DEBT COLLECTION HARASSMENT IN AUSTRALIA (Part 1)

BRUCE KERCHER*

I. HARASSMENT

The harassment of defaulting debtors by their creditors and debt collection agents has caused recent concern in Australia, New Zealand, Britain, and the United States.[1] This article examines the use of harassment by Australian creditors and collectors and the Australian law's reaction to that use. The American and British experience with abusive debt collection and the legal reactions to the practice are included for comparative purposes.

A. The Meaning of "Harassment"

Harassment is a particular type of extra-judicial debt collection. For reasons discussed below, creditors and collectors frequently find that it is more convenient to go outside the judicial system to apply coercive pressure to enforce the repayment of debts allegedly owing to them than to collect their debts judicially. The notion of force is central to non-judicial attempts to collect debts. Both harassing and non-harassing users of extra-judicial coercion aim to make it more unpleasant for a debtor to fail to pay their debts than to continue in default.

The term "harassment" is used to describe those methods of extra-judicial coercion which the person using the description finds objectionable. Harassing tactics are always extra-judicial and always coercive. They are distinguished from other forms of extra-judicial coercion by the nature of the method used. For example, a letter threatening to sue unless a debt is paid, is non-harassing extra-judicial coercion. If the letter threatened death, there would be almost universal complaints that the threat is unfair

* Faculty of Social Sciences, University of Kent at Canterbury.

1 For example, Australia: D. St. L. Kelly, *Debt Recovery in Australia* (1977) ch. 9; New Zealand: "Debt Collection—the End Doesn't Justify these Means" 110 *Consumer* September 1974 p. 241; Great Britain, *Report of the Committee on the Enforcement of Judgment Debts* (1969) Cmnd. 3909 par. 1235 ("the Payne Report"); United States: D. Caplovitz, *Consumers in Trouble—A Study of Debtors in Default* (1974) pp. 163f., 177f. and 283f. discusses harassment as do many of the American articles mentioned in these notes. The Australian Law Reform Commission is examining debt collection harassment at present, and its final report is due in the first half of 1979.

and "harassing". The most common forms of harassment are deception, shame and publicity, fear and badgering.

There is no universally held meaning of the term "harassment"[2] since there is no universal agreement as to whether any particular action is unfair. While some observers would argue that deliberately causing mental distress to a debtor is "harassment", others argue that debtors impliedly assent to that distress by accepting credit and thus that the creditor's action is reasonable and non-harassing.[3]

The decision that a collection method is unfair and thus "harassing" is a value judgment which depends on the viewpoint of the observer. Creditors would have a more liberal view of collection practices than neutral observers, and even neutral commentators apparently bring their own social views to bear on the decision that a practice is unfair.

With this background, it is no more possible to find a universally accepted "fair" balance between the creditor's right to payment and the debtor's right to freedom from harassment, than it is to find an observer who is entirely free of political and social prejudices and beliefs. Debt collection is not a process that goes on in a social vacuum but is at the centre of commerce and the capitalist social system[4] and judgments about it are affected by wider social viewpoints.

Despite the lack of universal agreement on what is harassment, there is a basic core of practices which most people would apply to the term. Thus, it would be almost universally agreed that physical violence and constant telephone calls at night are harassing and unfair tactics. It is that common core of harassing tactics which is the subject of this article.

The other important issue in defining harassment is the distinction between the nature of the threat or action made and the effectiveness of that threat or action. "Harassment" is applied to certain *types* of extra-judicial coercion and does not necessarily say anything about the power of that coercion. Some seemingly unobjectionable collection methods, such as the threat to take legal action, can be powerfully coercive to a debtor who particularly fears the threatened action.

However, there is a link between harassment and the power of the threat made. Harassing tactics are usually very powerful forms of coercion and they are used by collectors because they are so powerful. A threat of physical violence, for example, while not *necessarily* powerfully coercive (karate experts might be unmoved), is usually a strong inducement to pay.

[2] Caplovitz, ibid. p. 178.

[3] The latter argument is put by D. L. Nelson, "Mental Distress from Collection Activities" (1965) 17 *Hastings L. Jnl.* 369, 371. The argument contains a number of dubious assumptions: that debtors are "wrongdoers", that they "voluntarily" choose to take credit and that they impliedly consent to the application of distress. Despite these flaws, the argument has been accepted in some United States courts: *Fraser* v. *Morrison* 39 Hawaii 370, 375 (1952) and *Gouldman-Taber Pontiac* v. *Zerbst* 213 Ca. 682, 684; 100 S.E. 2d 881, 883 (1957).

[4] T. G. Ison, "Small Claims" (1972) 35 *Modern L. Rev.* 18, 23-24.

B. The Incidence and Evidence of Harassment

1. Direct Evidence

In the absence of a general survey of consumer debtors, there is little direct evidence about the rate of harassment in Australia.[5] One source which might offer evidence of the level of debtor harassment is the New South Wales Privacy Committee, which handles complaints about debt collector activity. The Committee only receives about twenty complaints per year from debtors about collector harassment, ten of which are over threats to credit ratings.[6] The Committee is surprised at this low rate, since repossession practices, continual calls, and disclosure of debts to employers and others have been the cause of "many" complaints outside New South Wales.[7]

The low level of complaints to the Committee does not allow the comfortable conclusion that harassment does not occur on a large scale in New South Wales. The Committee has never advertised that it processes complaints about harassment[8] and debtors may not be aware of its existence. Creditors might also deliberately restrict harassment to the ignorant, who are unlikely to complain to government agencies.[9] Furthermore, not all harassment involves the apparent major concern of the Committee, invasions of privacy. Deception and fear are two major forms of harassment which would concern the Committee, but the debtors concerned might not realise that privacy issues are involved and thus that the Committee would be interested. Debtors are also unlikely to complain to a public authority about an invasion of their privacy, since *ex hypothesi* it is their privacy they wish to protect. This will be aggravated where the complainant is embarrassed about being in debt trouble.

What evidence there is of a major harassment problem in Australia is either *ad hoc* or indirect. The fact that there are specific statutes regulating harassment might show that a problem has existed in the past.[10] There is, however, some direct evidence of the rate of harassment and the author has obtained evidence of a wide variety of harassing tactics by simply asking casual questions of acquaintances.[11] There are at least 12 prosecutions per

[5] Kelly, op. cit. p. 131.
[6] Interview, 2nd June, 1977 with Mr G. Greenleaf, Research Officer of the Committee. The author's request for information about the rate of debt collection licence cancellation was met with the response that those statistics are not compiled: letter 24th June, 1977 from F. H. Travis, Officer in Charge, Public Relations Branch, N.S.W. Police Department.
[7] New South Wales Privacy Committee, *Annual Report 1976* p. 19.
[8] Greenleaf interview.
[9] Interview 1st June, 1977 Mr A. Asher, ex- of Dun and Bradstreet, now of Australian Consumers' Association.
[10] New South Wales Department of Technical Education, *Mercantile Agents Course* (undated), "Introduction" p. 10.
[11] Including threats of physical violence, a number of types of deception, badgering and threats to cut off the telephone service of one person because a Telecom debtor was staying at his house.

year under the *Unauthorised Documents Act*, 1922 (N.S.W.)[12] which covers only one of very many types of harassment (simulated legal process); and a very commonly used Australian collection device is the sale of collection letters on collection agency letterhead for posting by creditors,[13] a deceptive and thus possibly "harassing" tactic. All of those facts suggest that unfair debt collection tactics are widely used in Australia.

Direct evidence of the *types* of harassment used by Australian collectors and creditors is more easily obtained and is widely reported in Australian publications. The clearest example of deception is the use of simulated legal process, collection letters which appear to be summons forms and which are designed to deceive the debtor into thinking that process has been served. The forms are in common use in Australia[14] and their use is not restricted to collection agencies.[15] Other deceptive tactics used by Australian collectors and creditors are: the use of bogus collection agencies to deceive debtors into thinking that the collection process has gone further than it has;[16] the sale of collection agency letterheads to creditors;[17] the use of solicitor letterheads by collectors;[18] false representations of the consequences of indebtedness;[19] collectors who wear uniforms in an apparent attempt to establish official status;[20] collectors who tell debtors that they (the collectors) will lose their jobs if a debt is not paid;[21] and the incorporation of collection agency fees in claims for payment when those fees are not due.[22]

The second major type of Australian harassment is the use of shame and publicity. Examples known to the author are: the use of a radio-telegram to seek payment of a debt;[23] the sending of letters with messages on the outside of the envelope publicising the debt;[24] parking vans outside the debtor's house with messages publicising the debt;[25] threatening to

12 Interview, 2nd June, 1977, Detective Carter of the N.S.W. Police Fraud Squad.
13 Interview, 3rd June, 1977, Ms M. Turner, Collection Manager, College Mercantile Agency, North Sydney.
14 Kelly, op. cit. p. 137; Australian Government Commission of Inquiry into Poverty, *Law and Poverty in Australia—Second Main Report* (1975) pp. 156-8 ("Sackville Report"); W. G. Hazlett, *The Recovery of Small Debts* (Monash University thesis) (1973) p. 29; Asher interview.
15 Broadmeadows Legal Service, *Waltons Survival Kit* (undated) pp. 106-7.
16 Sackville Report, op. cit. p. 157; Kelly, op. cit. p. 132. Bogus firms also exist in Britain: Rock, "Observations on Debt Collection" (1968) 19 *British Jnl. of Sociology* 176, 181; and the United States, Beckman and Foster, *Credits and Collection* (8th ed. 1969) p. 538.
17 Kelly, ibid. p. 143.
18 Ibid.; Hazlett, op. cit. p. 29.
19 Kelly, ibid. pp. 134-5; Sackville Report, op. cit. pp. 156-8.
20 Asher interview.
21 Personal experience of Mr P. Howell, Macquarie University Law School, interview, June, 1977.
22 Kelly, op. cit. p. 134; Sackville Report, op. cit. p. 157; Hazlett, op. cit. p. 30.
23 Letter to author from the debtor concerned, 19th June, 1977.
24 Asher interview.
25 Ibid.; Kelly, op. cit. p. 132 n. 9. The practice has apparently waned recently: Asher ibid. and telephone interview, 1st June, 1977, Sgt. Williams of N.S.W. Police Fraud Squad.

place the debtor on a blacklist distributed to traders;[26] leaving calling cards which reveal the nature of the call at the debtor's home where others can see them;[27] and threatening to "fully investigate your employment and financial status".[28]

The most serious example of the use of publicity is employer contact, a practice which is apparently beginning to be used in Australia.[29] Creditors argue that employers have an interest in knowing that one of their employees is less than honest[30] and claim that by contacting the employer they are fulfilling a social duty. The argument is obviously weak: the only reason for contacting an employer is to enlist his help in coercing the debtor. The effects of employer contact on debtors can be severe. About ten per cent of garnisheed debtors in Sydney are dismissed by their employers,[31] and, presumably, the employment relationship of many debtors whose employers are told of their unpaid debts would be adversely affected.

The third type of unfair collection is the use of fear. Threats to a debtor's credit rating are very commonly made in Australia.[32] The New South Wales Privacy Committee considers those threats to be unobjectionable if they are truthful warnings of possible consequences.[33] Kelly objected to those threats due to their powerfully coercive nature,[34] plausibly arguing that they tend to humiliate and embarrass the debtor, to induce him to act precipitously and to abandon good defences. He felt that debtors generally know of the importance of their credit rating, and reminders should come from the courts or counselling services, not from creditors and collectors.[35]

Even more powerful are threats of imprisonment (which are the basis of debt collection in South Australia[36]) and the threatened use of physical violence. Fortunately violence is rarely used in Australia,[37] though it is not unknown: one Sydney collector told the author that some New South Wales agencies employ "heavies" to collect debts;[38] and another Sydney agency employs "bikies" (who are told to wear their leather jackets and "act tough") to collect debts from non-English speaking migrants.[39]

[26] Sackville Report, op. cit. p. 157.
[27] New South Wales Privacy Committee *Annual Report, 1975* p. 33.
[28] Privacy Committee *Annual Report 1976*, op. cit. p. 39.
[29] Greenleaf interview.
[30] K. M. Block, "Creditor's Pre-Judgment Communication to a Debtor's Employer: an Evaluation" (1969-1970) 36 *Brooklyn L. Rev.* 95, 97.
[31] Kelly, op. cit. p. 14.
[32] Asher interview; Greenleaf interview.
[33] Privacy Committee, *Annual Report, 1975*, op. cit. p. 34.
[34] Kelly, op. cit. p. 134.
[35] Ibid.
[36] J. White, *Fair Dealing With Consumers: a Report to the Attorney-General, South Australia* (1975) pp. 52-53.
[37] Asher interview; Turner interview.
[38] Turner interview.
[39] Howell interview.

The final commonly used Australian tactic is to badger debtors with late night and frequent telephone calls or frequent visits,[40] sometimes accompanied by obscene language and name calling.[41] Australian collectors do not stop at the debtor. One collector visited the neighbour of a debtor six times in a short period to obtain information and place indirect pressure on the defaulting debtor.[42] The collector's apparent object was to annoy the neighbour who would react by asking the debtor to pay.

2. COLLECTION MANUALS

Strong evidence of the existence of harassment in Australia is provided by the recommendations of Australian manuals of debt collection practice. While it does not necessarily follow that collectors use the recommended practices, it can be reasonably assumed that some do and that some collectors would go even further than the recommendations.

The Mercantile Agents Course of the New South Wales Department of Technical Education was planned in conjunction with the Institute of Mercantile Agents, a body whose self-confessed aim is to improve the image of debt collectors.[43] The institutions responsible for the Course would lead one to assume that the Course would oppose the use of harassment.

However, the Course states that among the basic "motivating factors" to manipulate payment are the debtor's need for survival, his anxiety and his fear.[44] While the "fear" mentioned in the Course is ambiguously stated and possibly innocent, the Course goes on to make specific recommendations bordering on harassment. Some of the recommended "punch lines" to be used by collectors are

> "It took you years and years of hard work and sacrifice to build up the good [credit] record you own—are you going to jeopardize it all with this one bad bill?"
>
> "What is your credit rating worth to you? Surely it's worth more than this account isn't it?"
>
> "I don't know of a living soul who would ever accuse you of dishonesty. But really, when you buy something on time, and don't pay for it, its the same thing!"
>
> "Your boss pays his bills on time, and I think I know how he feels about people who don't. He has some slow accounts on his books too."
>
> "Nobody wants to hire a fellow with bills in a collection agency. For one thing he is usually thinking about his bills instead of his job."[45]

40 Sackville Report, op. cit. p. 157.
41 Ibid.
42 Personal experience of Mr M. Noone, Senior Lecturer in Law, Macquarie University, interview, August 1977.
43 Interview, 9th December, 1977, Mr Small, Secretary of the Institute of Mercantile Agents Ltd.
44 *Mercantile Agents Course*, op. cit. "Collection Techniques" chapter, p. 8.
45 Ibid. p. 9.

