OUTRAGED DIGNITY—DO WE NEED A NEW TORT?

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Professor Glasbeek discusses the problem of redressing mental suffering caused through insult or intrusion on a plaintiff's peace of mind. He examines the American solution based on the nominate tort of invasion of privacy, and concludes that if the movement in our Canadian Courts continues they will be able to compensate mental injury without having to make the American leap from established torts.

The pride of common law students is that the system's elasticity makes it ideally suitable to redress the greatest possible number of wrongs. We therefore tend to disbelieve suggestions that our loose, flexible concepts have failed to provide remedies furnished by supposedly more rigid systems. Yet this does occur. For instance, the *Actio Iniuriarum*[1] protects the dignity of people to an apparently much greater extent than that achieved by our laws of defamation which are devised for this purpose. It does this by redressing any harm which can be described as an *inuria,* and by accepting the sweeping ambit of that term given it by Watermyer, A. J., when he approved the following definition:[2]

> The specific interests that are detrimentally affected by the acts of aggression that are comprised under the name of injuries are those which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation. By a person's reputation is here meant that character for moral or social worth to which he is entitled amongst his fellowmen; by dignity that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive or degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt. The rights here referred to are absolute or primordial rights, they are not created by, nor dependent for their being upon any contract; every person is bound to respect them; and they are capable of being enforced by external compulsion. Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character for moral and social worth to which he may rightly lay claim and of that respect and esteem of his fellowmen of which he is deserving and against degrading and humiliating treatment; and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such right.[3]

Common law precepts have never explicitly recognized a concept analogous to *inuria.* However, in at least one common law jurisdiction the courts have reacted positively to the need to develop a tort to redress injury caused through insult. In the U.S.A. there has been the emergence of a tort which, although not as far reaching as the *Actio Iniuriarum,* permits the compensation of injuries which would not be actionable in other common law countries.

The high water mark of this new U.S. tort was the decision of *Nickerson* v. *Hodges.*[4] In this case, the plaintiff was a gullible female

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1 Of Roman-Dutch law. For a very good and exhaustive examination see, Amerasinghe—*Aspects of the Actio Iniuriarum in Roman-Dutch Law.*

2 *O'Keefe* v. *Angus Printing and Publishing Co. Ltd.* (1954) (3) S.A. 244 (C), 247, the passage being approved is from de Villiers—*The Roman and Roman-Dutch Law of Injuries,* 24.

3 The recent *Nordic Conference on the Right of Privacy* came to the conclusion that a right very similar to the one outlined by de Villiers ought to be protected. See, No. 31, Bulletin of the International Commission of Jurists.

4 (1920), 146 La. 735, 84 So. 37.

who was convinced that she was on the track of buried treasure. She and her helpers were continuously digging all over the neighborhood. The defendants thought that they would exploit this potentially hilarious situation. They sealed an old iron pot filled with ground earth and rocks, and having buried it, left so many clues as to its whereabouts that they could be sure that the plaintiff would discover it. Discover it she did, and when she displayed it to the defendants they persuaded her to deposit it in the bank until a ceremonial unveiling could take place before all her friends. Consequently the plaintiff was embarassed before a great gathering of people. Three years after this, the plaintiff having died, a relative brought an action against the practical jokers and recovered $500.00 in damages because "the mental suffering and humiliation must have been quite unbearable, to say nothing of the disappointment and conviction, which she carried to her grave some two years later, that she had been robbed."[5] This infliction of merely mental suffering would not have been recoverable under any nominate tort action known to the common law.

I

If the publication of a statement disturbs the peace of mind of a person, he will not automatically have a cause of action. Under the law of defamation certain requirements must be met. Thus, unless the statement was slanderous *per se,* damage must be shown.[5a] If the statement was written, then of course no tangible damage need be established, but it will have to be demonstrated that the plaintiff was brought into contempt, hatred or ridicule. Even then there will be no recovery, however, if there was in fact no damage to reputation, or where the representor can establish the veracity of his statement or where he was privileged for some reason. In the U.S. a fully-fledged right of privacy has been developed, and invasions of it which create emotional trauma and which may or may not be defamatory in the legal sense, will be actionable. Prosser wrote that the tort of privacy, is merely a common name for several situations in which a person's right "to be let alone"[6] is defended. These categories include:

(1) Intrusion upon the plaintiff's seclusion or solitude or into his private affairs.
(2) Public disclosure of embarrassing private facts about the plaintiff.
(3) Publicity which places the plaintiff in a false light in the public eye.
(4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[7]

The tort has grown out of the response to the clarion call to common sense made by Warren and Brandeis in an article that has become a classic of the common law.[8] The authors argued that the technicalities of the law of defamation permitted the yellow press to publish all kinds of material about people which would inflict emotional harm even though no tangible damage could be demonstrated. This was considered anathema and they suggested that the courts should use the elasticity of existent common law precepts to provide a remedy for unfortunate plaintiffs who had been needlessly exposed to the glare of publicity. The

[5] *Id.*, at 39, per Dawkins, J.
[5a] This is not the position throughout Canada. For example: see Alberta Defamation Act, R.S.A. 1955, c. 78, ss. 2 (b), 3.
[6] Cooley, *Torts* 29 (2nd ed. 1888).
[7] Prosser, *Privacy*, (1960) 48 Cal. L. Rev. 383, 389.
[8] Warren and Brandeis, *The Right to Privacy*, (1890) 4 Harv. L. Rev. 193.

American courts accepted the challenge and created the tort of privacy. Our courts had the same basic precepts to work on. Have they evolved similar causes of actions to the four listed categories?

It will be readily seen that the third category, placing the plaintiff in a false light, will frequently overlap with a cause of action in defamation. They differ, however, in that a plaintiff will succeed in a privacy action merely by showing that a reasonable man in his position would have found the implications raised by the defendant's conduct objectionable. Typically, the tort will be committed where the defendant has falsely attributed a statement to the plaintiff, or where the plaintiff's face or identity is falsely associated with something which he feels does him little credit. Thus, in *Gill* v. *Curtis Publishing Co.*, the plaintiffs were husband and wife who had a reputation for "industry, integrity, decency and morality."[9] The defendant's employee photographed them without obtaining their consent. They were snapped when seated together at their place of business, the husband having his arm around his wife and their cheeks were touching. The photograph was published in the defendant's *'Ladies' Homes Journal'* with a caption "Publicized as glamorous, desirable, 'love at first sight' is a bad risk." This illustrated an article entitled "Love" which classified the relationship between men and women as being based on either sexual attraction or respect. The photograph was meant to exemplify people in "love at first sight" which was said to be founded on sexual attraction only and was therefore love of the wrong kind. The plaintiffs recovered for an invasion of their privacy because they were shown as a dissolute couple and that therefore they had suffered mental anguish. This case shows that the distinction between defamation and privacy, namely, that the basis for a privacy action is the effect on the plaintiff's mind, whereas the basis for a defamation action is the effect on the public mind, may well be one without a difference; but the false light doctrine will facilitate a finding of liability. This likelihood is increased as in privacy it does not matter whether the statement is made orally or whether it is written, and therefore the burden of satisfying one of the more restrictive requirements of a successful action in defamation may be avoided.

