Cornell Law Review

Volume 47
Issue 1 *Fall 1961*

Article 4

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Charles B. Hochman

"OUTRAGEOUSNESS" AND PRIVILEGE IN THE LAW OF EMOTIONAL DISTRESS— A SUGGESTION

Charles B. Hochman†

The fashioning by the courts of a new tort for the intentional infliction of emotional distress in recent years has presented another area of the law in which liability is imposed for the use of words which have socially undesirable effects. The purpose of this article is to explore the relation of this development to the law of defamation and to indicate one respect in which traditional principles of defamation may be able to serve as a guide for the future refinement of the rules governing the new tort.

In considering liability for the infliction of emotional distress, courts are confronted with the conflict between two important interests—(1) the interest of the individual in his "peace of mind" or his right to be free from serious invasions of his mental and emotional tranquility and (2) the public and private interest in the free expression of information and ideas.

Although mental distress has long been recoguized as an element of damages when some other interest of the plaintiff has been invaded,[1] only recently have courts been willing to recognize invasions of peace of mind as an independent basis for tort liability. Undoubtedly, this development[2] has been influenced by the increasingly higher standard which society has imposed for socially acceptable conduct. Perhaps even more important in influencing the imposition of liability for the infliction of emotional distress have been the advances in medical science showing that emotional and mental injuries can be just as harmful as those physical injuries which the courts have traditionally redressed.[3] The courts, however, have been unwilling to give the same protection to peace of mind as they have afforded the interest in being free from bodily harm.

This reluctance is caused partly by the same fears which originally influenced courts in refusing to grant recovery for emotional distress. Because of the intangible nature of the injury judges were afraid of encouraging fictitious or trivial claims. Also contributing to this fear were distrust of the kind of proof offered to substantiate claims of emotional

† See contributors' section, masthead p. 69, for biographical data.

1 See McCormick, Damages § 88 (1935).

2 Perhaps the classic article in this field is Magruder, "Mental and Emotional Disturbance in the Law of Torts," 49 Harv. L. Rev. 1033 (1936).

3 See Smith, "Relation of Emotions to Injury and Disease," 30 Va. L. Rev. 193 (1944).

injury—often the only testimony of injury came from the plaintiff's own relation of his mental anguish—and the sympathy of juries toward the pregnant women and elderly persons who are often plaintiffs in these cases. Even though the courts were willing to recognize that these objections, which actually are more of a commentary on the ability of the courts to handle these cases than on the desirability of providing redress for this kind of injury, are not insuperable in the light of modern medical knowledge and even though the trial judge can exert a strong hand in controlling the jury's discretion, they have refused to extend full protection to the interest in peace of mind. The tentative draft of the RESTATEMENT OF TORTS (SECOND) probably reflects accurately the cases when it suggests that liability will be imposed only for the intentional or reckless infliction of emotional distress; negligently inflicted emotional distress states a cause of action only if forseeable physical injury results.[4]

This refusal to impose liability for negligently inflicted emotional distress can perhaps be explained on the ground that only if the defendant intends to inflict severe emotional distress, is it reasonable to hold him liable.[5] To the extent that this reasoning reflects the idea that the greater the defendant's moral culpability, the greater should be his liability, it seems sound; however, the argument that it is easier to assure the genuineness of plaintiff's injury when the defendant acts intentionally than when he acts negligently seems neither logically nor empirically sound. Perhaps a more satisfactory explanation is that the courts are concerned with the undesirable effects of imposing liability for the negligent infliction of emotional distress. For example, the comment to the proposed revision of the RESTATEMENT points out;

> There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.[6]

The tentative draft of the new RESTATEMENT again reflects accurately the interest in the free expression of ideas in suggesting that liability is imposed only when the defendant's conduct has been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[7] Moreover, in order to keep minor annoyances

[4] Restatement (Second), Torts §§ 46, 313 (Tent. Draft Nos. 1, 4, 1957); see Prosser, "Insult and Outrage," 44 Cal. L. Rev. 40 (1956).

[5] Cf. State Rubbish Collectors Ass'n. v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952).

[6] Restatement (Second), Torts § 46, comment d at 23 (Tent. Draft No. 1, 1957); see Magruder, supra note 2; State Rubbish Collectors Ass'n v. Siliznoff, supra note 5.