> "You have to have insurance to drive your car, and insurance companies are checking people's credit ratings pretty closely before renewing policies."[46]

The Course does not offer these phrases as suited for every occasion but hopes that

> "they will serve to open the imagination of the collector so that he, in turn, may take parts of these and add some of his own. When you find a phrase that works, write it down and use it suitably in every similar situation. If it works, that's what counts!"[47]

While not every observer will find threats to credit ratings offensive, the veiled accusation of dishonesty and the veiled threat to inform the debtor's employer of the debt are more widely seen to be unfair.

Scott's *Credit Practice and Procedure for Australian Executives* is published by a reputable business publisher, Rydge's, but has a chapter on "Some Unusual Collection Techniques" which recommends even more objectionable tactics. Among other things, the book recommends: that salesmen falsely claim that they will lose commission if a debt is not paid; following a debtor home; using the debtor's wife to badger him;[48] "using a sexy secretary" to embarrass him; persuading Postmasters to illegally reveal a debtor's address; falsely posing as a friend;[49] threatening to tell police about a dishonoured cheque when the creditor has no right to do so;[50] and implies that threats should be made by telephone where it is unlikely that the creditor will be caught;[51] and recommends deceiving the debtor's acquaintances in tracing.[52] To the reply that some of these practices might be unethical, Scott offers the rejoinder "Set a thief to catch a thief",[53] a doubtful moral principle even if debtors were "thieves".

Hogan's *Debts*, another Australian book of advice to collectors, recommends deception in tracing "absconding" debtors[54] and using the debtor's wife as a partner in collection.[55]

3. Overseas Evidence

Supporting evidence for the level of harassment in Australia comes from overseas sources. While foreign practices are not necessarily followed in

[46] Ibid. p. 10.
[47] Ibid. p. 9.
[48] Scott, *Credit Practices and Procedures for Australian Executives* (1970) p. 133.
[49] Ibid. p. 134.
[50] Ibid. p. 135: "Although this is only possible where the cheque is in settlement of a cash sale, few people would be aware of this fact—and why should his creditor enlighten him?" is Scott's comment.
[51] Ibid. p. 138.
[52] Ibid. p. 144.
[53] Ibid. p. 134.
[54] Hogan, *Debts* (1972): at pp. 16-7 Hogan recommends claiming to neighbours that the collector must contact the debtor as a matter of urgency; at p. 22 the collector is urged to claim that he is holding mail for the debtor.
[55] Ibid. p. 18.

Australia, British and American jurisdictions do have similar cultural backgrounds and legal systems to Australia. Most importantly, American collection manuals make remarkably similar recommendations to those made in Australian manuals. Beckman and Foster, an American collection manual, describes United States collection practices in detail. The description almost precisely applies to the Australian system, even down to the use of "bogus" collection agencies to avoid licensing controls.[56] That manual recommends the use of fear and threats to credit ratings,[57] as does the New South Wales Mercantile Agents Course.

The Mercantile Agents Course is apparently a direct copy of the training manual published by the American Collectors' Association. Cooper et al. extract several pages of the American manual[58] and the Mercantile Agents Course reads word for word with that extract.[59]

While American and Australian commercial pressures might differ, so introducing a possible difference in the rate of harassment, the fact that the American and New South Wales training manuals recommend the same dubious practices is evidence that the types of harassment and the rate of its use in the two countries is similar. Thus, American surveys of the rate and types of harassment have some relevance for Australia.

Caplovitz's major survey[60] of defaulting debtors sought information about harassment. The 1,331 consumers surveyed were all default judgment debtors. Their creditors were therefore inclined to use judicial coercion as at least a partial substitute for extra-judicial methods. Despite the fact that this group is thus likely to have been harassed to a less than normal degree, 59 per cent of them experienced some degree of "harassment" on a conservative definition of the word.[61] That very high figure in essentially similar jurisdictions throws heavy doubt on the importance to be given to

[56] Beckman and Foster, op. cit. p. 538. British and American examples of harassment are not included in this article, but are similar to the Australian tactics described above. For examples of British tactics, see the Payne Report, op. cit. pars. 1232-5 and the Crowther Report (Great Britain, *Report of the Committee on Consumer Credit* (1971) Cmnd. 4596) par. 16.10.28. American examples are listed by Beckman and Foster, op. cit. pp. 558f.; M. Halloran, "Collection Practices (Garnishment, Deficiency Judgments etc.)" (1971) 26 *The Business Lawyer* 889, 892-5; Nelson, op. cit. pp. 373-4; R. E. Scott and D. M. Strickland, "Abusive Debt Collection—a Model Statute for Virginia" (1974) 15 *William and Mary L. Rev.* 567, at 568, 585; Clark and Fonseca, *Handling Consumer Credit Cases* (1972) pp. 116-7; Greenfield, "Coercive Collection Tactics" [1972] *Washington Univ. L. Qtly.* 1 at 1-5, 63-9; S. D. Shenfield, "Debt Collection Practices: Remedies for Abuse" (1968-69) 10 *Boston College Industrial and Commercial L. Jnl.* 698, 704-6; Martin, "A Creditor's Liability for Unreasonable Collection Efforts" (1966-67) 9 *South Texas L. Jnl.* 127, 139; Dorfman (ed.) *Consumer Survival Kit* (1975) pp. 199-203; and M. Halloran in "Summary of Hearings on Debt Collection Practices" (1971) 88 *Banking L. Jnl.* 291, 292.

[57] Ibid. pp. 557-8.

[58] G. Cooper et al., *Law and Poverty—Cases and Materials* (1973) pp. 1095-7.

[59] *Mercantile Agents Course* op. cit., "Collection Techniques" pp. 9-12. The passage includes the extracts used at notes 16-8 above. Caplovitz, op. cit. pp. 179-80 extracts the same passages from the American manual.

[60] Report in Caplovitz, ibid. at pp. 180-2.

[61] Ibid. p. 182.

the low number of complaints received by the New South Wales Privacy Committee.

The most frequently used method of harassment found by Caplovitz has recently become noticeable to the New South Wales Privacy Committee:[62] 36 per cent of Caplovitz's sample suffered employer contact by creditors;[63] 29 per cent received insulting letters, 16 per cent were harassed by contact or threatened contact with friends or relatives and 15 per cent were subjected to bad language or name calling.[64]

Caplovitz's figures are supported by another American survey of legal services attorneys. Of forty five designated consumer problems, consumer harassment was the most frequent consumer client problem that occurred in their practice. Eighty seven per cent of the attorneys said that harassment arose either "often" or "very often" and 49 per cent said it arose "very often".[65]

In Britain, the knowledge of the level of harassment is as poor as it is in Australia. The Payne Report was non-committal on the level of harassment in Britain, though the Committee was

> "satisfied that some creditors are prepared to go to unacceptable lengths to harass and intimidate debtors in order to collect their debts."[66]

The Report attributed the general lack of knowledge about the various reprehensible forms of pressure which are employed and about their harmful effects on debtors and their families, to the fact that the devices are generally lawful. Being lawful, there is no point in debtors complaining about them.[67] That conclusion is equally valid for Australia.

4. The Users of Harassment

There is little Australian evidence about which creditors and collectors use harassment. The author has been told that harassment is engaged in by finance companies, by small collection agencies who employ "heavies" and by "low income retailers".[68] In Britain there is even evidence of harassment by a nationalised Gas Board.[69]

Again, Caplovitz's evidence is the most detailed and reliable. His survey found[70] that the highest number of complaints about harassment concerned the actions of collection agencies, followed in descending order by small loan companies, door-to-door salesmen, finance companies, low income

62 Greenleaf interview.
63 Caplovitz, op. cit. p. 182, Table 10.1.
64 Ibid.
65 Reported in J. M. Connolly, "Recent Statutes Regulating Debt Collection" (1973) 14 *Boston College Industrial and Commercial L. Rev.* 1274, 1275.
66 Payne Report, op. cit. par. 1235.
67 Ibid. par. 1231.
68 Turner interview; Asher interview.
69 Jones (ed.), *Privacy* (1974) pp. 195-6.
70 Caplovitz, op. cit. p. 183.

retailers, banks, car-dealers, general retailers and credit unions. Even the credit union complaint level was high: 41 per cent of the surveyed debtors who owed money to credit unions were harassed. Once more, Caplovitz's figures can be no more than a general guide to the Australian situation.

5. CONCLUSION—THE LEVEL OF HARASSMENT

Although the above evidence is not based on a general survey of Australian debtors, there is no doubt that harassment is a feature of Australian collection. The level of harassment is uncertain, though what evidence there is warns us against being complacent. Even if the level is generally low, the problem should not be ignored. As shown below, the effects of harassment and coercion on debtors and their families can be extremely serious and, like criminal actions against the person, should not be ignored even if comparatively few people are affected.

C. The Causes of Harassment

Since harassment is an extreme form of extra-judicial coercion, the factors favouring its use are basically the same as those causing other types of non-judicial coercion. The primary factors in the decisions to use extra-judicial coercion and harassment are cost and time. It is cheaper and more effective to make a threatening telephone call than it is to issue a summons and go through the full procedure of judicial coercion,[71] and there is little risk of being caught if the creditor harasses the ignorant and poor.[72] Similarly, harassment will be a tempting extra-judicial remedy if a debt is legally unenforceable.[73] Thus, a debtor's right to defend a claim can, ironically, be a contributing factor towards harassment.[74]

These factors contribute towards the decision to use harassment, but they do not explain why some creditors and collectors use harassment and others do not.

It has been claimed that some creditors become exasperated and use harassment partly to punish a debtor who they feel is being obstinate,[75] but that is not a full explanation. A further explanation can be found in the notion of pressure. Harassment is an attempt by a collector to apply extreme pressure on the debtor and it might be caused by pressures felt by collectors. When the pressure for collection rises, collectors might conceivably pass that pressure on to the debtor in the form of harassment.

The present recession may be pushing many small businesses towards insolvency and thus placing pressure on their liquidity. In that situation,

[71] R. M. Berger, "The Bill Collector and the Law—a Special Tort, at Least for a While" (1968) 17 *De Paul L. Rev.* 327, 328.
[72] Ibid. p. 329.
[73] Ibid.; Halloran, op. cit. p. 889.
[74] Berger, op. cit. p. 329 n. 8.
[75] Asher interview.

it is likely that small business creditors will become desperate to collect outstanding debts and will be inclined to use extreme pressure to do so.

The pressure on creditors is increased by the present *de facto* "first in first served" priority system among creditors. Short of bankruptcy, the creditor who can first obtain payment defeats his fellow creditors. In the race for the debtor's assets, the collector who places the most pressure on the debtor for payment is likely to be paid first, and thus harassment is likely.[76] Similarly, the apparently fierce competition between collection agencies for business is likely to lead some to take desperate measures to earn business and commission.[77] The fact that collection agencies are paid on a commission basis itself encourages harassment through its "results or nothing" effect.

Pressures on local offices of large creditors to lower their bad debt levels may also be passed on in the form of harassment.[78] On an even smaller scale, there may be pressure on an individual person doing the collection work for a creditor. The author was told that the position of collector in Australian finance companies is the least popular of positions and usually is filled by the least competent staff.[79] Collection officers obtain promotion away from the collection desk by "good" results, that is, by showing a high collection rate. Collectors see debtors as the "dags" who prevent their escape into a better job and their resentment for the "dag" means that they are not inhibited by sympathy for the debtor. Collection becomes an unpleasant, impersonal, high pressure job in which harassment is commonly used to boost results.[80]

Bureaucratic creditors who place pressure on local offices and individuals can truthfully claim that they have no official policy of harassment. However, they must be held responsible for its use, since it is apparently the original application of pressure for "results" which is the underlying cause of extreme collection tactics in many cases.

D. The Effects of Harassment

The general tactic of harassing debt collection is that the collector looks for the debtor's weakness and exploits that,[81] whether it is middle class respectability or the almost universal fear of physical violence. In exploiting those weaknesses, the creditor or collector causes a number of serious adverse consequences to the debtor. Some of those consequences are a direct result of the harassing tactics used, but others occur as a result of

[76] Scott and Strickland, op. cit. p. 568.
[77] Turner interview.
[78] T. C. Homburger, "Harassment of Borrowers by Licensed Lenders" (1965) 1 *Columbia Jnl. of Law and Social Problems* 39, 46.
[79] Letters from Mr M. Gill, a then finance company employee, now a journalist for the *Newcastle Morning Herald*, dated 15th June, 1977 and 29th June, 1977.
[80] Ibid.
[81] Halloran, op. cit. p. 893.

all types of extra-judicial coercion including those which most commentators would not see as unfair in themselves.

The only thorough survey of the ill effects of harassment was Caplovitz's 1967 American study. Caplovitz found a strong correlation between harassment and job loss or worry about job loss;[82] between harassment and marital trouble;[83] and between harassment and increased levels of ill-health.[84] Others have made the obvious comment that harassing contact with the debtor's friends, neighbours and relatives inevitably affects the debtor's social relationships.[85] Other individual harassing tactics each have adverse effects on the debtor. For example, it has already been pointed out that employer contact can seriously affect the debtor's employment relationship.

Those consequences are all the result of the particularly unfair non-judicial coercion applied. Non-judicial coercion itself (of which harassment is just one class) has further adverse consequences which can not be fully explored here: coercion is self-generating, causing more patient creditors to join in the race for the debtor's assets once a run begins; coercion invariably involves the infliction of some degree of suffering on the debtor which he is forced to escape by paying the debt; non-judicial force causes debtors to abandon their defences to the debt claim to avoid the pressure applied; and non-judicial coercion offers no formal opportunity to show that default was due to causes other than bad faith. While harassment has these further consequences, this article is focused on the unfairness of the particular type of extra-judicial tactic used, rather than on the possible unfairness of all non-judicial coercion.

II GENERAL CRIMINAL AND CIVIL REMEDIES FOR HARASSMENT

This part describes and criticises the remedies provided by the general criminal and civil law to harassment of debtors by creditors and collectors. Commercial statutes and statutes specifically dealing with debt and collection are not discussed here, but are examined in Part III.

1. Criminal Law

A. THE CRIMES

A number of Australian criminal laws are potentially useful for harassed debtors, the primary crimes being assault, extortion (demanding with menaces) and conspiracy.

[82] Caplovitz, op. cit. p. 278.
[83] Ibid. p. 285.
[84] Ibid. p. 283.
[85] P. H. Hubbard, "Recovery for Creditor Harassment" (1967-68) 46 *Texas L. Rev.* 950, 963.

Assault, the threat to interfere physically with a person, is punishable by two years of imprisonment in New South Wales: *Crimes Act*, 1901, section 16.[86] Some of the harassment situations mentioned in Part I would constitute a threat of physical injury. However, as shown there, relatively few collectors use threats of violence as a collection tactic, and those who do threaten violence usually do so orally, making assault charges difficult to prove. The low number of potential cases, and the difficulty of proof of assault make this crime a weak response to harassment. The tort of assault is discussed below.

