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THE MORES, GROUP SANCTIONS and religious ethics of a society attempt to regulate interactions between humans as harmoniously as possible. But it sometimes requires the intervention of formal legal authority to maintain a semblance of peace in the community by punishing disapproved conduct. All too frequently, social interaction leads to conduct that is tortious or criminal. Early in its history, the common law found it imperative to acknowledge and define an individual's interest in his personal integrity, physical safety and mental tranquility. The law formulated the legal rules of *assault* to protect this particular interest when it is wrongfully interfered with by another.[1] In this latter half of a nerve-wracking twentieth century, it is becoming necessary to revive the early concepts of common law assault, and under certain circumstances,[2] to redress abusive and insulting language.

Any principle of common law, particularly one concerned with the control of human behavior, has social implications, and such principle, whether dealing with a tort or a crime, must advance or retreat according to the social need.[3] Outrageous behavior, encompassing overt antisocial acts and abusive language, is once again being recognized by the authorities to be a legal as well as a social problem.

Assault as a Tort and a Crime

Assault can be a tort, a crime, or both simultaneously if the defendant's act falls within the scope of liability for both. Manslaughter, as a form of homicide, is, of course, punished as a crime. Manslaughter is the result, or harm, of an act defined by statute or common law as criminal, or as otherwise unlawful. The following questions then arise: Can manslaughter be the result of a mere tort?; Is the death of the victim limited to the legal liability for wrongful death, essentially

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1 See Prosser, Law of Torts, § 3, "Social Engineering" (3d ed. 1964).

2 Wade, Tort Liability for Abusive and Insulting Language, 4 Vand. L. Rev. 63, 101 (1950): "A rule to this effect would merely be restating a condition which existed in the days of the very beginning of the common law, when certain vituperative names were treated in the same way as assaults and when the law of defamation sought to redress insults as well as to protect reputation. It may seem retrogressive, a return to more barbaric times, to restore the rules of the middle ages. Instead, it has been called a mark of a more advanced civilization that tort liability affords protection against abusive language."

3 Reckless, The Crime Problem, C. 2 at 19 (3d. ed. 1961). "It is the scheme of social values current in any society that dictates the importance or unimportance or the sacredness or profanity of any activity in society. . . . The social values assigned to different kinds of behavior vary in time and place, and this is true of behavior that becomes defined as criminal in our criminal laws."

a tortious effect?; Does conduct defined as tortious come within criminal liability as unlawful? The answers are vital since imprisonment is the punishment for manslaughter, and only monetary damages are the compensation awarded for wrongful death in tort.

If the defendant's act has been defined by statute or common law as criminal, and the direct and proximate harm resulting from such act has also been described in criminal law with a proper sanction against the wrongdoer, then the consideration whether or not the same act can also be redressed in tort does not ameliorate the criminal nature of the act, or avoid the criminal liability.[4]

There has not yet been a successful codification of the law of torts as there has been for criminal law, and the definitions are not always clear-cut. Nonetheless, torts are defined as acts which invade or interfere with another's rights created or recognized by law.[5] Such tortious acts are, therefore, unlawful, in violation of interests protected by law, and may create criminal liability if the injury resulting is defined in the criminal statute.

The Restatement of Torts describes tortious conduct as acts which are

> . . . intended to cause an invasion of an interest legally protected against intentional invasion, or conduct which is negligent as creating an unreasonable risk of invasion of such a interest, but also conduct which is carried on at the risk that the actor shall be subject to liability for harm caused thereby, although no such harm is intended . . .[6]

Criminal conduct is defined by statute or by the principles of common law.[7] Both types of wrongful conduct are concerned with the field of intentional invasions of rights; the legal difference is that tortious conduct violates private law and the civil rights of an individual, and criminal conduct violates the public law as declared by statute, and infringes upon the public rights.[8]

The crucial distinction between tortious and criminal conduct is the difference in the effects, the "substantive harms."[9] A text on criminal law defines harm:

> Harm, then, is the violation of the intangible, legally protected interest (sometimes interests) which, in those crimes calling for a

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[4] Prosser, *op. cit. supra* n. 1, § 7.

