plaintiff. *See* Randall v. Ridgley, 185 So. 632, 633 (La. Ct. App. 1939); Brown v. Martinez, 361 P.2d 152, 160 (N.M. 1961); Daingerfield v. Thompson, 74 Va. (33 Gratt.) 136 (1880); *cf.* Vandenburgh v. Truax, 4 Denio 464 (N.Y. Sup. Ct. 1847) (defendant chased a boy, who ran into a store and knocked faucet out of a cask of wine; defendant liable for the damage).

42. For a discussion on the elements of assault, see PROSSER & KEETON, *supra* note 5, at 43-46. The elements include: 1) intent to cause apprehension or to cause contact; 2) an offer, attempt or threat

authority indicating that intent may be transferred in situations where there is only one victim instead of both an intended and a secondary victim. For instance, if the defendant shoots in the direction of the victim intending only to frighten him (i.e., intending only an assault), but accidentally hits the victim with the shot, there is battery liability (as well as assault liability) to the victim.[43] Again, the liability could often be based in such circumstances on the substantial certainty form of intent, or on negligence. But it is unnecessary for the plaintiff to rely on these in order to recover for battery. The defendant intended a wrongful, tortious act, and that intent can be transferred so as to supply the missing element of an *unintended*, but otherwise completed, additional tort, such as battery. Thus, an arrow fired merely to scare may cause a battery if it accidentally hits someone.[44] An unprivileged threat of harmful or offensive bodily contact is considered a serious enough invasion of the assailed person's rights of personal security to justify liability not only for the assault caused by the threat but also for battery if the threatened contact should somehow accidentally occur.[45] And if assault and/or battery is committed or attempted within the scope of employment, transferred intent can apply so as to hold the tortfeasor's employer vicariously liable for a secondary tort that occurs as a result of the intended tort, as where an employee of a bar throws an object at one customer and hits another customer instead.[46]

At least four possible rationales have been offered to justify the use of transferred intent in the assault and battery cases. First, some cases reason that if an act is unlawful — i.e., is in violation of the criminal law — there should be liability for its consequences even if the defendant lacked the specific intent to cause the harm that occurred. Thus, where the defendant had fired a gun at a waitress in a crowded restaurant and wounded both his intended victim and the plaintiff, another waitress, the court based liability to the plaintiff on the unlawfulness of the defendant's conduct.[47] The same result occurred where a young boy hurled a rock at a little girl and hit another girl instead.[48] The unlawfulness of the conduct is thought to justify both criminal and civil liability under the doctrine of transferred intent.

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to contact; 3) apparent present ability to carry out that offer, attempt or threat; and 4) apprehension on the plaintiff's part of imminent physical contact of a harmful or reasonably offensive nature. *See* PROSSER & KEETON, *supra* note 5, at 43-46.

43. *See Randall*, 185 So. at 633 (holding that the victim can recover whether the defendant shot him with deliberate purpose or through carelessness).

44. *See* Weisbart v. Flohr, 67 Cal. Rptr. 114, 122 (Cal. Ct. App. 1968). In *Weisbart*, a seven-year old boy shot arrow at five-year old girl in order to scare her. The court found him liable for assault and battery when the arrow hit her. *See id.* For discussion on the tort liability of children, see generally Francis H. Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1924) and Oteka Harris, Note, *Torts: Responsibility of Young Child for His Negligent or Intentional Acts*, 26 OKLA. L. REV. 300 (1973).

45. *See* Manning v. Grimsley, 643 F.2d 20, 22 (1st Cir. 1981) (holding a baseball pitcher liable for battery for throwing into a crowd of hecklers and hitting a spectator).

46. *See* McKeon v. Manze, 157 N.Y.S. 623, 626 (Sup. Ct. 1916) (holding an employer liable when employee bartender threw a beer glass at one bar patron, but hit another).

47. *See* Smith v. Moran, 193 N.E.2d 466, 468 (Ill. App. Ct. 1963).

48. *See* Singer v. Marx, 301 P.2d 440, 443 (Cal. Dist. Ct. App. 1956).

Second, closely related is the sometimes-applied theory that where a tort is attempted or committed with malice, the malice, and thus the possible liability, extends to anyone injured by the actor's conduct.[49] This merely shifts the emphasis from the prohibition by criminal statutes to the more philosophical basis of the antisocial attitude displayed by the defendant. The result is usually the same as under the first rationale since the violation of most criminal statutes can be found to indicate an attitude of malice. Third, where a number of persons have participated in the harm-producing conduct, a court may stress that all the participants should be held jointly and severally liable to all those injured, without regard to whether a particular defendant had any intent to harm, or even cause contact with, a specific plaintiff. Thus, where a number of persons are engaging in combat with pistols and an innocent passerby is wounded by a shot, any and all of those taking part in the gunfight may be held liable to the passerby.[50] The intent that each participant had to shoot one or more of his opponents will be transferred so as to establish liability on the part of each participant to the injured bystander.

Finally, a number of cases emphasize the general principle of intentional torts that there is liability for all the direct and natural consequences of the defendant's act. For example, if the defendant has fired a gun into a crowd, he is liable for the direct and natural result of hitting someone, though he had no intent to strike or injure any particular person.[51] This rationale is not limited to situations where the defendant's conduct is criminal or malicious in nature, or even involves an intent to injure, but may apply wherever there is the minimal intent needed for tort liability — such as the intent to touch required in battery. Thus, where the plaintiff, an elderly man, was leaning on a friend while talking to him, and the defendant came along and, intending only a friendly greeting, jerked the friend's arm, causing the plaintiff to fall down, liability was found for this direct and natural result.[52] On the other hand, if an assault is committed on a mother, and the mother's baby swallows a safety pin while left unguarded during the altercation, the baby's injury may well be found too far removed from the assault to be considered a direct and natural consequence.[53] Similarly, if a person has agreed to provide support for a town's paupers and one of those paupers is beaten and injured by the defendant, liability may be denied to

49. *See* Davis v. Collins, 48 S.E. 469, 472 (S.C. 1904) (upholding an instruction that, if the defendant attempts to strike one person in malice but by accident strikes another person, the blow to the latter is malicious); *cf. Smith*, 193 N.E.2d at 469 (stating that if there is malice behind a first shot, which struck the intended victim, there was also malice behind the second shot, which went astray and struck the plaintiff).

50. *See* Murphy v. Wilson, 44 Mo. 313 (1869) (holding that the defendants in such a situation were jointly and severally liable); *cf.* Keel v. Hainline, 331 P.2d 397, 400-01 (Okla. 1958) (finding that all defendants who aided, abetted, encouraged or instigated assault and battery could be liable therefore).

51. *See* Bannister v. Mitchell, 104 S.E. 800, 801 (Va. 1920) (holding the defendant liable when he intended to cut the plaintiff's brother with a knife, but wounded the plaintiff, who got in the way).

52. *See* Reynolds v. Pierson, 64 N.E. 484, 485 (Ind. Ct. App. 1902).

53. *See* Oklahoma Gas & Elec. Co. v. Hofrichter, 116 S.W.2d 599, 600-01 (Ark. 1938) (holding that assault was not "the proximate cause" of the baby swallowing the pin).

the promisor, as being too indirect and remote a consequence of the beating.[54] The promisor's loss is caused directly by his contract and only indirectly by the beating.

What defenses apply to transferred intent liability for assault and/or battery? Basically all the same defenses apply as in any assault and battery case. It is, for example, well established that if the defendant hits another person in self-defense, the defendant is not liable for assault or battery either to the person he intends to hit or to some third party unintentionally struck. In such case, there is no wrongful intent since the conduct is privileged; thus, there is no intent to be transferred. For instance, if the defendant has acted in self-defense in shooting at an assailant and has accidentally wounded a bystander, transferred intent does not apply and there is no intentional-tort liability.[55] As always, the test for the right of self-defense is whether or not the defendant reasonably believed that his actions were necessary to his self-defense.[56] The self-defense privilege applies not only in tort cases based on the common law but in cases growing out of statutes, such as a civil rights action.[57] In all such situations, there *is* one possible basis of liability. Though the lack of wrongful intent precludes use of the transferred intent doctrine, there can be liability for negligence. A person who in self-defense fires at his attacker and wounds a bystander can, if acting negligently, be liable to the bystander.[58] But negligence, of course, always means a lack of reasonable care under the circumstances, and a lack of such care is usually hard to establish under circumstances so urgent as to justify self-defense.