Extortion appears at first sight to be a most appropriate remedy for coercive collection. The essence of both harassing and non-harassing coercive collection is a threat: "pay up or else". The crime of extortion is essentially similar, involving a demand to pay money or otherwise pass property to the demander, accompanied by the threat of an "or else".[87] The threats required as elements of the various New South Wales crimes vary: section 100 of the *Crimes Act* requires a threat to publish information; sections 101 and 102 require a threat to accuse a person of having committed a crime, and sections 99 and 100 require demands "with menaces or any threat". "Menace" includes not only threats to injure a person or property but also threats to accuse of misconduct not amounting to a crime.[88]

The primary limitation on the use of extortion as a criminal remedy for harassment, is that the crimes concerned have restrictive *men rea* requirements. Section 99 requires an "intent to steal"; section 100 requires that a threat be made "without reasonable cause", section 100A requires an "intent to cause gain" and an "unwarranted demand", that is the absence of a "belief that he has reasonable grounds for making the demand" (section 100(2)(c)); and sections 101 and 102 require an intent to extort or gain property. In each case, the *mens rea* requirement means that an honest belief that a debt is due would be sufficient to escape liability. Although it might be true that in many cases debtors have valid defences to claims made against them, a creditor must *know* that he has no claim before being guilty of extortion. An honest belief that a claim is valid suffices even if the claim is unfounded in law.[89] It is suggested that few

[86] In other states assault is rendered a crime by: Qld: *Criminal Code Act* 1899, ss. 246 and 335; S.A.: *Criminal Law Consolidation Act* 1935-74, ss. 39-47; Tas.: *Criminal Code Act* 1924, ss. 182-4; Vic.: *Crimes Act* 1958, ss. 37-43; W.A.: *Criminal Code Act* 1913, c. XXX.

[87] A. A. Leff, "Injury, Ignorance and Spite—the Dynamics of Coercive Collection" (1970) 80 *Yale L. Jnl.* 1, 18-9 pointed out the similarity between coercive collection and extortion.

[88] R. Watson and H. Purnell, *Criminal Law in N.S.W.* (1971), Vol. 1, p. 149. The other states' legislation is: Qld: *Criminal Code Act* 1899, ss. 414-7; S.A.: *Criminal Law Consolidation Act* 1935-74, ss. 159-64; Tas.: *Criminal Code Act* 1924, ss. 241-2; Vic.: *Crimes Act* 1958, s. 87; W.A.: *Criminal Code Act* 1913, ss. 396-7.

[89] Watson and Purnell, ibid. citing *R.* v. *Bernhard* [1938] 2 K.B. 264 and *R.* v. *Gilson* (1944) 29 Cr. App. R. 174.

creditors and collectors know that their claims are defensible even if they frequently are.

As a consequence, creditors can make outrageous threats with impunity (provided that no other laws are breached) if they honestly believe that the debt is due. More accurately, a reasonable doubt about a creditor's mental state is sufficient to leave debtors without the criminal remedy of extortion for collection behaviour involving threats.

Despite similar limitations in the United States, American collectors are occasionally prosecuted for the crime of extortion.[90] It has been suggested in the United States that to threaten a debtor with criminal prosecution and to threaten bankruptcy proceedings are extortionate, and that even a threat to a debtor's credit rating might suffice.[91]

Criminal defamation is also possibly committed by Australian collectors. The crime is enacted in New South Wales in the *Defamation Act*, 1974, section 50.[92] The elements of the crime are similar to the elements of the tort of defamation which is discussed below. Briefly, the elements of defamation are: (i) publication, (ii) of defamatory material, (iii) relating to a defamable person which (iv) is not covered by a relevant defence. Defamatory material has been defined as material "which tends to lower a person in the estimation of his fellow men by making them think the less of him".[93]

Criminal prosecutions for defamation must meet a strict *mens rea* requirement: the prosecution must prove *either* intent to cause serious harm to any person; *or* where it is probable that the publication of the defamatory matter will cause serious harm to any person, knowledge of that probability (*Defamation Act*, section 50(1)). It is an open question whether harm to a debtor's credit rating (the most likely result of a collector's statement that the debtor is a bad payer), is sufficiently "serious" to constitute the crime. Even if the *mens rea* element is established, a criminal prosecution must also rebut the various tort defences which apply equally to criminal defamation (s. 51(1)). It is shown below that those defences are serious obstacles to debtor-plaintiffs. Due to the

90 Beckman and Foster, op. cit. p. 559; Halloran, op. cit. p. 896; J. B. Birkhead, "Collection Tactics of Illegal Lenders" (1941) 8 *Law and Contemporary Problems* 78, 87; Homburger, op. cit. p. 48; "Collection Capers: Liability for Debt Collection Practices" (1957) 24 *Univ. Chicago L. Rev.* 572, 578; "Scope and Adequacy of Existing Remedies for Improper Debt Collection Activity" [1959] *Washington Univ. L. Qtly.* 410, n. 3; Scott and Strickland, op. cit. p. 573; J. J. Vichich, "The Problem of Debt Collection in Pennsylvania" (1973) 12 *Duquesne L. Rev.* 69, 88.

91 Beckman and Foster, ibid.

92 In the other states defamation is rendered criminal by: Qld: *Defamation Law* 1889, ss. 8 and 9, and *Criminal Code Act* 1899, s. 370; S.A.: *Wrongs Act* 1936, s. 8; Tas.: *Criminal Code Act* 1924, c. XXIII; Vic.: *Wrongs Act* 1958, s. 10; W.A.: *Criminal Code Act* 1913, c. XXXV. In three states, the threat to publish defamatory material, or the publication of defamatory material, with the intention to extort property is a crime: S.A.: *Criminal Law Consolidation Act* 1935-74, s. 164; Vic.: *Wrongs Act* 1958, s. 9; W.A.: *Criminal Code Act* 1913, s. 363.

93 J. G. Fleming, *The Law of Torts* (5th ed., 1977) p. 528.

strength of these defences and a reluctance to prosecute criminal defamation where civil claims are available, prosecutions for criminal defamation are extremely rare in Australia.[94]

Where an Australian collector uses deception to collect a debt, he might be guilty of the crime of obtaining by false pretences: (N.S.W.) *Crimes Act*, 1900, sections 179-180.[95] The elements of the offence are (i) obtaining money or property, (ii) by falsely pretending a fact to be true, (iii) with intent to defraud. In New South Wales, a false pretence about the legal position of the parties is not sufficient,[96] so excluding those cases where a collector falsely represents that a debtor will be gaoled if he does not pay a debt. The *mens rea* requirement is also a restriction, since "intent to defraud" would exclude collectors who believed that a debt is validly due.

A miscellany of other statutory crimes might also be committed by Australian collectors: larceny ((N.S.W.) *Crimes Act*, 1900, section 117) in "repossession" cases; perjury and the swearing of false oaths (*Crimes Act*, Part VII) in cases where a process server lies about the manner of service; and the minor crime of disturbing occupiers of premises ((N.S.W.) *Summary Offences Act*, 1970, section 18)[97] where the collector visits the debtor's home for payment. The latter crime is potentially useful, but the maximum penalty is only $50, and it is a defence if the defendant did the act "with reasonable excuse" (*Summary Offences Act*, section 20). It may be that a visit for the purpose of collecting a debt is made "with reasonable excuse". The offence appears to be aimed at children who ring door-bells to create a nuisance.

Apart from these specific crimes, there is one very general crime available to the prosecution in Anglo-Australian law: conspiracy. A case which illustrates the application of conspiracy in the debt area and which warns against reliance on common law crimes to prevent harassment is *D.P.P.* v. *Withers*[98], a House of Lords decision.

The facts in *Withers* were directly relevant to the practice of tracing the whereabouts of "absconding" debtors by the use of deception. In the case, private investigators obtained confidential information about debtors and prospective debtors from banks, building societies, and government departments. They obtained the information by pretending to be other branches or departments of the same institution.

94 Australia. Law Reform Commission. *Defamation: Background Paper on the Present Law and Possible Changes* (1977), par. 6.2.

95 In other states: Qld: *Criminal Code Act* 1899, c. XL; S.A.: *Criminal Law Consolidation Act* 1935-74, s. 195; Tas.: *Criminal Code Act* 1924, ss. 250-2; Vic.: *Crimes Act* 1958, ss. 81-2; W.A.: *Criminal Code Act* 1913, c. XL.

96 Watson and Purnell, op. cit. p. 225. Cf. *Crimes Act* 1958 (Vic.) s. 81(4).

97 The section provides that "A person who disturbs an occupier of premises by ringing a door-bell [etc.] to arouse the occupier is guilty of an offence."

98 [1974] 3 All E.R. 984; [1974] 3 W.L.R. 751.

On being convicted of conspiracy to effect a public mischief, the defendants appealed unsuccessfully to the Court of Appeal, but then went to the House of Lords.

It was unanimously held by the House that there is no such offence as conspiracy to effect a public mischief.[99] Their Lordships felt that it would be improper to create a new crime, that being the function of the legislature.[100]

Some of their Lordships did express the *obiter* view that the facts of this case might have supported a conviction on the existing ground of conspiracy to defraud.[101] However, it was held that the summing up had misled the jury,[102] and the appeals by the defendants were allowed.

Although the result in *Withers* went against the debtors concerned, the case does support the possibility of the use of conspiracy to defraud in tracing cases. It may be though, that the offence is only committed where a collector deceives "public officers". Lord Kilbrandon felt that the term might not include bank and building society employees.[103] His Lordship also felt that where a government employee consciously assists a collector, it is doubtful whether the collector is guilty of conspiracy to defraud.[104]

The exclusion from the offence of situations involving "helpful" public servants and employees of "private" institutions such as banks and building societies would remove much of the impact of the offence on collection activities. Lord Kilbrandon's argument that banks are "private" institutions is, it is submitted, anomolous, since banks perform public tasks and frequently retain confidential information, the secrecy of which is as important to debtors as their public service files. It has been suggested that the correct view is that the public nature of the duty, rather than the official's public status is decisive.[105] On that view, where banking officers perform "public" tasks, commission of the offence is possible.

B. THE LIMITATIONS OF THE GENERAL CRIMINAL LAW

Withers illustrates a major limitation on the use of the general criminal law to deal with the particular facts of coercive collection. Lord Simon raised the perennial issue of "dynamism" in the law. He felt[106] that dynamism was often valuable in tort cases such as *Rylands* v. *Fletcher*[107] or *Donoghue* v. *Stevenson*[108] but pointed out the dangers of a dynamic approach to criminal law

[99] Viscount Dilhorne at [1974] 3 All E.R. 984, 991; Lord Simon p. 1004; Lord Kilbrandon pp. 1008-9.
[100] Viscount Dilhorne p. 992; Lord Simon p. 995.
[101] Viscount Dilhorne p. 992; Lord Diplock p. 994; cf. Lord Kilbrandon p. 1009.
[102] Viscount Dilhorne p. 992 (Lord Reid concurring); Lord Kilbrandon pp. 1009-10.
[103] Lord Kilrandon p. 1009.
[104] Ibid.
[105] P. Gillies, "The Offence of Conspiracy to Defraud" (1977) 51 *A.L.J.* 247, 253.
[106] *D.P.P.* v. *Withers* [1974] 3 All E.R. 984, 1000.
[107] (1866) L.R. 3 H.L. 330.
[108] [1932] A.C. 562.

> "But the resultant potentiality of dynamism enjoins that the generalising process should be used with special caution and advertance in the criminal law."[109]

Thus while there is no objection to applying new facts to an old crime, we cannot expect a dramatic judge-made breakthrough in the criminal law due to its peculiar need for certainty. It is a strong judicial policy that the criminal law should be fixed and predictable.[110]

Another major limitation on the use of the general criminal law to control collection is one of enforcement. Police and prosecuting authorities are frequently understaffed and when they have what they see as important crimes to deal with, quasi-civil matters such as harassment of debtors are likely to be given a low priority.[111] It has been suggested that United States prosecuting authorities also acquire a total acceptance of local collection methods.[112] Police there are likely to see disputed debts as civil matters which warrant attention in only the most extreme cases.

Enforcement is also rendered haphazard when the law being applied is not designed to specifically deal with the problem in issue. The general criminal law was not created with harassing debt collection in mind. Hence it is generally easy to find a collection device which avoids criminal liability, especially since the policy reasons expounded in *Withers* limit judge-made changes to criminal law to minor alterations. The result of these pressures is that:

> "Any effort to utilize existing state or federal statutory remedies to accomplish purposes for which they were not intended produces an inconsistency of application which induces a modification in the methods of abuse or harassment rather than a modification in the behaviour itself."[113]

The result of the lack of dynamism in the criminal law, the fact that it is potentially applicable to only a few harassment situations and its lack of enforcement is that the criminal law is an inadequate response to the problem of harassment. Australian prosecutions under the general law for harassment are non-existent. As a result, it cannot be seriously suggested that the general criminal law is a deterrent to Australian collectors. Even occasional prosecutions have been criticised in Australia for having limited

[109] Ibid.

[110] Scott and Strickland, op. cit. p. 591 point out the constitutional due process problems of ill-defined criminal laws in the U.S.A.

[111] When delivering a lecture on this topic at Macquarie University Law School, the author had this point confirmed by a police prosecutor (June, 1977). Detective Carter of the N.S.W. Police Fraud Squad confirmed that prosecutions under the Unauthorised Documents Act (discussed in Part III under "Unauthorised Documents Act") are considered minor tasks which are unpopular: telephone interview 1st June, 1977. See also, "Harassing the Debtor" (1973) *Consumer Reports* 136, 137; Scott and Strickland, op. cit. p. 590; Vichich, op. cit. p. 89 for confirmation of the similar American position.

[112] "Collection Capers", op. cit. p. 578.

[113] Scott and Strickland, op. cit. p. 575.

deterrent effect in the consumer area.[114] There can be no deterrent effect when there are no prosecutions and collectors do not know that their actions are technical breaches of the criminal law.

Despite American law suffering the same problems, a variety of state and federal general crimes have been the basis of collector prosecutions there. Prosecutions for extortion were mentioned above. Other general American criminal prosecutions have been for fraud, postal law offences,[115] telephone law offences, third degree robbery, conspiracy, mail fraud, obtaining by false pretences, assault, disturbing the peace, unauthorised practice of law and the unauthorised use of government names.[116] Despite the fact that American law is thus much more developed in the collection situation than Australian law, it has been found to be ineffective in presenting harassment.[117] There is no reason for believing that the general criminal law of Australian jurisdictions will be any more successful in solving the same problem.

2. Civil Law

There are two factors favouring the general civil law over the criminal law in the attempt to find a legal solution to harassment. Firstly, the onus of proof in civil law (the balance of probabilities) is less daunting than the criminal law's requirement of proof beyond reasonable doubt.

Secondly, the civil law, unlike the criminal law, is designed to generally compensate those who are harmed by harassment. While it can be strongly argued that those who are harmed should receive compensation as a matter of justice,[118] there is the further advantage that individual plaintiffs in the civil law have reasons of self-interest to motivate them to take their grievances to the courts. Both factors raise the hope that there will be more frequent actions in the civil sphere (and hence a stronger deterrent effect) than in the criminal area.