[5] *Id.* at § 1.

[6] Restatement of Torts 2d (1965), § 6.

[7] Reckless, *op. cit. supra* n. 3, at 17: "Any act which by omission or commission runs counter to the criminal law could be defined as a crime or criminal behavior in the legal sense."

[8] Blackstone, Commentaries on the Laws of England, Bk. III, 2; Bk. IV, 5. (Baker, Voorhis & Co. ed., N.Y.C., 1938.)

[9] *Ibid.*

> physically ascertainable effect of conduct . . . is identical with such a physical effect . . .[10]

The Restatement contrasts the terms "harm" and "injury" in contemplation of tort:

> . . . harm implies the existence of loss or detriment in fact, which may not necessarily be the invasion of a legally protected interest. The most usual form of injury is the infliction of some harm, but there may be an injury although no harm is done . . .[11]

Blackstone distinguished the effects of tort and crime: "Crimes . . . strike at the very being of society, which cannot possibly subsist when actions of this sort are suffered to escape with impunity . . . ," whereas, civil injuries are "immaterial to the public."[12]

The same facts of a situation may constitute both a tort and a crime, but such facts must be carefully analyzed from the two distinct viewpoints of tort law and criminal law. Injury to the individual is the concern of tort law in viewing the disapproved conduct, but social harm has no monetary value in the view of criminal conduct.[14]

Underlying the definitions of both tortious and criminal conduct is the social morality upon which the tort injury and the criminal harm is based.[15] Professor Hall states:

> The relevant ethical standards postulate the autonomy of the individual and his "right" to be made whole. So too, the above postulates, re-enforced by moral attitudes, give a designated "social harm," which, though nonmeasurable in money, are as "real" as is the damage to a particular individual. Thus the damage requirement in tort law serves to select and limit the "facts" to those that constitute harm to particular persons. It follows that moral culpability is of secondary importance in tort law. But in penal law . . . the immorality of the actor's conduct is essential whereas pecuniary damage is irrelevant.[16]

In the recent Ohio case of *State v. Nosis*, [17] a criminal conviction for manslaughter in the first degree was affirmed by the Court of Appeals, which held that the evidence was sufficient to sustain a judgment by the court that the defendant assaulted the deceased, which assault di-

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[10] Hall & Mueller, Criminal Law and Procedure, C. 3, p. 90. (2d ed. 1965).

[11] Restatement of Torts, § 7.

[12] Blackstone, *op. cit. supra* n. 4, at Bk. IV, 5.

[14] Hall, Interrelation of Criminal Law and Torts, 43 Col. L. Rev. 753, 976 (1943).

[15] Prosser, *op. cit. supra* n. 1, Sec. 4 at 16: "In a very vague general way, the law of torts reflects current ideas of morality, and when such ideas have changed, the law has kept pace with them." And at 17: "It is now more or less generally recognized that the 'fault' upon which liability may rest is social fault, which may but does not necessarily coincide with personal immorality."

[16] Hall, *op. cit. supra* n. 12, at 971.

[17] 22 Ohio App. 2d 16, 257 N.E. 2d 414 (1969).

rectly and proximately resulted in the victim's fatal heart attack. Defendant's acts consisted of a technical assault, menacing conduct and verbal abuse.

In the spring of 1968, decedent, while driving in his automobile and accompanied by his wife, attempted to pass the defendant in his automobile on a moderate grade, and blew his horn several times to warn the other of his intention to pass. At the next red light, the defendant jumped out of his car, ran up to the decedent's car, and pulled open the door, stating a desire to fight with the driver. At this point, the decedent's wife leaned over the steering wheel and warned the defendant that her husband had a bad heart. Nonetheless, the defendant continued to follow the couple for several miles, and then into their driveway at home. Defendant got out again and began cursing the decedent who, himself, then warned the defendant that he had a bad heart. It was to no avail, as the defendant continued his verbal abuse, whereupon the victim suffered a heart attack and died in the driveway.