[7] Restatement (Second), Torts § 46, comment d at 22 (Tent. Draft No. 1, 1957).

and petty grievances out of court, liability will be imposed only when the injury which the defendant intended to inflict can be characterized as "severe" emotional distress. The two requirements that the defendant's conduct be "outrageous" and that plaintiff's injury be "severe" are very ambiguous and consequently afford a jury instructed in these terms great leeway in determining liability. Since this discretion in the jury has historically, and to some extent justifiably, troubled the courts, one of the primary objectives in this field should be the development of more definite standards in applying these two requirements. Whether a more precise definition of the requisite degree of emotional distress can be developed than the present requirement of severity is doubtful; reliance will probably have to be placed on the trial judge to exercise the necessary control over the jury.

As for the requirement that the defendant's conduct be outrageous, one possibly fruitful avenue of inquiry does not seem to have been considered by the courts. This is the approach adopted in the area of defamation in which the courts have been called upon to accommodate the public and private interest in the free expression of ideas and opinions with another important interest, the individual's interest in his reputation. This latter interest is given broad protection by those rules which make it quite easy for a plaintiff to establish his case. For example, the definition of what is defamatory is very broad; the plaintiff can recover even though he does not prove actual damages through injury to his reputation; and liability is imposed in many cases even though there is no element of fault in the defendant's conduct.[8] The public and private interest in free expression is protected by certain well-developed privileges. In addition to the absolute privileges applicable to statements made in the course of judicial or legislative proceedings or by executive officials,[9] a defendant who has acted with an honest or reasonable belief in the truth of his statements has a valid defense if they were uttered to further a legitimate purpose. Thus, qualified privileges are available if the defendant was acting to protect a valid interest of his own,[10] or the interest of a third party to whom he owes a legal or moral duty of protection,[11] or if he was commenting on a matter in which the public has a

[8] See generally Harper & James, Torts §§ 5.1-5.20 (1956); Prosser, Torts §§ 92-94 (2d ed. 1955).

[9] See, e.g., Barr v. Mateo, 360 U.S. 564 (1959); Irwin v. Ashurst, 158 Or. 61, 74 P.2d 1127 (1938).

[10] See, e.g., Brow v. Hathaway, 95 Mass. (13 Allen) 239 (1866); 1 Harper & James, Torts § 5.26 (1956).

[11] See, e.g., Fresh v. Cutter, 73 Md. 87, 20 Atl. 774 (1890); Prosser, Torts § 95, at 615-19 (2d ed. 1955).

legitimate interest,[12] provided the defendant's conduct was reasonably related to the protection of the interest for which the privilege is accorded.[13]

It is submitted that the courts could profitably consider these privileges,[14] or something closely akin to them, in future cases involving the intentional infliction of emotional distress. That these privileges have been developed and applied in the context of a tort designed to protect reputation rather than peace of mind certainly should not bar their use in actions for emotional distress. In both of these areas of tort law the underlying objective is to accommodate the interest in the free exchange of ideas with the interest in protecting those persons adversely affected by this exchange. No reason appears why the introduction of the defense of privilege[15] could not serve a useful purpose when plaintiff claims an invasion of his interest in peace of mind rather than an attack upon his reputation.[16]

When one considers the policy considerations which the "outrageousness" requirement is intended to implement, it becomes clear that the qualified-privilege approach is much more satisfactory. One reason often given for imposing liability only where the defendant's conduct can be characterized as outrageous is expressed in comment (d) to the proposed revision of section 46 of the RESTATEMENT:

> [L]iability does not extend to mere insults, indignities, threats, annoyances, petty oppressions or other trivialities. The rough edges of our society are still in need of a good deal filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind.[17]

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[12] See, e.g., Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901). One important qualification on this privilege is stated in Prosser, supra note 10, at 621-22:

> Some three-fourths of the courts which have considered the question have held that the privilege of public discussion is limited to opinion, comment or criticism, and does not extend to any false assertion of fact.

[13] See generally id. Prosser, supra note 10, at 625-29.

[14] Of course, the absolute privileges available to a defendant in a defamation action would also be applicable when the plaintiff claims damages for intentionally inflicted severe emotional distress.

[15] Much of the discussion in this article will focus on the desirability of adopting the qualified-privilege approach in the law governing emotional distress. This, however, is merely to facilitate discussion of the manner in which the conflicting interests involved can best be accommodated. The author feels that the defense of the absolute privilege should be utilized here, as in the area of defamation, in those instances in which the interest the defendant was advancing is considered so strong as to outweigh in substantially all instances the interests of the plaintiff which the tort is designed to protect.

