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THE BILL COLLECTOR AND THE LAW—A SPECIAL TORT, AT LEAST FOR A WHILE

ROBERT M. BERGER*

FINANCE COMPANIES and collection agencies are notorious for their imaginative and callous use of various techniques to embarrass, harass, and coerce borrowers in their debt to make full payment. Law review articles¹ and numerous cases² chronicle some of the more interesting and heartless examples. Courts have reacted with sympathy for the debtor, and Lord Wensleydale's now familiar observation that, "[m]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone,"³ has for years been ignored in numerous cases granting relief in the circumstances to which he referred. Some commentators have argued that these cases demonstrate the emergence of a "new tort" which redresses injuries resulting from the intentional infliction of mental anguish.⁴ More timid souls may cautiously view the cases allowing recovery for emotional harm as falling into discrete categories⁵ in

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¹ See, e.g., Birkhead, *Collection Tactics of Illegal Lenders*, 8 LAW & CONTEMP. PROB. 78 (1941); Green, "Mental Suffering" Inflicted by Loan Sharks No Wrong, 31 TEXAS L. REV. 471 (1953); 66 U.S.L. REV. 349 (1932); authorities cited at Comment, *Collection Capers: Liability for Debt Collection Practices*, 24 U. CHI. L. REV. 572, n.1 (1957).

² See, e.g., *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954); *Houston-American Fin. Co. v. Travis*, 343 S.W.2d 323 (Tex. Civ. App. 1960); *Industrial Fin. Services Co. v. Riley*, 295 S.W.2d 498 (Tex. Civ. App. 1956); *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299 (1925).

³ *Lynch v. Knight*, 11 Eng. Rep. 854, 863 (H.L. 1861), quoted in Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

⁴ See, e.g., Magruder, *supra* note 3; Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950). An interesting non-collection case which sets out numerous useful citations is *Spackman v. Good*, 245 Cal. App. 2d 518, 54 Cal. Rptr. 78, 84-85 (1966).

⁵ For varying lists of the categories, see GREGORY & KALVEN, *CASES ON TORTS* 790-848 (1959); Wade, *supra* note 4; Comment, *Intentional Infliction of Mental Suffering*, 25 S. CAL. L. REV. 440 (1952); 34 TEXAS L. REV. 487, 488 (1956).

which special considerations justify redress. This article examines the more recent cases as well as a few older leading cases in an attempt to determine whether American courts are creating a narrow tort dealing with creditor-debtor relations or whether these cases are part of a more general movement toward the adoption of the broader "new tort" advocated by Professors Magruder and Prosser.⁶

This article will not discuss at any length the questions of what damages are recoverable once a cause of action is made out or precisely which collection methods are "unreasonable." As to damages, it appears that the plaintiff can recover for any loss proximately caused by the defendant's tortious conduct, including physical injuries, emotional suffering, humiliation and embarrassment, and loss of employment. Regarding the content of unreasonableness, the tension is of course between the creditor's legitimate interest in collecting his debt and protecting the debtor from coercion and unpleasant experiences. Although some courts have held that the creditor is privileged to notify the debtor and his employer that the debt is due and that legal process may be instituted, it is usually held to be the jury's responsibility to draw the line between permissible notification and unreasonable or coercive hounding.

THE REASONS FOR HARASSMENT AND FOR A SPECIAL TORT PERMITTING DEBTORS TO RECOVER

Creditors harass borrowers in ways which may appear shocking for reasons which are few and simple. Generally, it is cheaper to collect by this means than it is by going to court. Attorneys' fees and court costs may well exceed the total indebtedness,⁷ whereas repeated telephone calls and aggressive form letters are relatively inexpensive. In

⁶ See articles *supra* note 4.

⁷ See generally, 14 WASH. & LEE L. REV. 312, 316 (1957). It is interesting to note that in the reported cases, the debts sought to be collected were almost always small amounts, and they paled in comparison with the often extremely large damage awards granted in the states which permit recovery. For example, in *Houston-American Finance Co.*, 343 S.W.2d 323 (Tex. Civ. App. 1961), a borrower who owed \$810 was awarded \$13,530 in damages. One who originally borrowed \$45 was awarded \$2500 actual and \$5000 exemplary damages in *Signature Indorsement Co. v. Wilson*, 392 S.W.2d 484 (Tex. Civ. App. 1965). And the court in *Quina v. Roberts*, 16 So. 2d 558 (La. App. 1944), awarded \$100 damages to a debtor who owed \$1.45.

addition, practitioners of this art often charge usurious interest,⁸ so legal process might well be of no avail to them and might even focus attention on them which would result in criminal or civil penalties for usury. Furthermore, the borrower who must resort to usurious loans is generally ignorant of financial matters and his legal rights,⁹ and greatly fears the loss of his job which could result from the creditor's notifying his employer of the debt and garnishment of wages.¹⁰ Thus, harassment is often employed because the class of debtors involved is peculiarly susceptible to it and because more legitimate avenues may not be available to this class of creditors.

