

# Recent Decisions: Torts: Intentional Infliction of Emotional Distress as a Separate Tort

Francis J. Podvin

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against as a result of his testimony before a Wisconsin circuit court judge conducting a John Doe investigation may rely upon this case in an attempt to invalidate the information. Assuming that the same lack of consent is present when the witness is subpoenaed to appear before a magistrate, as when he is taken before a grand jury in handcuffs—the situation in *Jones*, a strong argument could be made for the reversal of a resulting conviction on the ground that the information was obtained in violation of his state constitutional privilege against self-incrimination.

A. WILLIAM FINKE

**Torts: Intentional Infliction of Emotional Distress as a Separate Tort:** Plaintiff sued for the recovery of damages incurred as a result of defendant's conduct in completing a contract to replace the wooden siding on plaintiff's home and to install combination aluminum windows and doors. Defendant delayed work on the contract, exposed the occupants of plaintiff's home to severe winter weather without adequate protection, and, through numerous personal contacts, intimidated, coerced, and bullied the plaintiff. The plaintiff's damage consisted of severe emotional distress brought on by a depressive reaction which left her unable to function effectively in her home or at her job. The trial court found defendant's conduct unreasonable, but refused to impose liability on the ground that such conduct was not extreme and outrageous, and of not sufficient flagrant character so as to be the basis for relief.

In *Alsteen v. Gehl*,<sup>1</sup> the court upheld the trial court's decision that the defendant's conduct would not be considered outrageous and extreme by the average member of the community. The court recognized the existence of an independent tort which heretofore had not been acknowledged in this jurisdiction:

One who by extreme and outrageous conduct intentionally causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from it.<sup>2</sup>

Four elements must be established before recovery is allowed:

- 1) The conduct must be intentional; that is, for the purpose of causing the plaintiff's emotional distress.
- 2) The conduct must be extreme and outrageous, characterizable by the average member of the community as a complete denial of the plaintiff's dignity as a person.

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trict attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The extent to which the magistrate may proceed in such examination is within his discretion. The examination may be adjourned and may be secret. If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint shall be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused."

<sup>1</sup> 21 Wis. 2d 349, 124 N.W. 2d 312 (1963).

<sup>2</sup> *Id.* at 358, 124 N.W. 2d at 317.

3) The defendant's conduct must be the legal cause of plaintiff's injury.

4) The plaintiff's injury must so disable him that he is not able to function in his normal interpersonal relationships.

The Wisconsin court limited recovery to pure intentional acts, rather than adhering to the *Restatement of Torts'* standard of liability<sup>3</sup> which allows recovery on a theory of constructive intent. This distinction eliminates the possibility of recovery for mental distress where the defendant "is not purposely attempting to impose psychological harm"<sup>4</sup> and is the one difference between the Wisconsin position and that of the *Restatement*. Gross negligence has been abolished in Wisconsin<sup>5</sup> and a strict dichotomy established between the areas of negligent action and intentional action. Therefore, reckless and grossly careless conduct will not serve as a basis for an implied intent. "Willful and intentional torts, of course still exist, but should not be confused with negligence."<sup>6</sup>

By requiring the conduct of the defendant to be extreme and outrageous, the court has taken an additional measure to insure freedom from fraudulent claims.<sup>7</sup> "If the conduct is gross and extreme it is more probable that the plaintiff did, in fact, suffer the emotional distress alleged."<sup>8</sup> Whether or not the defendant's conduct will be considered as a complete denial of plaintiff's personal dignity by the average member of the community is the test that *Alsteen* has set up.<sup>9</sup>

Courts have considered conduct extreme and outrageous in the following situations: persistent overtures for sexual intercourse,<sup>10</sup> threat to murder plaintiff's husband and the fulfillment of the threat,<sup>11</sup> and telling a mother that her child had been injured and was in the hospital.<sup>12</sup> Cases where conduct has not been found to be extreme or outrageous are generally in the area of "bad manners." The underlying principle that "some safety valve must be left through which irascible tempers may blow off relatively harmless steam"<sup>13</sup> has been zealously guarded by the courts. No recovery was allowed where a person merely had his feelings hurt,<sup>14</sup> where the defendant invited a woman to illicit

<sup>3</sup> The *Restatement* includes the theory of constructive intent: "One who by extreme and outrageous conduct *intentionally* or *recklessly* causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from it." (Emphasis added.) *RESTATEMENT (SECOND), TORTS* § 46 at 22 (Tent. Draft No. 1, 1957).

<sup>4</sup> *Alsteen v. Gehl, supra* note 1, at 358, 124 N.W. 2d at 317.

<sup>5</sup> *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W. 2d 105 (1962).

