Hastings Law Journal

Volume 17 | Issue 2 Article 12

1-1965

Mental Distress from Collection Activities

Duane L. Nelson

The doctor is, through his liability insurer, usually able to reach the manufacturer by suit. Insurance companies have offices or the ability to sue in almost every state because litigation is a necessary aspect of their particular business. The doctor is as able to bear the burden of serving as a conduit for the distribution of risk as the retailer. This extension does not make a physician an insurer of the success of his treatment. The liability would be strict liability only if the product used proved to be defective and this defective condition proximately caused the harm to the patient. It is in no sense absolute liability.

It is submitted that the policy involved in strict liability for defective products should extend to a physician. Many of the problems involved in such an extension are more illusory than factual. The problems that do exist can be minimized and do not, it appears, outweigh the advantages of allowing the patient to recover for his personal injuries. Such an extension, it must be reemphasized, is a limited, rather than a general one, and in this limited form seems to merit judicial thought.

Allen H. Cox, III[*]

[*] Member, Second Year Class.

MENTAL DISTRESS FROM COLLECTION ACTIVITIES

Two comparatively modern developments have created a need for an analysis of the tort liability of the creditor for the infliction of emotional disturbances upon his debtor. The first of these is the recent increase in the volume of credit purchasing. A society which relies so heavily upon credit demands an efficient collection of the resulting debts. Creditors are naturally concerned that legitimate business debts be honored and that payment be assured by the exertion of pressure upon delinquent debtors. The second of these developments is the growing legal protection of the individual's interest in "freedom from emotional disturbance" or "peace of mind."[1] The invasion of this interest may result in liability for emotional injuries regardless of any intrusion upon a traditional tort right.[2] The growth of this "new tort"[3] calls for an examination of the interrelation between the creditor's privilege to intrude upon the debtor's "emotional tranquility" and of the creditor's obligation to respect that interest.

[1] "It is not until comparatively recent years that there has been any general admission that the infliction of mental distress, standing alone, may serve as the basis of an action, apart from any other tort." PROSSER, TORTS 41-42 (3d ed. 1964).

[2] "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 if bodily harm to the other results from it, for such bodily harm." RESTATEMENT (SECOND), TORTS § 46 (1965).

[3] Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

Tort Limitations on the Collector

Even under the early common law the debt collector was limited as to the course of conduct which he might pursue. Collection activities which could be fitted within the bounds of one of the traditional torts have always been considered actionable. Thus, where the method of collection amounts to assault,[4] battery,[5] false imprisonment,[6] trespass,[7] nuisance,[8] or defamation[9] the victim is adequately protected by common law tort classifications, and compensation for emotional injuries is only incidental to other awards.[10]

The argument is not new that, in addition to the traditionally protected interests, protection ought to be given to the personal interest in emotional tranquility.[11] In the past thirty years, the suggestion of Dean Prosser[12] that tort liability will result from the intentional infliction of mental distress by extreme and outrageous conduct has steadily gained recognition.[13] California was an early leader in adopting this view.[14]

Early cases refused to allow recovery for emotional injuries unless they were accompanied by physical manifestations.[15] More recently, emotional injuries alone have been held compensable where intentionally inflicted,[16] but evidence of physical injuries as proof of the damages has been required where negligence is involved.[17] California cases involving collection harassment have all contained allegations of physical injuries,[18] but in other contexts California courts have stated, by way of dictum, that mental anguish unaccompanied by physical injury may result in tort liability.[19] The nominal prerequisite to recovery, intentional and outrageous conduct, has been applied to collection cases.[20]

---

[4] See Great Western Furniture Co., Inc., of Oakland v. Porter Corporation, 238 A.C.A. 604, 48 Cal. Rptr. 76 (1965).

[5] *E.g.*, Deevy v. Tassi, 21 Cal. 2d 109, 130 P.2d 389 (1942).

[6] *E.g.*, Salisbury v. Poulson, 51 Utah 552, 172 Pac. 315 (1918).

[7] See American Security Co. v. Cook, 49 Ga. App. 723, 176 S.E. 798 (1934).