It is clear that courts are sympathetic to the plight of the debtor who falls victim to such tactics, and seek to provide relief.¹¹ The question is whether there are special characteristics of the debtor harassment situation which warrant creating a special collection tactics tort, or whether the elements justifying recovery here are sufficiently

⁸ See Birkhead, *supra* note 1. The reported opinions in many of the debtor harassment cases reveal usurious interest was charged. *E.g.*, *Hill v. Budget Fin. & Thrift Co.*, 383 S.W.2d 79 (Tex. Civ. App. 1964); *Employee Fin. Co. v. Lathram*, 363 S.W.2d 899 (Tex. Civ. App. 1963); *Industrial Fin. Service Co. v. Riley*, 295 S.W.2d 498 (Tex. Civ. App. 1956).

In *Houston-American Life Ins. Co. v. Tate*, 358 S.W.2d 645, 653 (Tex. Civ. App. 1962), the court said: "The defendants had a note that was past due under its terms; it could have filed suit for its debt and for foreclosure of its chattel mortgage lien, but no doubt they had no desire to go to the court house to collect on a usurious contract, but rather chose the course of conduct of harassment, and in so doing, took extreme measures . . . This court cannot approve such methods for the collection of debts or for the enforcement of contracts." Cf. *Barnett v. Collection Service Co.*, 214 Iowa 1303, 242 N.W. 24 (1932), in which the harassing creditor could not lawfully attach the widow-debtor's earnings, which were exempt from attachment by statute.

⁹ See Birkhead, *supra* note 1, at 79; Kelly, *Legal Techniques for Combating Loan Sharks*, 8 LAW & CONTEMP. PROB. 88, 88-90 (1941). One student commentator has pointed out that the creditor's purpose is to harass so that he will be paid just to stop the annoyance, and that similar offenders—insurance adjusters and evicting landlords—have also been held liable under the theories used to recover against creditors, such as intentional infliction of mental anguish. Comment, *Collection Capers: Liability for Debt Collection Practices*, 24 U. CHI. L. REV. 572, 586 (1957). A recent example of the evicting landlord cases is *March v. Cacioppo*, 37 Ill. App. 2d 235, 185 N.E.2d 397 (1962); an example of the insurance adjuster cases is *Pinkerton Nat'l Detective Ag., Inc. v. Stevens*, 108 Ga. App. 159, 132 S.E.2d 119 (1963).

¹⁰ See Birkhead, *supra* note 1; Kelly, *supra* note 9.

¹¹ "How could anyone put forth an effort to collect a usurious, void, illegal, and unconstitutional note or debt in such cases and the effort be reasonable? . . . Appellants knew that what they were doing was wrong . . . [We abhor] the nefarious character of the business of the 'loan offices' . . . [which play on the fears of the ignorant], 'driving them through fear into deeper slavery.'" *Signature Indorsement Co. v. Wilson*, 392 S.W.2d 484, 489 (Tex. Civ. App. 1965).

similar to other situations to make the collection tactics cases merely one application of a broader tort principle. Professor Wade has articulated a number of factors which distinguish and justify liability in the creditor cases but not in all cases where emotional distress is inflicted intentionally. For one thing, the collection agent does not act in a sudden, thoughtless burst of temper, but rather harasses for a business purpose, premeditatedly and in cold blood so to speak, weighing the effects of his actions and carefully choosing the most annoying and disturbing acts.¹² His conduct is of the type that courts are anxious to prevent, and because it is done for business reasons, to collect money and make a profit, it can successfully be deterred by imposing monetary sanctions.¹³

However, the elements of the conduct which justify recovery here are also present in other situations: the infliction of harm on another with knowledge of the probable consequences and without justification is generally frowned upon, and the wrongdoer can properly be said to have an obligation to compensate the victim of his wrongful conduct for the injury it has caused. Intentional conduct in all situations, not only those involving creditors, can be deterred by the prospect of a damage award. The only truly distinctive characteristic of the collection cases would appear to be the argument that where opprobrious tactics which inflict damage are utilized as part of one's business for purposes of increasing revenues, the damage caused by such tactics is properly allocated to the actor as a cost of engaging in that business.

