WILKINSON v DOWNTON AND ACTS CALCULATED TO CAUSE PHYSICAL HARM[1]

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Introduction

At ten o'clock on the evening of April 9th 1896, one Downton entered the 'Albion' public house in St. Paul's Road in east London. He lived nearby, and therefore was well acquainted with Thomas Wilkinson, the landlord of the 'Albion', and his wife Lavinia. That day, Mr Wilkinson had gone to a steeplechase meeting in Harlow, and had told his wife that he would return by train. Downton (who had been at the same race meeting) had come to tell Mrs Wilkinson that her husband had decided instead to come home by road with some friends, and that on the journey the wagonette in which he was travelling had been involved in an accident. Mr Wilkinson, he said, was now lying at 'The Elms' in Leytonstone with both legs broken, and desired somebody to come and fetch him home. As requested, Mrs Wilkinson at once dispatched her son and a servant by train to Leytonstone, with pillows and rugs; and only when they arrived at 'The Elms' was it discovered that the whole thing was a practical joke. Mr Wilkinson arrived home safe and sound at midnight, having come back by train as he said he would.

Downton's actions caused Mrs Wilkinson to suffer a severe shock. She was seriously ill for some time, to the extent that at one point her life

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1 Some of the material in this article originally formed part of a thesis entitled 'Tort Liability for Intentional Mental Distress' which was awarded a Ph D by Cambridge University in 1975 Three other articles owe their origin to material from the same thesis 'Tort Liability for Threatening or Insulting Words' (1976) 54 *Can B R* 563, 'Moral Damage in Germany' (1978) 27 *I C L Q* 849, 'Intentional Infliction of Mental Distress Analysis of the Growth of a Tort' (1979) 8 *Anglo-Am L R 1* See also 'Damages for Injured Feelings in Australia' (1982) 5 *U N S W L J* 291 I know of only one other paper dealing with the theme of this article Trindade, 'The Intentional Infliction of Purely Mental Distress', an unpublished paper delivered at a Conference of the Australasian Universities Law Schools Association

and sanity were threatened, and her hair turned white. On April 30th 1897, she and her husband brought an action against Downton in the High Court before Wright J. and a common jury. So arose a case which was to have important implications for the law of torts both in England and elsewhere.[2]

The plaintiffs alleged in their statement of claim that the defendant Downton had falsely, fraudulently and maliciously spoken the words in question with intent to aggrieve, injure and annoy Mrs Wilkinson, and that she had thereby been caused to suffer mental anguish and resulting illness. She claimed damages in respect of this harm, and her husband claimed for medical and other expenses and for loss of services. Downton's principal defences were that he had merely been playing a joke and had no intention to injure Mrs Wilkinson, and that the damage was too remote.

Wright J. left various questions of fact to the jury. They decided that Downton had spoken the words and had meant them to be heard and acted upon, and that they were believed and acted upon; that they were, to his knowledge, false; and that the words produced the shock and resultant illness suffered by Mrs Wilkinson. They assessed the damages as ls.10½d. in respect of the train fares to Leytonstone and £1 for the shock. The judge then heard further argument on the question of Downton's legal liability for the shock damage.

A few days later, on May 8th, Wright J. gave judgment for the plaintiffs. He held Downton liable in deceit for the cost of the railway fare, and then dealt with the plaintiffs' contention that they could also recover in deceit the £1 claimed as compensation for the illness. He said:[3]

> I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no injuria of that kind. I think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff — that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That

2 Wilkinson v Downton [1897] 2 Q B 57 The case is also reported in a number of other reports, some of which give rather more in the way of factual detail than does the Law Reports version (1897) 66 L J Q B 493 is particularly useful in this respect, and has been relied upon for many of the facts stated in this and the preceding paragraph It also gives a summary of the arguments of counsel (1897) 76 L T 493, which was reproduced in [1895-7] All E R Rep 267, contains extracts from the statement of claim and details of the questions put to the jury Both these other reports make it clear (unlike the Law Reports version) that Wright J's judgment was a reserved judgment It has not been thought necessary to attach any citation to further references to Wilkinson v Downton in this article, except where specific statements in the judgment are being referred to

3 [1897] 2 Q B 57 at 58-59

> proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.

He then went on to justify the assumptions involved in this proposition — and in so doing, disposed of the defendant's two defences. First, there was the question of intention. He felt that Downton's act was so clearly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to him. His statements, in the circumstances, might be expected to have serious effects upon "any but an exceptionally indifferent person."[4] Secondly, there was the argument that the damage was too remote. As a matter of principle, he had no difficulty in disposing of this argument, for "the connection between the cause and the effect is sufficiently close and complete."[5] Two authorities which seemed to stand in the path of such a conclusion, *Victorian Railways Commissioners* v *Coultas*[6] and *Allsop* v *Allsop*,[7] were successfully distinguished.[8] The plaintiffs, then, were entitled to judgment.

It is the principle which was the basis of Wright J.'s decision — that a person is liable if he wilfully does an act calculated to cause physical harm, and physical harm results — that is responsible for the importance of *Wilkinson* v *Downton*, and it is that principle which is the subject of this article. It has been the ground on which courts both in England and in other jurisdictions have held defendants liable for the intentional infliction of mental distress which results in some form of physical harm. It has also played an important part in the development of an even wider liability in the United States, a liability for the intentional infliction of mental distress *without* physical consequences. There is no reason, however, why the principle should be restricted to shock and mental distress: it is a wide principle which has important implications for the law of tort generally. I will therefore deal with the general effect of the *Wilkinson* v *Downton* principle before concentrating on its career in the field of shock and mental distress.

4 Id at 59

5 Id

6 (1888) 13 App Cas 222

7 (1860) 5 H & N 534

8 For his treatment of Victorian Railways Commissioners v Coultas (1888) 13 App Cas 222, see post text to nn 93-94 As for Allsop v Allsop (1860) 5 H & N 534 (in which a wife suffered mental distress and consequent illness when someone falsely told her husband that she had committed adultery), Wright J said that it was based on lack of precedents and the fear of a flood of litigation, neither of which applied in the present case He could perhaps also have said that in Allsop v Allsop the person who suffered a shock as the result of the lie was the person about whom, and not the person to whom, the statement was made Janvier v Sweeney [1919] 2 K B 316, 323 per Bankes L J , 328-329 per A T. Lawrence J , Bielitski v Obadiak (1922) 65 D L R 627, 633 per Turgeon J A.

The General Effect of the *Wilkinson* v *Downton* Principle

In order to find for the plaintiffs in *Wilkinson* v *Downton*, Wright J. had to create a new tort, because no existing tort category quite fitted the facts. The tort that he created is potentially quite wide-ranging: it covers any sort of conduct which is calculated to cause physical harm to the person. He might have opted for something more limited, something specifically involving the intentional causing of physical harm *through shock*, but he chose not to do so.[9] Although in fact the *Wilkinson* v *Downton* principle has seldom, if ever, been invoked except in shock cases, it clearly has a potential application in cases that have nothing to do with shock or mental distress. What cases, then, might fall within the principle, and how does it relate to existing torts in this area? What was the inspiration for Wright J.'s formulation, and what does it mean for the law of torts as a whole?

It is best to begin by examining the relationship between *Wilkinson* v *Downton* and the older torts of trespass to the person — battery, assault and false imprisonment.[10] What is immediately clear is that *Wilkinson* v *Downton* is in no sense a substitute for these older torts. Certainly, *Wilkinson* v *Downton* is more general in its scope than the trespass torts, which — as one would expect with such ancient causes of action — all cover fairly particular instances of conduct. In addition, these three torts, like all trespass torts, are limited by the requirement that the harm be a direct, rather than a consequential, result of the defendant's conduct. However, battery, assault and false imprisonment are not restricted to physical harm to the person. They are all wide enough to encompass conduct which causes no physical harm but merely injures the dignity. Assault, indeed, since its essence is causing an apprehension of imminent hostile bodily contact, is exclusively concerned with the causing of mental anguish rather than physical harm — though in admittedly rather special circumstances.[11] Battery would certainly cover cases involving substantial physical harm, but any unlawful contact with the person of another is sufficient for a battery,[12] and so it is clear that it covers offensive as well as harmful contacts.[13] Battery may even be committed where a plaintiff is unaware of the contact at the time when it happens, as where a woman is kissed while asleep — clearly a case involving injury to the

9 See the treatment of Wilkinson v Downton in G L Williams, *Learning the Law* (11th ed 1982), 68-81

10 For a detailed study of the elements of battery and assault, see Trindade, 'Intentional Torts Some Thoughts on Assault and Battery' (1982) *1 O J L S* 211 The author promises a subsequent article on false imprisonment On assault, see also Handford, 'Tort Liability for Threatening or Insulting Words', supra n 1

11 See Handford, 'Tort Liability for Threatening or Insulting Words', supra n 1, 564-66

12 Cole v Turner (1704) Holt K B 108

13 e g spitting in a person's face R v Cotesworth (1704) 6 Mod 172, or throwing water over him Pursell v Horn (1838) 8 A & E 602

dignity. False imprisonment likewise covers purely dignitary injuries,[14] since there is no minimum duration of imprisonment and damages may therefore be recovered for even a token confinement — though it is less certain whether the tort is committed when the plaintiff is unaware of the imprisonment until later.[15]

One possible explanation of the relationship between *Wilkinson* v *Downton* and these older torts is that the purpose of *Wilkinson* v *Downton* is to cover cases where harm is inflicted intentionally *but indirectly* — and that it therefore creates an action on the case for intentional harm to the person to fill in the gaps left by the limitation of trespass to direct harm. There is some evidence in favour of such a view. There are various cases of intentional harm to the person indirectly inflicted which must come within *Wilkinson* v *Downton* if they are to be remediable at all — cases where injuries have been caused by the setting of spring-guns,[16] the administration of drugs or poison,[17] the infliction of disease,[18] and, remembering the classic example of the distinction between trespass and case, the leaving of logs in the highway.[19] More specific support is provided by the fact that the law already recognises actions on the case for intentional harm parallel to other forms of trespass.[20]

Is it really satisfactory, however, to perpetuate the trespass-case distinction in this way? Milsom has shown that originally there was no distinction between direct and indirect harm and that the distinction arose accidentally as the result of a jurisdictional division.[21] Williams and Hepple have pointed out that *Wilkinson* v *Downton* is a leading example of a tort created after the abolition of the forms of action, without any reliance on old precedents,[22] and it would seem that it therefore ought not to be restricted by forms of action thinking. Moreover, in the United States the distinction between directness and indirectness has been abolished,[23] and so one presumes that assault, battery and false imprisonment can all now be committed indirectly — and yet there is still

14 Though Atkin L J in Meering v Grahame-White Aviation Co (1919) 122 L T 44, at 54, in holding that there is liability in false imprisonment even where the plaintiff is not conscious of it at the time, justifies this on the basis of harm to the plaintiff's reputation, rather than his dignity See also H Luntz, A D Hambly & R Hayes, *Torts Cases and Commentary* (1980) chapter 16, which likewise rationalises false imprisonment in terms of injury to reputation

15 Herring v Boyle (1834) 6 C & P 496 appears to hold that there is no liability unless the plaintiff is conscious of the confinement at the time, but Atkin L J in Meering v Grahame-White Aviation Co (1919) 122 LT 44 took a contrary view See Prosser, 'False Imprisonment Consciousness of Confinement' (1955) 55 *Col L Rev* 847

16 Deane v Clayton (1817) 7 Taunt 489, Bird v Holbrook (1828) 4 Bing 628, Jordin v Crump (1841) 8 M & W 782

17 See H Street *Law of Torts* 7th ed (1983) 22 An example is Smith v Selwyn [1914] 3 K B 98 (seduction after putting drug in drink)