As has been seen, appropriation of the plaintiff's name by the defendant is listed as a separate category subsumed in the tort of privacy as defined by Prosser. Yet a distinction between this category and the false light one is at best only theoretical. It is postulated by the American writers that appropriation requires that the defendant's conduct benefited him, which of course is not necessary under the false light cause of action. Further, the latter requires publication and appropriation does not. But in a typical false light case the defendant would most often be acting to obtain an advantage, and such advantages will frequently depend on a publication of a falsehood relating to the plaintiff.[10]

There is then in existence in the U.S.A. a greater area of liability for the infliction of mental suffering through the medium of the torts of false light and appropriation. There have been similar developments

9 *Gill* v. *Curtis Publishing Co.* (1952), 38 Cal. (2d) 273; 239 Pac. (2d) 630.

10 In his note on *Sim* v. *H. J. Heinz Co. Ltd.*, [1959] 1 W.L.R. 313 (C.A.); (1961) 39 Can. B. Rev. 409, D. L. Mathieson also assumed that there was no worthwhile distinction between false light and appropriation.

outside America, but these apparently fall short of the scope of recovery provided in America. For example, closely analogous to the torts of false light and appropriation is the cause of action known as injurious falsehood. It has been described as follows:

> To support such an action it is necessary for the plaintiffs to prove (1) that the statements complained of were untrue; (2) that they were made maliciously—i.e. without just cause or excuse; (3) that the plaintiffs have suffered special damage thereby.[11]

The malice requirement does not put a greater burden on the plaintiff than the one he must discharge in the two privacy torts. There is a notable difference though in that the plaintiff must establish pecuniary loss to satisfy the special damage criterion. Thus, in *The Manitoba Free Press Company* v. *Rachel Miriam Gomez Nagy*,[12] the plaintiff was the owner of a house which was described in the defendant's newspaper as being haunted. This of course had the effect of keeping people away from the area, but this in itself was not held to be sufficient damage to found an action. The plaintiff recovered, however, when she established that her property had been depreciated in value by the publication.

The tort of passing-off, which is considered a particular instance of injurious falsehood, could be thought to have in it the seeds for the development of a tort approximating 'appropriation' and 'placing in a false light.' The defendant commits the tort by passing off goods in such a way that the consumer will be led to believe that they carry with them the imprimatur of the plaintiff's name or reputation. The *raison d'être* of the action is the necessity of protecting the plaintiff-trader from such unfair competitive practices. This rationale could conceivably permit the tort of passing-off to be invoked in cases not concerned with the sale of goods. Thus, in *Byron's*[13] case, in which a publication was falsely represented to be the product of the famous poet's efforts, the sale of the work was prohibited on the basis that it would be a 'passing-off'. But in two cases in which the names of reputable medical practioners were, without their consent, linked with patent medicines, the doctors were given no right of action because at common law a man does not have sufficient interest in his name or personality to warrant protection against their unauthorized use.[14] Thus, the famous actor Alistair Sim was denied recovery when a company allegedly simulated his very distinctive voice to advertize its goods.[15] The Court of Appeal did not have the question of whether the defendant's conduct constituted a passing-off squarely before it, but it did comment that to suggest that that tort could cover this situation would be a novel argument. Similarily a well-known amateur golfer[16] whose name and likeness were 'borrowed' by the defendants to give their chocolates greater appeal, was left without a remedy until the House of Lords overruled the lower courts on what was essentially a finding of fact, and held that the plaintiff had been libelled by innuendo.[17]

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11 *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (1901), 18 R.P.C. 95, 99 per Lord Davey.
12 (1907), 39 S.C.R. 340.
13 *Lord Bryon* v. *Johnston* (1816), 2 Mer. 29.
14 *Clark* v. *Freeman* (1848), 11 Beav. 112, 50 E.R. 759; *Dockrell* v. *Dougall* (1899), 80 L.T. 556.
15 *Supra*, at n. 10.
16 *Tolley* v. *J. S. Fry & Sons Ltd.*, [1930] 1 K.B. 467.
17 This highlights how difficult it might be for a plaintiff to succeed in libel, where he would be granted remedy by an American court under false light and appropriation. Only five States in the U.S.A. have expressly refused to grant the protection of the tort of privacy as herein defined. See: Prosser, *Torts*, para. 112, at 831 (3rd ed. 1964).

It appears then that the plaintiff must demonstrate a pecuniary loss. Further the tort of passing-off requires that the plaintiff and defendant be in some kind of economic competition.[18] Thus, our courts will not go so far as to protect a person from conduct which he, as a reasonable man, finds offensive and objective. It appears that the failure to evolve equivalent torts to false light and appropriation will too frequently leave mental harm and pain unredressed if the victims are not fortunate enough to be U.S. citizens.

II

Although the tort of privacy is said to contain four categories, it was intended by its creators to have only the one, namely public disclosure of private facts about the plaintiff. The American courts have of course permitted recovery in this type of situation. The essence of actionability is the publication of facts which are not of such a nature that a reasonable man would expect him to be fair game for reportage because, even though newsworthy, they are of a kind that he would find offensive. Thus, a court found liability when the true story of a former prostitute and her involvement in a sensational murder trial was made into a film by the defendant, who released the movie at a time when the plaintiff had been leading a respectable life for a long period.[19] Again a garage owner who put a notice in his display window that the plaintiff, in spite of many promises to pay, still owed him money was held liable.[20] Less sensationally, a man who sought to lead a quiet life had his habits and preoccupations revealed by the press, the publishers claiming that as the plaintiff had once been a widely publicized infant prodigy, the public had a right to know what had become of him.[21] The plaintiff recovered, but this case indicates that the difficulty of line drawing in this area between permissible reporting of the truth and unacceptable disclosures could be very great. Yet the U.S. courts have on the whole not backed away from compensating plaintiffs on the basis of the familiar floodgates argument.