Common law torts offer a vast collection of possible remedies to harassed debtors. Although Anglo-Australian law has no general unfair debt collection tort (as does Texas), it may be possible to cover the field

114 C. Turner, "Fair Dealing with Consumers in South Australia" (1976) 2 *Legal Service Bulletin* 38, 39.

115 Which limit what may be placed on the outside of envelopes: Homburger, op. cit. p. 48 cites this crime.

116 Beckman and Foster, op. cit. p. 559; "Remedies and Enforcement Procedures" (1974) *1 C.C.H. Poverty Law Reporter* 3460, 3530; Halloran, op. cit. p. 895; Birkhead, op. cit. p. 79; Givens in "Summary of Hearings", op. cit. p. 293; "Collection Capers", op. cit. p. 578; "Scope and Adequacy", op. cit. at n. 3; Scott and Strickland, op. cit. p. 573; Halloran, op. cit. p. 895; "New Developments" (1972-74) 1 *C.C.H. Poverty Law Reporter* 16465; B. Schick, "A Primer on the General Law Applicable to Abusive, Unfair, and Harassing Debt Collection" (1972) 6 *Clearinghouse Review* 145, 145f.

117 Schick in "Summary of Hearings", ibid. p. 328; Vichich, op. cit. pp. 88-9.

118 Berger, op. cit. p. 330 argues that because harassment is done cold-bloodedly for financial gain, monetary sanctions are especially appropriate.

of abusive collection by the creative use of general tort law as Dworkin attempted to show in the privacy field.[119]

Like its criminal law, the general civil law of the United States is better developed for the control of collection than Anglo-Australian law. That development has occurred because American debtors have used a wide range of torts in attempting to recover for harassment: intentional infliction of emotional distress, invasion of privacy, intentional interference with contractual relations, defamation and abuse of process have all been used for that purpose.[120] The more fully developed United States law is used below as a contrast to Australian law and as a guide to its possible future development. Thus the fact that American debtor-plaintiffs began by using the torts of abuse of process and defamation, but, finding them to be too technical, later moved to a reliance on the torts of privacy and the intentional infliction of emotional distress,[121] might be useful for Australians. The American experience leads us to expect that we are more likely to find an adequate remedy in the Australian tort of intentional infliction of nervous shock than in defamation.

A. Defamation

1. Australian Law

Australian state legislation on defamation falls into two categories: the states in which the law has been codified,[122] and the rest, in which there are varying degrees of statutory interference with the common law.[123] New South Wales falls into the latter category. Its *Defamation Act* 1974 alters and defines the common law to a large extent, but leaves important gaps to be filled by the common law.

The elements of a defamation action are: (i) publication, (ii) of defamatory material; which (iii) relates to a defamable plaintiff. There are several defences.

"Publication" is the oral or written transmission of defamatory material and it is sufficient if the material is published to only one person (other than the plaintiff): *Defamation Act* sections 8 and 9. A conversation with one person is sufficient "publication".

[119] G. Dworkin, "The Common Law Protection of Privacy" (1967) 2 *Tasmania Univ. L. Rev.* 418 attempted to show that the majority of privacy invasions can be made actionable under existing torts.

[120] A quick summary of harassment torts is provided in Schick, op. cit. Useful longer articles on the same topic are Berger, op. cit.; and Greenfield, op. cit. at pp. 15-35.

[121] Berger, ibid. p. 331; "Collection Capers", op. cit. p. 579. For the possibility that American law is developing towards one large tort, see C. E. Hurt, "Debt Collection Torts" (1964-65) 67 *West Virginia L. Rev.* 201, 210 and "Collection Capers", op. cit. p. 587.

[122] Qld: *Defamation Act* 1889; Tas.: *Defamation Act* 1957.

[123] N.S.W.: *Defamation Act* 1974; S.A.: *Wrongs Act* 1936, Part I; Vic.: *Wrongs Act* 1958, Part I; W.A.: *Criminal Code Act* 1913 ch. 35.

"Defamatory material" is not defined by statute in New South Wales, its definition being left to the common law. Fleming succinctly defines as defamatory, that material "which tends to lower a person in the estimation of his fellow men by making them think the less of him".[124] That is, the tort primarily protects the plaintiff's interest in his good reputation. Damages are awarded for hurt feelings as well as lost reputation, and although exemplary damages may no longer be awarded in New South Wales (*Defamation Act* 1974, section 46(3)(a)), aggravated damages are still available (section 46(3)(b)). The policy of the New South Wales Act is that plaintiffs are to be compensated for actual harm and if the actual damage (namely damage to feelings) is made worse by the malice of the defendant, then that further damage is to be compensated (aggravated damages). No damages are awarded for malice *per se* (exemplary damages).

The third element, that the material relate to a defamable plaintiff, is of no concern to harassed debtors. The main controversy within that element concerns defamation of a group. Individuals, such as debtor-plaintiffs, are "defamable plaintiffs".

The defences are of critical importance. It is *not* a defence that the publisher did not intend that the material be defamatory. If the objective test is satisfied, it is irrelevant that the defendant did not intend to harm the plaintiff. However there are several defences open to the "defamatory" collector.

The primary defence is justification. At common law, truth alone is a defence. Plaintiffs are better protected by the New South Wales statute: a statement must be both true and relate to a matter of public interest (section 15(2)).[125] That is, the defendant must show that it is to the public benefit that he publishes defamatory material and also that the material is true.

Another major defence is qualified privilege. Under section 22(1) of the *Defamation Act* 1974 (N.S.W.), there are three elements to the defence:

(i) that the recipient has an interest or apparent interest in having information on some subject;

(ii) that the matter is published to the recipient in the course of giving that information; and

(iii) that the conduct of the publisher is reasonable in the circumstances.

By section 20(1)(b)(ii) the publication must be relevant to the occasion. The essence of the defence is that the recipient has an interest or an

[124] Fleming, op. cit. p. 528. See *Jones* v. *Skelton* [1963] 1 W.L.R. 1362; *Yousoupoff* v. *M.G.M. Pictures Ltd* (1934) 50 T.L.R. 581; *Tolley* v. *J.S. Fry & Sons Ltd* [1931] A.C. 333.

[125] "Public benefit" was explained by Evatt J. in *Howden* v. *Truth and Sportsman Ltd* (1937) 58 C.L.R. 416, 427.

apparent interest in receiving certain information and it is reasonable for the publisher to give that information to him. What conduct is "reasonable" and what information is "relevant to the occasion" depends partly on the purposes of the disclosure. Thus in *Guise* v. *Kouvelis*[126] it was held that although the members of a club have an interest in knowing that a prospective member had cheated at cards, it was going too far to shout out in the middle of a card game "You're a crook", and the defence failed.

The other major defences are absolute privilege (*Defamation Act* sections 17-19) and fair comment (sections 29-35). Neither is relevant to debt collection. Absolute privilege is granted to reports of parliamentary and similar proceedings, and there is no need to show that publication was reasonable. Fair comment applies to criticisms of such things as public performances and works of art.

2. *The Application of Australian Law to Collection*

Defamation potentially covers all situations in which a collector actually discloses something about the debtor to a third party. Thus it might cover disclosure of default to the debtor's employer or associates. Since publication to a third party is essential, this tort will not be applicable to collectors who badger or abuse the debtor only.

There are a number of difficulties in applying defamation to the collection situation. The first is whether the simple statement that "X has not paid his account" is defamatory. That is, does that statement tend to lower the plaintiff in the estimation of his fellow men by making them think the less of him? It is sufficient if the statement makes a defamatory implication about the plaintiff (section 9(1)). It may be that the statement implies that the debtor is a dishonest person who never pays his debts. If so, the material would be defamatory and the complaint actionable if the other elements were present and no defences were available.

Having established that the collector's words are defamatory, the plaintiff-debtor is faced with two defences which could turn the case against him. The first is truth and public interest. This defence would be available to few collectors. To establish the defence, a collector must prove that the statement and its innuendoes are true, the onus being on the defendant collector. Even if a collector proved that his statement was true on its face (that the debt was owing and unpaid), he must further prove the truth of any innuendoes inherent in the collector's statement (section 15(2)). If it was established that the collector's statement implied that the debtor is dishonest and untrustworthy, the collector would, in many cases, find it impossible to establish the truth of the innuendo. Where a debt was not validly due, or where default was due to inability to pay rather than bad faith, the collector would be unable to establish truth.

[126] (1947) 74 C.L.R. 102.

Having overcome those obstacles, to establish the defence the collector must go on to prove that his statement was made in the public interest. It would only be in the most extraordinary circumstances that the revelation of an apparently private matter could be seen to be made in the public interest.[127]

The other major defence, qualified privilege, is of use to collectors who inform the debtor's employer of the existence of an overdue debt. Section 22(1) of the *Defamation Act* requires that the recipient have an interest in the subject-matter or (section 22(2)) that the defendant believes on reasonable grounds that the recipient has that interest. Collectors might argue that employers have an interest in knowing that their employees default on debt obligations. Employers might have that interest because:

(i) default might show dishonesty;

(ii) default might cause an employee's work to slip as he worries about his debts; and

(iii) default might cause the employer direct financial loss if garnishee proceedings are taken.

Even if an employer interest is shown, the collector's action must still be "reasonable in the circumstances". As stated above, what is "reasonable" depends partly on whether the statement is made for the purposes of the occasion. There is no doubt that collectors who advise employers about debts do so for the purpose of collection rather than for the benefit of the employer. This ulterior purpose may be sufficient for a court to hold that the statement was not reasonable in the circumstances.

The result of these doubts is that it is uncertain whether New South Wales law gives a harassed debtor an action in defamation. It is certain that no action is available unless a third party is involved. It is also possible that in one of the most damaging areas of collection, collector contact with the debtor's employer, the collector might escape liability by using the defence of qualified privilege.

As a result, it would take a brave and wealthy debtor to take a defamation action against a harassing collector. The deterrent effect of the law of defamation in this situation must be minimal.

3. The American Experience

In the United States (in which the law of defamation is generally similar to the Australian law), defamation has frequently been used as a remedy for harassed debtors.

There have been occasional American successes, a leading case being *Stickle* v. *Trimmer*.[128] In that case, a collector contacted a debtor's employer

[127] Dworkin, op. cit. p. 425.
[128] 143 A. 2d, 1; 50 *N.J. Sup.* 518 (1958).

stating falsely that a debt was overdue. The debtor successfully sued for defamation.[129]

The American experience backs up the previously expressed doubts about the operation of the tort in the collection field. Firstly, American courts have not been quick to draw an imputation of dishonesty from the statement that a debt is overdue.[130] In *Judevine* v. *Benzies—Montanye Fuel & Warehouse Co.*[131] for example, the court failed to draw an imputation of dishonesty from a brilliant orange hand-bill advertising a $4 debt for sale. Once an imputation has been drawn, it is generally held that the collector must prove its truth or be held liable in defamation.[132]

American debtor-plaintiffs must also face one obstacle which New South Wales law does not provide. In many United States jurisdictions, debtor-plaintiffs are denied recovery by a rule requiring that unless a statement is defamatory on its face, the plaintiff must show that he has suffered pecuniary loss before he can recover.[133]

The American experience with qualified privilege is ambiguous. In the leading case of *Gouldman-Taber Pontiac* v. *Zerbst*[134] a debtor sued for invasion of privacy[135] when a collector told his employer of the debt. It was held that an employer has a natural and proper interest in his employee's debts and hence contact with the employer was not actionable.

The same argument can be made by collectors who seek to establish in defamation cases that employer contact is covered by qualified privilege. The point has not been settled, but it appears that the courts are tending to deny that employer contacts for ulterior (collection) purposes are within the defence.[136] Any debtor seeking to sue for employer contact would have to gamble that the court he sues in will follow this trend.

[129] The case is discussed in Fimburg, *Stickle* v. *Trimmer* note (1959) 6 *U.C.L.A. L. Rev.* 343, 343; Hurt, op. cit.; and "Scope and Adequacy", op. cit. p. 416.

[130] "Scope and Adequacy", ibid.

[131] 222 Wis. 512; 269 N.W. 295 (1936); noted by Hurt, op. cit. p. 203.

[132] Fimburg, op. cit. p. 347; Hurt, ibid. p. 205; "Scope and Adequacy", op. cit. p. 417; Hubbard, op. cit. pp. 965-6; Schick, op. cit. p. 146; Greenfield, op. cit. p. 17; Shenfield, op. cit. p. 700; Berger, op. cit. p. 340; M. J. McGinn, "Tort Aspects of Reflections on Credit" (1969-70) 14 *St. Louis Univ. L. Jnl.* 283, 292; "Collection Capers", op. cit. p. 579; W. F. Julavits and C. A. Stuntebeck, "Effectively Regulating Extrajudicial Collection of Debts" (1968) 20 *Maine L. Rev.* 261, 265; H. M. Pippin, "Improper Collection Practices" (1955) 31 *North Dakota L. Rev.* 277, 277; Armstrong and Delaney, "Focus on Debtor's Rights—Making the Bill Collector Pay" (1975) 23 *Kansas L. Rev.* 681, 683.

[133] Armstrong and Delaney, ibid. p. 683; "Scope and Adequacy" op. cit. n. 5, pp. 414-5; Pippin, ibid. pp. 277-8; Julavits and Stuntebeck, ibid.; McGinn, op. cit. p. 292; Hubbard, ibid., p. 966; Block, op. cit. p. 99; Berger, ibid. p. 340; Hurt, ibid., p. 203.

[134] 100 S.E. 2d 881 (Ga. 1975); noted by Basford at (1958) 35 *Univ. Detroit L. Jnl.* 530 and F. Brace (1958) 56 *Michigan L. Rev.* 661.

[135] The tort is discussed below, under "Invasion of Privacy".

[136] Greenfield, op. cit. p. 18. Privilege in debt collection is also discussed in "Collection Capers" op. cit. p. 580; McGinn, op. cit. pp. 288, 292; Block, op. cit. pp. 100-1; Fimburg, op. cit. p. 348; Hurt, op. cit. p. 205; "Scope and Adequacy", op. cit. pp. 416-7; Pippin, op. cit. p. 279; Armstrong and Delaney, op. cit. pp. 683-4; "Collection Agencies and Practice" (1974) 1 *C.C.H. Poverty L. Reporter* 3720.554; Schick, op. cit. p. 147.

Even apart from these technicalities, the defamation response to harassment has been criticised by United States commentators. They make the obvious point that at best defamation covers only the broadcasting of information to third parties: it does not help debtors who are directly harassed.[137] Further, it offers no recovery where a simple truthful statement is made to a third party that a debt is overdue and the court fails to draw defamatory inferences. That is, defamation does not allow recovery for a debtor's "right" to keep intimate facts to himself.[138]

Another commentator argues that defamation is inadequate in the collection situation because it covers the wrong interest. It awards damages where reputations are harmed, while debtors are really complaining about the coercive tactic used.[139] That reputational interest is seen by Prosser[140] as being a very middle class interest, favouring middle class plaintiffs, thus providing another barrier to harassed working class debtors.