Two statutes were invoked for criminal prosecution: the "manslaughter statute"[18] which states that the unlawful killing of another is manslaughter in the first degree; and the "assault and battery statute"[19] which reads:

> No person shall assault or threaten another in a menacing manner, or strike or wound another.

Was the technical assault (defendant's pulling open the door of decedent's car),[20] sufficient to bring him within the criminal assault statute, and thereby, impose liability under the manslaughter statute for the victim's death?

Determining Criminal Liability

Criminal liability for assault refers to an unlawful attempt, with present ability, to commit a violent injury upon the person of another.[21] It is also said (in Ohio, for example) to include a threatening of another in a menacing manner without necessarily touching his person.[22] In the criminal assault statute, the word "menacing," used to describe the defendant's manner, means the manifestation of an intention to inflict injury.[23] Ohio's criminal statutes are based on the common law, and a

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[18] Ohio Rev. Code, § 2901.06.

[19] *Id.*, § 2901.25.

[20] United States v. Anderson, 190 F. Supp. 589 (D. Md. 1961); see also Crossman v. Thurlow, 336 Mass. 252, 143 N.E. 2d 814 (1957); Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F. 2d 793 (4th Cir. 1949).

[21] People v. Stagg, 29 Ill. 2d 415, 194 N.E. 2d 342 (1963).

[22] State v. Thiesen, 94 Ohio App. 461, 115 N.E. 2d 863 (1962).

[23] State v. Moherman, 62 Ohio App. 258, 15 Ohio Ops. 185, 555, 29 Ohio L. Abs. 223, 23 N.E. 2d 651 (1939).

good definition of assault has been suggested by Turner in his article, "Assault at Common Law":

> It is an assault at common law when any person intentionally, or recklessly, by active conduct threatens to apply unlawful physical force to the person of another in such a manner as to create in the mind of that other an apprehension that such force is about to be so applied.[24]

At what point does common law assault become criminal under the statute? That crucial point is reached when the actor's intention, "*mens rea,*" is to inflict personal injury upon his victim.[25] Defendant, according to the testimony of the *Nosis* case, did not display a weapon. But could criminal intent be *inferred* from his reckless disregard of the warnings of decedent's heart condition? The court held that it could be reasonably foreseen by an ordinarily prudent person that the victim could have a heart attack as a result of defendant's conduct, and that the defendant had been twice warned of the decedent's heart condition. It was said by the court in *People v. Carlson,* "There must exist in the mind of the accused, at the time of the act or omission, a consciousness of the probable consequences of the act, and a wanton disregard of them." [26]

> It must be shown that a homicide was not improbable under the facts as they existed which should reasonably have influenced the conduct of accused . . . (I)t is ordinarily required that the negligence on which involuntary manslaughter may be based must be of a gross or flagrant character, such as would show wantonness or recklessness, or would evince a reckless disregard of human life, or the safety of others, or indifference to consequences, *equivalent to criminal intent.*[27]

Therefore, "*mens rea,*" or guilty intent, is present when the wrongdoer has the intention to produce the harmful effect, or has knowledge that the harm will come from the act (*scienter*). Scienter can be equivalent to criminal intent, according to the circumstances.[28] In his article, Turner says,

> In common assault the "mens rea" is merely the *realization in the mind of the wrongdoer* that his conduct will produce the necessary

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[24] Turner, Assault at Common Law, 7 Camb. L. J. 56, 67 (1939).

[25] Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42 (1885).

[26] 176 Misc. 230, 26 N.Y.S. 2d 1003, 1005 (1941).