<sup>6</sup> *Id.* at 18, 114 N.W. 2d at 113.

<sup>7</sup> *Magruder, Mental and Emotional Disturbances in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

<sup>8</sup> *Alsteen v. Gehl, supra* note 1, at 360, 124 N.W. 2d at 318.

<sup>9</sup> *Id.* at 359, 124 N.W. 2d at 318.

<sup>10</sup> *Samms v. Eccles*, 11 Utah 2d 289, 358 P. 2d 344 (1961).

<sup>11</sup> *Kniesin v. Izzo*, 22 Ill. 2d 73, 174 N.E. 2d 157 (1961).

<sup>12</sup> *Savage v. Boies*, 77 Ariz. 355, 272 P. 2d 349 (1954).

<sup>13</sup> PROSSER, *LAW OF TORTS*, 45 (2d ed. 1955).

<sup>14</sup> *Wallace v. Shoreham Hotel Corp.*, 49 A. 2d 81 (D.C. Munic. App. 1946).

intercourse,<sup>15</sup> and where insults or indignities amounting to no more than annoyances were endured by the plaintiff.<sup>16</sup>

However, borderline cases continue to raise serious problems of proof. In *Curnett v. Wolf*,<sup>17</sup> the court allowed \$4000 in damages where plaintiff received pecuniary threats involving his employment in a long distance telephone conversation. On the other hand, courts have refused to allow recovery where a fifteen year old female was approached by a man who made indecent proposals and gestures to her.<sup>18</sup> Another case held that a female employee who was unjustly cursed in public and then fired from her job could not recover in an action against her employer.<sup>19</sup>

The third element, that of legal causation, has received extended treatment in Wisconsin law—treatment that has culminated in the “substantial factor” test cited in the case of *Pfeiffer v. Standard Gateway Theatre, Inc.*<sup>20</sup> Pre-existing susceptibility<sup>21</sup> to mental distress was found to have no effect on the question of causation, except where the defendant could show that plaintiff’s injuries would have been present in the absence of his conduct.

The severity of emotional distress suffered by the plaintiff is an essential element in the cause of action. “The severity of the injury is not only relevant to the amount of recovery, but is a necessary element to any recovery.”<sup>22</sup> Plaintiff must prove that his emotional distress is extreme and disabling—one which affects him in his everyday life to the extent that he is unable to function in his normal day to day relationships. Temporary discomfort has been eliminated as a basis for recovery.<sup>23</sup> This requirement provides an effective safeguard against litigation by plaintiffs with mere injured feelings. Prosser notes that there are few cases allowing recovery without proof of serious physical illness resulting from the alleged emotional distress.<sup>24</sup>

Four arguments have been used in cases rejecting the imposition of liability for pure mental distress.<sup>25</sup>

<sup>15</sup> *Reed v. Maley*, 15 Ky. 816, 74 S.W. 1079 (1903).

<sup>16</sup> *Beck v. Luers*, Iowa, 126 N.W. 811 (Iowa 1910).

<sup>17</sup> 244 Iowa 683, 57 N.W. 2d 915 (1953).

<sup>18</sup> *Davis v. Richardson*, 76 Ark. 348, 89 S.W. 318 (1905).

<sup>19</sup> *Atkinson v. Bibb Mfg. Co.*, 50 Ga. App. 434, 178 S.E. 537 (1935).

<sup>20</sup> 262 Wis. 229, 55 N.W. 2d 29 (1952), wherein the “substantial factor” test was defined as “such efficient cause of the accident as to lead the jurors, as reasonable men and women, to conclude that the negligence of A . . . was a substantial factor in causing the injury.” *Osborne v. Montgomery*, 203 Wis. 223, 234 N.W. 372 (1931). See also 55 Wis. L. Rev. 36.

<sup>21</sup> *Alsteen v. Gehl*, *supra* note 1, at 360, 124 N.W. 2d at 318. Cf. *Colla v. Mandella*, 1 Wis. 2d 594, a case involving fright induced physical injuries, as contrasted with the present case where the plaintiff suffered from pre-existing emotional problems.

<sup>22</sup> *Id.*, *Alsteen v. Gehl*.

<sup>23</sup> *Id.* at 361, 124 N.W. 2d at 318.

<sup>24</sup> PROSSER, *op. cit. supra* note 13, at 46.

<sup>25</sup> *Harned v. E-Z Finance Co.*, 151 Tex. 641, 254 S.W. 2d 81 (1953). For other cases summarizing these policy arguments, see *Mitchell v. Rochester Ry. Co.*,

1) Mental anguish, standing alone, is too subtle and speculative to be measured by any known legal standard.

2) Mental anguish and its consequences are so intangible and peculiar and vary so much with the individual that they cannot reasonably be anticipated, hence they fall without the boundaries of any reasonably proximate causal connection with the act of the defendant.