The result of this string of technicalities is that harassed debtors in the United States are moving to other torts for recovery.[141] Although the New South Wales tort does not have as many barriers as those in the United States, many of the principles and problems unearthed by American debtor-plaintiffs apply equally in Australia. It may be that a harassed debtor in New South Wales will overcome the obstacles of proving a defamatory imputation and successfully avoid the defences of justification and qualified privilege, but any action he takes will be an expensive gamble. The tort is complicated and uncertain, and the points in issue are entirely open. Few harassed debtors would have the personal and financial resources to risk taking a defamation action, especially against a creditor or collector who has substantial financial capacities.

B. WILFUL INFLICTION OF MENTAL INJURY

This tort seems, at first glance, to be an ideal remedy for harassed debtors. The aim of collection is to force the debtor to choose between paying a debt and living with the worry inflicted by the collector. In deliberately inflicting that worry, collectors come within the tort's scope.

1. Australian Law

The leading New South Wales case on wilful infliction of mental injury is *Bunyan* v. *Jordan*[142] where Jordan C.J. defined the tort as follows (at p. 353)

137 Armstrong and Delaney, ibid. p. 683; Hubbard, op. cit. p. 965; Shenfield, op. cit. p. 701; Hurt, ibid. p. 205; "Scope and Adequacy" ibid. p. 413.
138 Greenfield, op. cit. p. 19.
139 Fimburg, op. cit. p. 347.
140 W. L. Prosser, *Handbook of the Law of Torts* (4th ed. 1971), section 106.
141 Berger, op. cit. p. 331.
142 (1936) 36 S.R. (N.S.W.) 350. The facts of the case were that the defendant threatened, in the presence of the plaintiff, to shoot himself. He went outside and

> "It is established by the authorities that a person is liable for any act of his which has so terrified another person as to injure him, if the act was done with the intention of alarming the other, and was either of a kind reasonably capable of terrifying a normal human being, or was known or ought to have been known to the doer of the act to be likely to terrify the person injured for reasons special to that person."

One of the two cases the Chief Justice relied on[143] for authority was *Janvier* v. *Sweeney*[144] a useful case whose facts are analogous to collection. The case has a first world war background, the female plaintiff's German fiance being imprisoned at the time. In an attempt to obtain certain letters from the plaintiff, the defendant private detective falsely claimed to be a Scotland Yard detective inspector representing military authorities. He told the plaintiff "You are the woman we want, as you have been corresponding with a German spy". It was alleged that the statements were made with knowledge that they were likely to cause injury. The plaintiff "sustained a severe shock and became incapacitated from following her employment, and suffered from neurasthenia, shingles, and other ailments".[145] The defendants were held liable at the trial, and their appeal to the Court of Appeal was dismissed.

Another analogous case is *Stevenson* v. *Basham*[146] in which the defendant visited the dwellinghouse of the female plaintiff demanding possession. The defendant threatened the plaintiff's husband, saying "I'll have you out within twenty-four hours. If I can't get you out I'll burn you out."[147] The plaintiff, who was three months pregnant, was in another room and overheard the threat. The defendant knew that she was there. As a result of the threat she became hysterical and suffered a miscarriage the next day.

The plaintiff succeeded at the trial, and the defendant appealed to the Supreme Court. Herdman J., finding for the plaintiff, held that the case against the defendant was made out on one of two grounds, either negligence or wilful infliction of mental injury, depending on whether he acted wilfully or negligently. (There was evidence of both types of conduct.) The intention to frighten the husband was sufficient for the wife to recover on the ground of wilful infliction of shock.[148]

Janvier v. *Sweeney* and *Stevenson* v. *Basham* show that some collection situations are covered by this tort. In those cases, as in many collection situations, deception and threats were used, and as Herdman J. noted in

shot a gun. He returned five or ten minutes later and told the plaintiff that there would be a death. The trial judge refused to put the case to the jury. The plaintiff's appeal was dismissed on the ground that the defendant did not intend to frighten the plaintiff.

143 At p. 353.
144 [1919] 2 K.B. 316.
145 Ibid. p. 316.
146 [1922] N.Z.L.R. 225.
147 Ibid. p. 227.
148 Ibid. p. 232.

Stevenson v. *Basham* at page 232, "if he (the defendant) did not intend to frighten Basham (the husband) and those in the house, why did he make the threat?" His Honour has stated the essence of coercive collection, the wilful infliction of fright by the use of threats, and that same situation is the basis of recovery for wilful infliction of mental injury.

This optimistic picture is disturbed by two controlling devices evident in Jordan C.J.'s definition of the tort in *Bunyan* v. *Jordan*.

The first controlling device, and that which is most obstructive to debtor-plaintiffs, is that the plaintiff must be so terrified of the defendant's actions as to be "injured". The dividing line between "injury" and mere anxiety or upset is most unclear. In a negligence case, *Mt. Isa Mines Ltd* v. *Pusey*[149] the High Court held that a plaintiff who suffered an acute schizophrenic reaction was sufficiently "injured". Windeyer J. discussed the point at p. 92

> "Sorrow does not sound in damages. A plaintiff in an action of negligence cannot recover damages for a 'shock', however grievous, which has no more than an immediate emotional response to a distressing experience sudden, severe and saddening. It is, however today a known medical fact that severe emotional distress can be the starting point of a lasting disorder of the mind or body, some form of psychoneurosis or a psychosomatic illness. . . . An illness of the mind set off by shock is not the less an injury because it is functional, not organic, and its process is psychogenic."[150]

As a consequence, the first controlling device prevents recovery by all but the most seriously harmed debtor-plaintiffs. Only those rare debtors whose reaction is so severe as to be a long-lasting illness can recover.

The second controlling device mentioned by Jordan C.J. is that the action must either be capable of "terrifying" a normal human being or the defendant must have had actual or constructive knowledge of the plaintiff's susceptibility to terror. A weak debtor harmed by over-vigorous collection cannot recover unless either the collector knew of the weakness or a normal person would have been "terrified". Terror is an obviously extreme word.

These controls are manifestations of the common law's traditional concerns: the fear of a flood of cases and the fear of being duped by unfounded claims. It can be argued that neither fear is well-based: there has not been a flood of cases since the enactment of section 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (N.S.W.) which liberalised

[149] (1971) 45 A.L.J.R. 88.

[150] Although *Mt. Isa Mines* v. *Pusey* is a negligence case, the principles of the kind of "injury" essential for recovery apply equally to wilful infliction cases. In fact Windeyer J. cited *Bunyan* v. *Jordan* in the middle of the passage reproduced. Fleming, op. cit. p. 33 defines the necessary injury as "substantially harmful physical or psychopathological consequences such as actual illness".

recovery by relatives for negligently inflicted mental harm;[151] and the courts should be capable of distinguishing real harm from counterfeit harm, since they frequently deal with equally abstract concepts in other areas of the law.[152]

The result of these controlling devices, and especially the first one, is that Australian debtors can rarely use the tort to recover for harassment. Very few debtors suffer sufficient physical or mental injury to be covered by the tort. Most would suffer temporary emotional disturbance, a loss of their right to defend a debt action and anger and disillusionment with the legal system for allowing collectors to use coercive tactics. None of those consequences is sufficient for recovery. As a result, the tort would have little deterrent effect on the actions of collectors.

2. The American Experience

Due to its relative freedom from technicalities, the tort of wilful infliction of nervous shock is at present a major form of recovery for American debtor-plaintiffs.[153] It was the basis of recovery in the leading collection case of *Duty* v. *General Finance*.[154]

The American tort has two main elements: the act of the defendant must be extreme and outrageous (on an objective test) and the defendant must intend the consequences.[155] The defendant's mental state is described as "intentional" but that term includes recklessness[156] and may arguably even include negligence.[157]

The American courts are subject to the same policy constraints as the Anglo-Australian common law. They are reluctant to award damages for purely mental harm because they fear a flood of cases, they fear the possibility of trivial cases and they are concerned that mental suffering is difficult to quantify.[158]

151 That section does not allow recovery for mere emotional upset, but does extend the duty of care in negligence to a wider class of persons than the common law allowed. It is submitted that the common law's refusal (in *Chester* v. *Waverley Corporation* (1939) 62 C.L.R. 1) to extend the duty of care beyond a very narrow range was based on the same principle as its refusal to allow recovery for emotional harm: the fear of flooding.

152 As discussed below, assault is actionable without proof of damage of any kind. The fear of flooding and fear of trivial claims arguments are put and well rebutted by L. Green, " 'Mental Suffering' Inflicted by Loan Sharks No Wrong" (1953) 31 *Texas L. Rev.* 471, 488-90.

153 Berger, op. cit. p. 331: "Collection Capers", op. cit. p. 579. The tort was first suggested in the United States by W. L. Prosser, "Intentional Infliction of Mental Suffering: a New Tort" (1939) 37 *Michigan L. Rev.* 874.

154 154 Tex. 16; 273 S.W. 2d 64 (1954). For examples of collection cases based on this tort, see "Collection Agencies and Practice", op. cit. par. 3720.50; Nelson, op. cit. pp. 373-4; "Intentional Infliction of Mental Distress in the Debtor-Creditor Relationship" (1973) 37 *Albany L. Rev.* 797; Hurt, op. cit. pp. 208-10.

155 Hubbard, op. cit. p. 959 at n. 88; Prosser, *Torts*, op. cit. p. 60.

156 Prosser, *Torts*, ibid.; McGinn, op. cit. p. 293; Armstrong and Delaney, op. cit. p. 686; Berger, op. cit. p. 333.

157 Berger, ibid.

158 Green, op. cit. pp. 488-90; "Scope and Adequacy", op. cit. p. 420; Halloran, op. cit. p. 897.

These fears are manifested in three major control devices: the defendant's action must be "extreme and outrageous"; it must have been capable of affecting an ordinary person in the way it affected the defendant; and the type of damage sufficient for recovery is limited.

In a deliberate attempt to limit trivial claims,[159] the American tort requires that the defendant's conduct be "extreme and outrageous". There are a number of factors in deciding whether conduct fits the description. The two most important factors in collection are related. If a plaintiff is in a weak position, such as being pregnant or otherwise peculiarly susceptible, the defendant's harassment of that person is likely to be seen as outrageous and extreme. Similarly, if a defendant abuses a special relationship (which includes the debtor-creditor relationship) that conduct is likely to be so characterised. The very unevenness of the parties' strength (which is inherent in collection) is a relevant factor.[160] It is also relevant that the amount is not actually due[161] which is very weak recognition of the fact that coercion causes payment without the opportunity of asserting defences.

Duty v. *General Finance* is one example of sufficiently extreme and outrageous conduct. In that case the defendant used 19 different types of harassing conduct to collect debts from one couple. Another is *State Rubbish Collectors Association* v. *Siliznoff*[162] where threats of the destruction of the truck used for the debtor's livelihood and threats of physical beatings were held sufficient. In *George* v. *Jordan Marsh Company*[163] a continuation of otherwise common tactics was "extreme and outrageous" enough when the serious effects on the plaintiff's health were ignored by the defendant. Undaunted by their collection efforts having caused the plaintiff to have a heart attack, the defendants launched a new series of harassing tactics, causing a second heart attack. The plaintiff recovered.[164]

The requirement of "extreme and outrageous" conduct may be used by some courts as a reason for denying recovery for employer contact. The courts may feel that employer contact is unreasonable but not extreme and outrageous.[165] While the difference between "unreasonable" and "extreme and outrageous" may appear to be semantic, this test would be sufficient for conservative courts to deny recovery in otherwise clearly deserving cases. A liberal court, on the other hand, could virtually ignore

159 Greenfield, op. cit. p. 24.
160 "Intentional Infliction", op. cit. p. 801; Nelson, op. cit. p. 371; Greenfield, op. cit. pp. 24-5; Armstrong and Delaney, op. cit. p. 686; "Scope and Adequacy", op. cit. p. 421; "Collection Capers", op. cit. pp. 585-6; Hurt, op. cit. p. 209; McGinn, op. cit. p. 292.
161 "Collection Capers", op. cit. p. 585.
162 38 Cal. 2d 330; 240 p. 2d 282 (1952).
163 268 N.E. 2d 915 (1971).
164 These cases are described in "Intentional Infliction", op. cit. pp. 798-9.
165 Block, op. cit. p. 110.

the requirement by defining any creditor conduct which causes severe emotional distress as extreme and outrageous.[166]

The second controlling device of the American tort is that an ordinary person would have suffered the same consequences as the plaintiff, or that the defendant-collector was aware of the debtor's special susceptibilities.[167] As in Australia, there is no recovery by peculiarly timid plaintiffs unless the defendant knows of the weakness.

The third American controlling device is the type of harm required. The line between mental and physical harm has caused trouble in the United States as it has done in Australia. The distinction between the two is not clear,[168] especially since plaintiffs usually allege that they suffered insomnia, indigestion and nervousness as a consequence of emotional upset.[169] Emotional upset is almost always accompanied by *some* physical symptoms, making the physical requirement an inadequate test of seriousness of harm.

Recognizing that problem, and the fact that the "extreme and outrageous" test is a sufficient control on its own, most American jurisdictions recently dropped the requirement that mental harm be accompanied by physical injury. The 1948 Supplement to the *Restatement of Torts* included, for the first time, emotional distress as sufficient damage on its own.[170] Since then, there has been a solid trend away from requiring physical injury among the state jurisdictions,[171] though some states still require it.[172]

Although mental distress is sufficient damage in many American jurisdictions, the fear of fraudulent claims still has an impact.[173] Where mental distress is sufficient on its own, recovery is limited to cases where "severe" stress is proved.[174]

To some extent the controlling devices in the American jurisdictions have a see-saw relationship. Where the requirement of physical injury has been relaxed, control has been achieved by the requirement that the defendant's action be "extreme and outrageous". Where less extreme defendant action is necessary, that is, where the negligence standard

166 "Intentional Infliction", op. cit. p. 804 looks at the tests of "outrageous", "malicious" and "unreasonable" and concludes that they may not be as different as they appear to be.

167 Greenfield, op. cit. p. 25; Pippin, op. cit. p. 281.

168 "Intentional Infliction", op. cit. p. 806.

169 Ibid. p. 808.

170 Homburger, op. cit. p. 52 discusses the point.

171 Halloran, op. cit. p. 897; Berger, op. cit. p. 332; "Scope and Adequacy", op. cit. p. 420; McGinn, op. cit. p. 293; "Collection Capers", op. cit. pp. 584-5; Armstrong and Delaney, op. cit. p. 685; Schick, op. cit. p. 145.

172 "Intentional Infliction", op. cit. p. 804; Shenfield, op. cit. p. 699; Berger, ibid. p. 334; Halloran, ibid. p. 897 sees the original refusal to compensate pure mental suffering as a reflection of a time when property rights were considered to be more important than personal rights. There is a present trend away from that view, he claims. See also Green, op. cit. p. 481.