This argument in the collection situation, however, differs from the normal cost of doing business argument employed in areas like manufacturers' liability or workmen's compensation. In the latter situations, the cost is imposed on the business because it can better afford to bear the loss, and it is contemplated that the loss will be passed on to the consumers of the product as part of the price they pay for that product or service. In the creditor situation, however, the aim is not to pass this cost on to the creditor's other hapless borrowers, but rather to place its final burden on the creditor to encourage him to withdraw from the business or at least to desist from employing the oppressive tactics that trigger liability.

Thus, the apparent purpose of imposing liability for wrongful collection activities is not to make the business bear the reasonable costs

¹² See Wade, *supra* note 4, at 72.

¹³ See Kelly, *supra* note 9, at 93.

of production, but rather, as in the case of any intentional infliction of emotional anguish, to deter unjustifiably injurious activity. Still, courts hesitant to make the full leap of granting recovery in all cases of intentional infliction of emotional harm may be willing to do so in the creditor cases because of the public policy against taking advantage of necessitous borrowers and purchasers and a desire to deter usurers and perhaps even force them out of business by granting large awards in wrongful collection tactics cases.

REDRESS FOR OPPRESSIVE CREDITOR TACTICS

The courts have long been sympathetic to the plight of the victim of oppressive creditors' devices,¹⁴ and have employed a number of theories to justify the granting of relief. These include abuse of process, defamation,¹⁵ invasion of the right of privacy, and intentional infliction of emotional distress.¹⁶ In recent years abuse of process and defamation have receded into disuse because in most states debtors can avoid the technical requirements of those causes of action by suing for intentional infliction of emotional harm or invasion of the right of privacy.¹⁷ Each of these latter two causes of action is really comprised of two related sub-rules, one or the other of which has been adopted by most states.

¹⁴ "Courts have long recognized that debtors have certain rights protecting them from overzealous collection activities. This is evidenced by a wealth of court decisions, commonly called 'rough collection' cases." Hurt, *Debt Collection Torts*, 67 W. VA. L. REV. 201 (1965).

¹⁵ *Cyran v. Finley Straus, Inc.*, 302 N.Y. 486, 99 N.E.2d 298 (1951), held that a cause of action in libel was stated by pleadings alleging creditor harassment by mailing letters to the debtor's relatives and friends.

¹⁶ See Hurt, *supra* note 14; Wade, *supra* note 4; 58 MICH. L. REV. 484 (1960); 14 WASH. & LEE L. REV. 312, 314-15 (1957); 10 VAND. L. REV. 158 (1956). Libel in creditor cases is discussed in, 2 WAYNE L. REV. 240 (1956).

Because the creditor's purpose is to pressure the debtor to pay the debt by improper means, some courts have called attention to the element of extortion present. See *Quina v. Roberts*, 16 So. 2d 558 (La. App. 1944). One decision was also found which permitted recovery on the grounds of intentional interference with contractual relations, where the debtor was fired because the creditor had hounded him so often at work. *Crowe v. Domestic Loans, Inc.*, 130 S.E.2d 845 (S.C. 1963).

¹⁷ See Hurt, *supra* note 14; 58 MICH. L. REV. 484 (1960); 10 VAND. L. REV. 158 (1956).

In *Ammons v. Jet Credit Sales, Inc.*, 34 Ill. App. 2d 456, 181 N.E.2d 601 (1962), the debtor alleged—unsuccessfully—abuse of process as well as intentional infliction of emotional distress, presumably because the first case accepting the latter as a cause of action under Illinois law had been decided only one year prior to *Ammons* (*Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961), and Illinois law on the subject was still unclear.

INTENTIONAL INFLICTION OF MENTAL ANGUISH

No Requirement of Physical Injuries

A leading creditor case establishing a right of action for the intentional infliction of mental anguish is *Barnett v. Collection Service Co.*¹⁸ The debtor was a widow with two children, whose earnings were protected against creditors by law. Undeterred by this obstacle to his obtaining payment of the twenty-eight dollar debt by legal process, the creditor sent the widow a series of vicious letters vilifying and threatening her. The court affirmed a verdict redressing the widow's emotional suffering, holding the creditor liable for his willful acts done for the purpose of causing mental anguish.