18 Id at 22

19 For this example, see Reynolds v Clarke (1725) 1 Str 634 at 636 per Fortescue J

20 See Bird v Jones (1845) 7 Q B 742 (false imprisonment), Hunt v Dowman (1618) Cro Jac 478, Baxter v Taylor (1832) 4 B & Ad 72 (land), Mears v London & South Western Ry (1862) 11 C B (N S) 850 (goods)

21 S F C Milsom, *Historical Foundations of the Common Law* 2nd ed (1981) chapter 11 Milsom 'Trespass from Henry III to Edward III' (1958) 74 *L Q R* 195, 407, 561

22 G L Williams & B A Hepple, *Foundations of the Law of Tort* (1976) 36-37

23 See *Restatement of Torts 2d*, chapter 2, scope note to topic 1, W L Prosser, *Torts* 4th ed (1971) 29, 34-35

room for a more generalised tort of intentionally causing physical harm to the person.[24]

Perhaps the best explanation of the relationship between *Wilkinson* v *Downton* and the trespass torts is provided by looking at the parallel problem of harm negligently inflicted. The trespass torts extended to cover harm inflicted directly but negligently,[25] and once upon a time plaintiffs injured as a result of negligence had to decide whether the harm they suffered had been inflicted directly or indirectly — because this determined whether they laid their claim in trespass or case.[26] This intolerable situation was resolved in 1833 when *Williams* v *Holland*[27] finally confirmed that in cases involving *unintentional* harm an action could be brought in case whether the harm was caused directly or indirectly — so creating the modern tort of negligence, which knows no bounds of directness or indirectness. However, trespass is still an available alternative to negligence in cases of negligent direct harm,[28] and this alternative may possess advantages which make it attractive to plaintiffs in particular cases.[29] The position, therefore, is that there is a generalised negligence remedy, available for both direct and indirect harm, with the alternative of trespass in certain cases of direct harm, including some cases where negligence might not lie. Surely the position vis-a-vis intentional torts is fairly similar. *Wilkinson* v *Downton*, unfettered by notions of directness or indirectness, covers all cases of intentional physical harm to the person, but trespass lies in cases of direct harm and especially in cases involving merely dignitary wrongs which *Wilkinson* v *Downton* does not reach. Where someone is struck a blow which causes him substantial physical harm, as in *Lane* v *Holloway*,[30] he will probably prefer to sue in battery, but there would seem to be no reason why *Wilkinson* v *Downton* should not be an available alternative.

One limitation of this analogy is that the negligence principle, unlike *Wilkinson* v *Downton*, is not restricted to physical harm to the person, but is more generalised. The neighbour principle formulated by Lord Atkin

24 See Prosser, supra n 23, 55-62, Handford, 'Intentional Infliction of Mental Distress' supra n 1 As the last part of this article will show, United States law has extended this tort to cover intentionally caused mental distress

25 This is clear from cases such as Holmes v Mather (1875) L R 10 Ex 261 and Stanley v Powell [1891] 1 Q B 86 It has even been suggested that at one time liability in trespass was strict but in fact what seems to have happened is that the fault issue was concealed by the practice of the defendant pleading that he was not guilty and the matter then being determined by the jury see Case of Thorns, Hull v Orynge (1466) Y B 6 Edw IV 7 pl 18, Weaver v Ward (1617) Hob 134, as discussed in J H Baker, *Introduction to English Legal History* 2nd ed (1979) 340-342, S F C Milsom *Historical Foundations of the Common Law* 2nd ed (1981) 392-396

26 See Prichard, 'Trespass, Case and the Rule in Williams v Holland' [1964] *C L J* 234

27 (1833) 10 Bing 112

28 Note however Letang v Cooper [1965] 1 Q B 232, in which Lord Denning M R and Diplock L J both, in slightly different ways, suggested that in cases involving the negligent infliction of personal injury negligence was the only available cause of action However the case turned on the interpretation of words in the Law Reform (Limitation of Actions) Act 1954 (U K) s 2(1)

29 See Trindade, 'Some Curiosities of Negligent Trespass to the Person' (1971) 20 *I C L Q* 706

30 [1968] 1 Q B 379

in *Donoghue* v *Stevenson*[31] contemplated at least either personal injury or damage to property. Lord Wilberforce in *Anns* v *Merton London Borough Council*[32] confirmed that this was a sufficient general principle by saying that when a neighbour relationship existed a prima facie duty of care arose, and clearly contemplated damage on at least as wide a basis as Lord Atkin. Round about the same time, it was finally confirmed that negligence extended beyond personal injury and property damage to economic loss.[33] However this general principle of negligence liability is of comparatively recent origin. It would certainly not have been recognised as far back as 1897 — which gives Wright J's general principle of liability for intentional harm to the person a very modern look. Moreover, at that time, even wider principles of liability for intentional harm were being canvassed, and it is here that we may perhaps gain a clue to the thinking that produced *Wilkinson* v *Downton*.

Sir Frederick Pollock, in the first edition of his 'Law of Torts' published in 1887, suggested that there was a general principle that it was tortious to do wilful harm to one's neighbour without lawful justification or excuse.[34] In later editions he found support for this principle in an obiter dictum of Bowen L.J. in *Skinner & Co.* v *Shew & Co.*[35] to the effect that "at common law, there was a cause of action whenever one person did damage to another, wilfully and intentionally, and without just cause or excuse". (The same judge had earlier made a similar statement, though limited to property damage, in *Mogul Steamship Co.* v *McGregor*.[36]) Wright J. was in close touch with the academic world, and with Pollock in particular — together the two had written an 'Essay on Possession in the Common Law' in 1888, one of three books of which Wright was either author or co-author.[37] Wright was familiar with Pollock's 'Law of Torts' and indeed cites it in *Wilkinson* v *Downton*.[38] Although he cites no authority for the general principle he outlines, it seems at least highly probable that Pollock's ideas had something to do with it.

Pollock's general principle was favourably received in the United States, where it was first adopted by Holmes J., a close acquaintance of Pollock, in *Aikens* v *Wisconsin*[39] in 1901, and has become the prima facie tort doctrine,[40] accepted by a number of United States jurisdictions (par-

31 [1932] A C 562, 580

32 [1978] A C 728 at 751-752

33 Caltex Oil (Australia) Pty v The Dredge Willemstad (1976) 136 C L R 529, Junior Books v Veitchi Co [1983] A C 520 See also n 225 below

34 F Pollock, *Torts* (1887) 21

35 [1893] 1 Ch 413, 422

36 (1889) 23 Q B D 598, 613

37 The others were R S Wright, *Law of Criminal Conspiracies and Agreements* (1873), R S Wright & H Hobhouse *Outline of Local Government and Local Finance in England and Wales, excluding London* (1884)

38 [1897] 2 Q B 57, 60

39 (1904) 195 U S 194 at 204

40 See Forkosch, 'An Analysis of the "Prima Facie Tort" Cause of Action' (1957) *42 Cornell L Q* 465

ticularly New York),[41] and approved by the American Restatement of Torts.[42] Under this doctrine, even where no specific intentional tort applies, the prima facie tort theory may make the defendant liable. Outside the United States however, it has not prospered. In England, House of Lords cases have made it clear that Pollock's principle is too wide, and that liability for intentional harm only exists when some specific intentional tort is committed.[43] A similar fate has befallen a later attempt to state a general principle of liability for intentional harm. In *Beaudesert Shire Council* v *Smith*,[44] the High Court of Australia purported to discover from certain old authorities a general principle, derived from the action on the case, that a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages.[45] This principle, however, seems to owe its origin to a misreading of legal history and of the authorities in question,[46] which were in fact antecedents of the more specific intentional tort of intimidation.[47] The *Beaudesert*[48] principle has never been adopted in any other case and has recently been looked upon with disfavour by the Privy Council in *Dunlop* v *Woollahra Municipal Council*[49] and the House of Lords in *Lonrho* v *Shell Petroleum Co*[50]. It would seem that, outside the United States, such general principles of liability are alien to the common law.[51] Perhaps this may indicate why Wright J's more limited general principle has seldom been invoked in the case-law, apart from cases involving shock. It is to such cases that we now turn.

Wilkinson v *Downton* and Liability for Shock

(a) The Cases

In *Wilkinson* v *Downton* itself, the physical harm required by Wright J.'s principle consisted of a physical illness brought about by the shock which Downton had caused Mrs. Wilkinson to suffer. It is interesting that in all the subsequent cases which follow *Wilkinson* v *Downton* the necessary physical harm has been caused by the wilful infliction of mental distress, even though Wright J.'s principle nowhere requires that the

41 But by no means accepted by all See in particular Nees v Hocks (1975) 536 P 2d 512 (Or)

42 See *Restatement of Torts* 2d s 870, and comment thereon

43 Mayor of Bradford v Pickles [1895] A C 587, Allen v. Flood [1898] A.C 1 See *Pollock on Torts* 15th ed (1951) Excursus A, 41-43.

44 (1966) 120 C L.R 145. See Dworkin & Harari, 'The Beaudesert Decision — Raising the Ghost of the Action Upon the Case' (1967) 45 *A L J* 296, 347; Sadler, 'Whither Beaudesert Shire Council v Smith?' (1984) 58 *A L J* 38

45 (1966) 120 C L.R 145, 156

46 Such as Garret v Taylor (1620) Cro Jac 567 and Tarleton v McGawley (1793) Peake N P 270

47 See Street, supra n.17, chapter 21, esp at 368-370

48. (1966) 120 C L.R 145

49 [1981] 1 N S W L R 76.

50 [1982] A C 173

51 A similar thing has happened to the possibility of a general principle of strict liability being derived from Rylands v Fletcher (1868) L R. 3 H L 330. see Prosser, 'The Principle of Rylands v Fletcher' in W L Prosser, *Selected Topics in the Law of Torts* (1953) 134

physical harm be brought about in this manner.

There has only been one other English case following *Wilkinson* v *Downton* — *Janvier* v *Sweeney*[52] in 1919. In this case a private detective, in order to obtain some letters, masqueraded as a Scotland Yard detective and told the plaintiff, whose fiancee was an interned German, that she was wanted by them for corresponding with a German spy. As a result of this the plaintiff suffered shock and became ill. The Court of Appeal held that the defendants were liable in accordance with the principle of *Wilkinson* v *Downton*. In Scotland, *Wilkinson* v *Downton* was followed in *A.* v *B's Trustees*,[53] where a lodger's suicide in his landlady's bathroom caused shock and injury to the health of the landlady and her daughter.[54] In New Zealand, *Wilkinson* v *Downton* was again followed in *Stevenson* v *Basham*,[55] where a wife suffered shock and a miscarriage on hearing the landlord threatening her husband to burn them out of their house if they did not give up possession.[56] In South Africa, *Wilkinson* v *Downton* was relied on in *Els* v *Bruce*[57], where the defendant threatened to have the plaintiff's husband arrested unless she paid him some money, causing injury to the plaintiff's health.