Warren and Brandeis relied on a few old English decisions to claim that the common law could be adapted to found liability for public disclosure of private facts. So far, the treatment of the same authorities by common law courts outside the U.S.A. has failed to give rise to the hope that the evolution of a right of privacy is on hand. The most cele-

18 D. L. Mathieson, in the note mentioned supra, n. 10, argued that the authorities have always recognized that an action existed independent of passing-off in that the plaintiff need not show that he was in competition with the defendant. He cited, as his primary authority, *Routh* v. *Webster* (1847), 10 Beav. 561, 50 E.R. 698 where the court granted an injunction to a person who had been falsely named as a trustee in a prospectus issued by the defendant company. Other cases cited by the writer where competition appeared to play no part in the finding of liability were *Maxwell* v. *Hogg* (1867), L.R. 2 Ch. App. 307; *Dixon* v. *Holden* (1869), L.R. 7 Eq. 488; *Day* v. *Brownrigg* (1878), 10 Ch. D. 294; and *Walter* v. *Ashton*, [1902] 2 Ch. 282. But the cases cited in the text and *McCulloch* v. *Lewis A. May (Produce Distributors) Ltd.*, [1947] 2 All E.R. 845 (Where the facts were similar to the *Sim* case) forced A. L. Mathieson (and C. L. Pannam who made a similar argument in *Unauthorized Use of Names or Photographs in Advertisements*, (1966) 40 Aust. L. J. 4) to concede that even if competition was not an essential criterion of passing off, pecuniary loss certainly was. See also Fleming, *Torts*, 573 (3rd ed. 1965). This would still leave the remedy available well short of the one provided by false light and appropriation. But in a recent Australian case, *Henderson* v. *Radio Corporation Pty Ltd.*, [1960] S.R. (N.S.W.) 576, the plaintiffs were not in competition with the defendants nor did they suffer financially. Yet they were granted an injunction. This case is on all fours with the U.S. decisions, but standing alone as it does, it is at best, a hopeful pointer to future development.

19 *Melvin* v. *Reid* (1931), 112 Cal. App. 285, 297 Pac. 91.

20 *Brents* v. *Morgan* (1927), 221 Ky. 765, 299 S.W. 967.

21 *Sidis* v. *F.R. Publishing Corp.* (1940), 113 Fed. (2d.) 806 (2d Cir.).

brated of these old cases was *Prince Albert* v. *Strange*.[22] The famous prince was wont to amuse himself by drawing etchings, and a workman who was employed to take copies retained some for himself although he was not permitted to do so. The defendant saw the copies and published a catalogue of them. Prince Albert succeeded in an action on the basis that "the invasion is of such a kind and affects such property as to entitle the plaintiff to the preventative remedy of an injunction."[23] It was a strange concept of property that prevented the publication of a description of a number of etchings: it must have been the creative idea that was being protected. It seems logical to infer that the court was really shielding the prince's private dabbling from public curiosity.[24] But it could be argued that the injunction was granted not because of any such lofty and unarticulated principles but because the catalogue was compiled as a result of unauthorized conduct by an employee. This argument, however, loses its potency when one considers a case where a similar result was reached despite the absence of any breach of fealty. In *Gee* v. *Pritchard*[25] an ungrateful protégé of the plaintiff threatened to publish copies of their correspondence. The plaintiff feared this would be embarrassing to her. She was granted an injunction, on the basis that her right of property had been violated. As she had no property in the letters themselves (as obviously she could not have had them compulsorily returned to her) the plaintiff must have been granted an injunction because of her property right in the contents of the letter. If this rationalization had been accepted by our courts, a right closely resembling the U.S. right to be free from unwarranted disclosures would have been established. But the reluctance of the courts to accept the logic of this line of argument was amply illustrated in *Pollard* v. *Photographic Company*[26] in which a photographer had made copies from a negative without his client's permission and tried to sell them. It was held that an injunction was a proper remedy in this case, not because the plaintiff had 'property' in his features,[27] but rather because the defendant had breached an implied condition of a contract, and, that, like an interference with property rights, was a proper ground for invoking this equitable form of relief.[28]

Thus, where American courts have accepted the challenge to treat the existing law as capable of supporting actions for disclosure of private facts, other common law courts have estopped themselves from adopting such a commendable approach by interpreting the cases in such a mechanical way that it appears that disclosure is not actionable unless an infringement of a vague property right or a violation of a term of a contract can be invoked. A recent case, however, has perhaps extended the ambit of recovery. In *Duchess of Argyll* v. *Duke of Argyll and others*,[29] the Duchess sought to restrain publication of articles written by her former husband, the Duke. It transpired that after a most acri-

22 (1849), 2 De G. & S. 652.
23 *Id.*, at 698.
24 An assumption made by Warren and Brandeis.
25 (1818), 2 Swans. 403.
26 (1888), 40 Ch. D. 345.
27 Such an anlysis would have been required if the *Gee* v. *Pritchard* (supra, at n. 25) analysis had been accepted. It was already thought too far-fetched, however, and the court was pleased to find a breach of contract on which it could rest the necessitated injunction.
28 For a learned discourse on the various fictional notions of 'property' invoked by the courts in this case see Paton, *Broadcasting and Privacy*, (1938) 16 Can. Bar Rev. 425.
29 [1965] 2 W.L.R. 790.

monious divorce settlement, the plaintiff had written two articles for newspapers which revealed some facts about the Duke's habits, and that now the Duke, in retaliation as it were, had agreed with the magazine *The People* to reveal some of the more interesting things he had learned during the marriage about the wife's feelings, conduct and proclivities. It was held that the plaintiff was entitled to an injunction. Ungoed-Thomas, J. surveyed the cases discussed above, and argued that if a breach of contract was necessary, then the marriage contract was sufficient to support the granting of an equitable remedy. If the holding is restricted to this ratio decidendi—and technically it could be—the case is merely of interest because of its spicy fact situation. But His Lordship was inclined to base his decision on a different ground. He argued that as a matter of public policy the courts should uphold the sanctity of marital confidences. His Lordship supported this theory by analogizing with evidentiary practices, which he examined exhaustively in the course of his judgment. It is submitted that if public policy is a valid basis for adjudicating the actionability or otherwise of a public disclosure of private facts, then the courts will be enabled to evolve the case law in the same way as their U.S. counterparts have already done. It must be remembered, however, that the *Argyll* situation involved a matrimonial relationship which is sufficiently different in character from creditor-debtor and press-newsmaker relationships to make it doubtful whether courts would extend recovery for disclosure to these other categories.[30]

III

The innovators of the tort of privacy concentrated their efforts on those situations where a "yellow press", while cunningly evading the sanctions of libel laws, scurrilously brought details of a private nature to the attention of a gleeful public. Yet, it has been seen that Prosser postulates that intrusions upon a plaintiff's physical and mental solitude and seclusion are actionable, even when there has been no publication. The argument supporting the validity of this head of recovery is of the same nature as the one used by Warren and Brandeis to shore up the tort of disclosure. The suggestion is that the common law always permitted recovery for intrusions on a man's solitude or dignity whether or not a technical wrong had been committed, because recovery in cases where the criteria of an existing tort has been established was often not redress of the specific wrong, but rather compensation for an injured psyche or punishment of an outrageous defendant. The areas in which this contention was easiest to prove were trespass to the person and land, dead body cases and *Wilkinson* v. *Downton*.[31]

Assault is defined by Salmond as "[T]he act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery."[32] The U.S. courts have apparently adopted the view that the apprehension requirement does not so much involve the fear of being touched as the

30 Legislative attempts to remedy the position in England have so far failed. Lord Mancroft's bill, after passing two readings in the House of Lords (1961) was withdrawn because of government opposition. A recent private member's bill which seeks to achieve the U.S. position is given no chance of passing. For a comment on this bill see Neill, *The Protection of Privacy*, (1962) 25 Mod. L. Rev. 393.