[8] *E.g.*, Wiggins v. Moskins Credit Clothing Store, 137 F Supp. 764 (E.D.S.C. 1956).

[9] *E.g.*, Stickle v. Trimmer, 50 N.J. Super. 518, 143 A.2d 1 (1958).

[10] For a survey of the possible tort liability for abusive collection methods, including other than mental distress liability, see Comment, 24 U. CHI. L. REV. 572 (1957); Note, 1959 WASH. U.L.Q. 410.

[11] Magruder, *Mental and Emotional Distress in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956); Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950).

[12] Prosser, *supra* note 3.

[13] The only jurisdiction which in a recent decision has refused to recognize the intentional infliction of mental distress as a separate tort is Ohio. Bartow v. Smith, 149 Ohio St. 301, 78 N.E.2d 735 (1948).

[14] State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952); Emden v. Vitz, 88 Cal. App. 2d 313, 198 P.2d 696 (1948).

[15] Duty v. General Finance Co., 154 Tex. 16, 273 S.W.2d 64 (1954).

[16] See Lyons v. Zale Jewelry Co., 246 Miss. 139, 150 So. 2d 154 (1963).

[17] *E.g.*, Moore v. Savage, 359 S.W.2d 95 (Tex. Civ. App. 1962).

[18] *E.g.*, Vargas v. Ruggiero, 197 Cal. App. 2d 709, 17 Cal. Rptr. 568 (1961); Bowden v. Spiegel, Inc., 96 Cal. App. 793, 216 P.2d 571 (1950).

[19] State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952); Richardson v. Pridmore, 97 Cal. App. 2d 124, 130, 217 P.2d 113, 117 (1950).

[20] Generally the early cases in each jurisdiction involve obvious situations of extreme outrage. See Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925).

A recognition of the unique relationship between the debtor and creditor will be beneficial in analyzing collection problems. The creditor's economic power over the debtor makes the latter particularly susceptible to mental distress,[21] so that the courts have readily imposed liability for emotional injuries when the actor has been a debt collector.[22] Such cases frequently involve conduct or threats which are not actionable themselves, but which become so because of the debtor's genuine fear of economic ruin or public disgrace.

Privilege of Collection

The creditor's liability for mental distress can be studied only in conjunction with his privilege to apply pressure in the collection of his debts.[23] Creditors must be permitted to pursue their rights by acceptable methods even though the results might be emotionally disastrous to others.

This privilege arises from the financial relationship between the debtor and creditor.[24] The court must be cautious in giving redress to the delinquent debtor for emotional or even physical injuries which occur as a result of his own wrongdoing. The debtor has voluntarily chosen to join the modern trend toward credit living and, in so doing, has impliedly assented to pressure from those who have a legitimate interest in the timely payment of his debts.[25]

Notice to the debtor of the claim being made by the collector is privileged.[26] Such notice may take the form of personal conversation, letters, or telephone calls. With difficult accounts, the debt may be assigned to and handled exclusively by a collection agency.[27] The privilege extends to continuous notices and increasing demands for payment until the legal limit, as yet undefined, has been

[21] "The extreme and outrageous nature of the conduct may arise not so much from what is done as from abuse by the defendant of some relation or position which gives him actual or apparent power to damage the plaintiff's interests. It is on this basis that the tort action has been used as a potent counter-weapon against the more outrageous high-pressure methods of collection agencies and other creditors." PROSSER, TORTS 49 (3d ed. 1964).

[22] "The relationship of the parties is important in relation to the tortious character of the defendant's conduct. For example, if the defendant is in a peculiar position to harass plaintiff and cause emotional distress, as, *e.g.*, a creditor his conduct will be scrutinized the more carefully by the courts." 1 HARPER & JAMES, TORTS 666-67 (1956).

[23] "The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." RESTATEMENT (SECOND), TORTS § 46, comment *g* (1965).

[24] "The right of a creditor to inflict some worry and concern upon a debtor by reasonable means is generally acknowledged and accepted by all as the necessary and usual adjunct to the very existence of the credit system." Fraser v. Morrison, 39 Hawaii 370, 375 (1952).