[27] 40 C.J.S. Homicide, Sec. 62 at 925-926 (1944). See Kirk v. Commonwealth, 186 Va. 839, 44 S.E. 2d 409, 412 (1947): "The negligence required in a criminal proceeding . . . is a recklessness or indifference incompatible with a proper regard for human life. It must be shown that a homicide was not improbable under all the facts existing at the time, and that the knowledge of such facts should have had an influence on the conduct of the offender."

[28] Hall & Mueller, *op. cit. supra* n. 10.

> *impression in the mind of the victim.* He must, in other words, either intend to alarm the victim, or (it is submitted) intend to do something which he realizes may cause such alarm.[29]

Another viewpoint of "*mens rea*" is given by Mueller in his article, "The Public Law of Wrongs—Its Concepts in the World of Reality":

> Precisely speaking, guilt is not merely objective attribution, but, rather, is a societal finding of a frame of mind, or an attitude, with which the perpetrator created the criminal harm . . . Guilt, or *mens rea,* then, is the known or felt ethico-legal negative value of the deed—a community value known to the perpetrator at the time of the deed. To this must be added the perpetrator's wish and decision to act nevertheless.[30]

An applicable maxim here might be, in criminal acts, that the intention is to be regarded and not the results (*in maleficiis voluntas spectatur non exitus*). There was a warranted inference of criminal intent, from the view of common law and sociology, in the *Nosis* case, and the court was justified in holding that the menacing and threatening behavior of the defendant towards his susceptible victim, by words and acts, constituted a criminal assault.

Having determined that defendant's conduct violated the assault statute, the court then correctly held, on the basis of expert medical testimony, that the death of the victim proximately resulted from the criminal assault, and was, therefore, manslaughter.

Under Ohio's criminal code, first degree manslaughter is the unlawful killing of another, without malice, and either voluntary, upon a sudden quarrel, or unintentional, while the slayer is in the commission of some unlawful act.[31] The Ohio manslaughter statute does not require an express intent to kill, but recklessness can be substituted as an equivalent.[32] *Black v. State* said:

> Unlawful killing as used in manslaughter must be such as would naturally, logically and proximately result from the commission of some unlawful act as defined by statute, and such unlawful act must be one that would be reasonably anticipated by an ordinarily prudent person as likely to result in such killing.[33]

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[29] Turner, *op. cit. supra* n. 24, at 63.

[30] Mueller, The Public Law of Wrongs—Its Concepts on the World of Reality. 10 J. Pub. L. 203, 237 (1962).

[31] State v. McDaniel, 103 Ohio App. 163, 3 Ohio Ops. 2d 235, 80 Ohio L. Abs. 522, 144 N.E. 2d 683 (1956), dism. 166 Ohio St. 378, 2 Ohio Ops. 268, 142 N.E. 2d 654 (1957).

[32] *Contra,* Smith v. State, 40 Ala. 158, 109 S. 2d 853 (1959): "In order to constitute manslaughter in the first degree, there must be either a positive intent to kill, or an act of violence from which, ordinarily, in the usual course of events, death or great bodily harm may be a consequence. . . . Without an intent to kill there can be no murder, or manslaughter, in the first degree."

[33] 103 Ohio St. 434, 133 N.E. 795 (1921).

Using this test for manslaughter, the Appeals Court affirmed the *Nosis* conviction for first degree manslaughter.[33a]

Is the defendant Nosis liable also in tort for his conduct? If the victim had survived his heart attack, would he have a cause of action for civil assault?