173 Shenfield, ibid.

174 Ibid.: Armstrong and Delaney, op. cit. p. 685; Greenfield, op. cit. p. 25; Block, op. cit. p. 109.

applies, control is achieved by the plaintiff having to show physical injury.[175] Thus, for example, the new Texas tort of unfair collection activities has adopted a negligence standard, but has retained control on the number of cases heard by requiring that the plaintiff's injuries be physical.[176]

The requirements of *severe* emotional distress and "extreme and outrageous" creditor conduct leave the bulk of coercive collection and its victims untouched by American tort law. Some courts and commentators argue that there is a privilege among creditors to apply some mental pressure on debtors to force payment.[177] This "privilege" is based on a number of dubious assumptions: (i) the laissez-faire view that debtors "freely enter" credit agreements, and in doing so (ii) that they impliedly "consent" to mental pressure being applied should collection efforts be necessary. The major assumption is (iii) that extra-judicial coercion is harmless, a doubtful proposition when it is recalled that the effects of non-judicial pressure are to force debtors to abandon their defences and to pressure more lenient creditors into a race for the debtor's assets. The practical result of these assumptions is that only the most extreme harassing tactics, and those with the most severe effects on debtors, come within the American tort's protection.

3. *Conclusion—Wilful Infliction of Mental Injury*

While the tort of wilful infliction or mental injury may be praised for being less technical than defamation[178] and for covering a wider range of creditor actions, in both Australia and the United States the tort supplies remedies in only the most extreme harassment situations. In both jurisdictions questionable policy reasons underlie a judicial reluctance to allow liberal recovery. What the Australian tort gains by not requiring "extreme and outrageous" collector activity, it loses to the American tort by requiring "injury".

The result in each jurisdiction is that few harassment situations are covered, and collectors are deterred only from the most extreme forms of harassment.

C. ASSAULT

Like the wilful infliction of mental injury, assault is an intentional tort in which the defendant adversely alters the plaintiff's mental state. One factual situation such as a threat to shoot the plaintiff, can lead to both

[175] Nelson, op. cit. p. 370; Hurt, op. cit. p. 208; Pippin, op. cit. p. 280.
[176] Schick, op. cit. p. 145. The Texas tort of unreasonable collection efforts is discussed below.
[177] Armstrong and Delaney, op. cit. p. 686; Pippin, op. cit. p. 282; "Collection Capers", op. cit. p. 586; Greenfield, op. cit. p. 26; Shenfield, op. cit. p. 699; "Intentional Infliction", op. cit. p. 800; Nelson, op. cit. p. 372.
[178] McGinn, op. cit. p. 293.

tort actions. If the defendant made that threat while holding a gun and standing before the plaintiff, the elements of assault would be present. At the same time, if the plaintiff suffered mental "injury" as a consequence and the defendant had intended that injury, the elements of wilful infliction of mental injury would also be present.[179]

Unlike the wilful infliction tort, the tort of assault has no damage requirement. Not only is it unnecessary to show "injury", the tort is actionable in the absence of any proven damage. The elements of assault are a threat to inflict any degree of force upon another person, together with the intention by the person making the threat to produce the expectation of unlawful physical contact in the mind of the victim and an apparent ability to immediately carry out the threat. It is irrelevant that the person making the threat had neither the intention nor the actual ability to inflict the unlawful contact which he had induced the victim to expect.[180]

Where threats of violence are made, they may be made by telephone, since there is little chance of the threat being witnessed in those circumstances. Those threatened by telephone face a number of problems in suing for assault. Firstly, there is some doubt whether "mere words" are enough; secondly, the defendant is not "immediately capable" of carrying out the threat; and thirdly, as the threat is conditional, the plaintiff can avoid injury by paying the debt.

In the very useful case of *Barton* v. *Armstrong*[181] these doubts were set aside by Taylor J. of the New South Wales Supreme Court. The facts were very closely analogous to debt collection. A series of threats of violence were made by telephone in the early hours of the morning to force the plaintiff to give his assent to a deed. It was held that those threats were capable of constituting an assault at law.[182]

Consequently, New South Wales debtors may be confident that telephone threats of violence, even if they are conditional on the debtor's refusal to pay, are actionable. The main problem of telephone threats is one of proof that the threats have been made. Telephone threats are in fact used to ensure that proof is difficult.[183]

Assuming that proof problems are overcome, the torts of assault and battery (the actual infliction of force) are clearly available to debtors in situations involving violence, as American collectors have occasionally found.[184] That clear situation, both as to civil and the almost identical criminal law, ensures a maximum deterrent effect.

179 Scott and Strickland, op. cit. p. 597; "Intentional Infliction", op. cit. p. 798.
180 The tort is discussed by Fleming, op. cit. pp. 24-5.
181 [1969] 2 N.S.W.R. 451.
182 The essence of the judgment is at [1969] 2 N.S.W.R. 451, 455-6.
183 Asher interview.
184 Greenfield, op. cit. p. 33 at n. 85 lists a number of cases where the tort of assault has been used against debt collectors.

The only limitation of the tort of assault is that it requires the threat of physical contact. As mentioned in Part I, while threats of physical violence may be among the most serious examples of harassment, they form only a small proportion of the harassing tactics in use. The majority of harassment situations remain unaffected.[185]

D. MALICIOUS PROSECUTION

Due to a policy of encouraging prosecution of crimes, the elements of the tort of malicious prosecution are closely restricted. The tort requires an actual commencement[186] of criminal or bankruptcy[187] proceedings by the defendant with *both* a lack of reasonable or probable cause *and* malice in the defendant. The proceedings must terminate in favour of the defendant and the plaintiff must suffer damage to his fame, actual bodily injury (including loss of liberty) or damage to property before recovery is available.

Since proceedings must actually be commenced by the defendant, the tort is of little use to harassed debtors. While collectors might frequently threaten to institute criminal or bankruptcy proceedings, they would rarely go to the expense of actually doing so, debt collection being the most cost-conscious of industries. Even if proceedings were begun, the debtor must prove malice and prove a negative: the lack of reasonable or probable cause for the action.

Abuse of process is a similar tort, little developed in British jurisdictions, and involves the procuring of process for ulterior purposes.[188] While less technical than malicious prosecution, the tort would rarely be available in the collection situation since the issue of process is again a pre-requisite.

Both torts also exist in the United States, but commentators note that they are only occasionally used by debtor-plaintiffs,[189] since they require the collector to actually issue process other than on the debt, and because debtors fear the possibility of a counter-suit for malicious prosecution.[190]

E. INTERFERENCE WITH CONTRACT

The tort of intentional interference with contractual relationships may possibly be applied to a creditor's action in causing the debtor to lose his job. Liability under the Australian tort lies for persuading one contracting party to breach his contract with the plaintiff, although advising a party to

185 For suggestions that assault can be used in the analogous field of invasion of privacy, see H. Storey, "Infringement of Privacy and its Remedies" (1973) 47 *A.L.J.* 498, 504 and Dworkin, op. cit. p. 422.
186 *Coleman* v. *Buckingham's* [1964] N.S.W.R. 363.
187 *Fenn* v. *Paul* (1932) 32 S.R. (N.S.W.) 315.
188 Fleming, op. cit. p. 611.
189 "Remedies and Enforcement Procedures", op. cit. par. 3540.111f.; Schick, op. cit. p. 147; Greenfield, op. cit. pp. 30-3; Berger, op. cit. p. 331.
190 Hurt, op. cit. p. 202; "Scope and Adequacy", op. cit. p. 413.

breach a contract is not actionable. The defendant must intend to harm the plaintiff or be wilfully blind as to the consequences. Negligent interference does not suffice. The interference is successfully defended if it is justified, that is if the court feels that the purpose in interfering is so meritorious as to require a sacrifice of the plaintiff's right to freedom from from interference. Damages are awarded for economic harm and for consequent injury to feelings.[191]

It is necessary to look at American experience with the tort before evaluating the Australian tort. In the United States, interference with contract is one of the lesser used torts among debtor-plaintiffs[192] who face a number of obstacles in its use. The first is that some courts do not allow recovery for termination of an employment contract terminable at will, while others do.[193] There is a general requirement that recovery is only for actual dismissal, not for harm to the employment relationship short of dismissal.[194] In deciding whether a creditor's action is justified, the courts balance the right of the creditor to a wide range of collection devices with the debtor's right of freedom from interference with his employment.[195] Most American courts conclude that it is reasonable for a creditor to contact a debtor's employer.[196]

The primary obstacle to recovery by American debtors is that the collector must have intended to induce a breach of employment.[197] In Australia "intention" includes reckless disregard,[198] but in the United States intention in this tort requires a desire to end the employment.[199]

Although the Australian tort is more liberal than its American counterpart, the American cases point to a number of difficulties for plaintiff-debtors. Even if those difficulties are overcome, the tort still only covers the relatively few cases in which employment is knowingly and actually interrupted by a creditor. The creditor's power lies in the *threat* to interfere, not in actual interference. There is no recovery under this tort for the threat alone, and threats are the basis of coercive collection.

F. Intimidation

A final intentional tort which might be used by debtors is intimidation, recently put on a sound footing by the House of Lords in *Rookes* v.

191 Fleming, op. cit. pp. 677-85.
192 Berger, op. cit. p. 331. The elements are listed in Schick, op. cit. p. 146.
193 Greenfield, op. cit. p. 28. Block, op. cit. pp. 106-7 points out that those courts holding that a contract terminable at will is insufficient, do so on the basis of an *obiter dictum* only: *S.C. Posner* v. *Jackson* 223 N.Y. 325, 332, 119 N.E. 573, 574 (1918); in that case there was a fixed term contract and the court noted that that was essential for recovery.
194 Block, ibid. pp. 105-6; Greenfield, ibid. p. 29; cf. Fleming, op. cit. p. 677.
195 Block, ibid. p. 108.
196 Halloran, op. cit. p. 896.
197 Scott and Strickland, op. cit. p. 589; Greenfield, op. cit. p. 27.
198 Fleming, op. cit. p. 682.
199 Greenfield, op. cit. p. 27.

Barnard.[200] To be actionable, there must be a threat to do an unlawful act or the doing of an unlawful act, together with an intention to cause injury. Threats to do lawful acts are not actionable. The latter requirement was ignored by the High Court in its wide statement of principle in *Beaudesert Shire* v. *Smith*.[201]

The tort is in its infancy in its modern state and it is difficult to predict whether a debtor, harassed by threats to do unlawful acts, would qualify. The actions so far have generally been for economic damage,[202] rather than for mental damage such as that suffered by debtors. Conceivably, a debtor could sue for his lost opportunity to assert his defences and draw in consequent mental injury to increase the damages award. The House of Lords and the High Court have been adventurous in *Rookes* v. *Barnard* and *Beaudesert Shire* v. *Smith* and that spirit might continue in an action by a harassed debtor. The debtor would have to take the financial risk in deciding to test the point.

G. NEGLIGENT INFLICTION OF MENTAL INJURY

1. Australian Law

The tort of negligent infliction of nervous shock has mainly been used as a remedy for those who are mentally injured by witnessing accidents to third parties caused by the defendant's negligence. The first major case was *Dulieu* v. *White*[203] and since then the tort has developed very slowly. In *Hambrook* v. *Stokes*[204] it was recognised that the fear causing mental injury need not be fear for the plaintiff's own life, but may be concern for another.

A great extension on this principle was *Owens* v. *Liverpool Corporation*,[205] a decision of only persuasive force in Australia, which held that there is no reason in principle why damage must arise from fear for human safety. In that case, the plaintiffs witnessed an accident in which a coffin was thrown out of a hearse and they allegedly suffered consequential shock. The trial judge's decision that the case should not go to the jury was over-ruled by the Court of Appeal.

200 [1964] A.C. 1129. In *Rookes* v. *Barnard*, the plaintiff was an employee of a British airline who refused to join a union. The union warned the employer that there would be a general strike unless the plaintiff was dismissed. Upon dismissal, the employee successfully sued the union officials for the tort of intimidation.

201 (1966) 120 C.L.R. 145. The facts were that the defendant-council took gravel from a river, so interfering with the plaintiff's irrigation rights. It was held that although there was no liability for negligence or nuisance, the defendant was liable in an action on the case for intentionally doing a positive act forbidden by law, so inevitably causing damage to the plaintiff.

202 Fleming, op. cit. p. 688.

203 [1901] 2 K.B. 669. The facts were that the defendant's servant drove a horsecar into a building, putting the plaintiff in fear of her own life. The plaintiff recovered.

204 [1925] 1 K.B. 141. The defendant's servant negligently put the plaintiff's child into great danger. The mother won an appeal to the Court of Appeal and a new trial.

205 [1939] 1 K.B. 394.

Like the intentional infliction of mental injury, this tort suffers two restrictions due to the influence of policy considerations.

Since this is the tort of negligence, the primary controlling device is foreseeability. Thus before a duty to the plaintiff arises, it must be foreseeable that a person in the plaintiff's position would be injured. *Owens* v. *Liverpool Corporation* shows a liberality which is absent in Australia. In *Chester* v. *Waverley Corporation*[206] the High Court found that it was not foreseeable that the mother of a child drowned by the defendant's negligence would suffer mental injury. That restrictive approach would make recovery in the collection situation unlikely in Australia.

The second limitation is the kind of injury necessary for recovery. It was shown above that *Mount Isa Mines Ltd* v. *Pusey* requires long term mental damage for recovery under the intentional and negligent infliction of nervous shock torts.

The two limitations mean that debtors receive little protection from this tort. Only debtors in the *Stevenson* v. *Basham* situation (a threat to life and a miscarriage of pregnancy) are certain to recover. Lesser threats or lesser injuries would involve debtor-plaintiffs in a most uncertain gamble.[207]

2. *The American Experience*

Few American harassment cases are based on the theory of negligence.[208] The standard of reasonableness is the basis of the Texas tort of unreasonable collection efforts and the same standard appears to have been adopted by Louisiana.[209] While the Texas tort may be categorised as the adoption of the general tort of the negligent infliction of nervous shock,[210] it is discussed separately below. The standard of reasonableness is also applied in other torts: the American torts dealing with collection activities tend to merge to some extent, it being difficult to decide which tort was used in some cases.[211]

Whatever tort heading is applied, the negligence standard is rarely applied to collection activities in the United States. The reason may be that the standard is too effective. Thus it has been criticised by commentators for being an impractical standard which requires too high a duty of

[206] (1939) 62 C.L.R. 1.

[207] Dworkin, op. cit. pp. 442-5 argues that the two torts of negligent and wilful infliction of mental harm could be extended to cover all forms of invasion of privacy (and, by analogy, all harassment cases). Storey, op. cit. p. 505 points out that radical decisions (which are unlikely) would be needed to achieve that result. The result of *Chester* and *dicta* in *Pusey* would support Storey.

[208] Nelson, op. cit. pp. 373-4. One of the few exceptions is a leading Connecticut case, *Urban* v. *Hartford Gas* 139 Conn. 301, 93 A 2d. 292 (1952): ibid.; Martin op. cit. p. 136.

[209] Vichich, op. cit. p. 95; California has also hinted at a reasonableness test: Nelson, op. cit. p. 373. The issue is discussed with Australian cases in E. I. Sykes, "The Urban Case: the English and Australian View" (1953) 27 *Connecticut Bar Jnl.* 183.

[210] "Intentional Infliction", op. cit. p. 803.