31 [1897] 2 Q.B. 57.

32 Salmond, *Torts*, 303 (13th ed. 1961).

mental anguish that a victim of the conduct of the defendant might suffer. It is true that, so far, even the U.S. courts have not permitted recovery where the defendant made immoral proposals to a female.[33] These cases were summed up in one memorable sentence: "[I]f there has been no incidental assault or battery, or perhaps trespass to land, recovery is generally denied, the view being apparently that there is no harm in asking."[34] But there are many situations in which the technical requirement of an act accompanying the defendant's conduct or the fear of an immediate battery are missing, but which have nonetheless given the plaintiff a cause of action. The most frequent instances are to be found in debt collection cases. Thus, in *Kirby* v. *Jules Chain Stores Corp.*,[35] the defendant called the plaintiff a deadbeat and yelled threats of arrest from a car. The plaintiff recovered for the insults he suffered. If it be argued that the yelling out of epithets is in fact a public disclosure of private facts, it must be noted that plaintiffs have recovered when their creditors flooded them with threatening and abusive letters.[36] Clearly the apprehension that the plaintiffs had was not one relating to physical damages, but a state of mind relating to the trauma of opening the letters. No like cases have been unearthed in jurisdictions other than the U.S., and this is so because very few of our lawyers would undertake to litigate in circumstances where there was no technical basis for the founding of a cause of action in a nominate tort.

A recent Canadian case provides an exception. In *Robbins* v. *Canadian Broadcasting Corporation (Que.)*[37] the facts were that a viewer of a television show, a doctor, wrote his criticisms of the programme to the compère. The compère read the letter out on his programme, giving the name and address of the correspondent. The television host then suggested that the criticism could have only come from an unhappy man and that it would be very nice if the viewers would call or write the doctor to cheer him up a little. The result was a series of letters and telephone calls, mainly abusive in tone, which caused the doctor to sue the television network. The Quebec Supreme Court permitted recovery for this hapless plaintiff, but did so on the assumption that the law in Ontario which was said to apply, was the same as that in Quebec. The law in Quebec, based on the French Civil Code, protects the idea of personality from all kinds of intrusions whether the damage inflicted be physical, economic or mental.[38] It is self-evident that the law in Ontario being common law would not have grounded a cause of action by itself. Thus, *Robbins* is hardly authority for the proposition that a tort of privacy has finally been recognized by the common law outside the U.S.A.

If one spits into the wind and as a result of that wind the spittle descends upon an unwary and unforeseen pedestrian's face, there will be an action in battery.[39] This tort is committed whenever there is an un-

33 Eg., *Western Union Telegraph Co.* v. *Hill* (1933), 25 Ala. App. 540, 150 So. 709; and *Prince* v. *Ridge* (1900), 32 Misc. 666, 66 N.Y. Supp. 454.
34 Magruder, *Mental and Emotional Disturbance in the Law of Torts*, (1949) 49 Harv. L. Rev. 1033, 1055.
35 (1936), 210 N.C. 808, 188 S.E. 625.
36 *La Salle Extension University* v. *Fogarty* (1934), 126 Neb. 457, 253 N.W. 424; and *Barnett* v. *Collection Service Company* (1932) 214 Iowa 1303, 242 N.W. 25.
37 (1957), 12 D.L.R. (2d) 35.
38 For a description see Walton, *Comparative Law of the Right to Privacy—Then French Law*, (1931) 47 L.Q. Rev. 219.
39 *R.* v. *Cotesworth* (1704), 6 Mod. Rep. 172.

authorized touching of another's person, providing the touching does not occur during the hustle and bustle of everyday life.[40] The Americans, while recognizing that the criterion of physical contact makes it impossible to argue that recovery was ever permitted if this technical requirement was not satisfied, note and accept that the award of damages is made because of the embarrassment or annoyance inflicted on the plaintiff, and that in most situations the physical touching is irrelevant to the issue of damages. This is clearly so in the spitting example where the plaintiff is more interested in having his dignity upheld than in having the discomfort caused by the wetting of his face redressed. Therefore, American lawyers embraced the proposition that even though battery was originally intended to deter those who might put their fellow citizen in physical jeopardy, it has become, like assault, a sophisticated means of protecting personality. Thus, decisions in battery cases like *Richmond* v. *Fiske*[41] have been interpreted so as to give the courts and writers more ammunition to make good their own claim that mental suffering is intended to be redressed in one way or another by the common law. In that case, the actual touching was a minor incident in the generally annoying conduct of the defendant milkman. The plaintiff had been asleep in his room when the defendant tiptoed in, and shook him by the arm to waken him. As he opened his eyes, the irritated plaintiff was presented with his milk bill. The ensuing battery action was successful. This case is cited in numerous articles as an example of the courts' willingness to allow recovery for mental suffering *per se*. It is clear that the same result would have been obtained in our courts as they frequently award substantial damages for the merest touching.[42] But it has never been conceded by these courts that they are at liberty to compensate a plaintiff for his mental anxiety in the absence of a battery. Indeed writers such as Professor Street have been forced to state a contrary view:

> There can be no battery unless there is contact with the plaintiff. Is any contact, however slight, enough? It would be rational to say that this tort protects not merely the interest in freedom from bodily harm, but also that in freedom from insult. There does not, however, seem to be any authority for the latter proposition.[43]

On the other hand, false imprisonment has given rise to some speculation among courts and writers that it is aimed at giving redress to people who have been ridiculed or shamed. The tort itself requires a total restraint of the plaintiff's freedom of movement. But the awards of damages reflect, in the main, a desire to compensate injured feelings. This is most apparent in the shop arrest cases where the public often does not know of the embarrassing predicament in which the plaintiff finds himself.[44] Of course, it could be argued that the freedom to go as one pleases is such an important privilege in our society, that the damages which are given really compensate a wrong to something much more

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40 *Cole* v. *Turner* (1705), 6 Mod. Rep. 149, 87 E.R. 907; *Coward* v. *Baddeley* (1859), 4 H. & N. 478, 157 E.R. 927.

41 (1893), 160 Mass. 34, 35 N.E. 103.

42 Eg. *London* v. *Ryder*, [1953] 2 Q.B. 202, in which very heavy exemplary damages were awarded "to show the defendant that he cannot do that sort of thing with impunity." The plaintiff had suffered no bruises or physical shock from the battery committed on her.