It seems clear that the other defenses normally applicable to intentional-tort cases will also, like self-defense, apply in transferred intent situations. For instance, defense of others will preclude any liability, including transferred intent liability, unless the scope of the privilege is exceeded or negligence is found.[59] The privileges of defense of property and crime prevention will apply, subject to the usual limitations that deadly force is not justified merely in defense of property or to prevent a misdemeanor.[60] Thus, if a police officer justifiably uses force to prevent a crime or make an arrest and in the process injures an innocent bystander,

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54. *See* Anthony v. Slaid, 52 Mass. (11 Met.) 290 (1846).

55. *See* Shaw v. Lord, 137 P. 885, 887 (Okla. 1914).

56. *See* Paxton v. Boyer, 67 Ill. 132, 135-36 (1873) (holding that assaulted party, if reasonably believing it necessary to his self-defense, strikes an innocent person, there is no civil or criminal liability).

57. *See* Grisom v. Logan, 334 F. Supp. 273, 279 (C.D. Cal. 1971) (applying same self-defense standard in civil rights claims as in "simple tort").

58. *See* Morris v. Platt, 32 Conn. 75, 84-87 (1864). In *Morris*, the court found liability only if the defendant was negligent, but questioned whether, considering the danger to innocent persons from the use of firearms, the common-law rule should be changed by legislation. *See id.*

59. *See* Lopez v. Surchia, 246 P.2d 111, 112 (Cal. Dist. Ct. App. 1952) (permitting liability when the defendant, who shot the plaintiff while the plaintiff was fighting with the defendant's son, had used excessive force in defense of his son).

60. *See* Brown v. Martinez, 361 P.2d 152 (N.M. 1961). In *Martinez*, the defendant fired a high-powered rifle at boys who were stealing watermelons from his patch, hitting one of the boys. The court found that the defendant acted outside the privileges of defense of property and crime prevention, though he alleged he was only intending to scare the boys. *See id.* at 159-60.

the doctrine of transferred intent does not apply and there is no liability unless for negligence.[61] But if the officer uses excessive force, as by employing deadly force to arrest for a mere misdemeanor, there may be both civil and criminal liability to anyone shot by the officer.[62] Such conduct is illegal and wanton, and transferred intent can apply so as to produce liability on the officer's part to a third party struck by one of the officer's shots.[63] Similarly, if an officer justifiably shoots his gun in order to subdue an angry mob and prevent violence, there is no liability, unless for negligence, to a bystander struck by a shot.[64] But, "[a] privilege to use deadly force is not a hunting license entitling the privileged person to strike without regard to risk of harm to third persons."[65] There is thus always the possibility of negligence liability,[66] as well as possible intentional tort liability for use of too much force, causing the privilege to be exceeded.[67] The existence and extent of all privileges are circumscribed by limits of reasonableness, involving a balancing of the interests being protected against the interests being invaded.[68]

Application of Doctrine to Other Torts

Once we go beyond the torts of assault and battery, the applicability of transferred intent becomes doubtful. False imprisonment is another tort that grew out of the old writ of trespass, and Prosser expressed "little doubt" that transferred intent applies to false imprisonment.[69] But he admitted that there is no authority directly in point, and the only case he cited[70] is one in which a jailer who confined

61. *See* Moore v. City of Detroit, 340 N.W.2d 640, 643 (Mich. Ct. App. 1983). In *Moore*, an innocent bystander was shot in a shoot-out between an off-duty police officer and an armed robber. The court found there was no intentional-tort liability but only possible negligence liability. *See id.*

62. *See* State *ex rel.* Harbin v. Dunn, 282 S.W.2d 203, 207 (Tenn. Ct. App. 1943). The *Harbin* court found that the duty of a police officer to arrest for a misdemeanor affords no justification for shooting into automobile. *See id.* Thus, if an occupant of the automobile is hit, there is a civil wrong and criminal assault. *See id.*

63. *See* Tuttle v. Forsberg, 73 N.E.2d 861, 864 (Ill. Ct. App. 1947) (finding that an officer acted illegally when he went to a place of business in response to police call and fired a shot to effect arrest of a party for failure to return a rented car).

64. *See* United States v. Jasper, 222 F.2d 632, 633 (4th Cir. 1955).

65. Burton v. Waller, 502 F.2d 1261, 1277 (5th Cir. 1974) (holding that the privilege of an individual police officer to fire in self-defense or to quell a riot was a common-law defense that existed under the 1871 Civil Rights Act to the same extent as under relevant Mississippi state law).

66. *See id.* at 1277-78.

67. *See* Jones v. State, 468 N.Y.S.2d 233 (N.Y. Sup. Ct. 1983). In *Jones*, the court found that the use of force employed in retaking state prison held by inmates during a riot was excessive. *See id.* at 225. Therefore, a cause of action would lie against the state and would come within the intentional tort exception to the general rule that workers' compensation was the exclusive remedy for death or injury of a state employee. *See id.*

68. *See* Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307, 314-18 (1926).

69. Prosser, *Transferred Intent*, *supra* note 1, at 656.

70. *See* Rex v. Huggins, 92 Eng. Rep. 518 (1730). There are several cases in which one person has been wrongfully confined and another person has unsuccessfully sued for mental anguish. *See generally* Sperier v. Ott, 41 So. 323 (La. 1906) (wrongful arrest of son); Sanderson v. Northern Pac. Ry., 92 N.W.

a prisoner in unhealthy conditions was held criminally liable for the prisoner's resulting death. This would seem no more than application of the general rule, in both civil and criminal cases, of liability for direct consequences of a wrongful act — a rule that is one of the possible rationales for transferred intent but that does not necessarily, or in this particular case, involve such intent. A clear situation for application of transferred intent would have been presented if the jailer had wrongfully intended to confine one prisoner and had, instead or in addition, confined another person; but that was not the case. An Arkansas case[71] involved a situation in which the defendant allegedly forced a mother to accompany him against her will, thus leaving her infant child alone and unwatched for a time, during which the baby swallowed a safety pin. In the suit for harm to the baby, this fact pattern could have been analyzed in false imprisonment terms. But the court talked only of possible assault and battery and/or negligence and ruled that, in any case, the harm to the infant was too remote to justify the defendant's liability.[72]

The property torts of trespass to chattels and trespass to land also developed from the writ of trespass and are therefore potential candidates for application of transferred intent. There is some authority to support such application, but the authority is sparse and weak. The question of transferred intent can arise here in either of two basic ways: The primary tort may be attempted against a person (such as a potential assault and/or battery), resulting in damage to property. Or the primary tort may instead be attempted against property but result, in addition or instead, in harm to a person, or to property other than that intended to be damaged. In the former category is an old New York case[73] in which the defendant ran after a boy with a pick-axe, causing the boy to flee into the plaintiff's store, where, in an effort to keep out of the defendant's reach, he ran against a cask of wine, knocking the faucet from it and causing some of the wine to spill and be wasted. The defendant was held liable to the plaintiff, but this result was based on the general principle prescribing intentional tort liability for direct and natural consequences of wrongful conduct rather than on transferred intent.[74] In a more modern New York case,[75] a defendant threw a garbage can at his intended victim, but missed that person and instead hit that person's automobile, damaging it. The court found no basis for criminal liability for this conduct under the New York statutes, but did declare that a civil action for damages would lie in such a situation.[76] The court, however, did not rely on transferred intent or any particular theory in making the

542 (Minn. 1902) (putting the plaintiff's children off train); Ellis v. Cleveland, 55 Vt. 358 (1883) (wrongful arrest of husband); *cf.* Hunt v. Calacino, 114 F. Supp. 254 (D.D.C. 1953) (threat to put son in jail). The denial of recovery in these cases would seem to rest largely on the traditional rule that transferred intent does not apply to intentional infliction of mental anguish. *See infra* notes 107-36 and accompanying text.

71. *See* Oklahoma Gas & Elec. Co. v. Hofrichter, 116 S.W.2d 599 (Ark. 1938).

72. *See id.* at 600.

73. *See* Vandenburg v. Truax, 4 Denio 464 (N.Y. Sup. Ct. 1847).

74. *See id.* at 467.

75. New York v. Washington, 222 N.E.2d 378 (N.Y. 1966).

76. *See id.* at 380.

statement about civil liability, so the statement is of scant weight.[77] Civil liability has been denied against a murderer for the alleged loss of value to the house in which he committed the murder, thus causing people to shun the property.[78] There thus seems practically no support for the use of transferred intent in cases where the primary wrong is against a person and the secondary harm is to property.