3) A "wide door" would be opened, allowing recovery for fictitious claims and also allowing litigation over trivialities and mere bad manners as well.

4) Since mental anguish can exist only in the mind of the injured party, no recovery should be allowed in the absence of some objective injury.

In *Alsteen*,<sup>26</sup> the court relied on the advances made in the sciences dealing with mental health to rebut these policy arguments. Psychiatry and clinical psychology are now able to provide sufficiently reliable information enabling the jury to make intelligent, evaluative judgments upon the validity and extent of the plaintiff's claim.<sup>27</sup> This development in medical science serves as a basis by which the legal causation of an emotional injury can be determined. "While it may be true that at the time the rule of no recovery was formulated, we lacked techniques for gathering reliable information about psychological experience, we now possess the tools whereby we can intelligently evaluate claims of emotional injury."<sup>28</sup>

When faced with the argument that mental injuries were too evanescent to be fairly compensable, the courts have been cognizant of the fact that the law of torts has a recognized scope beyond the mere giving of redress for injuries capable of exact or appropriate pecuniary measurement.<sup>29</sup> The majority of courts have frankly admitted the inadequacies of the four policy arguments in light of modern developments in judicial proceedings—namely, the liberality of admitting expert testimony, the accessibility of experts in the field of mental health, and the recognition of the validity and trustworthiness of medical witnesses.<sup>30</sup> As the New York Court of Appeals pointed out in *Battalla v. State*:<sup>31</sup>

In the difficult cases, we must look to the quality and genuineness of proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out the dishonest claims.

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151 N.Y. 107, 45 N.E. 354 (1896), overruled by *Battalla v. State*, 10 N.Y. 2d 237, 176 N.E. 2d 729 (1961).

<sup>26</sup> *Alsteen v. Gehl*, *supra* note 1, at 359, 124 N.W. 2d at 317.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> PROSSER, *op. cit. supra* note 13, at 39.

<sup>30</sup> Smith, *Relation of Emotions to Injury and Disease, Legal Liability For Psychic Stimuli*, 30 VA. L. REV. 193 (1944).

<sup>31</sup> *Battalla v. State*, 10 N.Y. 2d 237, 176 N.E. 2d 729 (1961).

Dean Prosser's indignation at the objection that recognizing the intentional infliction of mental distress as a separate tort would create a "Pandora's box" adequately portrays the opposition the majority of courts have given to each of the classic policy considerations. Prosser pointed out that

it is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds.<sup>32</sup>

Recognition of the intentional infliction of severe emotional distress as a separate tort is a great stride in the modern development of the law. The legal profession has recognized the developments, both in medical science and the law, and relied thereon in extending the mantle of protection to an individual's right to enjoy peace of mind without intentional invasion. Whether this step marks but the midpoint in the eventual movement to allow recovery for mental distress resulting from negligent action has yet to be finally resolved.

FRANCIS J. PODVIN

**Torts: Trial Court Difficulties in Applying the New Rule of Fair Mistake to Civil Libel:** Defamation, comprising libel and slander, is one of the most complex areas of the law, replete with distinctions and qualifications.<sup>1</sup> The United States Supreme Court has recently added to the already existing constitutional restrictions by holding that the first amendment through the fourteenth "delimits a State's power to award damages for libel in actions brought by *public officials* against critics of their *official conduct*,"<sup>2</sup> (emphasis added) unless *actual malice* is shown. Before discussing the significance of this decision, it is necessary to review briefly the traditional law in this area.

Defamation involves the communication to others of matter which tends to lessen the goodwill, respect, esteem, or confidence in which a person is held or to encourage derogatory, adverse, or unpleasant feelings or opinions about him.<sup>3</sup> Originally, libel was defined as written defamation. This definition is no longer accurate. Libel, today, consists in the embodiment of defamation in some seemingly permanent physical

<sup>32</sup> PROSSER, *op. cit. supra* note 13, at 39. See also *Kniesin v. Izzo*, 22 Ill. 2d 73, 174 N.E. 2d 157 at 165: "Consequently, we must agree with those jurists and critics who find that the reasons advanced in the cases for denying an action for the intentional infliction of severe emotional distress have for the most part been added to support a predetermined conclusion dictated by history and the fear of extending liability . . ."

<sup>1</sup> WINFIELD, TORT 244 (5th ed. 1950); PROSSER, TORTS 572 (2d ed. 1955); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 273 (1906).

<sup>2</sup> *New York Times Co. v. Sullivan*, 84 S. Ct. 710, 727 (1964).

<sup>3</sup> RESTATEMENT, TORTS § 559 (1938).