43 Street, *The Law of Torts* 18 (3rd ed. 1963).

44 Eg. *Lewis (John) & Co. Ltd.* v. *Tims*, [1952] A.C. 676; *Conn* v. *David Spencer, Ltd.*, [1930] 1 D.L.R. 805; *Whiffen* v. *David Spencer, Ltd.*, [1941] 2 D.L.R. 727; *Sinclair* v. *Woodward's*, [1942] 2 D.L.R. 395; *Chaytor* v. *London etc. Ass.* (1961), 30 D.L.R. (2d) 527.

vital than wounded pride. Certainly this adequately explains cases like *Huckle* v. *Money*[45] where the plaintiff was wrongfully taken into custody by agents of the government. During the period of his restraint the defendants behaved civilly, treating him to steak and beer. Nevertheless, the plaintiff recovered £300 for his pains, an enormous sum at that time. The theory that the action of false imprisonment is intended to redress indignities was given a fillip, however, by a judgment of Atkin, L. J., in which he stated:

> I think a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious or while he is a lunatic. . . .
> So a man might in fact, to my mind, be imprisoned by having the key of a door turned against him so that he is imprisoned in a room in fact although he does not know that the key has been turned.[46]

The inference that could be drawn from this controversial statement (and one that was of course drawn by Prosser)[47] is that the award of damages goes to compensate the plaintiff for his embarrassment as it apparently does not matter that he did not know that he had been denied his precious freedom of liberty of locomotion. Unfortunately, it must be noted that Lord Atkin's statement did not form part of the ratio of *Meering* v. *Graham* and *White Aviation*. Warrington, L. J. who formed the majority with Lord Atkin, arrived at his conclusion by assuming that all the established criteria of the tort had been established. Duke, L. J., who wrote the dissent, rightly pointed out the fact that the general trend of the authorities required that the defendant knew of his plight.[48] It will therefore, require a positive acceptance of Atkin, L. J.'s dictum by a court of high authority before one can call that dictum more than a faint glimmer of hope that a new approach has been adopted.

Originally trespass to land lay solely to protect interests in possession. It is worth remembering that possession of land was such an important status symbol, as well as a source of wealth, that uninterrupted possession insured a tranquil state of mind. Accordingly one does not have to look too deeply into the cases to find that trespass to land has often been the means to offset a defendant's outrageous behaviour. Thus, in *Merest* v. *Harvey*[49] a well known member of society was severely punished for acting in a way not becoming a banker, magistrate and member of Parliament. This respectable citizen insisted on joining the plaintiff's shooting party held on the plaintiff's land. He was not wanted and the plaintiff eventually sued him. He succeeded in trespass to land, and Chief Justice Gibbs had this to say:

> In a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? . . . Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his home, and looks in while the owner is at dinner, is the trespasser to be permitted to say: Here is a half penny for you, which is the full extent of all the mischief I have done? Would that be compensation? I cannot say that it would be.[50]

This recognition that, technicality satisfied, a nominate tort could consciously be used to punish and deter bad behaviour by compensating vic-

45 (1763), 2 Wils. 205, 95 E.R. 768.
46 *Meering* v. *Graham-White Aviation Company, Limited* (1919), 122 L.T. 44, 53-4 (C.A.).
47 Prosser, *False Imprisonment: Consciousness of Confinement*, (1955) 55 Col. L. Rev. 847.
48 See *Herring* v. *Boyle* (1884), 1 M. & R. 377, where a boy kept at boarding school because his mother refused to pay a bill, failed in an action of false imprisonment because he did not know of the restraint.
49 (1814), 5 Taunt. 442.
50 *Ibid.*

tims, was yet another plank on which U.S. jurisprudence rested its confident assertions that it was proper to redress hurt feelings. Thus, in the case of *May et ux* v. *Western Union Telegraphy Co.*[51] employees of the Telegraph Company lawfully entered on the plaintiff's land to remove poles. During the execution of their work the workers indulged in loud, profane and lewd language. This upset the female plaintiff very much and she recovered damages for the mental suffering she was forced to endure. There was evidence that the defendants had entered the house of the plaintiff and thus provided a technical wrong to support the verdict. It was the tenor of the opinion, however, that recovery was granted because of the insults rather than the intrusion.[52] It is safe to assume that our courts would have reached the same conclusion. A classical example of the length to which our courts will go once a trespass is proved, is found in *Harrison* v. *Duke of Rutland.*[53] There the defendant was hunting grouse with his friends, and the plaintiff, merely to annoy the shooter, passed and repassed upon the highway near the butts occupied by the shooters. This prevented the grouse from flying within firing range and the defendant retaliated by having his servants physically hold the plaintiff down onto the road. The plaintiff sued in trespass. It was held that the defendant was justified in his conduct because the use made of the highway by the plaintiff was so unusual as to amount to a trespass to land. That being so, the defendant was entitled to exercise any reasonable means to protect his right to be left alone. But in the absence of a trespass, our courts have refused to compensate the same kind of intrusion upon a plaintiff's peace of mind. The best known illustration of this is *Victoria Park Racecouse* v. *Taylor.*[54] The High Court of Australia refused an injunction to the applicant racecourse owners who had complained that the defendant had erected a high tower on a public road along side the track and had utilized it to broadcast races to the public. Naturally the attendance figures were alleged to be affected by the defendant's conduct. It was held that there was no interference with the plaintiffs' property rights and hence, no injunction could be granted. To the argument that the right to privacy of the race track owners was violated, it was flatly stated by Latham, C. J., that no "general right of privacy exists."[55] And Sir Owen Dixon clearly indicated that there ought to be no recovery unless a plaintiff could bring himself within the requirements of an established legal remedy when he said:

> The law of tort has fallen into great confusion, but in the main what acts and omissions result in responsibility and what do not are matters defined by long established rules from which Judges ought not wittingly to depart and no light is shed upon a given case by large generalizations about them.[56]

This contrasts sharply with the U.S. attitude. In particular, in *Pittsburgh Athletic Club* v. *K.Q.V. Broadcasting Co.*[57] a Pennsylvanian court permitted recovery in a fact situation identical to the one in the *Victoria Park Racecourse* case.

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51 (1911), 157 N.C. 416, 72 S.E. 1059.

52 Immoral proposal cases referred to in note 33 have often been decided on this basis. See *Ford* v. *Schliessman*, (1900) 107 Wis. 479, 83 N. W. 761, where a defendant who came to the plaintiff's house and began fussing with his pants was held not liable in assault because he created no apprehension of a battery on her. But she recovered substantial damages, on the basis of trespass to land, because he entered the house.

53 [1893] 1 Q.B. 142.

54 (1937), 58 C.L.R. 479.

55 *Id.*, at 496.