There are also some Canadian cases. In *Bielitski* v *Obadiak*[58] the defendant circulated a false report that Steve Bielitski had hanged himself from a telegraph pole, and the report in due course reached Bielitski's mother, who suffered a violent shock and became ill. *Wilkinson* v *Downton* was followed and the defendant was held liable on the assumption that he must have intended the report to reach the plaintiff. In *Purdy* v *Wosnesensky*[59] the plaintiff became ill after the defendant assaulted her husband in her presence, knocking him to the floor and causing her to think that he was dead. Again the defendant was held liable under *Wilkinson* v *Downton*.[60]

Finally, there are two Australian cases. *Johnson* v *The Commonwealth*[61] resembles *Purdy* v *Wosnesensky*[62] in that the plaintiff suffered mental

52 [1919] 2 K B 316

53 (1906) 13 S L T 830

54 The court could not see the precise ground of action and so suggested breach of contract In a subsequent case involving similar facts, Anderson v McCrae (1930) 47 Sh Ct Rep 287, the court rejected breach of contract on the ground that damage such as this was too remote a consequence They distinguished Wilkinson v Downton on the not very convincing ground that it was based on implied malice Note also Stedman v Henderson (1923) 40 Sh Ct Rep 8, where the defendant was held liable for violent language and abuse causing fright and consequent illness, though Wilkinson v Downton was not in fact cited

55 [1922] N Z L R 225

56 The court held that the case could be treated either as a case of intentional conduct under Wilkinson v Downton or as one of negligence

57 1922 E D L 295

58 (1922) 65 D L R 627

59 [1937] 2 W W R 116

60 See also Campagne v Hoffman (1959) unreported — noted in I Goldsmith *Damages for Personal Injury and Death in Canada* (1959) Supplement 12-a case with identical facts

61 (1927) 27 S R (N S W) 133

62 [1937] 2 W W R 116

anguish and consequent ill-health as a result of acts done to her husband. The defendants wrongfully entered the plaintiff's house, assaulted her husband in her presence, and then carried him off to prison, where they kept him for some considerable time. The plaintiff recovered damages under *Wilkinson* v *Downton* and also for loss of consortium.[63] The other Australian case, *Bunyan* v *Jordan*,[64] recognised the *Wilkinson* v *Downton* principle but held that there was no liability on the facts. The plaintiff allegedly overheard the defendant threaten to kill himself and then heard a shot being fired, but it was held that her shock and her resulting neurasthenia were not results that could reasonably be expected to follow in the circumstances.

On the basis of these cases it is now possible to state in some detail the requirements of *Wilkinson* v *Downton* as it applies to shock cases. In essence, the principle requires that there be an act calculated to cause physical harm, and that physical harm should result. The physical harm is the 'nervous shock', that is to say, the physical result of the infliction of some form of mental distress on the plaintiff. For negligence cases Lord Denning M.R. in *Hinz* v *Berry*[65] put the problem into a more modern medical context by saying that what was required was a "recognisable psychiatric illness", and this is clearly what is required under *Wilkinson* v *Downton* also. In *Bunyan* v *Jordan*[66], for example, Dixon J. held that neurasthenia (an anxiety state) would be sufficient. Though in most of the cases such harm has been produced by fright, this is by no means the only emotion that qualifies. In *A.* v *B's Trustees*[67] the harm was caused not by fright at something that might happen but by horror at something that had happened, and in *Wilkinson* v *Downton* itself and *Bielitski* v *Obadiak*[68], the harm was due to horror caused by something that had supposedly happened.

Wright J's statement of the rule in *Wilkinson* v *Downton* requires that the defendant must have done an act calculated to cause physical harm, and that this act must have been done wilfully.

His conduct is required to be wilful, rather than merely careless — in other words, this is an intentional tort, and not a tort based on negligence. However, in tort recklessness is usually bracketed with intention, and the requirement of wilful conduct is presumably wide enough to include recklessness as well as intention. According to the

63 On this ground the case has since been overruled by Wright v Cedzich (1930) 43 C L R 493, which held that the action for loss of consortium did not lie in favour of a wife On this question, see Handford, 'Relatives' Rights and Best v Samuel Fox' (1979) 14 *U W A L Rev* 79.

64 (1937) 57 C L R 1

65 [1970] 2 Q B 40, 42

66 (1937) 57 C L R 1, 16

67 (1906) 13 S L T 830

68 (1922) 65 D L R 627

Restatement, conduct is intentional when the actor either desires to cause particular consequences or knows that they are certain or substantially certain to result from his act.[69] Recklessness denotes that, though the consequences of the act are less than substantially certain, the risk of them occurring is greater than the mere foreseeability of consequences that characterises negligent conduct.[70]

The requirement that the act be calculated to cause physical harm says something about the nature of the act, but also introduces a mental element.[71] 'Calculated' seems to mean something between 'intended' and 'foreseeably likely'. The meaning cannot be so restricted as to require that the defendant should have intended the physical harm to occur, because in *Wilkinson* v *Downton* itself the defendant only intended to play a practical joke and seemingly did not either desire or realise that more serious consequences would follow. On the other hand, it is necessary for the physical harm to be something more than merely foreseeable, because otherwise it will be difficult to distinguish the *Wilkinson* v *Downton* principle from negligence.[72] The Restatement probably provides the best indication of the meaning of the word: instead of 'calculated', it uses the words "intended or likely".[73] In *Wilkinson* v *Downton*, Wright J said that one question was "whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed,"[74] and it may thus be that in *Wilkinson* v *Downton* itself the defendant intended to cause physical harm in the sense that while he had no desire to bring about the harmful consequences they were substantially certain to follow. Other cases, such as *Stevenson* v *Basham*[75] in which the court expressly referred to the defendant's conduct as reckless, are perhaps cases in which the defendant's conduct was likely, rather than intended, to cause physical harm.

As for conduct itself, it may take any form. Some cases have involved lies;[76] some have involved threats;[77] others have involved other sorts of conduct, such as the suicide in *A. v B's Trustees.*[78] The motive behind the

69 *Restatement of Torts 2d* s 8A

70 Id s 500

71 On this see Vold, 'Tort Recovery for Intentional Infliction of Mental Distress' [1938] *Neb L B* 222, 238

72 As to this see section (c) below

73 See in particular *Restatement of Torts* s 46 and *Restatement of Torts 2d* s 312, which both set out a cause of action for the intentional infliction of emotional distress which results in physical harm

74 [1897] 2 Q B 57 at 59 (emphasis added)

75 [1922] N Z L R 225 at 229

76 Wilkinson v Downton itself, Bielitski v Obadiak (1922) 65 D L R 627 It has been suggested that there is no liability for the callous announcement of true bad news During the drafting of the *Restatement 2d*, Prosser referred to the famous exchange "Are you the widow Murphy?" "My name is Murphy, but I'm no widow" "The hell you ain't" as a case where there would be no liability (1957) *Proceedings of the American Law Institute* 292 However, there was liability in Price v Yellow Pine Paper Mill Co. (1922) 240 S W 588 (Tex), where the defendant brought a badly injured man home and abruptly delivered him to his pregnant wife See also Brown v Mount Barker Soldiers' Hospital [1934] S A S R 128 and text at nn 168-169 below

77 Janvier v Sweeney [1919] 2 K B 316, Stevenson v Basham [1922] N Z L R 225, Els v Bruce, 1922 E D L 295

78 (1906) 13 S L T 830

conduct may vary from the desire to play a practical joke to the opposite extreme. Duke L.J. in *Janvier* v *Sweeney*[79] referred to this case as "a much stronger case than *Wilkinson* v *Downton*" for precisely this reason. The conduct in question may be directed either at the plaintiff or at a third party[80] — in the latter situation it is still possible to regard the conduct as 'calculated' to cause harm to the plaintiff.[81] If the defendant knows that the plaintiff is specially sensitive in some way, then the defendant's conduct may be calculated to cause harm to this particular plaintiff although it would not affect a person of ordinary firmness.[82]

Finally, it must be shown that the harm is caused by the defendant's conduct, and is not too remote. Causation was a problem in *Bielitski* v *Obadiak*,[83] where it was argued that, since the defendant's tale had reached the plaintiff through repetition by others, there was no liability, since the intervening acts had broken the chain of causation. The court held, however, that in such a situation there was a responsibility to break the bad news to relatives, and so the story was as certain to reach the plaintiff as if the defendant had told her himself.[84] Remoteness has been a problem in several of the cases, particularly the original *Wilkinson* v *Downton* case, because of the decision in *Victorian Railways Commissioners* v *Coultas*[85] — but this issue is better seen against the general background of *Wilkinson* v *Downton* liability.

(b) The Background

In all the *Wilkinson* v *Downton* cases, and particularly in *Wilkinson v Downton* itself as the original case, the court had to contend with older notions which prohibited recovery for shock and mental distress. The older attitude was that the law would not countenance recovery for mental distress alone[86] — though it would allow parasitic damages for mental distress when that mental distress followed from the commission of another recognised tort,[87] and also came fairly close to the problem when

79 [1919] 2 K B 316 326

80 Stevenson v Basham [1922] N Z L R 225 and Purdy v Wosnesensky [1937] 2 W W R 116 are examples of cases where the acts were directed at third parties

81 American cases recognise three alternative bases for liability to the plaintiff when the acts are directed at a third party (1) if, vis-a-vis the plaintiff, the act can be characterised as intentional or reckless (see *Restatement of Torts 2d* s 46(2) and Knierim v Izzo (1961) 174 N E 2d 157 (Ill)), (2) regarding the harm to the plaintiff as negligent (see *Restatement of Torts 2d* s 312 and cases such as Hill v Kimball (1890) 13 S W 59 (Tex)), (3) invoking the criminal law doctrine of transferred intent — only done in one case, Lambert v Brewster (1924) 125 S E 244 (W Va) Purdy v Wosnesensky [1937] 2 W W R 116 is based on the intention theory, and Stevenson v Basham [1922] N Z L R 225 offers intention and negligence as alternatives Latham C J in Bunyan v Jordan (1937) 57 C L R 1 at 12 contemplated the application of the principle of transferred intent

82 Els v Bruce 1922 E D L 295 and see also Bunyan v Jordan (1937) 57 C L R 1 at 14 per Latham C J

83 (1922) 65 D L R 627

84 It was on this ground that Haultain C J S dissented from the majority

85 (1888) 13 App Cas 222

86 See Lynch v Knight (1861) 9 H L Cas 577 598 per Lord Wenslevdale

87 See e g Childs v Lewis (1924) 40 T L R 870 (false imprisonment), Dix v Brookes (1717) 1 Str 61, Bruce v Rawlins (1770) 3 Wils K B 61, Bennett v Allcott (1787) 2 T R 166, Waters v Maynard (1924) 24 S R (N S W) 618 (trespass to Land), Goslin v Corry (1844) 7 Man & G 342, Lev v Hamilton (1935) 153 L T 384 at 386 per Lord Atkin (defamation) Murray v Kerr [1918] V L R 409 at 412 per Irvine CJ (seduction), Quinn v Leathem [1901] A C 495, Huntley v Thornton [1957] 1 W L R 321 (conspiracy), Pratt v British Medical Association [1919] 1 K B 244 (interference with contract), Moore v News of the World [1972] 1 Q B 441 (infringement of copyright)

recognising that in nuisance cases damages could be awarded for physical inconvenience as opposed to actual physical harm.[88] One expression of this general attitude was the so-called 'impact' rule, according to which there could be no compensation for mental distress or physical illness which resulted from mental distress unless there was impact causing contemporaneous physical harm. The leading case was the Privy Council decision in *Victorian Railways Commissioners* v *Coultas*[89] in which a wife suffered shock and consequent injury to her health as a result of the negligence of a level-crossing keeper who allowed the buggy in which she and her husband were driving to cross when a train was approaching. The husband just managed to avoid a collision. The Privy Council did not in terms say that impact was necessary,[90] but raised other objections to finding a defendant liable in such situations, notably that there ought to be no recovery for mere fright and that therefore there should be no recovery for its consequences, and that the damage was too remote.[91] *Wilkinson* v *Downton* and the cases which followed it had to overcome such objections. Wright J. said[92] that *Victorian Railways Commissioners* v *Coultas*[93] did not apply to cases involving intentional conduct, and referred to the criticism of this case in subsequent cases.[94] The other *Wilkinson* v *Downton* cases echo these criticisms,[95] and also stress the increase in scientific and medical knowledge since 1888.[96] In cases where mental distress and resulting physical harm have been caused negligently, the courts have similarly had to overcome the impact rule.[97]