Two years later, the Nebraska Supreme Court reached the same result in *LaSalle Extension Univ. v. Fogarty*.¹⁹ Neither case emphasized the creditor-debtor aspect of the decision or suggested that this relationship results in a special legal duty or standard of care. They relied instead on the general rule that the intentional infliction of mental anguish constitutes an actionable wrong.²⁰ This general rule is very similar to the one advocated a few years later by Professors Magruder²¹ and Prosser,²² and has been applied in several more recent creditor cases.²³

The recent case of *Pack v. Wise*²⁴ points up some of the still un-

¹⁸ 214 Iowa 1303, 242 N.W. 24 (1932).

¹⁹ 126 Neb. 457, 253 N.W. 424 (1934).

²⁰ One of the non-creditor cases relied on by the *Barnett* court, *supra* note 18, was the famous case of *Great Atl. & Pac. Tea Co. v. Roch*, 160 Md. 189, 153 A. 22 (1931) wherein a groceryman wrapped a gory dead rat in paper and had it delivered to his customer who had ordered a loaf of bread.

²¹ "We would expect, then, the gradual emergence of a broad principle somewhat to this effect: that one who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquillity of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue." Magruder, *supra* note 3, at 1058.

²² "It consists of the intentional, outrageous, infliction of mental suffering in an extreme form." Prosser, *supra* note 4, at 874.

²³ *E.g.*, *Delta Fin. Co. v. Ganakas*, 93 Ga. App. 297, 91 S.E.2d 383 (1956). Most of the recent law review comments have taken the position that the creditor cases are merely examples of the "new tort." *See, e.g.*, Comment, *An Independent Tort Action for Mental Suffering and Emotional Distress*, 7 *DRAKE L. REV.* 53 (1957); Comment, *Extension of Recognition of Intentional Infliction of Mental Suffering as Independent Tort*, 33 *U. DET. L.J.* 49 (1955). *See also* 12 *SYRA. L. REV.* 131 (1960).

²⁴ 155 So. 2d 909 (La. App.), *cert. denied, no error*, 245 La. 84, 157 So. 2d 231 (1963).

resolved questions surrounding this cause of action. In that case, the court found that the creditor, a respected businessman not in the lending or collection business, was "a very high type of individual who was not motivated by any malicious motive in the matter, but rather by the righteous and firm conviction that Pack was liable for the debt and should pay it."²⁵ Yet his writing a letter to the debtor's employer, after the debtor's lawyer had told him of the legal defense to the debt and had asked him to refrain from communicating further to the employer about it, was held tortious both as an invasion of the right of privacy and as an intentional causing of unreasonable emotional disturbance. This case demonstrates the ambiguity of the "intentional" element of the tort: some decisions suggest that morally unjustifiable, malicious conduct is a requisite to recovery; some suggest that only conduct so disturbing that the actor should have expected severe emotional distress to result is required; and some cases, including *Pack*, indicate that mere negligence, or the use of unreasonable methods despite pure motives and the absence of a design to harm the debtor, is sufficient to warrant recovery.

Another question not definitively answered by these cases is whether the tort is viewed as a narrow one applicable only to the debtor-creditor relationship or whether it is merely one of many applications of the broader "new tort." The same court in *Pack* which declared that "Louisiana law clearly recognizes that coercive tactics to collect a debt by themselves constitute a tort,"²⁶ also characterized the creditor's wrong in more general terms as the intentional causing of unreasonable emotional disturbance. That Louisiana recognizes a special debt collection tort is indicated by the earlier case of *Quina v. Roberts*,²⁷ where the creditor asked the debtor's employer to help him collect the debt. The debtor sued in libel, attempted extortion, and invasion of the right of privacy, but the court relied on none of these explicitly, and verbalized its holding in terms of the debt relationship between the parties: "But whatever be the sound rule at common law respecting the libelous character of publications of this kind . . . the issuance of the letter . . . for the obvious purpose and design of forcing a payment by plaintiff, constituted a tort under our law . . ." even with-

²⁵ *Id.* at 914.

²⁶ *Id.* at 913.