Determining Civil Liability

Civil assault consists of acts that amount to an offer to use force,[34] accompanied by an apparent present ability to immediately carry out the threat of inflicting bodily harm.[35] The general rule still prevailing excludes mere words, no matter how insulting, vituperative, violent, profane, obscene, threatening or abusive.[36] Liability is incurred for civil assault when the actor intends to cause a battery to another, or intends to bring about an imminent apprehension of such a battery, and the victim is actually put in such apprehension.[37] The requisite intention is present when the act is done for the purpose of causing such apprehension,[38] or with knowledge that to a substantial certainty, such apprehension will result.[39] It is the intent of the wrongdoer that usually is the crux of the assault, both tortious and criminal, and liability is created with its formation.[40] It means a desire to produce the harmful effect, or knowledge that such an effect will occur.[41] Following are two authors' explanations of intent:

> "Intent" is the word commonly used to describe the desire to bring about the physical consequences up to and including death; . . .[42]
>
> It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does.[43]

[33a] State v. Nosis, *supra* n. 17.

[34] State v. Daniel, 136 N.C. 671, 48 S.E. 544 (1904); Haupt v. Swenson, 125 Iowa 694, 101 N.W. 520 (1905); Alexander v. Pacholek, 222 Mich. 157, 192 N.W. 652 (1923).

[35] Osburn v. Veitch, 1 F. & F. 317, 175 Eng. Rep. 744 (1858); State v. Church, 63 N.C. 15 (1868); *contra,* Woodruff v. Woodruff, 22 Ga. 237 (1857); also see Seavey, Threats Inducing Emotional Reactions, 39 N.C. L. Rev. 74 (1968).

[36] Gelhaus v. Eastern Air Lines, 194 F. 2d 774 (5th Cir. 1952); Johnson v. General Motors Acc. Corp., 228 F. 2d 104 (5th Cir. 1955); Stavnezer v. Sage-Allen & Co., 146 Conn. 460, 152 A. 2d 312 (1959); Gefter v. Rosenthat, 384 Pa. 123, 119 A. 2d 250 (1956); Bartow v. Smith, 149 Ohio St. 301, 78 N.E. 2d 735 (1948); Ashford v. Board of Liquor Control of State, 121 N.E. 2d 164 (Ohio Com. Pl. 1962); Ryan v. Conover, 59 Ohio App. 361, 18 N.E. 2d 277 (1938), where it was held that verbal abuse is regarded as "slander."

[37] Restatement of Torts, § 21, § 32.

[38] *Id.,* Comments (d) and (f).

[39] *Id.,* at Comment (d).

[40] *Id.,* Comment (f); see also, Raefeldt v. Koenig, 152 Wis. 459, 140 N.W. 56 (1912).

[41] Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42 (1885); State v. Deso, 110 Vt. 1, 1 A. 2d 710 (1938).

[42] Cook, Act, Intention and Motive in the Criminal Law, 26 Yale L. J. 644 (1917).

[43] Prosser, *op. cit. supra* n. 1, § 8 at 31 and 32.

Nonetheless, mere knowledge and appreciation of risk which is not a substantial certainty is not the equivalent of intent.[44] "Quasi intent"[45] can be formed by reckless conduct that is intentionally done, unreasonable in character, done in spite of a known risk, and when it is highly probable that harm will result.[46] If the defendant proceeded in his acts in a conscious disregard of, or indifference to, the consequences, then such "quasi intent" can be inferred,[47] and will impose liability in Ohio.[48] Such liability has been incurred by defendants who did continue their highly unreasonable conduct despite a high degree of danger, either known to them or apparent to a reasonable man in their position,[49] even without the required "quasi" or inferred intent.

The key to assault is the element of apprehension.[50] The defendant is liable even if his intention was limited to making his victim fearful of injury. Liability will not be avoided even if the victim knew of this limitation, but despite such realization was put in apprehension because of the assailant's menacing and threatening manner.

> The other may realize that the actor intends only to frighten him, but even so, he may believe that there is a chance that the act will go beyond its intended purpose and cause a harmful or offensive contact. If so, both the required intention and the required apprehension are present and the actor is liable.[51]

Threats by words do not constitute an assault unless they are combined with acts or circumstances that put the victim in *reasonable apprehension* of an imminent, harmful contact.[52] The general rule is qualified, however, in that words which accompany or precede acts seen and understood by the victim, may be concrete evidence of the actor's intention to commit the assault, and of the other's apprehension.[53] It is clear therefore, that a challenge to fight can be held to be

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[44] *Ibid.*

[45] Elliott, Degrees of Negligence, 6 So. Cal. L. Rev. 91, 143 (1932).