[211] Armstrong and Delaney, op. cit. p. 693.

collectors.[212] It has also been criticised for denying the alleged right of collectors to be unreasonable and inflict some distress on debtors.[213] That is, the tort affects the real world of collection activities, while some commentators feel that collectors should be one of the few classes in society who may act unreasonably with impunity.

In the one major jurisdiction where negligence has been adopted as the standard for collection cases, Texas, the liberality of the standard is counter-balanced by a harsh injury requirement; debtors must show physical injury to recover.

H. THE TEXAS TORT OF UNREASONABLE COLLECTION EFFORTS

The establishment of the separate tort of unreasonable collection efforts in Texas[214] began in 1953 with *Harned* v. *EZ Finance*.[215] There are several uncertainties in the tort, which is not yet fully developed.[216] The tort has two major elements: unreasonable collection activities and physical damage to the plaintiff.[217]

The standard of reasonableness was not adopted at the outset but was the result of development of the cases.[218] It now appears that the uneven balance of power between creditor and debtor raises a duty of care in the former.[219]

While the standard of care under the tort is generally recognized to be reasonableness, there have been recent suggestions by intermediate Texan courts that recovery will only be available if a creditor's actions are "wilful and wanton". The issue has not been authoritatively settled.[220] It is generally felt that the proper view is that intention and malice are relevant, but only in that they allow exemplary rather than ordinary damages.[221]

There are three factors the courts take into account in deciding whether an action is unreasonable: the collector's action, the debtor's vulnerability to coercion and the legal enforceability of the debt.[222] Generally, a cam-

212 Martin, op. cit. p. 136.
213 Ibid.; Vichich, op. cit. p. 93.
214 It may have been embraced, though not named as a separate tort, by Louisiana: Greenfield, op. cit. p. 75.
215 151 Tex. 641; 254 S.W. 2d 81 (1953); Berger, op. cit. p. 335; Hubbard, op. cit. p. 950; Martin, op. cit. p. 130. The facts were that a debtor was systematically harassed but could show no physical injury—he failed to recover. Berger and Martin both trace the development of the tort through the cases. A note on pleading the tort is Marshall, *Whatley* v. *K. Mart Discount Stores* note (1970-71) 2 *Texas Tech. L. Rev.* 197.
216 Martin, ibid. p. 127.
217 Greenfield, op. cit. p. 73; Armstrong and Delaney, op. cit. p. 687.
218 Martin, op. cit. pp. 131-4 clearly traces this development.
219 Ibid., p. 129. See Hubbard, op. cit. p. 955 on the relation of this tort to negligence.
220 Vichich, op. cit. p. 95; Greenfield, op. cit. p. 74.
221 Armstrong and Delaney, op. cit. p. 687; Berger, op. cit. p. 337; Greenfield, ibid. p. 73; Hubbard, op. cit. p. 953; Marshall, op. cit. discusses the pleadings for exemplary damages under this tort.
222 Armstrong and Delaney, ibid. p. 687; Martin, op. cit. pp. 138-42; Julavits and Stuntebeck, op. cit. p. 272.

paign of harassment rather than a single act is essential for recovery, although there is no reason in principle why a single act should not be sufficient.[223] The debtor might be particularly susceptible if he or she is poor, ignorant or pregnant.[224] It is considered more unreasonable to harass a person in those circumstances than an ordinary person.

Similarly it is more unreasonable to try to coerce payment of a debt which is legally unenforceable than one which may be enforced through the courts. There have even been suggestions that any attempt to coerce payment of a usurious debt is unreasonable *per se*.[225] This factor might be useful in those cases where coercion has prevented the assertion of a legal defence, although it may be that it is necessary that the collector knew that the debt was not legally due before the debtor can obtain the benefit of the factor.[226]

Although physical damage is essential for recovery,[227] it is sufficient if the plaintiff suffers symptoms such as nervousness, headache, nausea, vomiting, loss of appetite and indigestion.[228] At least one of those symptoms would usually occur to every harassed debtor. It is also a sufficient physical injury if the plaintiff's property, reputation or employment is injured.[229] The requirement of physical injury has been widely criticised.[230]

Some defendants have claimed that the plaintiff-debtor suing on this tort has been contributorily negligent in allowing himself to overspend and thereby go into default. While that claim has been rejected each time it has been raised, the defence of contributory negligence has not been rejected in principle.[231]

The reasonableness standard seems to be the most appropriate way to balance the interests of the parties concerned in a harassment situation. The factors taken into account in the Texas tort cover the field of relevant interests, and reasonableness is a flexible concept which does not set too high a level for harassment.[232] However, it does leave recovery to the discretion of possibly conservative courts, and requires that debtors take the initiative by suing. Even with the adoption of the "reasonable" standard, collection problems have not been solved in Texas.[233]

223 *Ware* v. *Paxton* 359 S.W. 2d 897, 900. In that case, four letters per month and the collector's sarcastic tone were not sufficient for recovery. See also Hubbard, op. cit. pp. 960-1, 963; Martin, op. cit. p. 139.
224 Hubbard, ibid. p. 961; Martin, ibid. p. 140.
225 Hubbard, ibid. p. 962; Martin, ibid. p. 142.
226 Martin, ibid. p. 140 suggests this requirement for the factor of debtor weakness.
227 Cf. Berger, op. cit. pp. 336-7 who discusses an opposing view.
228 Hubbard, op. cit. pp. 951-2.
229 Ibid. pp. 952-3.
230 See e.g. Greenfield, op. cit. p. 79; Martin, op. cit. pp. 145-6.
231 Hubbard, op. cit. pp. 957-8; Martin, ibid. pp. 137-8.
232 Greenfield, op. cit. pp. 75-9; Hubbard, ibid. p. 957. Martin, ibid. pp. 143f. argues that reasonableness is too high a standard.
233 Vichich, op. cit. p. 95.

I. PRIVATE NUISANCE

Ignored by American debtor-plaintiffs, there are several useful nuisance cases for Australian debtors. In *Stoakes* v. *Brydges*[234] and *Alma* v. *Nakir*[235] injunctions were awarded against the nuisance of persistent telephoning. In *Stoakes* v. *Brydges*, the facts were closely analogous to collection. Annoyed at being persistently woken up by a milk truck in the early morning, the defendant rang the directors of the milk company each time he was woken. His calls were held by Townley J. of the Supreme Court of Queensland to be nuisance, and a perpetual injunction was awarded. McLelland C.J. of the New South Wales Supreme Court made a similar order on similar facts in *Alma* v. *Nakir*.[236]

The elements of nuisance are (i) an indirect[237] (ii) substantial and unreasonable interference (iii) with the occupier's interest in the beneficial use of his land which (iv) would have disturbed a person of ordinary sensitivity.[238]

The standard of responsibility is reasonableness and that depends on the utility of the defendant's conduct and the gravity of the harm to the plaintiff,[239] implying a balancing of interests approach. *Stoakes* v. *Brydges* and *Alma* v. *Nakir* show that there is potential for recovery by harassed debtors, although only in those cases where the debtor's enjoyment of his property is interfered with.[240] Although tenancy is a sufficient property interest,[241] the fact that there must be a connection with the enjoyment of property limits the usefulness of the tort. All cases of contact away from home, and those contacts at home which do not affect property interests (such as, presumably, a barrage of mail) are excluded.

J. INVASION OF PRIVACY

There is no general Australian or English tort of invasion of privacy[242] such as exists in the United States. Several attempts have been made to show that Australian tort law covers basically the same ground,[243] some arguing that our present torts could be extended by judicial decisions to

234 [1958] Q.W.N. 9.
235 [1966] 2 N.S.W.R. 396.
236 The defendant persistently dialled the plaintiff's telephone number and, when the telephone was answered, left his receiver off the hook, so tying the plaintiff's telephone up. A permanent injunction was awarded against telephoning or communicating with the plaintiff. As in *Stoakes* v. *Brydges*, the plaintiffs were business people.
237 A direct invasion of property rights would be trespass.
238 Fleming, op. cit. ch. 20 discusses the tort.
239 Ibid. pp. 402-5.
240 Storey, op. cit. p. 504.
241 Ibid. p. 504.
242 Storey, op. cit. p. 503; M. D. Kirby, "Eight Years to 1984: Privacy and Law Reform" (1976) 1 *Legal Service Bulletin* 351; Fleming, op. cit. p. 590. New South Wales has a Privacy Committee which is critically discussed in part III below.
243 Storey, ibid. pp. 503-5; Dworkin, op. cit. pp. 437-45; Kirby, ibid. pp. 351-2; Fleming, ibid. pp. 592-6.

cover the field[244] and others that that is not possible.[245] A statutory tort of privacy was proposed by a South Australian Bill which was defeated in the upper house.[246] A general tort has been criticised as being too vague to be successful,[247] although that argument fails to distinguish between the inherent vagueness of the notion of privacy and the not-necessarily-vague legal definition of a right to privacy.[248]

The American tort was first suggested by an 1890 article by Warren and Brandeis[249] and the tort was first adopted judicially in 1902.[250]

1. The Elements

There are four separate types of the tort, loosely grouped under the single label of privacy. The two headings most commonly used by harassed debtors are intrusion on solitude and public disclosure of private facts. Schick[251] describes the elements of intrusion upon a debtor's right to seclusion as an unreasonable bothering of the debtor through speech, writing or conduct which would be highly offensive to a reasonable man. The elements of public disclosure of private facts are[252] a publication without privilege of a true but private fact about the debtor of a kind or in a manner highly offensive to a reasonable man, which causes harm to the debtor.

The tort is less technical than other torts such as defamation,[253] there being no requirement of malice, special damage or physical injury, and truth is not a defence.[254] Being an action for interference with the plaintiff's mental state, it has been pointed out that the tort is similar to, though separate in its elements from, the tort of intentional infliction of nervous shock.[255]

2. Application to Collection

Intrusion on solitude is not as well developed as unwanted publicity as a head of damage, but there have been a large number of collection cases under the intrusion head. A leading case was a successful action by a debtor who was phoned at home and work between six and eight times

244 Dworkin, ibid. p. 445.
245 Storey, op. cit. p. 505.
246 "The South Australian Privacy Bill" (1974) 48 *A.L.J.* 457.
247 J. Swanton, "Protection of Privacy" (1974) 48 *A.L.J.* 91.
248 See D. N. MacCormick, "Privacy: A Problem of Definition?" (1974) 1 *British Jnl. of Law and Society* 75.
249 S. D. Warren and L. D. Brandeis, "The Right to Privacy" (1890) 4 *Harvard L. Rev.* 193.
250 Block, op. cit. p. 102.
251 Schick, op. cit. p. 146.
252 Ibid.
253 McGinn, op. cit. p. 294.
254 This point is made by Hurt, op. cit. p. 208; "Collection Capers", op. cit. p. 581; Hubbard, op. cit. p. 964; Homburger, op. cit. p. 50; Block, op. cit. p. 102; Schick, op. cit. p. 146; Pippin, op. cit. p. 279; "Scope and Adequacy" op. cit. p. 420.
255 J. L. Flynn, *Beneficial Finance* v. *Lamos* Note (1971) 20 *Drake L. Rev.* 673, 677; K. D. McCoy, "Liability of Creditor for Contacting Employer of Debtor as Collection Method" (1964) 24 *Louisiana L. Rev.* 953, 956-8; Berger, op. cit. p. 340; "Intentional Infliction" op. cit. p. 809.

per day for three weeks and whose employer was told of the debt: *Housh* v. *Peth*.[256] The facts were held to be actionable because there had been a deliberate and systematic campaign of harassment. Another successful action was taken by a debtor whose wife and sister had been falsely told by the female agent of a creditor that the debtor had made her pregnant: *Norris* v. *Moskin Stores*.[257] A wrongful intrusion is actionable where it would cause outrage, mental suffering, shame or humiliation to a person of ordinary sensibilities,[258] and on that ground, late night telephone calls, persistent calls and shadowing the debtor have all been held to be actionable.[259]

The head of the tort most frequently used by harassed debtors is the public disclosure of private information.[260] The element of publication is the same as that in defamation, and the leading collection case is *Brents* v. *Morgan*[261] where a debtor successfully sued a creditor who advertised the existence of the debt by placing an eight foot square sign in a window. The original article by Warren and Brandeis suggested that there should be a requirement of special damage where the information was published orally. Whatever the strength of that requirement in the past,[262] there is no doubt now that there is no difference between oral and written publication for liability.[263]

Thus, a wide number of actions have been held to infringe the public disclosure tort: publishing an advertisement in a newspaper, calling a waitress a "deadbeat" in a loud voice in a restaurant, letters and calls to neighbours and removing the tyres from a debtor's car in a public carpark.[264]

3. The Tort's Limitations

The first important limitation on the tort is that it has been held virtually unanimously that simply informing the debtor's employer of the existence of a debt is not actionable unless there are further circumstances.[265] In

256 165 Ohio St. 35; 133 N.E. 2d 340 (1956). Noted by J. G. Curran, (1956) 32 *Notre Dame Lawyer* 168; E. B. Fortson, (1957) 14 *Washington and Lee L. Rev.* 312; E. Durance, (1956) 2 *Wayne L. Rev.* 240; and see Shenfield, op. cit. p. 699.

257 272 Ala. 174; 134 So. 2d 321 (1961). Noted by R. L. Hodges, (1962) 15 *Alabama L. Rev.* 304; and see Berger, op. cit. p. 339.

258 Shenfield, op. cit. p. 700.

259 "Collection Capers", op. cit. pp. 581-2; Hurt, op. cit. p. 205.

260 Hurt, ibid. p. 206; "Collection Capers", ibid. p. 582.

261 221 Ky. 765; 299 S.W. 967 (1927). Noted by J. D. Hurley (1927-28) 13 *Cornell L. Qtly.* 469; also McGinn, op. cit. p. 294; "Collection Capers", ibid. p. 582; Berger, op. cit. p. 338.

262 Curran, op. cit. p. 169 discusses this point.

263 Prosser, *Torts*, op. cit. p. 810.

264 McGinn, op. cit. p. 294; "Scope and Adequacy", op. cit. p. 418; "Collection Capers", op. cit. p. 582.

265 Homburger, op. cit. p. 51; "Scope and Adequacy", ibid. p. 419; Curran, op. cit. p. 169; Berger, op. cit. p. 338; M. E. Calkins, "The Debtor v. Creditor Dilemma: When Does a Creditor's Communication with a Debtor's Employer Result in an Actionable Invasion of Privacy?" (1974) 10 *Tulsa L. Jnl.* 231, 235; McCoy, op. cit. p. 955; Greenfield, op. cit. p. 21; Shenfield, op. cit. p. 700; Block, op. cit. p. 102; Fimburg, op. cit. p. 345; Hurt, op. cit. pp. 206-7; McGinn, op. cit. p. 294; Schick, op. cit. p. 146; Pippin, op. cit. p. 280; Flynn, op. cit. p. 673.