[25] Gouldman-Taber Pontiac, Inc. v. Zerbst, 213 Ga. 682, 684, 100 S.E.2d 881, 883 (1957) (involving invasion of privacy).

[26] Fraser v. Morrison, 39 Hawaii 370 (1952); Peoples Finance & Thrift Co. v. Harwell, 183 Okla. 413, 82 P.2d 994 (1938).

[27] For a study of the problems and practices of collection agencies see Comment, 11 HASTINGS L.J. 301 (1960). In California, collection agencies are licensed and their practices regulated by the Collection Agency Licensing Bureau of the Department of Vocational Standards. CAL. BUS. & PROF. CODE §§ 6850-59; CAL. ADM. CODE, Title 16, §§ 601-37.

passed. Reminders of the consequences of failure to make payments, such as possible legal action and the rumation of future credit standing, are both effective[28] and privileged.[29]

It is ordinarily true that both sides will prefer to avoid the expenses, bother and publicity of resorting to the courts. And crowded court dockets make it advisable to encourage collection activities that do not involve legal action. In particular, consideration must be given to the collector who, perhaps justifiably,[30] fears that the debtor might evade court judgment or that other creditors might exhaust the debtor's non-exempt assets. Nevertheless, both parties are entitled to judicial settlement where a dispute or conflict arises. Harassment by extrajudicial means, regardless of the violation of a traditional tort right, may constitute an actionable invasion of the debtor's mental tranquility.

Special Obligation of the Collector

While there is a privilege to inflict mental distress, the collector has a special duty to refrain from unprivileged collection activities which result in physical or emotional injuries.[31] It is here asserted that the conduct which will subject a collector to liability for mental distress is more properly described as "unreasonable" than as "extreme and outrageous." In other words, the collector is held to a higher duty of care than is the ordinary individual.

Several courts have specifically applied the language of the reasonableness test to cases involving the infliction of mental distress through collection abuses. Thus, in *Urban v. Hartford Gas Co.*,[32] the Connecticut court held the collector to a duty of reasonable care and imposed liability for injuries resulting from mental distress caused by collection activities which were merely negligent.

In *Moore v. Savage*[33] the Texas court allowed recovery for what it described as "unreasonable collection efforts." The problem of terminology was specifically discussed: "Defendant further asserts that a creditor has the right to be un-

[28] This writer was informed by persons active in the collection business that the method of collection most successful with collection agencies, and that encouraged by the National Association of Collectors, was the presentation of logical arguments to the debtor as to the effect of his nonpayment. Interview with Ronald J. Miguel, partner in Stores Collection Bureau of San Francisco, and Vice President, California Association of Collectors, in San Francisco, November, 1965. Mr. Miguel later wrote of the connection between ethics and economics in the collection field: "Ethical conduct will not only avoid the issue of liability for mental distress, but will collect more accounts." Letter from Ronald J. Miguel to the *Hastings Law Journal*, November 5, 1965.

[29] See cases cited note 26 *supra*. *But cf.* text accompanying notes 39 and 40 *infra*.

[30] In the interview mentioned note 28 *supra*, Mr. Miguel cited as a national figure that by the time an account is assigned to a collection agency the debtor has an average number of thirteen other delinquent accounts.

[31] There is "a definite trend toward recognition of a right to recover for severe disturbances of mental or emotional tranquility resulting from an unprivileged act of the defendant reasonably calculated to cause grave mental distress to the plaintiff and committed intentionally or recklessly." Lyons v. Zale Jewelry Co., 246 Miss. 139, 148, 150 So. 2d 154, 157 (1963).

[32] 139 Conn. 301, 93 A.2d 292 (1952). See text accompanying note 41 *infra*.

[33] 359 S.W.2d 95 (Tex. Civ. App. 1962). See text accompanying note 43 *infra*.

reasonable. A creditor has no right to be outrageous. We reject the contentions."[34] The court defined the standard of "unreasonable collection efforts" in terms of the usual jury question of what a person of ordinary care and prudence would not do under the same or similiar circumstances.