²⁷ 16 So. 2d 558 (La. App. 1944).

out proof of special damages. "It is well settled, even in the common law states, that damages will be allowed for mental anguish suffered by a debtor in cases where the creditor has pursued unreasonable methods in attempting to make collection of his claim."²⁸ Still, as noted above, the cases in other states speak not of a special creditor rule but rather of the broader "new tort," and the language in the later Louisiana case²⁹ referring to the broader rule as well as to the special creditor rule may reflect a movement even in Louisiana from the narrower creditor rule to the broader "new tort." This would support Professor Wade's observation that despite the characteristics distinguishing the collection cases,³⁰ they may merely presage the broader imposition of liability for the intentional infliction of severe emotional distress.

Requirement of Physical Injuries

The second sub-category of liability for the intentional infliction of mental anguish is comprised of cases which grant redress only if the mental distress was so severe as to result in physical injury. The leading case is *Clark v. Associated Retail Credit Men of Washington, D.C.*³¹ The trial court's judgment sustaining a demurrer to the complaint was reversed on the ground that a cause of action was stated by an allegation that the defendant intended its harassing letters to inflict mental and physical injuries on the plaintiff, and that such injuries in fact resulted from the harassment: "No one has a general license purposely to injure the bodies of others."³² Other language in the court's opinion further emphasized the necessity of proving physical injuries, and the dissent of Judge (later Chief Justice) Vinson asserted that the plaintiff should not be required to prove physical injury.³³

It is not altogether clear from either the majority or the dissenting opinion whether this is a special creditors' tort or whether it is just another example of the "new tort," but both opinions contain language supporting the former view. On the one hand, the court relied on non-

²⁸ *Id.* at 560.

²⁹ *Pack v. Wise*, *supra* note 24.

³⁰ See discussion in text accompanying notes 12-13, *supra*.

³¹ 105 F.2d 62 (D.C. Cir. 1939).

³² *Id.* at 66.

³³ *Id.* at 70.

creditor cases granting recovery for the intentional infliction of mental distress. On the other hand, the court declared: "There is a growing tendency to check offensive collection methods," and cited *High Pressure Collection Methods*, 66 U.S.L. Rev. 349, as well as the particular pages in Professor Magruder's article which discuss the creditor cases. Furthermore, the dissent stated:

I am in thorough accord that overbearing, brow-beating, and other "high-powered" methods to *compel collection* are not to be well received in court, and that where a creditor, his lawyer, or agent transcends his legal rights and harasses or coerces by threats or communications to the *debtor*, his employer . . . and humiliates or embarrasses the *debtor* . . . such conduct is actionable . . .³⁴

Other courts have applied the same rule as *Clark*,³⁵ but the most interesting line of decisions is that developed over the past fifteen years by the Texas courts. Beginning with *Harned v. E-Z Finance Co.*,³⁶ and *Duty v. General Finance Co.*,³⁷ the Texas Supreme Court established the rule that "borrowers [may] recover damages for mental anguish and physical injuries wilfully and wantonly inflicted on them by wrongful devices practiced by lenders for the purpose of collecting claimed balances."³⁸ The court clearly spoke in terms of a special liability arising from the debt collection situation, and neither referred to a broader rule (the "new tort") nor relied on non-collection cases. That the Texas rule is truly a "bill collectors' tort" is supported by the language in subsequent Texas cases. For example, the court in *Moore v. Savage* said: "This is an 'unreasonable collection efforts' case;"³⁹ and the plaintiff's cause of action has been similarly

³⁴ *Id.* (Emphasis added.)

³⁵ *E.g.*, *Berrier v. Beneficial Fin., Inc.*, 234 F. Supp. 204 (N.D. Ind. 1964) (dictum); *Bowden v. Spiegel, Inc.*, 96 Cal. App. 2d 793, 795, 216 P.2d 571, 573 (1950) (Relying not only on creditor cases, the court said: "We entertain no doubt that the intentional use of such an unreasonable method of attempting to collect a debt which proximately results in physical illness is actionable."); *Lyons v. Zale Jewelry Co.*, 150 So. 2d 154 (Miss. 1963) (discusses creditor cases but appears to state a broader principle of tort liability for the intentional infliction of mental and physical injuries); *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936) (collector's shouting of insults at debtor causing mis-carriage deemed a trespass to the person).

³⁶ 151 Tex. 641, 254 S.W.2d 81 (1953).

³⁷ 154 Tex. 16, 273 S.W.2d 64 (1954).

³⁸ *Id.* at 18, 273 S.W.2d at 64.