56 *Id.*, at 505.

57 (1938), 24 F. Supp. 490.

It must be noted, however, that there have been at least two instances where our courts have permitted recovery where the plaintiff had no action in trespass. The first is *Belham's* case in which the defendant succeeded in observing the fascinating goings on in a neighbouring dentist's surgery by way of a complex and cunning mirror arrangement. The dentist recovered, but the basis for the decision must remain a mystery because of the meagerness of the report.[58] The second is presented by the fairly recent decision in *Stoakes* v. *Brydges*.[59] There the defendant was piqued because the plaintiff's employees, who delivered milk, woke him in the early hours of the morning. He took revenge by continuously telephoning the plaintiff throughout the night. These results suggest the existence of a principle resembling the American tort of intrusion upon a man's solitude. But these isolated instances of recovery must in the light of more binding authority, however, be regarded as unrepresentative of our judiciaries' disposition. They are perhaps an indication that the courts will not permit the infliction of annoyance upon anyone unless there is at least some measure of social utility in the defendant's activity. This is important because today the possible means of intrusion are much greater than they have ever been.[60] But the courts have perhaps tied their hands too much to allow recovery where modern instruments are used to pry into other people's lives in the absence of a legal nuisance or a trespass. In America of course the courts have not held themselves so restrained, and they have allowed actions where there was eavesdropping through wiretapping[61] and hidden microphones,[62] and even where the defendants peered through the windows of the plaintiff's house.[63]

Another series of cases from which the Americans were able to argue that a principle of recovery for the infliction of mental suffering by insult had always been recognized in the common law was the area of law relating to offensive behaviour involving cadavers. Successful actions have been brought in cases of unauthorized autopsies,[64] the burial of a body in the wrong place when it was moved from one grave to another with the gratuitous comment that "You Polish people should be glad to bury any old way. Any place is good enough for you",[65] and where such negligent care of a corpse was taken that it was harmed by rain.[66] Similar cases have cropped up in Canada.

In *Phillips* v. *The Montreal General Hospital*[67] a widow recovered damages for "une dépression morale qui empoisonne son existence" which had been inflicted upon her when the defendant carried out an unauthorized autopsy on the body of her deceased husband. This result was approved in the leading case of *Edmunds* v. *Armstrong Funeral*

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58 Reported only in Kenny, *Cases on Torts* 326 (4th ed.).
59 [1958] Q.W.N. 5.
60 For a good review of the many cases of intrusion by the police and credit houses see Cornfield, *The Right to Privacy in Canada*, (1967) 25 U. of T. Fac. of L. Rev. 103. See also Packard, *The Naked Society;* Dash, *The Eavesdroppers*. Interesting examples were discovered by Perlman, *The Right to Privacy in Nebraska—A Re-Examination*, (1966) 45 Neb. L. Rev. 728, 740.
61 *Rhodes* v. *Graham* (1931), 238 Ky. 225, 37 S.W. (2d) 46.
62 *McDaniel* v. *Atlanta Coca Cola Bottling Co.* (1939), 60 Ga. App. 92, 2 S.E. (2d.) 810; *Roach* v. *Harper* (1958), 105 S.E. (2d) 564.
63 *Moore* v. *New York Elevated Rwy. Co.* (1892), 130 N.Y. 523, 29 N.E. 997; *Pritcheet* v. *Board of Commissioners of Knox County* (1908), 42 Ind. App. 3, 85 N.E. 32.
64 *Burnley* v. *Children's Hospital* (1897), 169 Mass. 57, 47 N.E. 401.
65 *Gostkowski* v. *Roman Catholic Church* (1953), 262 N.Y. 320, 186 N.E. 798.
66 *Lindh* v. *Great Northern Ry.* (1906), 99 Minn. 408, 109 N.W. 823.
67 33 Qu. S. Ct. 483.

Homes Ltd.[68] In voicing this approval, however, the Alberta Court of Appeal had to distinguish an earlier decision of an Alberta Court.[69] There the funeral of the decreased was delayed because of the misreading of a consignment label by the defendant employee. The word "Bawlf" was read as "Banff", and as a result the body was kept in Banff for a day before it was routed to its correct destination. The mother of the deceased sued because the delay had allegedly caused her even more grief and anguish than she already felt. Unsympatheticially the court held that no cause of action had been established. In *Edmunds* it was rightly pointed out that the plaintiff in *Miner* v. *C.P.R.* failed because she pleaded her case in negligence, and under the doctrine then prevailing, nervous shock without physical damage was not actionable. But if, as was the case in *Edmunds,* the action was brought in trespass, the causing of emotional disturbance would permit an award of exemplary damages against the trespasser. In order to find trespass it was necessary to hold that the plaintiff had property in the corpse. This property interest was said to exist, although it was conceded not to be the ordinary kind of property right. It was postulated that the plaintiff had custody of the body because of her common law duty to give it burial, and although this did not give her a right to deal with it as her sole property, it was sufficient to ground an action in trespass. It must be assumed that trespass to land was the actual basis for recovery, rather than trespass to goods. This is borne out by *O'Connor* v. *Victoria*[70] where the municipality, under the authority of an expropriation order, dug up some graves and was then sued by relatives of people who had been buried there. One of the co-plaintiffs recovered because she had an owner's interest in the land on which the cemetery was situated, but the other, who could not establish an equivalent title claim, failed to obtain redress. The notion of converting a duty to bury into a property right sufficient to base an action permitting recovery for the infliction of emotional upset is rather strange. It would be a step forward if our courts conceded Professor Prosser's point that "this 'property' is something evolved out of thin air to meet the occasion, and that it is in reality the personal interest of the survivors which are being protected, under a fiction likely to deceive no one but a lawyer."[71] But it is doubtful whether such a step will be undertaken. Yet, the very fact that our courts have been willing to strain precepts in order to find the necessary mechanical prop to support an action for compensation of grief, at the very least, indicates that our courts, although generally adhering stringently to the existing tenets of the law, operate under the same pressures as their more adventurous U.S. counterparts and will, where at all possible, innovate.