[46] Cope v. Davison, 30 Cal. 2d 193, 180 P. 2d 873, 171 A.L.R. 667 (1947); Sullivan v. Hartford Acc. & Indem. Co., 155 So. 2d 432 (La. App. 1963).

[47] Helleren v. Dixon, 152 Ohio St. 40, 86 N.E. 2d 777 (1949); Universal Concrete Pipe Co. v. Bassett, 130 Ohio St. 567, 200 N.E. 843, 119 A.L.R. 646 (1936).

[48] Tighe v. Diamond, 149 Ohio St. 520, 80 N.E. 2d 122 (1948).

[49] Taylor v. Lawrence, 229 Or. 259, 366 P. 2d 735 (1961); Cramer v. Dye, 328 Mich. 370, 43 N.W. 2d 892 (1950); Turner v. McCready, 190 Or. 28, 222 P. 2d 1010 (1950); see also Restatement of Torts, § 500, Comment (c). *Contra* Cope v. Davison, *op. cit. supra* n. 46, which held that the intent to do harm is required.

[50] Restatement of Torts, § 21, Comment (c): "In order that the actor shall be liable . . . it is only necessary that his act should cause an apprehension of an immediate contact whether harmful or merely offensive." See also Erickson, What Constitutes an Assault?, 16 Clev.-Mar. L. Rev. 14 (1967).

[51] Restatement of Torts, § 28.

[52] *Id.*, § 31.

[53] *Ibid.*

an assault. In the *Nosis* case, the pulling open of the car door, accompanied by such a challenge, clearly constituted an assault.

Another facet of the defendant Nosis' liability was the outrageousness of his conduct towards the decedent, which directly resulted in severe emotional distress and the physical injury, ultimately ending in death. Liability imposed for such extreme conduct is an extension of the principles of the tort of assault.[54] The rule is postulated in Section 46 of the Restatement of Torts:

> 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.[54a]

A landmark case, *State Rubbish Collection Ass'n v. Siliznoff*, stated, in the words of Justice Traynor, that,

> . . . a cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault.[55]

In the earlier Ohio case of *Bartow v. Smith*,[56] the majority opinion did not follow the modern rule, but the two dissenting justices strongly advocated the principles of the *Siliznoff* case and the Restatement.[57]

The intentional infliction of mental disturbance by extreme and outrageous conduct is a relatively "new tort," and has been much advocated and discussed by the legal writers in the past forty years.[58] Prosser dubbed the tort "orneriness," and likened it to assault. It would

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[54] *Id.*, § 46, Comment (f); see also § 31, Comment (a).

[54a] *Id.*, § 46.

[55] 38 Cal. 2d 330, 240 P. 2d 282 (1952).

[56] 149 Ohio St. 301, 78 N.E. 2d 735, 743 (1948). The majority opinion held that, "It is axiomatic that opprobrious epithets, even if malicious and profane and in public, are ordinarily not actionable. There is no right to recover for bad manners!"

[57] *Id.*, at 746 (Dissent by Justice Zimmerman): "There is an abundance of respectable authority supporting the proposition that where one wilfully and with a malicious motive uses vile and opprobrious language toward another, under conditions where deleterious consequences might reasonably be anticipated and the use of such language does in fact cause an emotional disturbance resulting in physical harm, the actor may be made to respond in damages for the consequences of his inexcusable and reprehensible contact." See notes 46 and 49, *supra*.