³⁹ 359 S.W.2d 95 (Tex. Civ. App.), application for writ of error refused, no reversible error, 362 S.W.2d 298 (Tex. 1962).

characterized in nearly every recent collection methods case in the Texas courts.⁴⁰

Less clear, however, is precisely what facts need to be proved to establish a right to recover. It is not even clear whether physical injuries need be proved. *Harned v. E-Z Finance Co.*⁴¹ refused recovery because no physical injuries were alleged, and *Duty v. General Finance Co.*,⁴² decided the following year, explained that the reason recovery was proper in this case and not in *Harned* was because physical injuries were proved here but not there. Also, *Houston-American Finance Co. v. Travis*⁴³ held that the statute of limitations in collection cases does not begin to run until the plaintiff's physical injury appears, since the cause of action does not accrue until then. However, one case which remains unexplained and which raises grave doubts about the physical injuries requirement is *Western Guaranty Loan Co. v. Dean*,⁴⁴ decided by the intermediate appellate court. That case held that even absent an allegation or proof that the defendant intended to or did cause emotional or physical injuries, the plaintiff could recover where the jury found "unreasonable collection efforts . . . with reckless disregard for appellee's health and welfare."⁴⁵ This decision indicates that the only relevance of physical injuries is that the plaintiff must show that the defendant's acts were likely to cause physical injury resulting from emotional anguish.

However, *Harned* was decided by the state's highest court and has never been overruled. *Dean* did not even discuss it, and the precedential value of *Dean* is further weakened by the fact that *Travis* (holding that for purposes of the statute of limitations the cause of action does not accrue until the physical injury occurs) was decided three years after *Dean*, and that the plaintiff in each case since *Dean* has

⁴⁰ *Montgomery Ward & Co. v. Brewer*, 416 S.W.2d 837 (Tex. Civ. App. 1967); *Salazar v. Bond Fin. Co.*, 410 S.W.2d 839 (Tex. Civ. App. 1966); *United Fin. & Thrift Corp. v. Bain*, 393 S.W.2d 429 (Tex. Civ. App. 1965); *Employee Fin. Co. v. Lathram*, 363 S.W.2d 899 (Tex. Civ. App. 1961); *Houston-American Fin. Co. v. Travis*, 343 S.W.2d 325 (Tex. Civ. App. 1961); *Western Guar. Loan Co. v. Dean*, 309 S.W.2d 857 (Tex. Civ. App. 1958); *Industrial Fin. Service Co. v. Riley*, 295 S.W.2d 498 (Tex. Civ. App. 1956).

⁴¹ 151 Tex. 641, 254 S.W.2d 81 (1953).

⁴² 154 Tex. 16, 273 S.W.2d 64 (1954).

⁴³ 343 S.W.2d 325 (Tex. Civ. App. 1961).

⁴⁴ 309 S.W.2d 857 (Tex. Civ. App. 1957).

⁴⁵ *Id.* at 860. The debtor recovered for loss of employment resulting from the creditor's unreasonable collection efforts.

continued to allege and prove physical injuries.⁴⁶ Thus, while *Dean* may signal a transition to the broader principle that unreasonable collection tactics are tortious regardless of the type of harm they cause, and any loss resulting from them will be redressed, it is probably nothing more than an aberration among the Texas decisions.

Another interesting aspect of the Texas cause of action is that mere negligence supports recovery, whereas both Prosser and Magruder would have required "intentional, outrageous, infliction of mental suffering in an *extreme* form."⁴⁷ The Texas rule is that malicious or intentional infliction of mental distress need be proved only for exemplary damages, and that compensatory damages may be recovered on a showing merely of unreasonable collection methods.⁴⁸ In one respect, the Texas requirement of physical injuries appears to resemble the general American rule regarding the negligent infliction of emotional injury, which requires a threshold "impact." The Texas requirement of physical injuries may be analogized to the miniscule impact of the general negligence rule, in that both could be characterized broadly as a trespass to the person;⁴⁹ and both requirements probably stem from the courts' belief that a physical manifestation is somehow easier to verify as a matter of proof and therefore less likely to admit of fraudulent claims, and also that physical invasions and injuries, in the broad universe of cases, are more likely to be the serious ones.

Thus, while the Texas decisions are clearly "creditor cases," they differ from the others in that mere negligence, and not intent, need be shown. However, they apparently still require physical injuries as a precondition to recovery for mental anguish, as opposed to granting redress for solely emotional distress.