Over and above all the nominate torts from which the Americans draw their inferences, they could in fact point to an area of the law whose avowed purpose it is to redress the intentional infliction of emotional harm. This is the tort known as *Wilkinson* v. *Downton.*[72] But even here, there is a technical requirement which, if it is considered

68 [1931] 1 D.L.R. 676.
69 *Miner* v. *C.P.R.* (1910), 3 Alta. L.R. 408.
70 (1913), 4 W.W.R.4., 11 D.L.R 577 (B.C.).
71 Prosser, *Intentional Infliction of Mental Suffering: A New Tort,* (1939), 37 Mich. L. Rev. 874, 886.
72 *Supra,* at n. 31.

vital, obstructs the evolution in our courts of a concept that all mental suffering which is intentionally inflicted should be actionable. This is the requirement that the plaintiff suffer physical harm as a direct consequence of the shock inflicted upon him, a criterion imposed because of the courts' natural fear that mental suffering is too easy to fake.[73] Judge Magruder forcefully rejected this when he noted that in *Wilkinson* v. *Downton* itself:

> the plaintiff's sudden shock at being told by the "practical" joker that her husband had been smashed up in an accident actually caused a physical illness. But suppose she had only suffered keen anguish of mind, for a few hours, with none of the ensuing bodily illness. A man from Mars would find it difficult to understand the denial of recovery for mental anguish in such a case, when a person is allowed to recover twelve hundred dollars for the indignity of being spit upon in the presence of others.[74]

Reluctant though our courts may have been to award damages in the absence of physical injury, they have been easily satisfied as to the existence of the intent requirement of the tort. Thus, in *Barnes* v. *The Commonwealth*[75] the government was said to have the necessary intent to inflict mental anxiety when one of its form letters, stating that the plaintiff's husband had been put into the government's mental health facilities, was sent to her. There was no malice toward the plaintiff, but the very negligence of the defendants was held to amount to intent for a *Wilkinson* v. *Downton* action. This importation of the concept of negligence into the tort was even more pronounced in *Bielitski* v. *Obadiak*[76] where the defendant was held liable when he had repeatedly told people that the plaintiff's son had committed suicide. This was a fabricated story, and when it reached the ears of the plaintiff she suffered great anxiety, for which she recovered. Although it was not established that the defendant meant to inflict injury upon the plaintiff at all, the plaintiff was successful because the defendant's action was held to be reckless enough to be tantamount to intentional conduct. In another Canadian case the concept of imputed intent was widened even further to allow a *Wilkinson* v. *Downton* action. In *Purdy* v. *Woznesensky*[77] the defendant beat the plaintiff's husband before her very eyes. It was held that the shock suffered by the plaintiff and the physical harm which ensued therefrom, were recoverable heads of damage. Impliedly there was a finding by the court that the defendant's intent to hurt the plaintiff's husband included an intent to hurt a watching plaintiff. It seems clear, therefore, that our courts are willing to find liability rather readily where mental injury is accompanied by physical injury.[78]

IV

In summation, it appears that the scope of injurious falsehood and passing-off is not as great as the categories of privacy described as false light and appropriation. Moreover, in our courts there is no generally accepted right respecting non-disclosure of private facts in the absence

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73 Indeed, even physical injury will not always suffice to permit recovery for shock. A fair degree of robustness is presumed. See in particular the Australian cases of *Bunyan* v. *Jordan* (1937), 57 C.L.R. 1, and *Chester* v. *Waverley Municipal Council* (1939), 62 C.L.R. 1.

74 *Supra*, n. 34, at 1059.

75 (1937), 37 S.R. (N.S.W.) 511.

76 (1922), 15 Sask. L.R. 153; 65 D.L.R. 627.

77 *Purdy* v. *Woznesensky*, [1937] 2 W.W.R. 116.

78 This case was fought primarily as a *Wilkinson* v. *Downton* action. Today it seems indistinguishable from a run of the mill nervous shock case. Compare, for instance, *Boardman* v. *Sanderson*, [1964] 1 W.L.R. 1317.

of a violation of a property, contractual or fiduciary right. Further, the American courts have used the torts of trespass to the person and land much more creatively than we have, to enable them to come to the view that mental suffering is to be redressed. Only in the dead bodies area have our courts reached similar results to their American equivalents. As a rule, then, we have lagged in compensating mental pain.

One of the major reasons is, of course, that our courts are traditionally more conservative in their approach to law. They will, in general, apply the law as it exists even if this means that community expectations are defeated. This was specifically enunciated in the recent *Airline's Case* where Kitto, J., speaking of a decision which failed to resolve the possibility of conflict and even deadlock between concurrent Commonwealth and State civil aviation powers, said: "A degree of public inconvenience will exist. While this may be regretted it leads to no legal conclusion."[79]

On the other hand the American judicial approach has been succinctly summed up as being "a more flexible pragmatic philosophy of the law in action, which enabled their courts not only to respond to public opinion on social and economic matters but even to lead it."[80]

Of course, it may not be a good thing to allow recovery without establishing the commission of a technical wrong which can be objectively proved. It has been said that an action at large which would permit a plaintiff to obtain redress whenever he plausibly alleged mental harm, could well lead to injustices because

> . . . there is a sweet smell of shysterism about most suits for invasion of privacy—the money-damages remedy tends to recruit the wrong complaint.[81]

Thus, it could be argued that the American courts have gone too far in their endeavours to compensate anguish. Certainly this would be persuasive to this writer if reliance on existing torts would ensure recovery for all meritorious plaintiffs. But this desire will not always be satisfied. Consider for example the facts of the recent criminal prosecution against Bolduc and Bird.[82] There the prosecutrix had agreed to let a colleague of her doctor observe a vaginal examination the latter was to undertake. The colleague turned out to be a layman friend of the medical practitioner. The prosecution was for assault under the Criminal Code. The Supreme Court of Canada found that the patient's consent to the act of the examination justified the unwanted intrusion upon the privacy of the patient. It was one of these difficult judgments turning upon whether the prosecutrix consented to the quality of the act itself or only to an act committed by a certain person.[83] If the prosecutrix had been a plaintiff in a civil action, she would have had to overcome a similar consent argument and, therefore, the plaintiff could well have been remediless. Surely it cannot be questioned that such a plaintiff would be entitled to compensation when she discovered her humiliation? It cannot be persuasively argued that the danger of falsified mental anxiety in this kind of case is so great that it would be proper to restrict

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79 (1965), 38 A.L.J.R. 388.

80 (1965-66) 39 A.L.J. 81, per Crisp, J. Another factor is that the number of law teachers in America far exceeds that of all other common law jurisdictions combined. This becomes even more important because the American law teacher sees his role not only as an instructor, but as a prime force in law reform.

81 Harry Kalven Jr., *The Problems of Privacy in the Year 2000*, (1967) 96 Daedalus 876, 881.

82 *Bolduc and Bird* v. *The Queen* (1967), 63 D.L.R. (2d) 82 (Sup. Ct.).

83 Cf. *Papadimitropoulus* v. *The Queen* (1957), 98 C.L.R. 249; *R.* v. *Clarence* (1888), 22 Q.B.D. 23.

the plaintiff to recovery only if a trespass could be established. It goes without saying that in an identical fact situation, an American plaintiff recovered substantial damages.[84]

At first blush it appears that the recent decision of *Rookes* v. *Barnard*[85] may also adversely affect the chances of recovery for mental suffering of a deserving plaintiff. But this is not necessarily true. Lord Devlin, speaking for the House of Lords, held that exemplary or punitive damages are only to be awarded if there "is oppressive, arbitrary or unconstitutional action by the servants of the government" or where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff."[86] It has been seen that, in the cases that have used assault, battery and the like as the basis for recovery for injury resulting from insult, shock and anxiety, the courts have often pointed out that damages were awarded to punish the defendant for his outrageous conduct.[87] If now the courts are to point out to a jury that the defendant's state of mind may not be taken into account, many of the cases which permitted the plaintiff to recover for his mental anguish might today result in an award of nominal damages only.