[16] The fact that liability is only imposed for the intentional infliction of severe emotional distress while a defendant may be held liable for libel or slander upon a lesser showing of fault is immaterial. The defendant's fault is relevant to the requirements which plaintiff must meet to establish a prima facie case for recovery and relevant in determining whether a qualified privilege has been abused, but seems to have little bearing on whether a qualified privilege should be made available.

[17] Restatement(Second), Torts § 46, comment d at 23 (Tent. Draft No. 1, 1957).

Although this observation undoubtedly states a valid policy consideration and represents an accurate summary of the present state of case law, it is difficult to see that the requirement of "outrageousness" is the most rational manner of implementing it. If the concern is that the plaintiff may not have suffered more than a petty annoyance, is not this the very factor which the requirements of intention to inflict harm and severity of distress are designed to guarantee? The concern should be with the nature of the plaintiff's injury rather than the nature of the defendant's conduct. It has been argued that in light of the great fear of permitting recovery for a feigned or trivial claim, requiring the defendant's conduct to be outrageous is an effective means of assuring the severity of the plaintiff's injury; if the defendant's conduct merely represents the kind of petty annoyance which we all must endure, it is extremely unlikely that the plaintiff has been seriously distressed.[18] Even though it be admitted that the nature of the defendant's conduct may have some probative value in determining the nature of the plaintiff's injury, it does not follow that the only time one can be sure that the plaintiff has been sufficiently distressed is when the defendant's conduct can be characterized as outrageous. It is certainly conceivable that the plaintiff will be able to establish the severity of his emotional distress through other proof, such as by the use of medical testimony.[19] For this reason a simple instruction that the jury should consider the nature of the defendant's conduct in addition to any other relevant evidence in deciding whether the plaintiff's injury satisfies the requisite degree of severity would be preferable to the fixed requirement that the plaintiff can only recover if the defendant's conduct can be characterized as outrageous.

If the "outrageousness" requirement is to have any validity, it must be justified on grounds other than those discussed above. One important function which it might serve is suggested when one considers why a defendant who intentionally inflicts severe emotional distress should ever escape liability. The reason must be that there are circumstances in which to permit recovery for an invasion of peace of mind would be to encroach upon interests of either the defendant or the general public which are sufficiently important to outweigh the plaintiff's interest in obtaining redress. An obvious example would be the case in which an attorney during the course of a trial subjected his adversary's witness to extreme embarrassment on the witness stand. Certainly, in this case the attorney should have a defense to an action for the intentional inflic-

18 See Prosser, "Insult and Outrage," 44 Calif. L. Rev. 40, 44-45 (1956).
19 See generally Smith, "Relation of Emotions to Injury and Disease," 30 Va. L. Rev. 193 (1944).

tion of emotional distress.[20] One way to express this defense is to say that his conduct was not outrageous under all the circumstances, but this statement merely conceals the real reason—the overriding interest in an attorney's zealous presentation of his client's case in court.

Although this is perhaps an extreme example, it is submitted that the same reasoning applies in most cases in which the defendant's conduct was not sufficiently outrageous under the circumstances. Cases involving overzealous creditors or collection agencies are a good example.[21] In determining whether the creditor's conduct is outrageous, the jury is told to consider all the circumstances of the case. In particular, was the creditor trying primarily to collect his money or was he sadistically subjecting the plaintiff to embarrassment? Was there any dispute as to the validity of the debt? The jury is then asked to give a *gestalt* reaction as to whether, lumping all these factors together, his conduct was outrageous.

A more sensible and straightforward way to strike a balance between the interests involved would be to talk in terms of qualified privilege and the abuse of this privilege. The inquiry would be whether the defendant had invaded the plaintiff's interest in peace of mind by intentionally subjecting him to severe emotional distress, and if he had, was he justified in so doing. If the defendant had a privilege to pursue his own interest, did his conduct exceed the bounds of this privilege? At the very least, this type of approach would facilitate clarity of analysis by giving a more defined content to and explicit recognition of the interests which the "outrageousness" requirement is intended to implement.