California has also given recognition to the reasonableness test, at least where the emotional distress results in physical injuries. "The important elements are that the act is intentional, that it is unreasonable and that the actor should recognize it as likely to result in illness."[35]

The language used in the cases involving invasion of the right of privacy is similiar to the reasonableness test suggested here as a replacement for the test of extreme and outrageous conduct.[36] Courts have stated on several occasions that the creditor has a right to take reasonable action to pursue his debtor and persuade him to make payment but that the debtor may hold him liable for injurious conduct which exceeds the bounds of reasonableness.[37]

Application of the Reasonableness Test

In many cases which have allowed recovery for the infliction of mental distress from collection activities, the courts have unconsciously applied a standard of reasonableness to the conduct of collectors. The earliest case which required of the collector a more restrictive standard of conduct than that of the "extreme and outrageous" test is *Herman Saks & Sons v. Ivey*,[38] where it was held that one letter entitled the debtor to substantial damages. The contents of the letter are not described other than that "the evident purpose of the letter is to frighten delinquent debtors into settlement of their accounts."[39]

Similarly, the Washington court found that allegations of emotional and physical injuries resulting from one letter stated a good cause of action.[40] The letter threatened to refer the matter of a check, on which the debtors had stopped payment, to a prosecuting attorney for criminal action. The defendant knew of the age and poor health of both plaintiffs and had been notified that payment had been stopped because of dissatisfaction with hospital service. "Unreasonable" is a more accurate description of the creditor's conduct than is either "extreme" or "outrageous."

Urban v. Hartford Gas Co.,[41] has already been mentioned as one of the few collection cases to be decided on the theory of negligence. The collector,

[34] *Id.* at 96.

[35] Bowden v. Spiegel, Inc., 96 Cal. App. 2d 793, 795, 216 P.2d 571, 572 (1950).

[36] The comparison is relevant in light of the fact that the recognition of the right of privacy is primarily concerned with the protection of a mental interest and is only a phase of the larger problem of the protection of peace of mind against unreasonable disturbances. Both torts provide similiar protection. Bowden v. Spiegel, Inc., 96 Cal. App. 2d 793, 796, 216 P.2d 571, 573 (1950).

[37] Norris v. Moskin Stores, Inc., 272 Ala. 174, 177, 132 So. 2d 321, 323 (1961); Housh v. Peth, 165 Ohio St. 35, 40, 133 N.E.2d 340, 344 (1956).

[38] 26 Ala. App. 240, 157 So. 265 (1934).

[39] *Id.* at 240, 157 So. at 266. The quoted phrase is not meant to establish a line of illegality for collectors. Rather, it is used for purposes of indicating an early recognition of the special duty required in collection.

[40] Christensen v. Swedish Hospital, 59 Wash. 2d 545, 368 P.2d 897 (1962).

[41] 139 Conn. 301, 93 A.2d 292 (1952).

in the presence of plaintiff's guests, accused her of failure to meet payments on an installment purchase and threatened immediate removal of her water heater. The court found that the collector should have known that the plaintiff had made the payments. On the facts, the court could properly have found an intentional infliction of mental distress and could have based liability on the unreasonableness of the collector's action.

Santiesteban v. Goodyear Tire & Rubber Co.[42] involved the removal of the debtor's tires from his automobile while he was parked at his place of employment, a respected country club. The defendant held a lien on the tires, but the plaintiff was current in his payments. A practical joker attempting to embarrass the plaintiff might have been held liable only for the value of the tires in conversion. But, because the defendant was a creditor in a position to inflict great embarrassment and humiliation, it was held that there was no legal certainty that a claim of over ten thousand dollars for damages from emotional injuries could not be sustained, and hence that federal jurisdictional requirements as to the amount in controversy were met.

In *Moore v. Savage*,[43] the collector made appearances at and telephone calls to the debtor's place of employment, demanding payment of both the debtor and his employer. The Texas court affirmed a judgment in favor of the employer, but against the debtor, for mental and physical injuries resulting from the unreasonable collection efforts. (The employer alone suffered physical injuries.) As in the *Urban* case, a more logical basis for liability would be an intentional infliction of mental distress by unreasonable means, rather than negligence.