But *Rookes* v. *Barnard* will not necessarily lead to this position. Lord Devlin while disallowing punitive damages as a means of recovery, expressly preserved aggravated damages as an alternative head of damages. It is interesting to note that Salmond argues that the courts have never drawn a distinction between aggravated and exemplary damages.[88] It is now clearly necessary to do so. Fleming suggests that aggravated damages go to compensate a plaintiff who has established the commission of a tort against him for any additional injury to himself arising from the defendant's conduct.[89] In other words, the idea that insulting behaviour is to be redressed would still be judicially recognized. Indeed, it might be argued that such redress being based on compensation of the victim rather than punishment of the defendant would clearly indicate that our courts have the lever by which they can openly advocate that actions for the intentional infliction of mental harm are completely acceptable to the notions of the common law. This could certainly eventuate in England where *Rookes* v. *Barnard* is binding authority. But even there it is not likely to occur because of the diffidence with which the courts will probably approach the distinction they will have to draw between exemplary and aggravated damages. First, they will have to overcome an historical trend of punishing the defendant, and secondly, trial courts will have the onerous burden of directing a jury to compensate a plaintiff for injury arising out of the reprehensible conduct of the defendant while, at the same time, warning the jury that the

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84 *De May* v. *Roberts* (1881), 46 Mich. 160, 9 N.W. 146.
85 [1964] A.C. 1129.
86 *Id.*, at 1226.
87 See eg. the quote from Gibbs, C. J., in *Merest* v. *Harvey*, *supra*, at n. 49. In addition to the trespass cases already discussed in the text, see also *Fleming* v. *Spracklin* (1922), 64 D.L.R. 382, (search for liquor on yacht, no warrant, no belief there was any liquor—punitive damages justified); *Spencer* v. *Grant*, [1928] 1 D.L.R. 820 (repeated trespasses by defendant who when asked to depart yelled derisively, grinned provocatively, used foul language—deserved punitive damages). In other cases, the state of mind of the defendant went to mitigate damages, indicating that damages do have a retributive function; see *Evans* v. *Bradburn*, [1916] 9 W.W.R. 281; *Short* v. *Lewis*, (1832-34), U.C.Q.B. 30 s. 385; *Kazakoff & Kazakoff* v. *Podmaroff*, [1939] 1 W.W.R. 713.
88 *Supra*, n. 32, at 739.
89 Fleming, *Torts*, 565 (3d ed., 1965).

defendant must not be punished for this reprehensible conduct. Another point to be made is that mental suffering will still require the finding of a nominate tort to make it actionable. At any rate, the High Court of Australia has refused to accept Lord Devlin's view on exemplary damages.[90] In Canada there is also considerable doubt whether the postulated demise of exemplary damages will be conceded. Spence, J., in his dissent (on another point) in *McElroy* v. *Cowper-Smith and Woodman* stated that "I am of the opinion that in Canada the jurisdiction to award punitive damages in tort action is not so limited as Lord Devlin outlined in *Rookes* v. *Barnard*."[91] Although this statement was clearly obiter, Spence, J. referred to previous Supreme Court authority,[92] which recognized the propriety of an award of exemplary damages.

If recovery for mental suffering in deserving cases is deemed to be a worthy goal, it will be better if a means of giving this kind of redress is found by other than the potential backdoor development just discussed. It is submitted that there is a discernible movement in our courts which, if continued, will enable them to openly compensate mental injury without having to make the American courts' somewhat undignified leap from existing torts to a desirable one.

It has been seen that physical injury must flow from intentionally inflicted emotional harm to succeed in a *Wilkinson* v. *Downton* action. This may no longer be necessary. Ever since the famed *Wagon Mound I*[93] decision it has been possible to argue that mental suffering is the kind of injury that was reasonably foreseeable by the defendant, and that therefore it was an actionable *kind* of damage. This widened the potential scope of recovery tremendously, as very often nervous shock will be a more probable result of careless conduct than physical injury. It had already been held in one of the leading nervous shock cases that:

> It is no longer necessary to consider whether the infliction of what is called mental shock may constitute an actionable wrong. The crude view that the law should take cognisance only of physical injury resulting from actual impact has been discarded, and it is now recognized that an action will be for injury by shock sustained through the medium of the eye or the ear without direct contact. The distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the nervous system. And a mental shock may have consequences more serious than those resulting from physical impact.[94]

But until 1967 our courts had not permitted recovery for the bare infliction of nervous shock. This year, however, Waller, J. allowed a rescuer to recover for merely nervous shock, on the basis that it was the kind of injury which was foreseeable.[95] This is, it is submitted, the inevitable result of the judicial development of the remoteness area. If it becomes accepted that mental anguish by itself is sufficient damage to found an action whenever the duty and remoteness concepts are satisfied,

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90 *Uren* v. *John Fairfax Ltd.*, [1966] 40 A.L.J.R. 124.
91 (1967), 62 D.L.R. (2d.) 65, 71 (Sup. Ct.).
92 *Knott* v. *Telegram Printing Co.*, [1917] 3 W.W.R. 335. He also notes that the Ontario Court of Appeal, after *Rookes* v. *Barnard*, had allowed an award of punitive damages to stand. See *Pretu et el* v. *Donald Tidey Co. Ltd.* (1966), 53 D.L.R. (2d) 504. The same court, again obiter, refuted *Rookes* v. *Barnard* in *Gouzenko* v. *Lefolii et al* (1967), 63 D.L.R. (2d) 217.
93 *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Company Ltd.*, [1961] 2 W.L.R. 126.
94 *Bourhill* v. *Young*, [1943] A.C. 92, per Lord MacMillan 103. (Contrast this with the views expressed by Smith, *Relation of emotion to injury and disease—legal liability for psychic stimuli*, (1943-44) 30 Va. L. Rev. 193, 303, 306).
95 *Chadwick* v. *British Railways Board*, [1967] 1 W.L.R. 912.

then *ipso facto*, the intentional infliction of such emotional harm must be actionable. This would not be a startling development as it has already been seen that decisions like *Purdy* v. *Woznesensky* anticipated that the *Wilkinson* v. *Downton* action might merge with the nervous shock area. If this should eventuate, there will have become available a salutory means of redressing plaintiffs like the little old lady in *Nickerson* v. *Hodges* without in any way having had to distort well-established principles of tort law.