There is somewhat more support for the doctrine where the facts are reversed and the primary act is against property, often a dog, resulting also or instead in injury to a person. Thus, where the defendant in a Minnesota case shot at a dog and instead wounded a teenage boy, liability was found.[79] The court, however, based liability not on transferred intent but on the fact that the attempt to shoot the dog was unlawful and that unlawful discharge of a firearm results in civil liability to anyone injured thereby, even if the victim is not an intended target and is not even known by the defendant to be within his range.[80] Similarly, in a case in which the defendant shot at a sleeping dog, wounding it, and the dog sprang up, ran into the plaintiff's house and knocked her down, injuring her, tort liability was found.[81] But again, the liability was not based on transferred intent, but on the malicious and wanton nature of the shooting, justifying liability for any direct consequence, as established here "by the continuous and connected succession of the intervening events."[82] And there is some modern tendency to reject altogether the reasoning that there is necessarily liability for the illegal or malicious discharge of a firearm where the defendant intends to hit property with his shot and instead hits a person. For instance, a North Carolina court held that the illegal shooting of a firearm at a dog did not impose liability on the shooter for injuries sustained by a nearby person unless negligence was shown.[83] The court reviewed older authorities imposing liability under such circumstances but concluded that modern law rejects liability unless it is shown that the defendant knew or had reason to know that some person was on the premises and might foreseeably be hit by the shot.[84]

Besides these "dog shooting cases," most of the other authorities finding possible intentional-tort liability to a person where the defendant initially acts to harm property also rely on some basis other than transferred intent — usually the basic rule of liability for all direct consequences of an intentionally wrongful act. Thus, where the defendant was beating a horse in violation of criminal statutes against cruelty to animals, it was ruled that there could be tort liability, without regard to negligence, when the defendant's foot slipped, causing him accidentally to strike the plaintiff, who was holding the horse.[85] The slipping of the defendant's foot was said to be a consequence of his own wrongful act and thus no excuse as to the

77. *See id.*
78. *See* Clark v. Gay, 38 S.E. 81, 82 (Ga. 1901).
79. *See* Corn v. Sheppard, 229 N.W. 869, 871 (Minn. 1930).
80. *See id.* at 871.
81. *See* Ishman v. Dow's Estate, 41 A. 585, 586 (Vt. 1898).
82. *See id.* at 585.
83. *See* Belk v. Boyce, 138 S.E.2d 789, 793 (N.C. 1964).
84. *See id.*
85. *See* Osborn v. Van Dyke, 85 N.W. 784, 786 (Iowa 1901).

hitting of the plaintiff.[86] Much the same reasoning was used where, in violation of statutes on use of firearms, a shot was fired at the tire of a moving automobile, causing the car to overturn, resulting in personal injury to the occupants.[87]

Thus, although trespass to chattels has been listed among the torts to which transferred intent applies,[88] there is little authority to support this. The inclusion of trespass to chattels on such a list does raise the question of whether transferred intent could also apply to conversion, which has a different history from trespass to chattels in that it did not grow out of the writ of trespass, but has in modern times become simply a "big brother or sister" to trespass to chattels — i.e., a tort action for more serious interference with personal property.[89] There seems to be no authority directly on point, but certainly it would make no sense to apply transferred intent to trivial interferences with chattels (as may be involved in trespass to chattels cases) but deny its use where more serious interferences are concerned. Those cases that have found liability where either the primary or secondary tort has involved harm to personal property have often dealt with harm of a serious, or potentially serious, nature, thus justifying conversion liability.[90] For example, shooting at a dog, such as occurred in some of the cases, is surely a serious enough invasion of the owner's interest in the dog to justify conversion. But, as has been seen,[91] the cases, if finding liability at all for the secondary tort, have largely done so on the basis of some theory other than transferred intent.

What if the primary or secondary tort is not, as in the above cases, an interference with personal property but a trespass to real property? The tort of trespass to land is another that grew out of the writ of trespass, and furthermore, there is here a long history of applying a broad scope of liability.[92] One who trespasses on real property has traditionally been held liable for all direct outgrowths of the trespass. Indeed, the modern tendency has been to relax even the "direct consequences" requirement and make the trespasser practically an insurer as to any harm to the property or occupants resulting, directly or indirectly, from his trespass.[93] The result of applying this broad rule of liability is often much the same as would occur under transferred intent, as where police officers who entered land without the owner's consent and without legal privilege in order to kill a dog thereon were held

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86. *See id.*

87. *See* State *ex rel.* Harbin v. Dunn, 282 S.W.2d 203, 207 (Tenn. Ct. App. 1943) (holding the defendant liable for shooting tire of automobile, which resulted in death of driver and injury to passenger, even though constable did not intend the death or injury and could not foresee that they would happen in the way that they did); *cf.* Schmitt v. Kurrus, 85 N.E. 261, 262 (Ill. 1908) (finding liability for assault and battery where defendant struck the glass door of telephone booth that the plaintiff was using, causing piece of glass to go into the plaintiff's eye).

88. *See* Prosser, *Transferred Intent*, *supra* note 1, at 655.

89. *See* PROSSER & KEETON, *supra* note 5, at 88-90.

90. *See supra* notes 73-75, 79-82, 85-87.

91. *See supra* notes 73-87.

92. *See* PROSSER & KEETON, *supra* note 5, at 67-69 & 75-77.

93. *See* Prosser, *Transferred Intent*, *supra* note 1, at 658-61. Prosser observed that "the tendency has been to relax the old requirement of direct results." *See* Prosser, *Transferred Intent*, *supra* note 1, at 660.

liable for damage, caused by the same shotgun blast that killed the dog, to the landowner's house.[94] A situation of a more indirect type of harm was presented by a New York case in which employees of a telephone company trespassed by spilling lead on the plaintiff's premises and were held liable, despite possible lack of any negligence or foreseeability of the harm, when the landowner's dogs died from lead poisoning after eating the lead.[95] In either case, the liability could have been based on transferred intent — i.e., intent transferred from the trespass to the land to the trespass to the house or to the dogs. But, in fact, the courts did not rely on that principle and simply took the view that an intruder "is liable for the consequences regardless of whether the results could or should reasonably have been foreseen, or whether the acts constituted negligence."[96] This is the same principle applied in a leading case in which an intruder to a blacksmith shop started a fire which got out of control and destroyed the shop and some neighboring property.[97] The trespasser was held liable for all the resulting damage, despite lack of evidence of negligence as to the failure to control the fire.[98] The broad net of trespass liability has been held to cover "nervous prostration" and resulting physical suffering caused by the fright induced by a trespass to land.[99] In all these cases, an analysis could be based on transferred intent, but instead the courts have utilized the broad chain-of-causation rule as to the scope of liability for trespass to real property — a rule even broader than the direct-consequences requirement applied in most intentional tort cases.

A situation of transferred intent might be thought presented if the defendant intends to intrude on one person's land or chattels, but instead or in addition intrudes upon another person's property. But in such cases, there is normally no need to rely on transferred intent because of the minimal nature of the intent required to complete the torts of trespass to land and trespass to chattels. Only intent to go on *the* land (or other real property)[100] or intent to affect *the* chattel[101] is required — not intent to trespass or intrude on another person's rights, and there may thus be liability even for an honest, reasonable mistake. If the situation is one in which there is a privilege to enter upon or seize certain property, but the defendant mistakenly acts against the wrong property, there can also be liability; but again, transferred intent is unneeded. There is already the requisite intent to affect the property. Therefore, if law enforcement officers acting under a writ of attachment seize the wrong person's property, they can be liable even if acting under innocent mistake, as they are acting with intent to affect the property seized and are outside the scope of legal privilege.[102]

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94. *See* City of Garland v. White, 368 S.W.2d 12, 16-17 (Tex. Civ. App. 1963, no writ).

95. *See* Van Alstyne v. Rochester Tel. Corp., 296 N.Y.S. 726, 731-32 (1937).

96. *See id.* at 730.

97. *See* Wyant v. Crouse, 86 N.W. 527 (Mich. 1901).

98. *See id.* at 528-29.

99. *See* Watson v. Dilts, 89 N.W. 1068, 1069 (Iowa 1902) (permitting the plaintiff to recover for fright caused by night-time trespass at the plaintiff's home).

100. *See* PROSSER & KEETON, *supra* note 5, at 73-75.

101. *See id.* at 86-87.