A mother of the debtor was allowed to recover for emotional injuries arising out of attempted collections in *Lyons v. Zale Jewelry Co.*[44] The collector's misconduct included posing as a lawyer on the telephone, swearing at the debtor's mother, and threatening to hold her responsible for her son's debt or throw her in jail. Again, the acts can best be described as unreasonable, rather than outrageous. It is unlikely that a person other than a collector would be held liable for similiar conduct.[45]

The California court in *Bowden v. Spiegel, Inc.*[46] held actionable conduct which included awakening the plaintiff's daughter (a neighbor) with a midnight telephone call to summon plaintiff to the telephone and threatening "a lot of trouble" over a bill she did not owe. Had such a phone call been made by a practical joker, it is unlikely that the actions would have been considered outrageous enough to warrant liabiblity.[47] However, because the caller was a creditor attempting to make a debt collection, the court allowed recovery on the theory that the conduct was an intentional interference with the plaintiff's mental tranquility and an unreasonable interference with her physical well-being.

[42] 306 F.2d 9 (5th Cir. 1962) (invasion of privacy).

[43] 359 S.W.2d 95 (Tex. Civ. App. 1962).

[44] 246 Miss. 139, 150 So. 2d 154 (1963).

[45] *Cf.* Kramer v. Ricksmeier, 159 Iowa 48, 139 N.W 1091 (1913), where a noncreditor used profane and abusive language talking to woman over the telephone but was not liable. However, the case was tried on the theory of assault.

[46] 96 Cal. App. 2d 793, 216 P.2d 571 (1950).

[47] Recovery for such practical jokes has been allowed only under extreme and outrageous circumstances. The classic case finding liability is Wilkinson v. Downtin [1897] 2 Q.B. 57, where defendant told plaintiff that her husband had been in a serious acci-

The Elements of Reasonableness

In determining the reasonableness of the creditor's action in the collection of his debts, certain factors are of particular importance. No one is conclusive, but where the plaintiff alleges emotional damages from collection methods, each factor will be weighed in determining whether the defendant's conduct gives rise to liability.

The first of these factors is the degree of the debtor's susceptibility to emotional injuries from collection.[48] Before the plaintiff will be protected from mental distress caused by "unreasonable" conduct it must be shown that the plaintiff does in fact fear the economic power of the creditor.[49] The evidence must demonstrate that the plaintiff is in a particularly vulnerable position and that pressure and coercion are likely to result in physical or serious emotional injuries. It is not a prerequisite that the plaintiff in fact owe money to the collector. Indeed, the nonexistence of the debt may have the opposite effect. However, apparent power of the collector in the mind of the plaintiff is necessary before the reasonableness test will be applied, and the degree of such appearance may determine the reasonableness of the collection methods.[50]

It follows that if, in addition to the normal vulnerability of a debtor to emotional injury, the plaintiff has a susceptibility to physical injury which is known to the collector, the courts will be more willing to find liability. Thus, where the collector is aware of the plaintiff's bad heart,[51] his physical hypertension,[52] or his old age and poor health,[53] greater care in collection has been required. Similarly, where the person from whom collection is sought is a young child[54] or a woman in an advanced state of pregnancy,[55] reasonableness requires the collector to respect this physical condition. On the other hand, the creditor will not be liable for abnormal injuries which, although created by collection pressure, occur only as a result of an unusual physical weakness unknown to the collector.[56]

A second factor in determining the reasonableness of the collector's activities is the legitimacy and collectability of the debt. The cases cited earlier illustrate

---

dent, that he was lying in the street with both legs broken, and that she was to go to his aid with two pillows to bring him home.

[48] See authorities cited notes 21 and 22 *supra.*

[49] It is because of the particular vulnerability of the apparent debtor that the reasonableness standard is applied. For explanation, see text accompanying notes 21 and 22 *supra.*

[50] Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W 25 (1932) (threats to attach wages when plaintiff was a widow with two children and with a weekly salary immune from attachment).