88 Bone v Seale [1975] 1 W L R 797 makes it clear that the interference with use and enjoyment of land, which is the interest which the tort of nuisance protects, has a non-pecuniary element similar to damages for pain and suffering in personal injury cases – see particularly 803-804 per Stephenson L J , 804 per Scarman J But this interest only contemplates physical discomfort, and mere mental distress is insufficient see Thompson-Schwab v Costaki [1956] 1 W L R 335 (brothel held to be nuisance on the ground that it caused physical inconveniences to neighbours), Shuttleworth v Vancouver General Hospital [1927] 2 D L R 573 (isolation hospital not a nuisance because no physical inconvenience, plaintiff's complaints based on mental distress)

89 (1888) 13 App Cas 222

90 Id at 226

91 Id at 225

92 [1897] 2 Q B 57, 60

93 (1888) 13 App Cas 222

94 Specifically Pugh v London Brighton & South Coast R Co [1896] 2 Q B 248 in which the Court of Appeal had treated it as open to question and decisions from Ireland and the United States which repudiated it Bell v Great Northern R Co of Ireland (1890) 26 L R Ir 428 Mitchell v Rochester R Co (1894) 25 N Y S 744 (cited in Pollock *Torts* 4th ed (1895) p 47 note (n) – but as Sir Frederick Pollock noted [1897] 2 Q B 57 60 n 4 this case was subsequently reversed on appeal (1896) 45 N E 354 (N Y)

95 Stevenson v Basham [1922] N Z L R 225 at 232 per Herdman J , Biehitski v Obadiak (1922) 65 D L R 627 at 632 per Lamont J A 635-636 per Turgeon J A Purdy v Wosnesensky [1937] 2 W W R 116 at 123 per Mackenzie J A (non-applicability to intentional conduct) A v B's Trustees (1906) 13 S L T 830 per Lord Johnston Janvier v Sweeney [1919] 2 K B 316 at 323-324 per Bankes L J , 327 per Duke L J Stevenson v Basham [1922] N Z L R 225 231 per Herdman J Purdy v Wosnesensky [1937] 2 W W R 116 122 per Mackenzie J A 126 per Gordon J A (subsequent criticism)

96 Purdy v Wosnesensky [1937] 2 W W R 116 at 122-124 per Mackenzie J A 126 per Gordon J A

97 Bell v Great Northern R Co of Ireland (1890) 26 L R Ir 428 (Ireland), Dulieu v White [1901] 2 K B 669 (England) Gillgan v Robb 1910 S C 856 (Scotland) Hauman v Malmesbury D C 1916 C P D 216 (South Africa), Stevenson v Basham [1922] N Z L R 225 (New Zealand) Chester v Waverley Corp (1939) 62 C L R 1 (Australia) Horne v New Glasgow [1954] 1 D L R 832 (Canada)

Exactly the same development has taken place in the United States.[98] When presented with a case in which the only harm suffered by the plaintiff was mental distress, or physical harm arising out of mental distress, without any 'impact', the original attitude of the courts was to deny recovery. The arguments which were advanced in support of such an attitude recur in case after case — there could be no action for fright alone and therefore none for its consequences, the damage was too remote, there would be difficulties of proof, and above all that the floodgates would be opened and there would be a spate of litigation on trivial issues and a danger of false claims succeeding. The leading case was *Mitchell* v *Rochester R. Co.*,[99] where the plaintiff suffered fright, a miscarriage and consequent illness when a horse-drawn carriage, out of control, narrowly avoided striking her as she stood on a street pavement. All the above reasons were cited to justify refusing an award of damages.[100]

However, from the last years of the nineteenth century onwards, the older attitude was gradually overtaken by a newer, more benevolent attitude, under the influence of which American jurisdictions gradually abolished the impact rule and allowed recovery, both in intention and in negligence cases.[101] In *Hickey* v *Welch*[102] in 1901, the defendant was the plaintiffs' landlord and also occupied the house next door. Relations were at a low ebb, and when matters came to a head the defendant banked up earth around the plaintiffs' water closet, thus making it impossible to use, threatening and abusing the plaintiffs while he did so and keeping them at bay with a pistol. The female plaintiff suffered injury to her health and the Missouri court held that where the defendant intentionally caused the plaintiff to suffer mental anguish which was likely to, and did, result in some proved nervous illness, an action lay. This, four years after *Wilkinson* v *Downton*, was the first United States case recognizing liability for shock caused by intentional conduct. However, in an earlier case, *Hill* v *Kimball*,[103] where the defendant, fully aware of the plaintiff's

98. The material in this and the next three paragraphs was dealt with in detail in Handford, 'Intentional Infliction of Mental Distress' supra n 1, at 3-13 where fuller citation of authorities will be found

99. (1896) 45 N.E. 354. For the citation of this case in Wilkinson v. Downton see supra n. 94.

100. All states at one time affirmed the impact rule. Other leading cases are Ewing v. Pittsburg C.C. & St.L.R. Co. (1892) 23 A. 340 (Pa.) and Spade v. Lynn & B.R. Co. (1897) 47 N.E 88 (Mass.). Braun v. Craven (1898) 51 N.E. 657 (Ill.) is of particular interest, since it affirms the impact rule in a case of intentionally caused shock

101. The first state to abolish the impact rule was Texas in 1890: Hill v. Kimball (1890) 13 S.W. 59 (Tex.), and to date 38 other jurisdictions have followed suit. Significant decisions include Battalla v. State (1961) 219 N.Y.S.2d 34, 176 N.E. 2d 729 (N.Y.), Niedermann v. Brodsky (1970) 261 A.2d 84 (Pa.), and Dziokonski v. Ola Babineau (1978) 380 N.E.2d 1295 — which abolish the impact rules adopted in the three leading cases mentioned in n.100 ante, and, more recently, three important cases in 1983: Rickey v Chicago Transit Authority (1983) 478 N.E.2d 1 (Ill), Bass v Nooney Co. (1983) 646 S.W.2d 765(Mo), Schultz v Barberton Glass Co. (1983) 447 N.E.2d 109 (Ohio). Of the other jurisdictions, in seven of them there appear to be no recent cases, so the rule might be abolished when opportunity arises. Only in five jurisdictions — D.C., Fla., Ind., Ky., and Utah — are there decisions since 1961 upholding the rule, and these are all negligence cases. Even where the impact rule is retained in negligence cases, courts have dispensed with it in cases involving intentional conduct — a movement which began with Spade v. Lynn & B.R. Co. (1897) 47 N.E. 88 (Mass.)

102. (1901) 91 Mo.App. 4 (Mo.).

103. (1890) 13 S.W. 59 (Tex.).

pregnant condition, entered her land and in her presence violently beat two of her labourers, it was held that the defendant was liable in negligence for causing the plaintiff fright and a consequent miscarriage, and in *Sloane* v *Southern California R.Co.*,[104] where the plaintiff was expelled from a railway carriage by the conductor, and suffered humiliation, indignity and subsequent nervous disturbance, the railway company was again held liable in negligence. From the turn of the century onwards, cases recognising liability, both for intentional conduct[105] and for negligence,[106] multiplied.

We thus have a movement which originates in the last few years of the nineteenth century and which is common to all common law jurisdictions and jurisdictions influenced by the common law. What caused it to occur? Of *Wilkinson* v *Downton* and the other non-American cases, all one can say is that they came before the courts at a time when, for one reason or another, the courts were favourably disposed towards granting redress. However, we have more United States cases and from them we can give a more definite answer.

One reason was that there had been a considerable amount of scientific research into emotions and their effects, culminating in the work of Dr W B Cannon of the Harvard Medical School in the first few years of the twentieth century.[107] Cannon demonstrated that there was a close interaction between the physical and mental aspects of the human organism, and that fright and other strong emotions always produced bodily changes, and might in the long term cause permanent physical harm. The courts took account of this research.[108] Another influence was the existence of a special liability placed on carriers for insulting conduct towards their passengers, dating from *Chamberlain* v *Chandler*[109] in 1823 and extending also to other public utilities, notably innkeepers and telegraph companies.[110] This liability was well established by the last years of the nineteenth century, and these cases were referred to in some

104 (1896) 44 P 320 (Cal.)

105 Early cases include Voss v Bolzenius (1910) 128 S W 1 (Mo), Kurpgewett v Kirby (1910) 129 N W 177 (Neb), Goddard v Watters (1914) 82 S E 304 (Ga), Nickerson v Hodges (1920) 84 So 37 (La)

106 Early cases include Purcell v St Paul City R Co (1892) 50 N W 1034 (Minn), Mack v South Bound R Co (1898) 29 S E 905 (S C), Watkins v Kaolin Manufacturing Co (1902) 42 S E 983 (N C), Alabama Fuel & Iron Co v Baladoni (1916) 73 So 205 (Ala), Hanford v Omaha & C B St R Co. (1925) 203 N W 643 (Neb)

107 See W B Cannon, *Bodily Changes in Pain, Hunger, Fear and Rage* (1915), W B Cannon, *The Wisdom of the Body* (1932) See also G W Crile, *The Origin and Nature of the Emotions* (1915) For an account of this research by a lawyer, see Goodrich, 'Emotional Disturbance as Legal Damage' (1922) 20 *Mich L Rev* 497

108 See in particular Sloane v Southern California R Co (1896) 44 P 320 (Cal) 322 per Harrison J , Spade v Lynn & B R Co (1897) 47 N E 88 (Mass), 88-89 per Allen J , Hickey v Welch (1901) 91 Mo App 4(Mo) 9-10 per Goode J , Dulieu v White [1901] 2 K B 669 at 677 per Kennedy J

109 (1823) 5 Fed Cas No 2575 (Mass)

110 See Prosser, supra n.23, at 52-55; see also Handford, 'Tort Liability for Threatening or Insulting Words', supra n 1, at 580-589

shock cases[111] and doubtless influenced the decision in others. Also important was another special liability, for wanton interference with corpses causing mental distress to relatives.[112] This liability was finally established in *Larson* v *Chase*[113] in 1891 and again was often referred to in shock cases.[114]

It can thus be seen that *Wilkinson* v *Downton* was in no sense an isolated decision, but was in the forefront of an important development which took place in every common law jurisdiction and which opened up a new liability for physical harm resulting from mental distress, whether caused by intentional or by negligent conduct.

(c) The Appropriateness of Wright J.'s Principle

The essence of what has been said so far is that Wright J. in *Wilkinson* v *Downton* created an intentional tort, in the sense that the defendant acted wilfully, and that his act was calculated (meaning, seemingly, intended or likely) to cause physical harm. This may not be an intentional tort in quite the same sense as, for example, deceit, in which the defendant's statement must be *intended* to cause harm (through the statement being acted on) rather than merely being calculated to cause harm. However, it is to be distinguished from negligence, in which the act will normally be inadvertent rather than wilful — though it may be wilful, in the sense that the defendant might have intended to cause, or been reckless as to whether he might cause, *some* harm[115] — and in which the consequences of the act will be foreseeable, but no more than foreseeable.