102. *See* Wright v. Husband, 99 S.W.2d 583, 585 (Ark. 1936). If a transferred intent analysis were

Thus, although five torts — assault, battery, false imprisonment, trespass to chattels and trespass to land — developed from the old writ of trespass, the doctrine of transferred intent has only been clearly applied to the first two of these torts. As to two other torts, the doctrine has occasionally been mentioned but generally rejected: misrepresentation and intentional infliction of mental anguish. In misrepresentation, the general rule is that a misrepresentation of fact made to one person does not result in liability, except possibly for negligence, to another person who learns of the assertion.[103] There is no legal right to rely on a statement made to someone else in order to induce that person to do a particular act.[104] Therefore, the intent to defraud the person to whom the statement is made will not be transferred to a person who, for instance, overhears the remark and acts upon it to his detriment.[105] Similarly, aside from situations of subrogation, an insurer or other party who bears a loss because of the defendant's attempt to defraud another person (such as the insured person) does not have an action against the defrauder.[106] Thus, in cases of misrepresentation and other fraud, there is no transferred intent and is generally liability to third parties — i.e., those other than the party intended to be defrauded — only for negligence.

The situation regarding intentional infliction of mental anguish is somewhat more complex. It is hornbook law that transferred intent is inapplicable where either the primary or secondary tort is intentional infliction of mental anguish since this tort did not fall within the old writ of trespass.[107] There are a number of cases applying this reasoning, usually in situations in which an assault and/or battery occurred against one person, allegedly resulting in mental anguish to another person. Thus, a wife who has witnessed an assault and battery on her husband, but who has not herself been threatened or struck, has been denied a tort action for the anguish and fright suffered due to the attack on the husband.[108] The same result has

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attempted, it is doubtful that the doctrine could be found appropriate, since there is no wrongful intent to transfer. But that is unnecessary, since the intent necessary to the tort is merely intent to affect the property and does not require a wrongful motive. *See* PROSSER & KEETON, *supra* note 5, at 86.

103. *See* William L. Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 254-55 (1966).

104. *See* McCracker v. West, 17 Ohio 16, 26 (1848).

105. *See* Westcliff Co. v. Wall, 267 S.W.2d 544, 546-47 (Tex. 1954).

106. *See* Rockingham Mut. Fire Ins. Co. v. Bosher, 39 Me. 253, 257 (1855) (holding that no action can be maintained by the insurer against third person who maliciously burned insured property).

107. *See* PROSSER & KEETON, *supra* note 5, at 65 (noting as to transferred intent that "rarely does a case so much as mention it by analogy in allowing recovery for fright at a battery committed upon another, even a close relative."); *see also* Williams v. Lee Way Motor Freight, Inc., 688 P.2d 1294 (Okla. 1984) (two-year statute of limitations for torts not specifically named in statute held to govern intentional infliction of mental anguish rather than the one year statute applicable to most intentional torts); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939) (addressing the development of the tort of intentional infliction of mental anguish). *See generally* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936) (noting trend to allow recovery even where mental pain is the only injury).

108. *See* McGee v. Vanover, 147 S.W. 742 (Ky. 1912); *see also* Hutchinson v. Stern, 101 N.Y.S. 145, 146 (App. Div. 1906) (finding that the plaintiff, in action for assault and battery committed on him in presence of his wife, cannot recover for injuries to wife caused by her fright); *cf.* Bucknam v. Great

occurred where a mother suffered mental agony when watching a physical attack on her child.[109] But the plaintiffs have often found ways of circumventing this general rule. One possibility is to establish that the attack upon the primary victim also amounted to, or included, a threat of attack against the secondary victim, thus allowing the latter to recover for assault.[110] Often, however, the facts won't support such a conclusion. Nonetheless, many courts have allowed the secondary victim to recover for fright or anguish that can be regarded as a direct result of the primary threat or attack. This is simply an application of the general rule that liability for intentional torts extends to all direct consequences — a rule also sometimes used to justify transferred intent in cases where both the primary and secondary torts amount to assault and/or battery.[111]

A woman who witnessed a defendant pointing a revolver at her husband has, for example, been allowed to recover for her fright and shock on the ground that "the party guilty of the tort must be held liable for the reasonable and natural consequences to be anticipated therefrom."[112] Similarly, where a defendant-landlord used violent language toward a tenant in the presence of the tenant's pregnant wife, resulting in fright to the wife and an eventual miscarriage, recovery to the wife was allowed.[113] Mental or emotional shock that is a "direct and natural result" of the defendant's conduct may, under this reasoning, be recoverable even though the shock is to someone other than the primary or intended victim.[114] Since the primary or initial wrong is intentional, there is recovery for consequences that are to be naturally anticipated, which can certainly include mental suffering and wounded feelings on the part of a witness.[115]

No. Ry., 79 N.W. 98, 98-99 (Minn. 1899) (denying recovery for wife where violent language was directed at husband).

109. *See* Knox v. Allen, 4 La. App. 223, 225-26 (1926).

110. *See* Jeppsen v. Jensen, 155 P. 429, 430 (Utah 1916) (arguing that the plaintiff wife was frightened by the defendant's use of abusive language toward her husband in her presence and his threat to shoot her husband).

111. *See supra* notes 51-54 and accompanying text.

112. Goddard v. Watters, 82 S.E. 304, 304 (Ga. 1914).

113. *See* Duncan v. Donnell, 12 S.W.2d 811, 812 (Tex. Civ. App. 1928, no writ). *See generally* Michael A. DiSabatino, Annotation, *Civil Liability for Insulting or Abusive Language — Modern Status*, 20 A.L.R.4th 773 (1983) (stating that the great weight of authority is that insulting or abusive language can be actionable if sufficiently outrageous).

114. Purdy v. Woznesensky, [1937] 2 West. Weekly R. 116, 124 (Sask.) (permitting recovery when unprovoked and violent assault by the defendant on the plaintiff's husband in the plaintiff's presence caused nervous shock and permanent injury to the defendant's nervous system); *cf.* Wiggins v. Moskins Credit Clothing Store, 137 F. Supp. 764, 767 (E.D.S.C. 1956) (establishing liability based on nuisance due to repeated phone calls by creditor which disturbed debtor's landlady). *See generally* Allan E. Korpala, Annotation, *Recovery for Emotional Distress or Its Physical Consequences Caused by Attempts to Collect Debt Owed by Third Party*, 46 A.L.R.3d 772 (1972) (discussing the courts' increasing recognition of the tort of intentional infliction of mental anguish in debt-collection cases).

115. *See* Young v. Western & Atl. R.R., 148 S.E. 414, 416-17 (Ga. Ct. App. 1929) (permitting recovery where the defendant's agent entered the plaintiff's home violently at night and dragged her husband from the bed in which he and the plaintiff were sleeping).

There are, however, a number of factors that may affect whether or not the secondary victim's mental anguish can be found to be a direct and natural result of the primary tort — particularly such factors as whether the secondary victim actually witnessed the original occurrence and whether the defendant was at that time aware of the secondary victim's presence. Thus, where a woman was frightened by a quarrel between the defendant and her husband but only overheard and did not see the quarrel and was not known by the defendant to be within the range of hearing, recovery was denied.[116] The court stated that the anguish to the wife "was not such a consequence as, in the ordinary course of things, would flow from defendant's conduct" and was therefore not a natural consequence for which the defendant should be liable.[117] The same result occurred in a case in which the plaintiff overheard the defendant make a threat to shoot himself or someone else but the words were not uttered in the plaintiff's presence.[118] Unless the defendant has made his threat or attack within the actual presence (usually meaning sight) of the plaintiff and unless the plaintiff's presence is known to the defendant, the plaintiff's fright and anguish are likely to be held "too remote and speculative" to support recovery of damages.[119]

The rule of liability for "direct and natural consequences" *is* thus different from the doctrine of transferred intent. The result can be the same under either rule, but transferred intent does not require the secondary victim's presence or that the presence be known. Transferred intent, however, has traditionally been rejected where mental anguish is concerned; there is no such complete roadblock to recovery for anguish under the direct consequences doctrine. The "direct and natural consequences" rule does in effect require something close to a separate intent to harm the secondary victim — a substantial certainty, or at least likelihood, that this victim will also suffer from the primary tort. Thus, where the plaintiff witnessed the beating of her father by the defendants but was not known by them to be present, recovery was denied on the ground that the defendants had no purpose or certainty of causing distress to the plaintiff.[120] And even the murdering of the plaintiff's sister and leaving the disfigured body where the plaintiff was likely to see it have been held insufficient to support the plaintiff's recovery for anguish where the plaintiff did not witness the killing.[121] Some argument may be made that the "presence" requirements are more appropriate to cases of merely negligent conduct

116. *See* Phillips v. Dickerson, 85 Ill. 11, 16 (1877).

117. *Id.*; *cf.* Ellsworth v. Massacar, 184 N.W. 408, 410 (Mich. 1921) (holding that there could be no recovery for mental shock where the plaintiff's husband was taken from home at night and assaulted but none of the acts were directed toward the plaintiff or committed in her presence).