⁴⁶ *E.g.*, *Montgomery Ward & Co. v. Brewer*, *supra* note 40. A recent Texas case totally unrelated to debt collection practices, involving an alleged assault, cited *Harned* for the proposition that "[m]ental anguish and mental suffering without proof of resulting physical injury will not support a recovery of damages." *Fisher v. Carrousel Motor Hotel, Inc.*, 414 S.W.2d 774, 776 (Tex. Civ. App. 1967).

The result of the physical injuries requirement has been for plaintiffs to exaggerate claims of physical symptoms, such as headaches, sleeplessness, dizziness, etc., in order to qualify for relief. This result was predictable. *See Magruder, supra* note 3, at 1059.

⁴⁷ Prosser, *supra* note 4.

⁴⁸ *Ware v. Paxton*, 359 S.W.2d 897 (Tex. Sup. Ct. 1962), *rev'g in part* 352 S.W.2d 520 (Tex. Civ. App. 1961); *Salazar v. Bond Fin. Co.*, 410 S.W.2d 839 (Tex. Civ. App. 1966); *United Fin. & Thrift Corp. v. Bain*, 393 S.W.2d 429 (Tex. Civ. App. 1965); *Moore v. Savage*, 359 S.W.2d 95 (Tex. Civ. App. 1962).

⁴⁹ *See Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936).

INVASION OF THE RIGHT OF PRIVACY

There are two bases for a creditor's liability for invading his debtor's right of privacy. The older, more accepted, approach involves unreasonably making public, facts which the debtor has a right to have kept secret, such as his nonpayment of a debt. A newer approach, as yet quite undeveloped and not widely accepted, is to hold that the creditor's harassment itself invades the debtor's privacy by interfering with his right to be left alone.

Publication of Information Embarrassing to the Debtor

The leading case of *Brents v. Morgan*⁵⁰ permitted the debtor to recover for mental anguish when the creditor, to pressure the debtor to pay his debt, invaded his privacy by posting an eight-foot sign in the window of his showroom proclaiming to the world that the debtor owed him fifty dollars. The same principle has been applied by many courts for various lesser degrees of publication, including: following the debtor-waitress around in the restaurant in which she worked, calling her a deadbeat who wouldn't pay her bills;⁵¹ unjustifiably removing the tires from the debtor's car and leaving it standing on its rims in full view of the debtor's friends and fellow-employees;⁵² and, repeatedly telephoning the debtor's employer to inform him of the debt.⁵³ The essence of this approach was ably articulated by the dissenting opinion in *Hawley v. Professional Credit Bureau*,⁵⁴ recently decided by the Michigan Supreme Court. There the creditor had repeatedly

⁵⁰ 221 Ky. 765, 299 S.W. 967 (1927).

⁵¹ *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892 (Mo. 1959).

⁵² *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962).

⁵³ *Pack v. Wise*, 155 So. 2d 909 (La. App.), *cert. denied, no error*, 245 La. 84, 157 So. 2d 231 (1963) (alternative holding) (creditor wrote debtor's employer after the debtor had informed him of a legal defense to the debt and had requested that he not speak to the employer); *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956), *aff'g* 99 Ohio App. 485, 135 N.E.2d 440 (1955) (telephoning debtor's employer and repeatedly telephoning debtor at home and at work). *But see, e.g.*, *Hawley v. Professional Credit Bur.*, 345 Mich. 500, 76 N.W.2d 835 (1956) (no recovery where creditor wrote employer of the debt and asked his co-operation in collecting it, even though he knew the debtor contested the validity of the debt). 15 ALA. L. REV. 304, 307-308 (1962), cites several additional cases in support of the proposition that there is no "publication" for purposes of an invasion of the right of privacy when the creditor informs the debtor's employer of the debt. Those courts justify this rule on the ground that the employer has a legitimate interest in seeing that the debt is paid so that he is not made the defendant in a garnishment proceeding.