[58] Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497 (1922); Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033 (1936); Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874 (1939); Wade, Tort Liability for Abusive and Insulting Language, 4 Vand. L. Rev. 63 (1950); Prosser, Insult and Outrage, 44 Cal. L. Rev. 40 (1956); Vold, Tort Recovery for Intentional Infliction of Emotional Distress, 18 Neb. L. B. 222 (1939); Borda, One's Right to Enjoy Mental Peace and Tranquility, 28 Geo. L. J. 55 (1939); Seitz, Insults, Practical Jokes, Threats of Future Harm, 28 Ky. L. J. 411 (1940); Smith, An Independent Tort Action For Mental Suffering and Emotional Distress, 7 Drake L. Rev. 53 (1957); Seavey, Threats Inducing Emotional Reactions, 39 N.C. L. Rev. 74 (1968); 52 Cal. L. Rev. 939 (1952); 25 So. Cal. L. Rev. 440 (1952).

include ". . . the intentional, outrageous infliction of mental suffering in an extreme form." [59] Wade called the tort "insult," as derived from the original Latin term for assault, "insultum." [60] The Restatement describes the conduct as:

> The prohibited conduct is conduct which in the eyes of decent men and women in a civilized community is considered outrageous and intolerable. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim "Outrageous!" [61]

The gist of the outrage is the defendant's knowledge of the vulnerability of the victim.[62] Such was the fact in the *Nosis* case. It was outrageous to add insult to injury by subjecting the victim to verbal abuse after inexcusably following him home. It was the opinion of the court that the emotional disturbance that brought on the victim's heart attack was a result foreseeable by all parties, and recognized in law as an effect and harm entitled to compensatory damages and criminal sanction.[63] The defendant would be liable even for "unexpectable" bodily harm caused by the severe emotional distress brought on by his assault.[64] Intention, once again, is the basis of the liability, and exists when the purpose of the act is to bring about the emotional distress, or is done with the knowledge and awareness that such distress is substantially certain to result:

> If an act is done with the requisite intention it is immaterial that the actor is not inspired by any personal hostility to the other . . . Such conduct is tortious. The injury suffered by the one whose interest it invades is frequently far more serious to him than certain tortious invasions of the interest in bodily integrity and other legally protected interests . . .[65]

Mental disturbance and emotional suffering, in the form of the apprehension of physical injury, is the important element of assault, and especially in its concept as a "new tort." The invasion of the victim's mental peace is an assault, as an individual is protected against a "purely mental disturbance of his personal integrity." [66]

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[59] Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874 (1939).

[60] Wade, *op. cit. supra* n. 2, at 110.

[61] Restatement of Torts (1948 Supp.), § 46. Comment (g).

[62] Prosser, Insult and Outrage, 44 Cal. L. Rev. 40 (1956).

[63] For medical documentation of emotional disturbance, see Tibbetts, Neurosthenia, the Result of Nervous Shock as a Ground for Damages, 59 Cent. L. J. 83 (1904); Earengy, The Legal Consequences of Shock, 2 Medico-Legal Crim. Rev. 14 (1934); Burdick, Tort Liability for Mental Disturbance and Nervous Shock, 5 Cal. L. Rev. 177 at 186 (1905).

[64] Restatement of Torts, *op. cit. supra* n. 61.

[65] *Ibid.*

[66] Prosser, *op. cit. supra* n. 1, § 11, Infliction of Mental Distress, at 37.

Conclusion

Bartow v. Smith, decided 22 years ago, is still the tort rule in Ohio. The true test for liability should be the *intention* of the wrongdoer, particularly in the light of his knowledge of the probable effects of his behavior on the other.

The Ohio criminal statute for assault and battery recognizes that a threat or a menace alone, without any overt act, can constitute an assault. In this writer's opinion tort liability should be extended to cover the same area as the criminal statute covers. In 1971, the civil courts of Ohio should review their conservative position as taken in the *Bartow* case, and modify the rule for recovery for verbal abuse and emotional disturbance and distress according to the principles of the "new tort."