118. *See* Bunyan v. Jordan, 57 C.L.R. 1 (1936).

119. Reed v. Ford, 112 S.W. 600, 601 (1908). In *Reed*, the plaintiff was frightened by an assault against a third person who occupied a room in her house. The plaintiff could not recover, though, because the defendant did not see her or know of her presence and it was not alleged that the plaintiff saw the defendant but merely that she heard him. *See id.* Query whether the "sight" requirement would be applied to a blind person or whether perception by other senses would then suffice.

120. *See* Taylor v. Vallelunga, 339 P.2d 910, 911-12 (Cal. Ct. App. 1959).

121. *See* Koontz v. Keller, 3 N.E.2d 694, 697 (Ohio Ct. App. 1936).

on the defendant's part and should not be applied where the defendant has committed an intentional wrong,[122] but clearly much authority is reluctant to allow recovery to a bystander for mental anguish caused by even a willful act unless the bystander was actually present and known to be present. There is simply concern that liability could be extended to far-removed, unlikely, or feigned results.

Some courts may be more hesitant to find mental anguish to a secondary victim to be a natural and reasonable result of a defendant's conduct where that conduct occurred against property rather than against a person, e.g., more reluctant to allow recovery to a plaintiff who has witnessed a dog being shot than to one who has seen a person attacked. A Minnesota case, for instance, denied recovery to a woman who saw a dog shot by the defendant in proximity to her home, reasoning that the shooting of the dog could not be considered the direct and immediate cause of the plaintiff's anguish.[123] But in that case, the dog did not belong to the plaintiff, and many courts are willing to recognize an owner's sentimental attachment to a pet and to find that killing or injuring a person's own animal may directly result in anguish to the owner. Thus, a Florida case allowed an owner to recover for mental suffering where she had observed the malicious killing of her dog.[124] Indeed, some cases have allowed recovery for mental anguish caused by harm to the plaintiff's property even where the property has not had significant sentimental value, as where an automobile was wrongly seized by law enforcement officers under a writ of

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122. See *Schurk v. Christensen*, 497 P.2d 937 (Wash. 1972), where a teenage boy had allegedly molested a five-year old boy and the victim's parents brought suit against the teenager and his parents for mental anguish and distress. *See id.* at 938. The claim was allowed against the teenager but not against his parents, since the claim against the parents was based on negligence, not malice or wrongful intent. *See id.* at 939-40. For a discussion of recovery by bystanders for negligently caused mental or emotional distress, see P.G. Guthrie, Annotation, *Right to Recover Damages in Negligence for Fear of Injury to Another, or Shock or Mental Anguish at Witnessing Such Injury*, 29 A.L.R.3d 1337 (1970) and PROSSER & KEETON, *supra* note 5, at 365-67.

123. *See* Renner v. Canfield, 30 N.W. 435, 435-36 (1886). In *Renner*, the defendant did not see the plaintiff and was not aware of her presence. The court found that, if any act was the proximate cause of the plaintiff's fright, it was not the killing of the dog but negligence in shooting close to a residence. *See id.* at 436.

124. *See* La Porte v. Associated Indeps., Inc., 163 So. 2d 267, 268-69 (Fla. 1964), *noted in* Fredric C. Jacobs, *Torts — Damages — Florida Owner Entitled to Damages for Mental Anguish or Malicious Destruction of Her Dog*, 9 VILL. L. REV. 681 (1964); *cf.* Reeves v. Melton, 518 P.2d 57, 62-63 (Okla. Ct. App. 1974) (allowing recovery for mental suffering from threat to shoot the plaintiffs' dogs). *See generally* W.E. Shipley, Annotation, *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property*, 28 A.L.R.2d 1070 (1953) (recognizing that damages for mental injury are sometimes awarded in cases of interference with property if the defendant's conduct threatened the integrity of the plaintiff's person).

Cases allowing recovery for mental anguish due to mistreatment of a close relative's corpse may also be looked upon as transferred intent situations, with the primary tort being interference with "property" (the corpse) and the secondary tort being the resulting infliction of anguish on the deceased's surviving relatives. *See* Note, *Dead Bodies-"Property"-Nature of the Rights in a Dead Body*, 18 MINN. L. REV. 204, 205 (1934). But the modern tendency is to regard property rights in the dead body as largely a fiction and to treat the possible tort recovery by a relative as not involving *transferred* intent but simply ordinary intent, at least in the "substantial certainty" sense, to cause mental anguish to the relative. *See* PROSSER & KEETON, *supra* note 5, at 63.

attachment.[125] It has been held that where furniture is wrongfully taken from one's home, mental suffering to the owner may be "the proximate and natural consequence of the trespass."[126] Similarly, a trespass to one's home or other real property may naturally lead to fright and anguish, especially if accompanied by threatening or abusive language, and may thus justify recovery for the mental suffering.[127] Certainly the creation of a bloody mess in a person's kitchen by the act of committing suicide may be considered to lead, naturally and probably, to mental anguish on the part of the homeowner who later comes upon the scene.[128]

Of course, the kitchen-suicide case also involved personal injury, though the initial injury was just to the defendant himself. And the strongest cases for finding a plaintiff's mental anguish to be the natural and probable consequence of an act initially directed against someone else *are* usually cases of physical violence against persons. In these cases, courts are sometimes willing to bend the usual restrictions. Thus, a West Virginia case allowed a woman to recover for her fright and shock upon witnessing a violent assault and battery on her father by the defendant, even though the defendant was unaware of the witness's presence.[129] The mental anguish was nonetheless considered a natural consequence of the intentional tort and therefore within the scope of liability.[130]

A final factor that may sometimes influence courts in determining whether the plaintiff's mental anguish is a natural, and thus reasonable, result of a tort initially directed against another is whether there is a family relationship between the primary and secondary victims — whether, for instance, the one who witnesses the attack on another person is the spouse or sibling of the attacked individual. Most of the cases in which recovery has been allowed have involved some such close

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125. *See* Wright v. Husband, 99 S.W.2d 583, 585 (Ark. 1936). *See generally* Joel E. Smith, Annotation, *Recovery of Damages for Mental Anguish, Distress, Suffering, or the Like in Action for Wrongful Attachment, Garnishment, Sequestration, or Execution*, 83 A.L.R.3d 598 (1978) (stating damages are recoverable for mental anguish in cases of wrongful seizure of property if wanton or malicious conduct was present).

126. Mattingly v. Houston, 52 So. 78, 81 (Ala. 1909) (wife's furniture wrongfully attached for debts of husband). But recovery for mental anguish will only be allowed where the reasonable person under the circumstances would suffer such anguish. *See* March v. Cacioppo, 185 N.E.2d 397, 400 (Ill. App. Ct. 1962) (denying recovery for the defendant's acquisition of a void judgment and garnishment of bank account); Oehler v. L. Bamberger & Co., 137 A. 425, 425-26 (N.J. 1927) (denying recovery for repossession of vacuum cleaner, which allegedly caused stroke).

127. *See* Bouillon v. Laclede Gaslight Co., 129 S.W. 401, 404 (Mo. Ct. App. 1910) (permitting recovery for fright where the defendant's agent wrongfully entered the plaintiff's residence and used violent language toward her nurse).

128. *See* Blakeley v. Shortal's Estate, 20 N.W.2d 28, 30-32 (Iowa 1945) (allowing recovery when deceased committed suicide at home of neighbors while they were out, creating ghastly scene which they discovered on returning home).

129. *See* Lambert v. Brewster, 125 S.E. 244, 250 (W. Va. 1924).

130. *See id.* The court noted that if the defendant had committed an assault on the primary victim and in the process had unintentionally come into physical contact with the plaintiff, there could undoubtedly have been liability. *See id.* The court then found no reason to treat this situation differently — thus applying a kind of transferred intent by analogy. *See id.*; *see also* PROSSER & KEETON, *supra* note 5, at 65 & n. 1 (citing this as a rare case that mentions transferred intent by way of analogy).

relationship, but Prosser has concluded that the language of the cases does not indicate that this is an absolute requirement.[131] It seems that if the other factors considered by the courts are strongly in the plaintiff's flavor — if, for instance, the plaintiff actually witnesses the event and it was an extremely violent happening — then the plaintiff's mental anguish may be found a natural consequence of the defendant's conduct despite the lack of relationship between the plaintiff and the initial victim. Thus, where a defendant brandishes a pistol at another person in a plaintiff's presence and threatens to shoot the person on the spot, the plaintiff's anguish may be found a direct consequence of the defendant's act — particularly if the defendant was aware that the plaintiff was present and that the plaintiff was pregnant or otherwise in a delicate state of health.[132] Under similar circumstances, recovery is likely even if the attack on a third person is not accompanied by threat or use of a firearm but is simply made in a violent manner.[133] No family relationship existed in these cases between the primary victim of the attack and the plaintiff who witnessed the attack; yet, the witness was allowed to recover for mental anguish as a direct consequence of the defendant's conduct.[134] The need for a family relationship was not even mentioned.