[51] Personal Finance Co. of Atlanta v. Loggins, 50 Ga. App. 562, 179 S.E. 162 (1935).

[52] Clark v. Associated Retail Credit Men of Washington, D.C., 105 F.2d 62 (D.C. Cir. 1939).

[53] Christensen v. Swedish Hospital, 59 Wash. 2d 545, 368 P.2d 897 (1962).

[54] Delta Finance Co. v. Ganakas, 93 Ga. App. 297, 91 S.E.2d 383 (1956).

[55] Digsby v. Carroll Baking Co., 76 Ga. App. 656, 47 S.E.2d 203 (1948); Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936).

[56] Oehler v. V L. Bamberger & Co., 4 N.J. Misc. 1003, 135 Atl. 71 (1926), *aff'd,* 103 N.J.L. 707, 137 Atl. 425 (1927).

the willingness of the courts to compensate persons who have been disturbed by collectors but who in fact are not indebted to the alleged creditor.[57] As one court stated: "[I]t is more unreasonable to harass someone who does not owe a debt than it is to harass someone who does owe a debt."[58] Thus, where pressure has been brought against the wrong party,[59] against an employer,[60] against a relative,[61] or against a debtor who was current in his payments,[62] the courts have allowed the harassed party to recover for resulting injuries. Similarly, where the debtor's wages were known by the creditor to be immune from attachment, letters containing threats to attach have been held to be actionable.[63]

However, the mere fact that a mistake is made as to the identification of the debtor or the existence of the debt does not make attempted collections unreasonable. In *Fraser v. Morrison*,[64] recovery for alleged emotional disturbances was denied, despite a finding that the collector, by his own fault, had pursued the wrong party.

A third factor, and one which the courts particularly emphasize in determining liability for mental distress from collection activities, is the state of mind of the collector. It is frequently recited that only for the *willful* and *intentional* infliction of mental distress will recovery be allowed for mere emotional injuries.[65] Injuries intentionally caused have been distinguished from those negligently caused,[66] and only rare cases have based liability for excessive collection methods upon the collector's negligence.[67]

The latter cases avoid the question of the obligation of the collector to respect the peace of mind of the debtor. Although the acts are intentional, the courts base liability upon the negligence of the collector as to the debtor's physical well-being. It is illogical, and yet would necessarily follow from the language the courts have used, that the limits on an intentional act ("extreme and outrageous") are less restrictive than the limits on less culpable, negligent conduct (reasonableness) Only because of adherence to principles which give greater protection to physical than to emotional well-being can the resort to the negligence fiction be justified. An admission that compensation is being awarded for the intentional infliction of mental distress by unreasonable collection methods would eliminate this pretense. It would further eliminate the necessity of proving physical injuries, a requirement only in negligence cases.

In fact, emotional distress in the typical collection cases is intentionally inflicted. Creating concern and worry in the mind of the delinquent debtor, so as

---

[57] See cases cited notes 47, 50-54 *supra*.

[58] Moore v. Savage, 359 S.W.2d 95, 96 (Tex. Civ. App. 1962).

[59] Bowden v. Spiegel, Inc., 96 Cal. App. 2d 793, 216 P.2d 571 (1950).

[60] Moore v. Savage, 359 S.W.2d 95 (Tex. Civ. App. 1962).

[61] Vargas v. Ruggiero, 197 Cal App. 2d 709, 17 Cal. Rptr. 568 (1961); Lyons v. Zale Jewelry Co., 246 Miss. 139, 150 So. 2d 154 (1963).

[62] Urban v. Hartford Gas Co., 139 Conn. 301, 93 A.2d 292 (1952).

[63] Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W 25 (1932).

[64] 39 Hawaii 370 (1952).

[65] *E.g.*, Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W 25 (1932).

[66] *E.g.*, LaSalle Extension University v. Fogarty, 126 Neb. 457, 253 N.W 424 (1934).

[67] Urban v. Hartford Gas Co., 139 Conn. 301, 93 A.2d 292 (1952); Moore v. Savage 359 S.W.2d 95 (Tex. Civ. App. 1962).