⁵⁴ 345 Mich. 500, 76 N.W.2d 835 (1956).

urged the debtor by letter and telephone to pay the debt, and had been advised by the debtor that he denied the debt and contested its legal validity. Despite this, the creditor wrote the debtor's employer, informed him that the debtor had not paid an obligation, and requested the employer's co-operation in securing payment. The court held that this one letter was not wrongful because it neither suggested that the debtor was dishonest nor unduly publicized the debt. The dissent, however, declared:

[T]here has been an attempt to collect this debt by means of duress and coercion, in violation . . . of the common decencies, and . . . an unreasonable and serious interference in plaintiff's interest in not having his affairs known to others.⁵⁵

As the commentators have pointed out, this cause of action provides much more effective relief for the debtor than do the traditional torts because truth is no defense as it is in defamation, special damages need not be proved, and neither malice nor physical injuries need be established as they often must be to show the intentional infliction of emotional distress.⁵⁶ But it does require communication to persons other than the debtor, sometimes to a substantial number of persons,⁵⁷ and thus would not provide redress against the creditor who is satisfied to harass the debtor with letters, phone calls, and visits to his home.

Intrusion Into the Inner Sanctum: "I Want to be Alone"

The final category of creditors' liability, an innovation in the right of privacy, was suggested by two recent decisions. In *Norris v. Moskin Stores*,⁵⁸ the Alabama Supreme Court held a creditor liable for hiring a woman, a stranger to the debtor, to telephone his wife and sister and tell them that the debtor had made her pregnant. The court referred to Dean Prosser's four categories of invasion of privacy⁵⁹ and determined that the creditor's activities here fell within the first category, the "outrageous 'wrongful intrusion'" "upon the plaintiff's physical solitude and seclusion."⁶⁰ Recovery was allowed even though the de-

⁵⁵ *Id.* at 518, 76 N.W.2d at 843.

⁵⁶ See 58 MICH. L. REV. 484 (1960); 10 VAND. L. REV. 158 (1956).

⁵⁷ See *Hawley v. Professional Credit Bur.*, *supra* note 53.

⁵⁸ 272 Ala. 174, 132 So. 2d 321 (1961).

⁵⁹ PROSSER, TORTS 637-39 (2d ed. 1955).

⁶⁰ *Norris v. Moskin Stores*, 272 Ala. 174, 176, 132 So. 2d 321, 323 (1961).

feudant had not been humiliated publicly—only three people, all of them his relatives, had heard the telephone allegations by the woman—because the creditor's act constituted an unreasonable harassment which was "outrageous and humiliating to a person of ordinary sensibilities" ⁶¹

In *Housh v. Peth*,⁶² there probably was sufficient "publication" to satisfy courts which insist on that requirement in that the creditor told the debtor's employer and her landlord of the debt. The point of interest here is that the court approved the trial judge's charge to the jury which included the statement:

[A]s a matter of law the plaintiff's right of privacy includes the right to be let alone The invasion of the right of privacy may be defined also as the wrongful intrusion into one's private activities in such manner as to outrage or to cause mental suffering, shame or humiliation to a person of ordinary sensibilities. A person may, therefore, adopt a life of seclusion with a right to remain undisturbed if she so desires.⁶³

In this view, the tort is not publishing but intruding. Recovery is permissible for mere harassment alone, if that is unreasonable under the circumstances. This interpretation is consistent with that given these cases by the commentators.⁶⁴ This tort is thus virtually indistinguishable from the intentional infliction of mental anguish.

CONCLUSION

The two new causes of action, invasion of privacy and the intentional infliction of emotional distress, are similar means utilized by the courts in the collection cases to permit recovery to aggrieved debtors. They are sure to replace the older means of obtaining redress for this conduct because the plaintiff's chances of success here are enhanced by being relatively free of the technical elements of the older offenses. Whether these cases reflect the courts' creation of a special debt collection tort or merely constitute one application of the broader "new tort" is unclear, and probably the answer differs from

⁶¹ *Id.* at 179, 132 So. 2d at 325.

⁶² 165 Ohio St. 35, 133 N.E.2d 340 (1956), *aff'g* 99 Ohio App. 484, 135 N.E.2d 440 (1955).

⁶³ *Housh v. Peth*, 165 Ohio St. 35, 39, 133 N.E.2d 340, 343 (1956).

⁶⁴ See *Hurt, Debt Collection Torts*, 67 W. VA. L. REV. 201 (1965); Note, *Right of Privacy—Invasion by Debt Collector*, 17 OHIO ST. L.J. 346 (1956); 10 VAND. L. REV. 158 (1956).

state to state. The law is probably wise to proceed cautiously by first creating a special category of liability in the debt collection area, where the plaintiffs are so susceptible to harm and the defendants are so likely to engage in particularly distasteful conduct unless deterred by frequent and substantial damage awards, but it appears that the basic considerations underlying liability here are no different from those in all situations where harm is inflicted intentionally for no justifiable reason.

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