It thus seems that the rule against applying transferred intent to the tort of intentional infliction of mental anguish can be circumvented if a court is convinced that mental anguish to one person is the natural outgrowth of a tort primarily committed against another person or against property. In determining what may be found a natural consequence, courts will weigh such factors as whether the plaintiff

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131. *See* PROSSER & KEETON, *supra* note 5, at 66 ("The language of the cases themselves does not suggest any such arbitrary limitation, and it does not appear to be called for."). *But see* RESTATEMENT (SECOND) OF TORTS § 46(2) (1965) (providing that a plaintiff-witness must, in order to recover for mental distress, be a member of the primary victim's immediate family). A family relationship is also generally required in those jurisdictions allowing recovery for *negligently* caused mental or emotional anguish due to witnessing harm to a third person ("bystander's shock"). *See* Kraszewski v. Baptist Med. Ctr., 916 P.2d 241, 243-44 (Okla. 1996) (permitting husband to recover for witnessing injury to wife under either intentional or negligent infliction of mental anguish); Ramirez v. Armstrong, 673 P.2d 822, 825 (N.M. 1983) (stating that negligent infliction of mental distress is a tort against the integrity of the family unit); Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968) (requiring that the plaintiff and the primary victim must be closely related). *See generally* John S. Herbrand, Annotation, *Relationship Between Victim and Plaintiff-Witness as Affecting Right to Recover Damages in Negligence for Shock or Mental Anguish at Witnessing Victim's Injury or Death*, 94 A.L.R.3d 486 (1979) (providing that negligence cases for bystander's shock have required a close, but not necessarily a blood, relationship between the plaintiff and the primary victim). *Some* jurisdictions allow bystanders to recover for negligently caused emotional distress only if they were themselves in the zone of danger. *See* Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 554-55 (1994) (applying the zone of danger test under the Federal Employers' Liability Act). *See generally* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm — A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477 (1982) (supporting use of the zone of danger test in bystander cases).

132. *See* Rogers v. Williard, 223 S.W. 15, 16-17 (Ark. 1920) (defendant threatened to shoot a third person in the plaintiff's presence, knowing the plaintiff was present and was in an advanced stage of pregnancy).

133. *See* Hill v. Kimball, 13 S.W. 59, 59-60 (Tex. 1890) (finding liability where the defendant violently assaulted two persons in presence of the plaintiff, a pregnant woman).

134. *See id.*

suffering the anguish actually witnessed the occurrence, was known by the defendant to be present, witnessed an attack merely against property or an assault on a person, or witnessed an attack on a family member or on a stranger.[135] Of course, there is no need for the natural consequences rule — or for transferred intent — if there is clearly intent to cause distress to the plaintiff, even if the distress is caused by threats against a third person. Thus, if the defendant tells the plaintiff he plans to kill her husband, there is obviously a desire to cause — or, at least, a substantial certainty of causing — anguish to the plaintiff.[136] The plaintiff is then a primary victim, not just a bystander, and there is liability without need for further analysis.

Criminal Law Precedents for the Doctrine

It has been noted that the use of transferred intent in tort law grew out of its development in the criminal law.[137] In considering the present need for the doctrine, it is thus well also to consider its status in the criminal law. The doctrine of transferred intent remains securely established as part of the criminal law. If a criminal defendant has, for instance, shot at one person and hit another, the defendant may be convicted of a crime against the unintended victim, even though the defendant had no malice or wrongful intent toward that person.[138] Thus, if the defendant took aim at his intended victim and accidentally struck someone behind whom that person was trying to hide, the defendant may be found guilty of shooting the "human shield," with the defendant's guilt or innocence being determined by the same conditions as if he had shot the intended victim.[139] The criminal intent — whether an intent to kill or a lesser intent — is transferred from the intended to the actual victim.[140] This is true whether the shooting or hitting of the unintended victim occurs because that person obtrudes himself between the defendant and the intended victim or whether the unintended victim is simply struck by mistake.[141]

The reason most often given for the transfer in the criminal law is that the malice and deliberation necessary to commit a crime are broad enough to cover even accidental victims.[142] In effect, a crime, being a public offense, is treated as a wrong against all the world, justifying punishment of the perpetrator regardless of

135. *See generally* David J. Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163 (1976-77) (discussing these and other factors weighed in determining liability for emotional distress). The article focuses on cases of negligent, rather than intentional, misconduct by the defendant, but the factors considered are much the same.

136. *See* Knierim v. Izzo, 174 N.E.2d 157, 165 (Ill. 1961) (finding that the defendant, in threatening to murder the plaintiff's husband and then fulfilling the threat, intended to cause the plaintiff emotional disturbance and nervous exhaustion).

137. *See supra* notes 8-12 and accompanying text.

138. *See* Dunaway v. People, 110 Ill. 333, 333, 340 (1884) (holding that, when the defendant shot at *A*, missed him and fatally wounded *B*, the defendant could be convicted of murdering *B*).

139. State v. Williams, 97 N.W. 992, 996 (1904).

140. *See* State v. Batson, 96 S.W.2d 384, 38-89 (Mo. 1936).

141. *See* People v. Aranda, 83 P.2d 928, 929 (Cal. 1938).

142. *See* State v. Ochoa, 297 P.2d 1053, 1054 (N.M. 1956).

whether or not the victim turns out to be the intended target. Thus, if the defendant gives poison to one person and that individual unwittingly passes it on to someone else, who drinks it and dies, the defendant can be guilty of the victim's murder, even though the defendant had never met the victim and intended no harm to that person.[143] The malicious act has created a risk of harm to society, and there will be criminal liability if any member of society is harmed thereby. The transfer of the malice is perhaps clearest in cases in which the defendant, in attempting to commit a crime, harms someone who tries to obstruct him from his aim.[144] But in the eyes of the law, the defendant also assumes the risk of harming a totally uninvolved bystander — someone peacefully minding his own business who merely happened to get into the defendant's path.[145]

Ordinarily, the attempted crime and the crime unintentionally committed do not have to be the same. If, for instance, the defendant attempts to shoot and kill *A*, and his shot goes astray and hits but does not kill *B*, the defendant may be convicted of assault and battery on *B*, though the crime he was attempting would have been murder.[146] It has even been held that if a person attempts suicide and accidentally kills someone else in the process, the person attempting suicide is guilty of murder.[147] Occasionally, however, the statute defining the unintended crime may specify a particular intent required — such as the "intent to destroy or injure the property of another" sometimes required for malicious mischief — and the intent to commit some other crime cannot then be transferred so as to supply the missing intent.[148]

But ordinarily the malice present in attempting to commit one crime will suffice to cover other, unintended offenses. Courts may be influenced toward applying this rule because otherwise a crime might go totally unpunished, as in a case of the defendant giving a poison, with intent to kill, to one person, who innocently passes it on to another, who takes it and is thereby killed.[149] Since the one who passed on the poison had no wrongful purpose, that person would not be liable (unless for negligence), and there would be no criminal liability at all unless the defendant — who did have wrongful intent and was the original cause of the harm — can be punished.[150] And the general rule of the criminal law *is* to hold the original

143. *See* Coston v. State, 190 So. 520, 522 (Fla. 1939) (holding that malice transferred as a matter of law from the one against whom it was entertained to the unintended victim).

144. *See* Regina v. Salisbury, 75 Eng. Rep. 158, 159-60 (1553) (finding that, if the defendant acts with malice to kill one person and in the process kills another who tries to restrain the defendant, the defendant has malice, in the eyes of the law, toward the intervenor who is killed).

145. *See* Davis v. Collins, 48 S.E. 469 (S.C. 1904) (addressing situation where the defendant attempted to strike one person in malice but by accident struck another).

146. *See* Dunaway v. People, 110 Ill. 333, 333 (1884).

147. *See* State v. Levelle, 34 S.C. 120, 130-32 (1890) (holding that, since suicide is a felony, a person who attempts to take his own life and unintentionally kills another is guilty of murder).

148. *See* New York v. Washington, 222 N.E.2d 378, 379-80 (N.Y. 1966) (concluding that the facts could not support a conviction of malicious mischief under statutes where the defendant threw a garbage can at the complainant, missed, and hit complainant's automobile instead).