A desirable by-product of the qualified-privilege approach would be that by clarifying the interests at stake in a particular case, it would permit instruction of the jury in more precise terms as to the issues involved. Under the RESTATEMENT view the jurors are asked for a basically emotional reaction as to whether a recitation of the defendant's conduct moves them to exclaim "Outrageous!" In addition to the disadvantages of inviting the jury to decide on an emotional basis the standard is so vague and indefinite that persons are likely to be in substantial disagreement as to what is meant by "outrageous" and whether the defendant's conduct, even given an adequate definition of outrageousness, is sufficiently gross to meet this standard. It must be admitted that the law often must, and perhaps even should, deal in vague and general standards of conduct; the reasonable-man test may be cited as a standard quite susceptible to different interpretation. But even when this is recognized it is submitted that the adoption of a qualified-privilege approach

[20] Cf. Irwin v. Ashurst, 158 Or. 61, 74 P.2d 1127 (1938).
[21] E.g., Barnett v. Collection Serv. Co., 214 Iowa 1303, 242 N.W. 25 (1932).

would eliminate much of the unnecessary fuzziness inherent in the "outrageousness" test and thereby reduce the opportunity for inconsistent and arbitrary results in this area of the law.

The cases in which the "outrageousness" requirement apparently serves its greatest function are those involving the thoughtless practical joker whose perverted sense of humor results in disastrous consequences to his victim.[22] It might be argued that in this area, at least, the "outrageousness" requirement presents a manner of separating the ostensibly harmless practical joke which results in disastrous consequences from the more sadistic of the species. To speak of a privilege to perpetrate practical jokes would not make much sense since the defendant would not be acting to further any interest of his own or anyone else. The problem here is to establish the point at which the general interest in freedom of action should be limited because it comes in conflict with a legitimate interest of another. Certainly, it is plausible to say that defendant's freedom of action should be limited when an average member of the community would deem it outrageous. However, even in this situation it is submitted that the qualified-privilege approach is to be preferred. The conclusion would be that the defendant has no privilege to escape liability for severe emotional distress, intentionally or recklessly caused. That defendant will not be subject to liability unless he acted at least in conscious disregard of a high degree of probability that serious emotional distress would be produced by his conduct[23] seems to provide adequate protection for the general interest in freedom of action. Indeed, to require outrageousness in this area might perhaps be to introduce a superfluous requirement; the mere fact that the defendant intentionally or recklessly caused severe emotional distress in another for no good reason seems sufficient to dub his conduct outrageous.

Of course, an argument can be made that, even given the advantages of the qualified-privilege approach over the "outrageousness" test, the latter should be retained because it affords greater protection to the interests served by encouraging persons to express their ideas and opinion freely and by permitting persons to blow off a little harmless steam on occasion. It is undoubtedly true that the "outrageousness" test probably makes it more difficult to recover than would the qualified-privilege approach, because even in situations in which the defendant has a

22 For a particularly extreme example, see Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

23 This assumes that the Tentative Draft of the Restatement is correct in suggesting that there should be liability for the reckless infliction of severe emotional distress. If liability is to be imposed only for an intentional tort, the protection of the defendant's freedom of action is correspondingly greater.

qualified privilege a finding that the privilege had been abused would probably require a lesser showing of gross conduct than would a finding of outrageousness. It is extremely difficult to meet such an argument in favor of the "outrageousness" test because it depends essentially on a judgment of the weight to be accorded a particular interest and a guess as to whether the qualified-privilege approach would impose undue restraints on the expression of ideas and opinions. It is suggested, however, that in no other area of tort law has it been found necessary to go beyond an intent requirement to protect the interest in the free expression of ideas. This interest has long been protected by the qualified-privilege approach in defamation cases, and a defendant who communicates his opinions to persons other than the plaintiff is certainly more likely to gain an impartial evaluation of and wider dissemination for his ideas than the defendant in a typical emotional-distress case. Moreover, to the extent that the defendant was seeking to protect a legitimate interest, he would be protected under the qualified-privilege approach, even though he intentionally caused severe emotional distress to the plaintiff, provided only that his conduct was reasonably related to the advancement of that interest. As to the desirability of permitting a person to vent his spleen freely, it is perhaps not unreasonable to suggest that a person who has intentionally inflicted severe emotional distress on another has gone farther than simply providing a healthy outlet to his emotions.

Conclusion

In conclusion, it should be made clear that the foregoing is not necessarily an argument for the carrying over en masse into the emotional-distress context the set of qualified privileges available to a defendant in a defamation suit. Rather, it is submitted that the qualified-privilege approach is more likely to facilitate clarity of analysis and to provide a more sensible manner for accommodating the competing interests involved in the emotional-distress cases than does the present "outrageousness" requirement.