Beneficial Finance Co. v. *Lamos*,[266] thirteen calls to the debtor's wife at work were held not to be an invasion of privacy. Similarly, a letter to the debtor's employer asking for assistance in collecting an employee's debt is not actionable.[267] Employer contact is actionable though, if it is part of a campaign of harassment.[268]

The leading case on this point, *Gouldman-Taber Pontiac* v. *Zerbst*[269] justified these decisions by the statement that an employer has a natural and proper interest in his employee's debts.[270] Other justifications are: that a defence to a privacy action is consent, and a debtor has impliedly consented to employer contact by making the original credit contract; that publication in privacy matters must be to a substantial portion of the public and one person is not enough; that the public has an interest in avoiding crowded courts which would be harmed by preventing coercive extra-judicial contact; and that, by analogy with defamation, there is a defence of privilege, and employer-contact is privileged.[271]

These arguments can be quickly answered: while an employer *may* have an interest in his employee's debts, that argument is strongest in those rare cases of debtor dishonesty where the debtor has a position of trust in his employment. In other cases of employer interest, that interest is heavily outweighed by a policy of not allowing a creditor to abuse that position. By analogy with abuse of qualified privilege, a creditor who uses another person's interest in hearing information should not be able to set up that interest to justify his own actions.

The second argument, implied consent, is poor. There is no evidence that debtors in any way consent to employer contact and consequential income insecurity simply by making a credit contract. The third argument, that publication should be to more than one person, fails to take into account the special nature of the employment relationship. More damage can be done to most debtors by publication to an employer than to a large number of other people. The final, crowded court, argument is valid only if it can be shown that the debtor is not harmed by being dealt with outside the judicial system. It has already been noted that non-judicial coercion is itself harmful to debtors. This and other arguments in favour of employer contact fail to take into account that employer contact severely harms

[266] 179 N.W. 2d 573 (1970).
[267] *Lucas* v. *Moskin Stores* 262 S.W. 2d 679 (Ky. 1953), noted by Dansky, (1954) 26 *Rocky Mountain L. Rev.* 347.
[268] *Pack* v. *Wise* 155 So. 2d 909, noted by McCoy, op. cit. see p. 953.
[269] 213 Geo. 682; 100 S.E. 2d 881 (1957). Noted by Basford, op. cit.; and Brace, op. cit.
[270] See also Flynn, op. cit. p. 675; Calkins, op. cit. p. 236; McCoy, op. cit. p. 955; Block, op. cit. p. 103; and *Household Finance* v. *Bridge* 250 A. 2d 878 (1969), noted at (1970) 87 *Banking L. Jnl.* 637.
[271] Curran, op. cit. p. 169; Calkins, ibid. pp. 233, 236; Armstrong and Delaney, op. cit. pp. 684-5; McCoy, ibid. p. 955; Greenfield, op. cit. pp. 22-3; Fimburg, op. cit. p. 345; *Household Finance* v. *Bridge* note, ibid. p. 647; "Collection Capers", op. cit. pp. 582-3.

debtor-employees by jeopardising their employment for the benefit of only one creditor.[272]

The second major limitation on the tort of privacy is related to, and an explanation of, the first. Although the standard of care required is reasonableness,[273] that standard has been qualified. To be actionable, the defendant's acts must be vicious,[274] serious and outrageous,[275] unwarranted, undue and oppressive, beyond the limits of decency or outrageous to those of ordinary sensibilities.[276] The original single requirement of "unreasonable" action has been qualified until it now approaches the "extreme and outrageous" standard of the American wilful infliction of mental injury tort. As a result, only the most extreme creditor activities are actionable.

The third limitation is not unique to this tort. Like other torts, this one potentially covers only some of the many harassing tactics available to creditors. The major class of tactics, deception, can in no way be seen as an invasion of privacy. Nor does publication of private facts cover badgering the debtor himself or, possibly, publication to only one or two others.[277] The intrusion on solitude aspect of the tort potentially covers a wider field, but probably would not cover threats by single letters or telephone calls. This tort is designed to give a remedy for invasions of a privacy interest and is not designed to supply a remedy for the right not to be coerced.

It is also ironic that a remedy designed to protect against invasions of privacy must be brought in a public court;[278] that fact might prevent a debtor with the strongest case from taking action. Most debtors would be embarrassed by their debt situation and those who are embarrassed by their situation being generally published by creditors would be reluctant to publicise their situation even more widely by suing in open court.

4. *Conclusion—The Tort of Privacy*

Although only some of the harassment situations are potentially covered, the American tort of privacy is evidence of a lost opportunity for tort law to deal with unfair collection tactics. Its substance is relatively free of technicalities, and recovery is available for a wide range of injuries: outrage, mental suffering, shame and humiliation[279] and consequential financial loss[280] are all compensable, and punitive damages are available in the presence of defendant malice.[281]

272 Greenfield, ibid. p. 22; Calkins, ibid. pp. 237, 239.
273 Geenfield, ibid. pp. 20-1.
274 *Household Finance* v. *Bridge* note, op. cit. p. 645.
275 Hurt, op. cit. p. 208; "Scope and Adequacy", op. cit. p. 419.
276 Hubbard, op. cit. p. 964.
277 Berger, op. cit. p. 339.
278 Jones (ed.), op. cit. p. 159.
279 Shenfield, op. cit. p. 700.
280 Prosser, *Torts*, op. cit. p. 815.
281 Ibid.

However, narrow judicial decisions have restricted recovery under the tort to extreme cases, the clearest example being the refusal to allow recovery for employer contact. The courts have been concerned, consciously or unconsciously, to allow extra-judicial collection to remain basically unaltered, due to the fear of overcrowded courts[282] and the fear of manufactured claims.[283] The tort encompasses an explicit policy that the parties' interests must be balanced and that some invasions of privacy are allowed to go without a remedy.[284] The balance under this, and all other Australian and American torts examined, favours the creditor's right to non-judicial collection over the debtor's right to be free of coercion and harassment.

K. Other General Law Civil Remedies

In Australia, several other general actions may occasionally be useful to harassed debtors. Trespass to property is useful where a collector physically goes onto the debtor's property or otherwise directly invades his property interest. There is also an action available for recovery of money paid under compulsion,[285] and the doctrines of constructive trust and unjust enrichment might also be useful in recovering money.[286] The latter actions would only be available to recover money paid, not to award general compensation. Injurious falsehood, breach of statutory duty and breach of confidence[287] might offer general damages in limited circumstances. Recovery under any of these actions is unlikely in the debt collection situation.

In the United States, the prima facie tort, an action for wilful and malicious conduct for which there is no traditional category might also be useful, although in very limited circumstances.[288] More importantly, in response to judicial and quasi-judicial abuses, the United States Constitution has been a useful source in ensuring procedural justice.[289] The fifth and fourteenth amendments ensure that life, liberty and property shall not be taken from any person without due process of law. The Supreme Court has interpreted the words "due process of law" in *Sniadich* v. *Family*

[282] Hurt, op. cit. pp. 206, 208; Basford, op. cit. p. 531.
[283] "Scope and Adequacy", op. cit. pp. 419-20.
[284] "Scope and Adequacy", ibid. p. 419; Homburger, op. cit. p. 51; *Household Finance* v. *Bridge* note, op. cit. p. 644; Calkins, op. cit. p. 233.
[285] *Ochberg* v. *Commissioner for Stamp Duties* (1943) 43 S.R. (N.S.W.) 189; *T.A. Sundell & Sons* v. *E. Yannoulatos Pty Ltd* (1956) 56 S.R. (N.S.W.) 323.
[286] See Dworkin, op. cit. pp. 438-9. Similarly the equitable doctrine of constructive fraud might allow recovery for unequal contractual provisions, but only for the amount of the debt: G. C. Cheshire and C. H. S. Fifoot, *Law of Contract* (3rd Aust. ed., 1974) pp. 340-1.
[287] *Tournier* v. *National Provincial Bank* [1924] 1 K.B. 461.
[288] Block, op. cit. p. 109. There is a slight possibility that an Australian prima facie tort is developing: see *Beaudesert Shire* v. *Smith* (1966) 120 C.L.R. 145.
[289] Due process and collection is discussed at length in Rogge, "Treatment of Debtors" (1972-73) 22 *Buffalo L. Rev.* 45.

Finance Corp.,[290] in doing so striking down pre-judgment garnishment as unconstitutional. In *Fuentes* v. *Shevin*[291] pre-judgment replevin (taking of property) was also struck down as unconstitutional. Sewer service, imprisonment, attachment of property and repossession are all possible candidates for constitutional scrutiny. Lacking a Bill of Rights, the remedy is obviously not available in Australia.

L. CONCLUSION—THE CIVIL LAW

The general Australian civil law has been examined for its usefulness in supplying a remedy for and deterrent against harassment. While some areas of harassing activity come under the scrutiny of a number of torts, they are only covered coincidentally.[292] One major area of what was described in Part I as "harassment", deception, is not covered by Australian tort law. Many other individual tactics would also slip through the tort net. These holes appear because tort law is designed to give remedies for a variety of injuries, and not to remedy invasions of the right to freedom from coercion. No tort or complex of torts specifically covers the injuries caused by coercive collection: anxiety and forced payment despite defences.

Even if the general area of a collection tactic is covered by a tort (such as threatening behaviour and wilful infliction of mental injury), judicial conservatism and the fears of a flood of cases and of manufactured claims, work together to ensure that only extreme cases of creditor action and debtor reaction are covered. The mental injury torts require a degree of "injury" which would rarely be suffered by harassed debtors[293] and which is difficult to prove when the injury does exist.[294] The subtle injuries suffered by debtors are not recoverable: loss of the right to defend claims, lost credit reputations and the suffering of real, though temporary, emotional distress.

Even in the rare cases where debtors do have a right of action, that right is useless if it cannot be enforced. A person whose default is due to inability to pay obviously cannot afford to sue his creditor for harassment. The cost of litigation is supposed to have been solved by the provision of legal aid. One of the usual eligibility criteria of Australian legal aid schemes is that a financially sound and non-assisted litigant would have sued on those facts. For large claims, the uncertainty of the application of Australian torts to harassment might deter an individual litigant and

290 395 U.S. 337 (1969).
291 407 U.S. 67 (1972).
292 The point is made for American torts (and applies equally to Australian torts) by Connolly, op. cit. p. 1277; Armstrong and Delaney, op. cit. p. 704; Scott and Strickland, op. cit. p. 572. Armstrong and Delaney ibid. p. 705 also note that the common law cannot develop innovative remedies such as minimum damages which might be necessary in this field.
293 "Harassing the Debtor", op. cit. p. 137.
294 Scott and Strickland, op. cit. p. 572.

hence prevent legal aid. Similarly, if it is not financially worthwhile to sue because of the small size of the claimed damage, legal aid will be unavailable.

A further factor preventing recovery by debtors is that judicial remedies are generally only available to articulate people who are confident of their own abilities in the court situation. Asher has suggested that those who are badly harassed are usually poor and inarticulate, collectors knowing that they are unlikely to cause a fuss.[295] Debtors might also think that because they apparently owe the debt, they have no right to claim damages for any attempt to collect it.[296] Furthermore, many people would be completely unaware that a remedy might be available for harassment.[297] An unknown right is useless.

Many collection devices invade the debtor's privacy. In seeking recovery, a civil action firstly labels the debtor as a defaulter[298] and secondly broadcasts the embarrassing facts in open court making the remedy self-defeating and consequently unlikely to be used.[299] This point was made above for the tort of privacy, but is also applicable to other torts.

The result of all these factors is that civil actions are rarely available and even more rarely taken. The deterrent impact of tort law on harassing collectors is thus extremely low. The futility of occasional civil claims has even been recognised by an American court.[300]

The conclusion is clear: Australian tort remedies supply an inconsistent and uncertain reaction to creditor harassment and are weak deterrents to harassing conduct. Even the better developed American tort system has provoked the same conclusion.[301]

3. *Conclusions—Criminal and Civil Law*

This part has examined the reactions of the general civil and criminal law to collection harassment to see whether either or both offers an adequate solution to its peculiar problems. Criminal and civil law each has an advantage over the other in dealing with harassment.

Criminal law offers a theoretically more severe penalty (fine or imprisonment) than the civil law, criminal law thus being more likely to deter harassment than the chance of a civil judgment. From the debtor's point of view, the criminal law offers the advantage of being cost-free, the state bearing the cost of prosecutions.

On the other side, civil actions, unlike criminal prosecutions, allow liberal compensation to injured debtors in accordance with principles of

295 Asher interview.
296 Scott and Strickland, op. cit. p. 580.
297 Jones, op. cit. p. 159; Scott and Strickland, ibid. p. 580.
298 Connolly, op. cit. p. 1277.
299 Jones, op. cit. p. 159.
300 R. E. Speidel et al. *Commercial and Consumer Law* (2nd ed., 1974) p. 583 quoting *Kruger* v. *Romain* 58 N.J. 522, 279 A. 2d 640 (1971).
301 Armstrong and Delaney, op. cit. pp. 695, 705; Connolly, op. cit. p. 1277; cf. McGinn, op. cit. p. 284 who feels that the common law generally reacts more quickly than the legislature.

basic justice.[302] That compensation is alleged to result in self-enforcing control of objectionable actions. One difficulty with criminal prosecutions is ensuring that action is taken by prosecuting authorities. Some commentators argue that civil plaintiffs have an economic self-interest in enforcing claims and civil claims are therefore likely to be made more frequently than criminal prosecutions.[303]

While each has an advantage over the other, criminal and civil laws have a number of crippling inadequacies in common. They are:

(1) While some types of harassing activity are potentially covered by either the civil or the criminal law, at least one major area, deception, is a prima facie breach of neither. Both the civil and the criminal law leave gaps for collectors to exploit.

(2) Where a prima facie breach of the criminal or civil law exists, both require extreme creditor action and/or extreme debtor reaction before a successful prosecution or suit can be launched. The majority of individual cases of harassment go without a remedy.

(3) Neither the criminal nor the civil law is strongly enforced (for different reasons) and consequently the deterrent effect of each is poor. It may be that the effectiveness of sanctions depends more upon the certainty of enforcement than on the severity of punishment.[304]

(4) Both suffer from a lack of specificity; that is, each is created for purposes other than controlling and compensating harassing debt collection. Harassing collection finds gaps in the general law and has its own unique problems which cannot be resolved by applying that law. Laws dealing specifically with harassment might be able to close all gaps and provide more effective controls and remedies[305] than the general law.

The result is that the general law is a poor reaction to collection harassment and might be improved by specific legislation. Part III therefore examines existing remedies designed to deal specifically with debt collection and harassment.

[302] Homburger, op. cit. p. 49; Scott and Strickland, op. cit. p. 591 argue that civil remedies may be more appropriate in collection than civil sanctions since most unreasonable collection activities are not worthy of criminal punishment. The authors apparently under-rate the effects of harassment and of coercion generally. They also claim (ibid.) that civil law is more appropriate than criminal prosecution where an "offence" is ill-defined.

[303] Committee of the Law Council of Australia, *Report on Fair Consumer Credit Laws* (1972) par. 10.3.2. ("the Molomby Report"); Scott and Strickland, ibid. pp. 590-1.

[304] Molomby Report, ibid. par. 10.2.1.

[305] Armstrong and Delaney, op. cit. p. 705 point out that the common law is unable to create new remedies, such as minimum damages provisions, to deal with specific problems.