149. *See* Queen v. Saunders & Archer, 75 Eng. Rep. 706, 708 (1576).

150. *See id.* at 708.

perpetrator liable for all direct consequences.[151] As in tort law,[152] responsibility basically extends to all natural and probable consequences,[153] though not to merely possible ones, such as where the defendant knocks the victim down and the victim is then killed by a horse jumping on him.[154]

Where a person commits an act that would ordinarily be criminal but has a good defense, that defense will also operate to prevent the doctrine of transferred intent from applying. The basic rule is that the defendant is liable or not liable for the unintended crime in the same manner and to the same extent that he would have been liable or excused for the intended one.[155] Thus, if the defendant is justifiably acting in self-defense and accidentally harms a bystander, there is no wrongful intent to transfer and therefore no criminal liability to the bystander.[156] Again, the rules in this regard are basically the same as in tort cases of transferred intent.[157] The doctrine in the criminal law is thus much the same as in tort law and rests on the same basic rationale: a policy of widespread liability for an intentional wrong, reflected in extending liability to all direct consequences. But in the criminal law, there is no problem comparable to the tort question of allowing recovery for mental anguish. Indeed, the whole emphasis in the criminal law is on wrongful intent, not on scope and recovery of damages. Thus, the criminal cases may be regarded as of limited precedential value in tort.

The Need for the Doctrine in Tort

What, then, is the status of transferred intent in tort law? Its roots in English law provide little support, and there is scant authority to support it in American tort cases outside the areas of assault and battery. There *are* a good number of American precedents in assault and battery cases, and the doctrine is also well-established in criminal cases. But is the doctrine necessary in torts? Where liability in tort is based on transferred intent, it could also be based on some one or more of five other theories that are recognized parts of tort law — the four that have

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151. *See* Massachusetts v. Campbell, 89 Mass. (7 Allen) 541, 543 (1863) (stating that a person committing an illegal act "is legally responsible for all the consequences which may naturally or necessarily flow from it," but ruling that a rioter could not be guilty of murder or manslaughter due to the accidental killing of an innocent person by those suppressing the riot).

152. *See supra* notes 51-54 and accompanying text and *infra* notes 169-78 and accompanying text.

153. *See* People v. Rockwell, 39 Mich. 503, 504 (1878).

154. *See id.* (stating that liability does not extend to merely "possible consequences" and noting that, from the record, it could not be said that the defendant was responsible for the conduct of the horse); *cf.* Dominus Rex v. Gill, 93 Eng. Rep. 466, 466 (1719) (finding that a defendant who threw skins into man's yard was not responsible when wind blew the skins away, causing them to put out another man's eye).

155. *See* Mayweather v. State, 242 P. 864, 865 (Ariz. 1926) (holding that a person who, when shooting at one person, killed a bystander instead is either liable or excusable in same manner as though he had killed the intended victim).

156. *See* State v. Fielder, 50 S.W.2d 1031, 1034 (Mo. 1932) (finding that the defendant was entitled to an instruction on self-defense when the evidence showed that he was defending himself against a deadly assault by two women when he shot and killed a man who was taking no part in the encounter).

157. *See supra* notes 55-68 and accompanying text.

already been noted as rationales for the doctrine in assault and battery cases,[158] and the rule of broad liability that has been noted as existing in trespass to land cases.[159]

First, one long-established doctrine provides that a person who commits an act that is illegal under the criminal law will be civilly liable for all direct consequences, as where the defendant throws an explosive device at one person, who instinctively throws it elsewhere,[160] or where the defendant throws a rock at one person and hits another.[161] Unlawful use of firearms will, for instance, result in tort liability to those injured thereby, even though the particular injuries and the specific victims are outside the scope of foreseeability,[162] or even though the shooting occurs without negligence on the defendant's part.[163] Liability in such situations rests on the continuous succession of events from the unlawful act,[164] and there is no need to speak of transferred intent.

Second, some authority supports the view that there is, as under the preceding rule regarding unlawful conduct, tort liability for all direct consequences of a *malicious* act, whether or not it is illegal, as where the defendant maliciously destroys the plaintiff's pet and thus becomes liable for the plaintiff's mental suffering.[165] This avoids the problem of transferred intent not applying, historically, to intentional infliction of mental anguish,[166] and yet it stays within the bounds of generally accepted tort liability. Since most criminal acts are malicious, and vice versa, it overlaps the preceding theory of liability for all direct consequences of an unlawful act.

Third, some cases apply the rule that if several persons join together to commit an intentional tort, with a mutual purpose and mutual aid in achieving that purpose, there will be joint and several liability to all those injured by the common enterprise. Thus, several persons engaging in tortious mutual combat may be held liable to an injured bystander, without resort to transferred intent.[167] The same is

158. *See supra* notes 47-54 and accompanying text.

159. *See supra* notes 92-99 and accompanying text.

160. *See* Scott v. Shepherd, 95 Eng. Rep. 1124, 1126-30 (1773).

161. *See* Singer v. Marx, 301 P.2d 440, 443 (Cal. Dist. Ct. App. 1956).

162. *See* State *ex rel.* Harbin v. Dunn, 282 S.W.2d 203, 207 (Tenn. Ct. App. 1943) (finding that constable acted illegally in shooting tire of automobile, causing automobile to overturn and resulting in death of driver and injury to passenger).

163. *See* Belk v. Boyce, 138 S.E.2d 789, 792-93 (N.C. 1964). The *Belk* court discussed the traditional rule of liability for injury resulting from illegal use of firearms, but noted a modern trend to require negligence for liability. *See id.* The court ruled that the violation of a statute against cruelty to animals did not result in negligence per se as to a human being injured as a result of the defendant's attempt to shoot a dog. *See id.*

164. *See* Isham v. Dow's Estate, 41 A. 585, 586 (Vt. 1898) (assigning liability where the defendant wantonly shot dog, which thereupon rushed into the plaintiff's house, knocking the plaintiff down and injuring her).

165. *See* La Porte v. Associated Indeps., Inc., 163 So. 2d 267, 268-69 (Fla. 1964) (holding that the defendant could be liable for the plaintiff's mental suffering when the defendant maliciously killed the plaintiff's pet dog).

166. *See supra* notes 107-36 and accompanying text.

167. *See* Murphy v. Wilson, 44 Mo. 313 (1869). *But see* Burton v. Waller, 505 F.2d 1261, 1284

true though the situation is a less threatening one, as where several children engage in horseplay in the classroom by throwing erasers at each other. Anyone substantially aiding or abetting the tortious activity can be liable to anyone hit and injured by one of the thrown erasers.[168]

Fourth, but what if the situation does not necessarily involve criminal or malicious activity or any sort of joint enterprise, but is merely a potentially tortious act? There is still no need for transferred intent because it is the general rule of tort law "that every person is presumed to intend the natural and probable consequences of his acts."[169] No intent need be transferred; liability for an intentional tort simply extends to all direct and natural consequences of the defendant's conduct.[170] All that is required is an attempted tort, with wrongful intent, toward someone, and then a direct chain of causation producing injury.[171] Again, the liability can extend to mental anguish that is the direct consequence of an intentional tort, as where a wife witnesses an assault on her husband and the wife is frightened thereby.[172] No artificial limit excluding the tort of intentional infliction of mental anguish need be encountered here, such as encountered when an attempt is made to apply transferred intent to that tort.[173] Mental and emotional shock is *often* the direct and natural result of an intentional tort, as in the example of hitting or attempting to hit the plaintiff's spouse in the plaintiff's presence.[174] Recovery can then be allowed for the shock, without facing the restrictions present in transferred intent. The anguish need only be a natural, not necessarily an inevitable, consequence of the tort attempted or committed by the defendant.[175] So long as an intentional tort is involved, rather than mere negligence, the extent of liability is not even limited by

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(5th Cir. 1974) (finding that, under Mississippi law, actions of law enforcement detachment, each member of which had individualized authority to act against sniper fire, were not consistent with joint enterprise liability).

168. *See* Keel v. Hainline, 331 P.2d 397, 399 (Ky. 1881) (holding that student who retrieved erasers that had been thrown and handed them to other students for further throwing could be held liable to the plaintiff struck by thrown eraser).

169. *See* Lopez v. Surchia, 246 P.2d 111, 113 (Cal. Dist. Ct. App. 1952).

170. *See* Bannister v. Mitchell, 104 S.E. 800, 801 (Va. 1920) (finding liability where the defendant was fighting with the plaintiff's brother and wounded the plaintiff when she came to her brother's defense).