Looking now specifically at the shock cases in which the *Wilkinson* v *Downton* principle has been adopted, the suggestion is that they involve the intentional causing of shock, in the sense that the defendant intends to cause mental distress and that the shock which results from the mental distress can be regarded as intended or likely, rather than as merely foreseeable. There is therefore, it is suggested, a distinction between such cases involving the intentional infliction of shock and other cases in which shock is caused negligently. Such a distinction is supported by cases such as *Bunyan* v *Jordan*[116] and *Stevenson* v *Basham*,[117] in which the plaintiff relied on these two causes of action as alternatives. In *Bunyan* v *Jordan*[118]

111 Kuhn v Kuhn (1910) 129 N W 177 (Neb), the first case in which it was held that there was liability for the intentional causing of mental distress *without* physical consequences (as to which see post referred to the earlier cases Note also that Dunn v Western Union Telegraph Co (1907) 59 S E 189 (Ga) a telegraph case referred to Wilkinson v Downtown (sic) — the first American case to refer to the leading English authority

112 See Prosser, supra n 23, at 58-59

113 (1891) 50 N W 238 (Minn)

114 See Hickey v Welch (1901) 91 Mo App 4 (Mo), Johnson v Sampson (1926) 208 N W 814 (Minn)

115 On the appropriateness or otherwise of the tort of negligence for wilful acts, see *Clerk and Lindsell on Torts* 15th ed (1982) para 10-02, Trindade, supra n 10 at 212-213, and cases there cited

116 (1937) 57 C L R 1

117 [1922] N Z L R 225

118 (1936) 36 S R (N S W) 350 (Full Court), (1937) 57 C L R 1 (High Court)

the Full Supreme Court of New South Wales rejected a claim based on negligence and on appeal the High Court likewise rejected a claim based on *Wilkinson* v *Downton*, but in *Stevenson* v *Basham*[119] the court held that the plaintiff was entitled to recover under either principle. The distinction is also supported by the Restatement of Torts, which sets out, side by side, two principles of liability for physical harm resulting from emotional distress:[120] first, a principle involving the intentional subjection of another to emotional distress which should be recognised as likely to result in physical harm, and second, a principle covering the unintentional causing of emotional distress in circumstances where physical harm is foreseeable. These points, plus the history and general background dealt with in the previous section of this article, show that the two principles are closely related.[121] Nevertheless, the general supposition is that they are distinct.

Some writers, however, have questioned this. Accepting that there is room for a principle involving the wilful doing of an act calculated to cause physical harm, and also, perhaps, that this may be appropriate in certain cases involving nervous shock, they question whether the principle is in fact appropriate for the actual facts of *Wilkinson* v *Downton*, and suggest that it would have been preferable to regard the case as one of negligence. Baker, for example, says:

> The principle on which the case was decided gives rise to difficulty. The main trouble is with the words 'calculated to cause.' If these words mean no more than that harm was foreseeably likely as a result of the act or statement, there is great difficulty in distinguishing the *Wilkinson* v *Downton* (1897) principle from negligence. If the words mean more than foreseeable, such as certain or substantially certain, there is difficulty with the case itself since nervous shock, as distinct from mental distress, though a foreseeable result of the news imparted to the plaintiff, was hardly a certain or a substantially certain result. Only if the case is interpreted in this way, however, does it seem that the principle can have a separate existence independent of the tort of negligence.[122]

Goodhart held a similar opinion. He said of *Wilkinson* v *Downton*:

> Is this a new tort, or is it merely a particular way of committing

119 [1922] N Z L R 225

120 *Restatement of Torts 2d* ss 312, 313

121 See also D v National Society for the Prevention of Cruelty to Children [1976] 3 W L R 124, a case mainly concerned with crown privilege, in which Lord Denning M R assumed that the cause of action would fall under Wilkinson v Downton, if it existed at all, whereas the other two judges assumed that it would be an action in negligence

122 C D Baker, *Tort* 3rd ed (1981) 20

> the tort of negligence? In *Wilkinson* v *Downton* and *Janvier* v *Sweeney*, the emphasis is on the fact that the acts were wilfully done, but it is not certain that the principle does not cover a wider field. The physical harm was intended only in a limited sense — the acts were intentional, but there was no evidence that the defendant intended the plaintiff to become ill.[123]

Would it have been possible for Wright J., instead of inventing a new principle of intentional liability, to hold that Downton was liable in negligence? At the time the case was decided, the major obstacle in the path of such a decision was *Victorian Railways Commissioners* v *Coultas*[124] and the lack of impact. Wright J. elected to overcome these obstacles by holding that the wrong was a wilful wrong, but he was in no way bound by the Privy Council decision and could simply have held that it did not apply even in cases of negligence, as two of Wright J.'s brother judges sitting as a Divisional Court did in *Dulieu* v *White*[125] four years later. However, it does not follow automatically from the rejection of *Victorian Railways Commissioners* v *Coultas*[126] and the impact rule that there would be liability in negligence on the facts of *Wilkinson* v *Downton*. Even in *Dulieu* v *White*[127] the court, while abandoning the idea that there could never be liability for the negligent infliction of shock in the absence of impact, suggested that there would be no liability unless the shock was caused by reasonable fear of impact[128] — and, of course, there was no question of that in *Wilkinson* v *Downton*.

This limitation — called by the American courts the 'zone of danger' rule — has now long been abandoned, and today the courts are ready to grant recovery to a wide range of people who suffer shock even though they are in no danger of themselves being physically injured.[129] The only proviso is that the general test of liability must be satisfied — that is, that injury by shock to the plaintiff must be foreseeable in the circumstances.[130] Thus, relatives have recovered for shock caused by an accident to someone else, both when they are on the scene and see the accident,[131] and, according to the recent decisions in *McLoughlin* v

123 Goodhart (1944) 7 *M L R* 87 at 87-88 (book review of the second edition of P H Winfield, *Textbook of the Law of Tort* 2nd ed (1943))

124 (1888) 13 App Cas 222

125 [1901] 2 K B 669

126 (1888) 13 App Cas 222

127 [1901] 2 K B 669

128 Id , at 675 per Kennedy J

129 The first case to recognise liability in such circumstances was Hambrook v Stokes Bros [1925] 1 K B 141

130 Bourhill v Young [1943] A C 92, King v Phillips [1953] 1 Q B 429, Mount Isa Mines v Pusey (1970) 125 C L R 383, McLoughlin v O'Brian [1983] A C 410

131 Eg Storm v Geeves [1965] Tas S R 252, Abramzik v Brenner (1967) 65 D L R 2d 651, Hinz v Berry [1970] 2 Q B 40, cf Boardman v Sanderson [1964] 1 W L R 1317 (hearing accident)

O'Brian[132] and *Jaensch* v *Coffey*[133], when they appear later and view its results. Others in a special position, such as rescuers,[134] have also recovered damages, though there may still be no duty owed to mere bystanders who are unrelated to the accident victim.[135]

These authorities, however, do not tell us whether the law would recognise a duty of care on the facts of *Wilkinson* v *Downton*. This is because they all deal with shock caused by a negligent *act*. It is perfectly possible for *Wilkinson* v *Downton* cases to involve acts which cause shock. Dressing up as a ghost in order to scare someone would be a good example.[136] However, in *Wilkinson* v *Downton* itself, and in most of the *Wilkinson* v *Downton* cases, the shock was caused by a statement, rather than an act, and the law has always held that liability for statements differs from liability for acts.[137] Once upon a time the authorities virtually ruled out any liability for negligent statements,[138] though in fact this related to negligent statements causing financial loss, and negligent statements causing physical harm were actionable.[139] Even when, in *Hedley Byrne* v *Heller*,[140] liability for negligent statements was eventually recognised, it was clear that this liability was not to be as wide as liability for negligent acts. It was to be kept within bounds by devices such as the need for a special relationship. The judges in the House of Lords reiterated that liability for statements was to be more limited than liability for acts.[141]

This is no doubt true, but we must make an important distinction between the statement cases mentioned in the previous paragraph and *Wilkinson* v *Downton*. The cases on negligent statements, both those giving rise to liability under *Hedley Byrne* v *Heller*[142] and the earlier cases on negligent statements causing physical harm, contemplate harm suffered through *reliance* on the statement. *Wilkinson* v *Downton* involves harm being suffered not because the statement was acted on but because it was *made* — and indeed this distinction was made clear in *Wilkinson* v *Downton* itself

132 [1983] A C 410 (see Handford, 'Shock and Policy — McLoughlin v. O'Brian' (1983) 15 *U W A L Rev* 398), cf Benson v Lee [1972] V R 879, Marshall v Lionel Enterprises [1972] 2 O R 177

133 (1984) 54 A L R 417, the High Court affirming (1983) 33 S A S R 254

134 Chadwick v British Transport Commission [1967] 1 W L R 912, Mount Isa Mines v Pusey (1970) 125 C L R 383

135 Such as the fishwife in Bourhill v Young [1943] A C 92, though note the decisions in Dooley v Cammell Laird & Co [1951] 1 Lloyds' Rep 271 and Carlin v Helical Bar (1970) 9 K I R 154, in which workmen recovered damages for shock caused by seeing accidents to workmates In view of the way later cases such as McLoughlin v O'Brian [1983] A C 410 and Jaensch v Coffey (1984) 54 A L R 417 seem to stress relationship to the accident victim rather than presence, these decisions now appear rather isolated

136 Cf a United States case, Nelson v Crawford (1899) 81 N W 335 (Mich), in which there was no liability on the facts because the shock suffered by the plaintiff was due to her special susceptibility and the defendant, "a harmless lunatic", had no intent to frighten her

137 Nocton v Lord Ashburton [1914] A.C 932, 948 per Viscount Haldane L C "Liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act "

138 e g Derry v Peek (1889) 14 App Cas 337, Candler v Crane, Christmas & Co [1951] 2 K B 164

139 Sharp v Avery [1938] 4 All E R 85, Clayton v Woodman & Son (Builders) [1962] 2 Q B 533, Robson v Chrysler Corp of Canada (1962) 32 D L R (2d) 49

140 [1964] A C 465

141 Id at 483 per Lord Reid, 533 per Lord Pearce

142 Id

when Wright J. rejected deceit as a suitable cause of action.[143] Is there, then, a duty not to cause shock by a negligent statement? There is no English authority on this question,[144] but there are some interesting cases from Canada, Australia and New Zealand.