171. *Compare* Reynolds v. Pierson, 64 N.E. 484, 485 (Ind. App. 1902) (holding the defendant liable when the defendant pulled friend with whom the plaintiff was talking, causing the plaintiff to be thrown down) *with* John G. Kupferle Foundry Co., v. St. Louis Merchant's Bridge Terminal Ry., 205 S.W. 57, 58-59 (Mo. 1918) (finding liability via negligence where the defendant railroad backed freight car off the end of a switch track in the street, causing freight car to strike naphtha tank, causing naphtha to catch fire and burn the plaintiff's factory).

172. *See* Goddard v. Watters, 82 S.E. 304, 304 (Ga. 1914) (addressing situation where the plaintiff, who was pregnant, saw the defendant draw a revolver on her husband).

173. *See supra* notes 107-36 and accompanying text.

174. *See* Purdy v. Woznesensky [1937] 2 West Weekly R. 116, 124 (finding that the plaintiff's shock was direct and natural result of witnessing violent assault by the defendant on the plaintiff's husband).

175. *See* Blakeley v. Shortal's Estate, 20 N.W.2d 28, 31 (Iowa 145) (holding that shock to homeowner was natural result of deceased's act of committing suicide in her kitchen).

foreseeability.[176] Nor is it necessary that the wrongdoer have intended or desired the particular harm that occurs.[177] The plaintiff's recovery may encompass any direct result, including mental anguish, of the defendant's conduct, and this is true even if the initial damage was inflicted on property rather than on a person.[178]

Fifth, while the above-described "direct results" rule is the usual one for determining the scope of liability in intentional torts,[179] "[w]here the tort intended is trespass to land, other considerations become involved."[180] Since the trespasser's entry was wrongful, he can, without further wrongdoing, be liable for all the harm to which his entry led, as where he non-negligently sets a fire that causes damage.[181] "Recovery does not depend upon directness of the damage."[182] The recovery may thus extend to physical injury to persons,[183] to nervous prostration from fright,[184] to fright and mental anguish themselves,[185] and to physical injury resulting from fright.[186] It may include results that were improbable and not to be

176. *See* Lambert v. Brewster, 125 S.E. 244, 249 (W. Va. 1924). The *Lambert* court addressed a situation where the defendant violently beat the plaintiff's father in her presence, causing her to be frightened and suffer a miscarriage. The defendant was held liable to the plaintiff for all damages which could be directly traced to his wrongful conduct even though he was unaware of her presence or of her pregnant condition. *See id.*

177. *See* Rogers v. Williard, 223 S.W. 15, 16 (Ark. 1920) (holding the defendant liable for threatening to shoot another person in the plaintiff's presence); *cf.* Vandenburgh v. Truax, 4 Denio 464 (N.Y. Sup. Ct. 1847) (concluding that the defendant could be liable though he did not intend the particular injury; thus could be liable where he threatened and chased a young boy, causing the boy to bump against and damage some of the plaintiff's property). *Compare* Mobile Life Ins. Co. v. Brame, 95 U.S. 754, 758-59 (1877) (finding that person is responsible for all direct damage resulting from the person's unlawful act, but not liable to life insurance company that had to pay on its policy due to the person's unlawful killing of the insured because the results were too remote and indirect) *with* Oklahoma Gas & Elec. Co. v. Hofrichter, 116 S.W. 599, 601 (Ark. 1938) (finding the defendant who assaulted mother not liable for baby's swallowing safety pin).

178. *See* Brown v. Zorn, 275 S.W. 572, 574 (Mo. Ct. App. 1925) (permitting the plaintiff recovery for physical and mental anguish where the defendant attacked and damaged the plaintiff's car with a hatchet).

179. *See* Prosser, *Transferred Intent*, *supra* note 1, at 658.

180. *Id.* at 658-61.

181. *See* Wyant v. Crouse, 86 N.W. 527, 528-29 (Mich. 1901); *cf.* City of Garland v. White, 368 S.W.2d 12, 16-17 (Tex. Civ. App. 1963, no writ) (holding police officers liable for damage to house from shotgun blast inflicted when officers entered land with intent unlawfully to kill dog; officers were considered trespassers).

182. Van Alstyne v. Rochester Tel. Corp., 296 N.Y.S. 726, 729 (1937).

183. *See* Daingerfield v. Thompson, 74 Va. (33 Gratt.) 136, 149-52 (1880) (holding trespasser who participated in firing of pistol liable to person struck by shot).

184. *See* Watson v. Dilts, 89 N.W. 1068, 1069 (Iowa 1902) (finding liability for fright caused by night-time trespass at the plaintiff's home).

185. *See* Young v. Western & Atl. R.R., 148 S.E. 414, 416-17 (Ga. Ct. App. 1929) (holding the defendant liable for shock and fright suffered when the defendant's agent entered the plaintiff's bedroom at night and dragged her husband from bed).

186. *See* Bouillon v. Laclede Gaslight Co., 129 S.W. 401, 404 (Mo. 1910) (allowing recovery for fright and for physical injury resulting therefrom where the defendant's agent trespassed on the plaintiff's home and used violent language toward her nurse).

anticipated.[187] The liability is based on the wrongful nature of the defendant's act, not on the nature of the consequences.[188]

Thus — quite apart from any doctrine of transferred intent — liability for an intentional tort extends to all direct consequences, and extends to remote, indirect consequences where the tort of trespass to land is concerned, so long as there is some chain of causation. The rules on liability for criminal acts, malicious acts, and joint enterprises may be regarded as simply corollaries, or sub-rules, under the general principle of liability for direct results, since the same degree of liability could be achieved merely by using that general rule. The rule regarding liability for trespass to land may similarly be treated as just an extension of the usual doctrine. And under any of these theories, there is no need for automatic exclusion of mental anguish from the scope of liability. All that is really needed is the one rule: liability in intentional torts, and in the criminal law, for all direct consequences.

Conclusion

The transferred intent doctrine, besides its unreasoned non-application to intentional infliction of mental anguish, presents a number of queries to which there are no answers in the cases. Does the doctrine apply, for instance, if the statute of limitations has run on the primary tort but not on the secondary one? What if immunity prevents liability for the primary tort but not for the secondary?[189] Indeed, despite Prosser's statement that transferred intent is a well-settled tort rule "to which we can point with assurance,"[190] it rests largely on a handful of American assault and battery cases,[191] with hardly any precedent to sustain it as to other torts. But it certainly *is* true, as Prosser also observes, that there is a tendency to apply a broader scope of liability to the intentional torts than to negligence.[192] It is submitted that this tendency can be carried out simply by

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187. *See* Brackett v. Bellows Falls Hydro-Elec. Corp., 175 A. 822, 823 (N.H. 1934). In *Brackett*, the defendant caused flooding of the plaintiff's land, thereby committing a trespass. The court found liability when the flooding caused the land to be infested with muskrats, and the plaintiff-owner while driving a mowing machine was thrown to the ground when one wheel of the machine sank into a muskrat burrow. *See id.*

188. *See The Tie That Binds*, *supra* note 16, at 362 (quoting and discussing Wyant v. Crouse, 86 N.W. 527 (Mich. 1901)).

189. There appear to be no authorities on these points. Arguably, the wrongful intent could still be "transferred" even though it could no longer result in liability for the primary tort due to the statute of limitations having run, or could never have resulted in liability for the primary tort due to the immunity. Immunity, in particular, is applicable only to the person or entity enjoying it and should not extend to other victims. And similarly, one who has not "slept on his rights" — i.e., has not let the statute of limitations run out on his claim — should not be penalized because of someone else's lack of diligence. For these reasons, it is submitted that liability for the "secondary" tort should be allowed, whether under a transferred-intent analysis or simply as a direct result of the original tortious act. Under the latter analysis, the statute may be treated as having run (or the immunity as applying) as to some of the direct damage but not all.

190. Prosser, *Transferred Intent*, *supra* note 1, at 662.

191. *See supra* notes 28-54 and accompanying text.

192. *See* Prosser, *Transferred Intent*, *supra* note 1, at 662.

adherence to the direct result test — a test that has well been termed "the simplest causal standard yet devised."[193] Such simplicity, understandability to jurors, and the resulting predictability of result, are surely preferable to the rigidities and complexities of transferred intent — a doctrine that should be relegated to the compartment of legal history appropriate to a "bare-faced fiction of the kind dear to the heart of the medieval pleader."[194]

193. *The Tie That Binds*, *supra* note 16, at 370.
194. Prosser, *Transferred Intent*, *supra* note 1, at 650.