In *Guay* v *Sun Publishing Co.*[145] the plaintiff suffered shock on reading a (false) report in a newspaper which stated that her husband (from whom she was separated) and her three children had been killed in a car accident. The newspaper could not say where the information had been obtained from, and did not check its authenticity. Nevertheless, the Supreme Court of Canada, by a majority, held that the newspaper was not liable. All three majority judgments make reference to the distinction between harm suffered through hearing a statement and harm suffered through relying on it, and two of these three judges paid heed to this distinction. Estey J.'s finding of non-liability was based on the lack, as he saw the evidence, of physical harm resulting from the emotional distress suffered when reading the report in question (a point not taken by any other judge), and he was not prepared to say that there could never be liability for shock caused by a negligent statement.[146] Kerwin J. denied recovery on a different ground — that in his opinion the defendant owed no duty to the plaintiff on the facts of the case because she did not satisfy the requirements of the *Donoghue* v *Stevenson*[147] neighbour principle.[148] Both of them mentioned the line of pre-*Hedley-Byrne*[149] cases denying recovery for harm suffered through reliance on negligent statements, but recognised that this case was rather different.[150] However, the third majority judge, Locke J, dealt in detail with this line of cases and expressly held that, if there was no liability where harm was suffered through reliance upon a negligent statement, then likewise there should be no liability for harm suffered upon reading it or hearing it. *Wilkinson* v *Downton* was dismissed as remote from the present action because it was based on wilful conduct.[151]

The minority judgment of Cartwright J. (concurred in by Rinfret C.J.C.) also endorses the distinction between harm suffered through reliance on a negligent statement and harm suffered because it was made, and thus looks not to the cases on negligent statements but to the shock cases.[152] Unlike Estey J., Cartwright J. thought that the plaintiff had

143 [1897] 2 Q B 57, 58

144 Though De Freville v Dill (1927) 96 L J K B 1056, in which a doctor negligently certified the plaintiff to be insane, causing her to be detained in a mental home, is closely related to the point under discussion

145 [1953] 4 D L R. 577

146 Id at 587-589

147 [1932] A C 562

148 [1953] 4 D L R 577 at 582

149 [1964] A C 465

150 [1953] 4 D L R 577 at 579-582 per Kerwin J , 583-585 per Estey J

151 Id at 603

152 Id at 609-610

suffered more than just mental distress, and unlike Kerwin J. he was prepared to hold the defendant liable since in his opinion it was foreseeable that a person in the plaintiff's position would suffer shock on reading a report of this kind. Given that the courts had abandoned the limitation that the shock should be caused by fear of injury to oneself, there was no reason why a duty should not be recognised in the circumstances of the present case — even though there was no case in which a duty had been recognised in a precisely similar situation. The only difference between the present case and *Wilkinson* v *Downton* was that the element of wilfulness was lacking — but this was not vital. Thus, he was quite prepared to recognise a duty not to cause shock by a careless statement.[153]

How does this case stand today? It would certainly seem that the recognition of a duty in respect of shock caused by negligent words is not inconsistent with it. Four out of the five judges recognise such a duty, and the basis on which the fifth judge, Locke J., denied it has been swept away by *Hedley Byrne* v *Heller*.[154] Of the two judges out of these four who found reasons for refusing recovery to the plaintiff, Estey J. would seem to be alone in his view that there was no sufficient evidence of physical consequences of mental distress, and Kerwin J.'s opinion that harm to the plaintiff was not foreseeable might not stand today, now that *McLoughlin* v *O'Brian*[155] and *Jaensch* v *Coffey*[156] have decided that shock to relatives who do not view the accident but only learn of its results later *is* foreseeable.

Guay v *Sun Publishing Co.*,[157] then, may not be inconsistent with the recognition of a duty in respect of careless statements causing shock. Such a duty is supported by three other cases. It has already been seen that in *Stevenson* v *Basham*[158] a New Zealand court recognised that there could be liability in negligence for shock caused by a statement, as an alternative to liability under *Wilkinson* v *Downton*. On the facts of *Stevenson* v *Basham*,[159] of course, the shock to the plaintiff was caused by fear for her own safety as a result of the defendant's threat, and the case is therefore analogous to cases such as *Dulieu* v *White*[160] where shock is caused through fear for one's own safety as the result of a negligent act. Liability no longer being limited to such situations, we can therefore perhaps say that even if we should accept the view of Kerwin J. in *Guay* v *Sun Publishing*

153 Id at 612-613
154 [1964] A C 465
155 [1983] A C 410
156 (1984) 54 A L R 417
157 [1953] 4 D L R 577.
158 [1922] N Z L R 225
159 Id
160 [1901] 2 K B 669

Co.[161] that shock caused through reading a false report in a newspaper does not give rise to a duty, shock caused through actually hearing the false report being made may do so — and these, of course, are the exact facts of *Wilkinson* v *Downton*.

Barnes v *Commonwealth of Australia*,[162] on its facts, is very close to *Wilkinson* v *Downton*. The defendants sent the plaintiff a letter informing her that her husband had been admitted to a mental hospital, and this caused the plaintiff to suffer shock. The Full Supreme Court of New South Wales held that shock to the plaintiff was foreseeable as a result of the communication of such a statement and that the defendants therefore owed a duty to take care to ensure that the information being communicated was correct. The Court followed its own decision in *Bunyan* v *Jordan*[163] which, in general, accepted that a duty of care existed wherever shock was a foreseeable result of negligent conduct. Again, even if Kerwin J's view that in *Guay* v *Sun Publishing Co.*[164] the harm was not foreseeable is to be accepted as correct, it is easy to distinguish *Barnes* v *Commonwealth of Australia*[165]. Shock to a particular reader of a newspaper item circulated generally may not be foreseeable, but shock to the recipient of a letter must be. *Wilkinson* v *Downton*, of course, on its facts, is much closer to *Barnes* v *Commonwealth of Australia*[166] than to *Guay* v *Sun Publishing Co.*[167]

Finally, in *Brown* v *Mount Barker Soldiers' Hospital*,[168] the defendants negligently burnt a new-born baby, and the mother, who was also being cared for by the hospital but was not present when the accident occurred, suffered shock when told of the injury to her child. It was held that the hospital owed the mother a duty of care. Piper J. said:

> Here the defendant in taking charge of Mrs Brown as a patient assumed a care of her involving the need to avoid, so far as reasonably practicable, all things that might prejudice her health or comfort, or increase her need for exertion or care. It would be a breach of duty, actionable if followed by damage, to tell her untruly that her child had been burnt. As the truthfulness of the statement was owing to negligence, the truthfulness was no legal excuse for doing harm by telling her — it was a necessary consequence of the negligence that she had to be told.[169]

161 [1953] 4 D L R 577
162 (1937) 37 S R (N S W) 511
163 (1936) 36 S R (N S W) 350
164 [1953] 4 D L R 577
165 (1937) 37 S R (N S W) 511
166 Id
167 [1953] 4 D L R 577
168 [1934] S A S R 128
169 Id at 130

The shock appears to have arisen from the mother being told the bad news and not from having to help to care for the child's injuries later on. If the decision appears to go beyond other shock cases, which recognise a duty to relatives not present at the accident because they observe its results and not merely because they hear about it,[170] this is probably explained by the existence of a pre-existing duty of care which arose when Mrs Brown became a patient at the hospital.[171] The case, of course, involves shock from *true* bad news, and it is therefore important that liability should be limited to special circumstances; but Piper J. recognises that there will be liability for the negligent communication of *false* bad news, and that, of course, is exactly the situation in *Wilkinson* v *Downton*, the element of wilfulness apart.

There does not, therefore, seem to be any reason why the defendant in *Wilkinson* v *Downton* could not have been held liable in negligence. If the shock to Mrs Wilkinson is regarded as no more than a foreseeable consequence of Downton's conduct, negligence is the only appropriate cause of action. Wright J., however, specifically held that his actions were so plainly calculated to produce some effect of the kind which was produced that an intention to produce such an effect ought to be imputed to him.[172] He was not prepared to regard the harm merely as a foreseeable consequence, nor was he content to hold that the defendant was merely reckless. In his opinion the harm could be regarded as intentionally caused. It is on this, and on this alone, that the appropriateness of the *Wilkinson* v *Downton* principle for the facts of the case must rest.

Wilkinson v *Downton* and Liability for Mental Distress

(a) The Position in the United States

The position as so far described is that the intentional causing of physical harm resulting from mental distress is actionable, and the same is true if such harm is caused negligently. There is thus a right of recovery where mental distress causes physical harm, but none for mental distress alone. This remains the policy of England and other common-law jurisdictions apart from the United States.

As has already been stated, the original position in the United States was similar.[173] There was no liability for the intentional causing of mental distress alone. Liability only existed where the act involved a likelihood of physical harm and physical harm resulted.[174] However, the

170 McLoughlin v O'Brian [1983] A C 410, Jaensch v Coffey (1984) 54 A L R 417

171 Cf Schneider v Eisovitch [1960] 2 Q B 430, Andrews v Williams [1967] V R 831

172 [1897] 2 Q B 57, 59

173 The material in this and the following paragraph was dealt with in detail in Handford, 'Intentional Infliction of Mental Distress', supra n 1 at 14-23, where fuller citation of authorities will be found

174 See in particular Hickey v Welch (1901) 91 Mo App 4 (Mo), Johnson v Sampson (1926) 208 N W 814 (Minn) and the cases cited in n 105 ante

law did not stand still at this point. Round about 1930, the United States courts began to reach out further, and granted recovery for the intentional causing of mental distress, even though there was no physical harm and no likelihood of it. No doubt the courts were beginning to wonder why physical harm should be all-important, since the defendant usually had no actual intention to cause it. In addition, the existing knowledge about the effect of emotions on the body was being enlarged by continuing research, which was making it more and more straightforward to prove the existence and effects of mental distress in a particular case.

There is one early case where recovery was allowed for mental distress, without physical consequences[175] — though in fact there was also a technical battery. From 1930 onwards, the courts began to allow recovery for the intentional infliction of mental distress when there was no consequential physical harm and no other technical wrong to fall back upon.[176] In one case, *Barnett* v *Collection Service Co.*,[177] the principle was clearly stated:

> The rule seems to be well-established where the act is willful or malicious, as distinguished from being merely negligent, that recovery may be had for mental pain, though no physical injury results . . . In this case the jury could well find that appellants exceeded their legal rights, and that they willfully and intentionally sought to produce mental pain and anguish in the appellee, and that the natural result of said acts was to produce such mental pain and anguish.[178]

There was something of a step backwards when the original Restatement of Torts appeared in 1936. The effect of its provisions was that liability only existed where a wilful act was intended or likely to produce physical harm, and physical harm resulted.[179] Subsequent decisions on the whole adhered to this principle. The high point of this regression was *Clark* v *Associated Retail Credit Men*,[180] which went so far as to cite *Barnett* v *Collection Service Co.*[181] as an authority for the proposition in the Restatement — an unwarranted limitation of what the court actually said in that case. However, no state which had adopted the more advanced position recanted,[182] and it was soon recognised that the Restatement

175 Kurpgeweit v Kirby (1910) 129 N W 177 (Neb)
176 The first such case is Wilson v Wilkins (1930) 25 S W 2d 428 (Ark)
177 (1932) 242 N W. 25 (Ia)
178 Id at 28
179 *Restatement of Torts* ss 46 and 47A (1936)
180 (1939) 105 F 2d 62 (D C)
181 (1932) 242 N W 25 (Ia)
182 See e g Blakeley v Shortal's Estate (1945) 20 N W 2d 28 (Ia), Digsby v Carroll Baking Co (1948) 47 S E 2d 203 (Ga)

position was out of date. The 1948 Supplement modified the Restatement provisions accordingly,[183] and from then on the courts have been happy to hold that there should be liability for intentionally caused mental distress.[184] The Restatement of Torts Second, which began to appear in 1965, now endorses the position adopted in 1948. According to Section 46, there is liability if conduct is "outrageous" and causes "severe mental distress", and there is no need either for consequent physical harm or for a likelihood of it. Practically all states have now accepted this proposition,[185] and the case-law multiplies every year.[186]

The tort of intentional infliction of mental distress covers a wide variety of situations.[187] The comments to Section 46 of the Restatement Second mention several broad categories which can be identified, including cases where the plaintiff, to the defendant's knowledge, is specially vulnerable,[188] and cases where the defendant's conduct is directed at some third party,[189] as well as a general residuary category. A particularly important category covers cases where the mental distress is caused by the abuse of a position or relationship. There are cases in which the tort has been invoked against policemen,[190] school authorities,[191] employers[192] and trade unions,[193] but the most important cases are those in which landlords have been held liable for harassing their tenants in an attempt to evict them,[194] and those in which debt collectors have likewise been held liable for hounding creditors, or persons whom they think are creditors, in an attempt to collect debts.[195] The latter instance is now regarded in a few states as a separate tort in itself.[196] The dead body cases, originally an independent development, are now recognised

183 *Restatement of Torts Supplement* s 46 (1948)

184 See in particular State Rubbish Collectors Association v Siliznoff (1952) 240 P 2d 282 (Cal), Halio v Lurie (1961) 222 N Y S 2d 759 (N Y), Alsteen v Gehl (1963) 124 N W 2d 312 (Wis)

185 At the present time it appears that only two states still deny the existence of the tort of intentional infliction of mental distress — Indiana and Kentucky Kentucky is prepared to recognise liability on a Wilkinson v Downton basis, i e where physical harm results Of the other jurisdictions, 42 positively recognise the tort of intentional infliction of mental distress and in the others, there appear to be no cases

186 For criticism of this development see Theis, 'The Intentional Infliction of Emotional Distress A Need for Limits on Liability (1977) 27 *De Paul L Rev* 275

187 See Prosser, supra n 23, at 55-62

188 e g Delta Finance Co v Ganakas (1956) 91 S E 2d 383 (Ga) (children), Vargas v Ruggiero (1961) 17 Cal Rptr 568 (Cal) (pregnant women)

189 e g Knierim v Izzo (1961) 174 N E 2d 157 (Ill)

190 e g Savage v Boies (1954) 272 P 2d 249 (Ariz)

191 e g Blair v Union Free School District (1971) 324 N Y S 2d 222 (N Y)

192 e g Rockhill v Pollard (1971) 485 P 2d 28 (Or)

193 e g State Rubbish Collectors Association v Siliznoff (1952) 240 P 2d 282 (Cal)

194 See e g Hickey v Welch (1901) 91 Mo App 4 (Mo), Emden v Vitz (1948) 198 P 2d 696 (Cal), Ivey v Davis (1950) 59 S E 2d 256 (Ga), Scheman v Schlein (1962) 231 N Y S 2d 548 (N Y)

195 The cases are legion See in particular Barnett v Collection Service Co (1932) 242 N W 25 (Ia), La Salle Extention University v Fogarty (1934) 253 N W 424 (Neb), Duty v General Finance Co (1954) 273 S W 2d 64 (Tex), and, for a recent example, Aletcher v Beneficial Finance (1981) 632 P 2d 1071 (Haw) Cf Fletcher v Western National Life Insurance Co (1970) 89 Cal Rptr 78 (Cal) (insurance adjuster)

196 'Unreasonable collection efforts' is certainly a separate tort in Texas, and may be committed intentionally or negligently, provided that physical harm results see Moore v Savage (1962) 359 S W 2d 95 (Tex) The same seems to be true in Louisiana see Boudreaux v Allstate Finance Corp (1968) 217 So 2d 439 (La)

as another variety of outrageous conduct,[197] and the tort of intentional infliction of mental distress has also been used in cases involving racial discrimination,[198] though it seems that mere discrimination without aggrevating circumstances will not amount to outrageous conduct.[199]

More recently, there has been a similar movement in the field of negligence. As a general rule, it is still true to say that negligently caused mental distress must have physical results before liability can exist, but the exceptions to this rule are increasing. Two special exceptions have been recognised for some time — the negligent transmission of telegraph messages and the negligent handling of corpses. In these cases, recovery could be had for mental distress alone.[200] More recently, a few jurisdictions have gone over to the view that any negligent causing of serious mental distress should be actionable,[201] though most states continue to be against such an extension of liability.[202] Plainly, in the United States the interest in freedom from mental distress receives considerable protection.

(b) The Position in England and Australia

All the developments so far reviewed in this article proceeded from a common starting-point. Why, then, has the law in the United States developed further than the law of England or Australia? Why have other common-law jurisdictions not followed suit and allowed recovery for mental distress alone?

One answer to this question is that much depends on the pressure caused by the number of cases coming before the courts. As we have seen, in England, Australia, Canada and New Zealand there have only been a few *Wilkinson* v *Downton* cases. In the United States there have been many more. Once the American courts accepted this liability as an established fact, there has been considerable pressure on them to extend it.

This however, is only a partial answer. The real answer is that judges in the United States are much less conservative and much less ruled by precedent than their counterparts elsewhere.[203] The multiplicity of

197 See Stephens v Waits (1936) 184 S E 781 (Ga), Papieves v Lawrence (1970) 263 A 2d 118 (Pa)

198 See, e g , Ruiz v Bertolotti (1962) 236 N Y S 2d 854 (N Y) , Alcorn v Anbro Engineering (1970) 468 P 2d 216 (Cal)

199 Browning v Slenderella Systems of Seattle (1959) 341 P 2d 859 (Wash)

200 See Prosser, supra n 23 at 328-330 Neither of these exceptions is recognised in England Owens v Liverpool Corp [1939] 1 K.B 394 might have been the first of a series of English cases allowing recovery for the negligent mishandling of corpses, but it was condemned by the House of Lords in Bourhill v Young [1943] A.C 92

201 Rodrigues v State (1970) 472 P 2d 509 (Haw), Wallace v Coca-Cola Bottling Plants (1970) 269 A 2d 117 (Me), Montinieri v Southern New England Telephone Co (1978) 398 A 2d 1180 (Conn), Molien v Kaiser Foundation Hospitals (1980) 616 P 2d 813 (Cal)

202 There are many cases, but among the most recent are Keck v Jackson (1979) 593 P 2d 668 (Ariz), Corso v Merrill (1979) 406 A 2d 300 (N H), Vaccaro v Squibb Corp (1980) 418 N E 2d 386 (N Y), Banyas v Lower Bucks Hospital (1981) 437 A 2d 1236 (Pa)

203 See Brittan, 'The Right of Privacy in England and the United States' (1963) 37 *Tul L Rev* 235, reaching a similar conclusion as respects invasion of privacy

jurisdictions in the United States helps here — a judge who wishes to escape from an inconvenient case in his own jurisdiction can usually find support elsewhere. A contributory factor is the existence of the Restatement, drafted mainly by academic lawyers, which has a great influence in the courts. There is no real equivalent in England or Australia. To prove the point about the conservative attitude which prevails outside the United States I will take just two of the situations which are covered by the United States tort of intentional infliction of mental distress — debt collectors and landlords — and explore the position in England and Australia. Dealing first with debt collection activities, the law was that debt collectors could employ whatever tactics they chose in their efforts to collect a debt, so long as they did not infringe the existing civil or criminal law.[204] The Report of the Payne Committee on the Enforcement of Judgment Debts[205] made it clear that collection agencies in England employed tactics every bit as deplorable as those in the United States. The Committee felt that it was necessary to discourage such methods of debt collection by making unreasonable harassment of creditors unlawful, but they recommended that this should be done by the provision of a criminal penalty,[206] a recommendation that was duly enacted by s.40(1) of the Administration of Justice Act 1970. The Committee was against a civil remedy, saying that they did not think it wise to introduce a new cause of action and make unreasonable harassment actionable in itself.[207] Yet it is striking that the formulation of the rule in s.40(1) simply advances Wright J's *Wilkinson* v *Downton* principle one stage further — it refers to various kinds of harassment "calculated to subject [the debtor] or members of his family or household to alarm, distress or humiliation."[208]

The position as to landlord-tenant relationships is similar. In England, the Rent Act 1965 s.30 provided criminal sanctions against unlawful eviction and harassment of tenants[209] — it was on this provision that s.40(1) of the Administration of Justice Act 1970 was based — and the original provision has now been repealed and replaced by s.1 of the Protection from Eviction Act 1977. This provision too is reminiscent of *Wilkinson* v *Downton*, since it refers to the doing of acts calculated to interfere with the peace and comfort of the occupier or members of his

204 See generally, Kercher, 'Debt Collection Harassment in Australia' (1979) 5 *Monash U L R* 87, 204

205 1969 Cmnd 3909, paras 1232-1234

206 Id , para 1240

207 Id , para 1241

208 In Australia, some cases of harassment of creditors are covered by the Unauthorised Documents Act 1922 (N S W) s 4, which makes it an offence to use a collection letter which is "likely or intended to convey the impression that" it is a court document, and by the Trade Practices Act 1974 (Cth) s 60, which prohibits corporations using "at a place of residence, physical force, undue harassment or coercion in connexion with the payment for goods and services by a consumer"

209 And see Caravan Sites Act 1968 (U K) for a similar provision as respects caravan dwellers

household. Under s.47 of the Residential Tenancies Act 1978, harassment of tenants is also a criminal offence in South Australia. However, in neither jurisdiction is there a civil remedy for unreasonable conduct causing a tenant to leave. If some recognised tort is committed,[210] or if there is a breach of the covenant of quiet enjoyment,[211] damages[212] or an injunction[213] may be obtained, but otherwise there is no civil remedy. In *Perera* v *Vandiyar*,[214] the landlord cut off his tenant's gas and electricity, forcing the tenant to leave. The Court of Appeal held that there was no tort of eviction, so that the only damages that could be awarded were damages for breach of the covenant of quiet enjoyment, which had been assessed at £25. Judge Leon in the County Court had been highly indignant at the defendant's conduct, and had given the plaintiff leave to amend his pleadings so that he might claim in tort, but the Court of Appeal refused to recognise the existence of any tort remedy. More recently, the Court of Appeal in *McCall* v *Abelesz*[215] again refused to recognize a tort remedy for harassment of tenants, this time in the form of an action for breach of the duty created by the statutory provision.

It may be that, in rejecting tort remedies for harassment or eviction, the Payne Committee and the courts are guilty of thinking in over-narrow categories, and of ignoring developments elsewhere. If there was to be a tort remedy, a preferable approach would have been to extend the principle of *Wilkinson* v *Downton* to cover the intentional causing of mental distress without any requirement that it should result in physical harm, as has been done in the United States. As far as can be gathered from its Report, the Payne Committee took no notice of the position in the United States, nor was there any mention of this in Parliament in the debates on the Administration of Justice Bill.[216] Similarly, the Court of Appeal in *Perara* v *Vandiyar*[217] made no enquiry as to developments elsewhere.[218] The law in the United States, stemming originally from *Wilkinson* v *Downton* and similar cases, is satisfactory, and a civil remedy

210 As in Lavender v Betts [1942] 2 All E R 72 and Drane v Evangelou [1978] 1 W L R 455 (trespass to land)

211 As in Engvall v Ideal Flats [1945] K B 205 The Residential Tenancies Act 1980 (Vic) s 92 and the Residential Tenancies Act 1978 (S A) s 47 set out statutory implied terms of quiet enjoyment See generally A J Bradbrook *Residential Tenancy Law and Practice* (1983) paras 1501-1525

212 Including, in appropriate tort cases, exemplary damages Drane v Evangelou [1978] 1 W L R 455

213 As in Jennison v Baker [1972] 2 Q B 52 at 62-3 where Salmon L J , by characterising the defendant's conduct as "outrageous", unconsciously used the test of liability for the United States tort of intentional infliction of mental distress

214 [1953] 1 W L R 672

215 [1976] Q B 585

216 See 306 H L Deb , cols 223 (2nd reading), 906-910 (committee stage), 795 H C Deb cols 456-457, 473 (2nd reading), 801 H C Deb cols 1630-1638 (report stage)

217 [1953] 1 W L R 672

218 In Perera v Vandiyar [1953] 1 W L R 672, two New Zealand cases on punitive damages (Johnston v Fischer [1921] N Z L R 529 and Tankard v Twomey [1922] N Z L R 79) were cited, but the court did not even look at them

would be a useful weapon for debtors and tenants, if no others. Yet this is a step which English and Australian law has refused to take.

At this point it could be remarked that the unwillingness of the courts to recognise a civil remedy in such cases is perfectly explicable, since it is simply a reflection of the law's general refusal to award compensation for mere mental distress, unless some recognised tort is also committed;[219] and that what is happening in *Wilkinson* v *Downton* and similar cases is that compensation is being given for physical harm and not for the mental distress which produced such harm.

If this attitude is due to the traditional fears — the difficulties of proof, the likelihood of a flood of false claims and trivial litigation — then the reply would be that in jurisdictions where the intentional causing of mental distress is actionable this has not occurred. Scientific and medical knowledge is equal to any difficulties of proof of the existence and extent of mental distress. Fear of a multiplicity of actions is a poor reason for denying a remedy, if the cause is a just one.[220] As long ago as 1703, Holt J. said in *Ashby* v *White* :[221]

> It is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompence.

The cause is a just one. There are situations where a civil remedy on the lines suggested would be of much use;[222] and claims for mental distress have always been allowed as parasitic damage, where another tort has been committed.[223] Street said in 1906:[224]

> The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability. It is merely a question of social, economic and industrial needs as those needs are reflected in the organic law.

Street was writing of mental distress. Later events proved the truth of his statement as far as the United States is concerned, and there is

219 See text and nn 86-88 supra
220 See text and nn 98-100, 107-114 supra
221 (1703) 2 Ld Raym 938 at 955
222 See text and nn 204-215 supra
223 See text and n 87 supra
224 T A Street, *Foundations of Legal Liability* (1906) 1, 470

no reason why it should not also apply to other common law jurisdictions.[225]

The jurisdictions which do not allow recovery for intentionally caused mental distress are in a minority. Besides the United States, in the vast majority of civil law jurisdictions compensation for such harm is an established fact.[226] But there is no need to look further afield. There are analogous situations in English law where the traditional hesitancy has been overcome.

Until recently, the proposition that one could not recover damages for injured feelings in an action for breach of contract commanded general acceptance.[227] However, damages could be recovered for physical inconvenience;[228] where the breach of contract caused physical harm, for pain and suffering;[229] and where mental distress caused by the breach of contract resulted in actual physical illness.[230] The position as stated bears an almost exact resemblance to the position in tort. In 1972, however, in *Jarvis* v *Swans Tours*,[231] an English court, for the first time, awarded damages in contract for injured feelings alone. The case involved injured feelings resulting from a disappointing holiday.[232] Since the major benefit to be expected from such a contract is non-pecuniary the contract was perhaps not typical of the majority of commercial contracts, and indeed the possibility that recovery of such damages was confined to exceptional situations such as this was hinted at by the Court of Appeal, which suggested that mental distress damages were recoverable in a "proper" case, one example of which would be a holiday, or any other contract to provide entertainment and enjoyment.[233] However, in *Cox* v *Philips Industries*[234] an employee recovered damages for injured feelings

225 In the field of negligently caused economic loss the truth of the prophecy can already be demonstrated Until recently, no damages could be awarded for economic loss standing alone, see e g Weller v Foot & Mouth Disease Research Institute [1966] 1 Q B 569, but damages were awarded for economic loss consequential upon property damage S C M v Whittall [1971] 1 Q B 337, Spartan Steel v Martin & Co [1973] Q B 27, or where economic loss was regarded as parasitic damage Seaway Hotel v Gragg (1960) 21 D L R 2d 264, contra Spartan Steel v Martin & Co ante It has now been recognised that economic loss standing alone is actionable Caltex Oil (Australia) Pty v The Dredge "Willemstad" (1976) 136 C L R 529, Ross v Caunters [1980] Ch 297, Junior Books v Veitchi Co [1983] A C 520.

226 The Roman law principle of 'injuria' encompassed many such cases see C F Amerasinghe, *Defamation and Other Aspects of the Actio Injuriarum* (1968) 317-363. France, the leading modern civil law system, allows a very wide recovery for moral damage see H & L Mazeaud and A Tunc, *Responsabilite Civile* 6th ed (1965) 1, 392-428, B Starck, *Droit Civil Obligations* (1972) 45-79, and the position is similar in most non-socialist legal systems see *International Encyclopedia of Comparative Law*, vol xi (Torts) Chapter 8 (H Stoll), 36-50, chap 9 (H. McGregor), 18-20, though Germany is an exception see Handford, 'Moral Damage in Germany' supra n 1 Note also the position in South Africa. see R G McKerron, *Law of Delict* 7th ed (1971) 53-56, C F Amerasinghe, *Aspects of the Actio Injuriarum* (1966), C F Amerasinghe, *Defamation and Other Aspects of the Actio Injuriarum* (1968)

227 Addis v Gramophone Co [1909] A C 488, Hobbs v London & South Western Ry (1875) L R 10 Q B 111

228 Hobbs v London & South Western Ry (1875) L R 10 Q B 111, Bailey v Bullock [1950] 2 T L R 791

229 e g Godley v Perry [1960] 1 W L R 9

230 See Cook v Swinfen [1967] 1 W L R 457 (no liability on facts)

231 [1973] Q B 233

232 It was followed in Jackson v Horizon Holidays [1975] 1 W L R 1468 Cf Diesen v Samson, 1971 S L T 49 (damages awarded against photographer who failed to turn up for wedding)

233 [1973] Q B. 233 at 237-238 per Lord Denning M R at 239 per Edmund Davies L J

234 [1976] 1 W L R 638

caused by breach of his contract of employment — not primarily a contract to provide entertainment and enjoyment, as the court admitted. In *Heywood* v *Wellers*,[235] where a solicitor's client recovered for mental distress caused by the solicitor's breach of contract, the Court of Appeal rejected any previous limitation on the types of cases in which mental distress damages would be granted and held that such damages were available in any case in which such loss could be reasonably contemplated.[236]

In his judgment in *McCall* v *Abelesz*,[237] the case which held that the statutory provisions which imposed a criminal penalty for harassment by landlords did not give rise to a civil action for breach of statutory duty, Lord Denning M.R. said that the civil remedies given to tenants by the present law were satisfactory. One reason for this conclusion was that, in his opinion, the damages awarded for breach of covenant in *Perera* v *Vandiyar*[238] would now be larger because they would include an award for mental distress.[239] Surely this statement helps to support the argument here advanced. The law on remedies available to harassed tenants is satisfactory only if it is possible to recover damages for mental distress. That they are recoverable in contract rather than in tort does not matter all that much, though a tort action is probably preferable since there may be cases where there are difficulties in enforcing the contract.

Turning away from contract, another analogy is to be found in the law of divorce. For many years, until the Divorce Reform Act 1969 in England[240] and the Family Law Act 1975 in Australia, cruelty was a ground for matrimonial relief of one form or another. One of the essential elements of cruelty was proof that the conduct in question caused injury to the health of the petitioner. It is true that in matrimonial matters we are concerned with a particular relationship, between one husband and one wife,[241] whereas the law of tort usually assesses conduct according to the objective standard of the reasonable man. However the sorts of conduct which constitute cruelty, the fact that such conduct is likely to result predominantly in *mental* suffering, and the fact that until recently it has been necessary to prove that such harm has been done by reference to its physical results, all show the great similarity between cruelty and the intentional causing of mental distress. This similarity was par-

235 [1976] Q B 446

236 Australian cases have not gone nearly as far in allowing the recovery of damages for mental distress in actions for breach of contract Such damages are admitted only in special cases, as an exception to the general rule applying to ordinary commercial contracts Falko v James McEwan & Co Pty [1977] V R 447

237 [1976] Q B 585

238 [1953] 1 W L R 672

239 [1976] Q B 585, 594

240 See now the consolidating legislation, Matrimonial Causes Act 1973 (U K)

241 See in particular Lauder v Lauder [1949] P 277 at 308 per Pearce J "In a cruelty case, the question is whether *this* conduct by *this* man to *this* woman, or vice versa, is cruelty "

ticularly marked in England between 1937, when cruelty became a fully independent ground for divorce,[242] and 1963, when the House of Lords ruled that intention was not an essential element.[243] Before 1937, and after 1963, the courts were mainly concerned with protecting the injured spouse, but between 1937 and 1963 cruelty was a matrimonial offence and a mental element was necessary.

To constitute cruelty, the conduct had to be 'grave and weighty' — a test first stated by Lord Stowell in 1790.[244] However, violence or threatened violence was required[245] until 1870 when it was held in *Kelly* v *Kelly*[246] that violence or threatened violence was not essential. This, in effect, is a recognition that injury to health results, as often as not, from conduct causing mental distress rather than conduct causing physical harm. Even after 1870, however, it remained necessary to show that the cruelty caused injury to health, or at least a reasonable apprehension of it. This is a requirement similar to that imposed by Wright J. in *Wilkinson* v *Downton*. In *Russell* v *Russell*,[247] Earl Russell petitioned for a judicial separation on the ground that the Countess had persistently accused him of unnatural offences. The Countess pleaded that no injury to health had been shown. It was argued before the House of Lords that the essence of cruelty was that the conduct should make it absolutely impossible for the parties to live together again, and that injury to health, actual or threatened, was not necessary. However, the majority of the House of Lords confirmed the necessity of establishing injury to health. They were much influenced by the usual fears of a flood of litigation and false claims.[248] The petitioner's argument was doubtless ahead of its time, but in the following years, aided by the progressive developments in medical science, the injury to health requirement was gradually whittled down to vanishing point. Very few petitions failed on this ground, and the courts accepted medical evidence without question[249] and eventually even did away with the need for evidence.[250] The logical conclusion was reached when the Divorce Reform Act 1969 abandoned the need for injury to health and instituted a new guideline for breakdown of marriage called "intolerable conduct" — the "absolute impossibility" formula that had been

242 As a result of the Matrimonial Causes Act 1937 (U K)

243 Gollins v Gollins [1964] A C 644, see also Williams v Williams [1964] A C 698

244 In Evans v Evans (1790) 1 Hag Con 35 at 37

245 See id at 39-40

246 (1870) L R 2 P & D 31, and the decision of the Full Court, id , 59

247 [1897] A C 395

248 See in particular id at 460 per Lord Herschell

249 e g Horton v Horton [1940] P 187 (neurasthenia), Lauder v Lauder [1949] P 277 (wife heading for nervous breakdown) Contrast the attitude taken in earlier cases such as Statham v Statham [1929] P 131, in which the husband forced the wife to submit to sodomy Lord Hanworth M R said that the evidence of ill-health or danger to health was vague and inconclusive and not proved by the doctor's evidence

250 See Walker v Walker [1962] P 42 (highly overwrought nervous state), Gollins v Gollins [1964] A C 644 (moderately severe anxiety state)

advocated in *Russell* v *Russell*.[251] The debates in Parliament clearly show that the change was made because medical developments had made injury to health obsolete.[252]

The lesson for the law of tort seems clear. The *Wilkinson* v *Downton* cases are a thin trickle, conditioned by the original formulation laid down in 1897 by Wright J. No real account is taken of the developments in the knowledge of mental disorders during the twentieth century. By contrast, the cases on cruelty are a steady stream down to the present day, and show that the courts, followed by the legislature, have recognised that there is no longer any need to show a resulting bodily injury to prove the genuineness of a claim for mental distress.

This and the other points made in this section show that there is no reason why English and Australian law should not follow the United States lead and produce from *Wilkinson* v *Downton* a tort of intentional infliction of mental distress — and indeed that in a number of instances such a development would be highly desirable. The chances of this actually happening are not easy to assess. Nevertheless, surely enough has been said to show that *Wilkinson* v *Downton* has not only a past, but also a present, and might well have an interesting future.

251 [1897] A C 395

252 784 H C Deb. Col 1909 et seq, especially the speech of Mr Leo Abse at col 1914