TORT LIABILITY FOR INTENDED MENTAL HARM

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I. INTRODUCTION

In a spate of recent English cases,[1] courts have relied upon the judgment of Wright J in *Wilkinson v Downton*[2] as providing a basis for imposing liability in circumstances where a woman has been subjected to harassing conduct. Justice Wright enunciated a principle that it was wrongful in law to act in a manner calculated to cause physical harm to another.[3] The case was only indirectly concerned with the infliction of physical harm. Its real significance lay in the fact that it was the first in which an English court offered redress for the intentional infliction of purely mental harm.

Wilkinson v Downton was long regarded as something of an oddity in the law of torts. It was viewed as a decision tailored to achieve a desirable result in a particular case. Few would dispute the fact that Downton's conduct was not actually calculated to cause mental harm, but this is a mere factual quibble. The

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1 *Burnett v George* [1992] 1 FLR 525; *Pidduck v Malloy* [1992] 2 FLR 202; *Khorasandjian v Bush* [1993] 3 All ER 669; *Burris v Azadani* [1995] 4 All ER 802.

2 [1897] 2 QB 57.

3 *Ibid* at 58.

case was also questioned on doctrinal grounds. However, it will be argued that although the case departed from the paradigmatic formulation of liability (by failing to incorporate the requirement of an independently unlawful act) it does in fact embody a cogent remedial principle.

It is intended to discuss briefly the context within which *Wilkinson v Downton* was decided and the most significant of the early cases which followed it, before summarising the necessary elements. The form of liability taken by the tort will be discussed and a comparison made with other torts which embody 'the harm principle'. Finally, an examination will be undertaken of a couple of the contexts within which the tort of intentional infliction of mental harm has proven particularly useful.

II. THE DECISION IN *WILKINSON v DOWNTON*

The Wilkinsons were operators of The Albion public house. Mr Wilkinson decided one day to attend a steeplechase meeting and informed his wife that he would return later by train. Downton saw Mr Wilkinson at the races and afterwards attended The Albion where he said to Mrs Wilkinson: 'I have some very unpleasant news for you; it is a message from your husband. He has had a smash-up and is lying at The Elms public house, Leytonstone, and he desired me to ask you to go down at once with a cab and take some pillows and fetch him home'. This was by way of a practical joke. Unfortunately, the joke backfired and Mrs Wilkinson suffered a 'shock to the system' and fell seriously ill. Her reason was, for a time, 'called into doubt'.

There were a couple of forbidding obstacles standing in the way of liability. Firstly, the decision of the House of Lords in *Mayor of Bradford v Pickles*,[4] which precluded recourse to notions of actual intention in tort law. Secondly, the decision of the Privy Council in *Victorian Railways Commissioner v Coultas*,[5] which denied recovery for nervous shock. While Wright J expressly dealt with the latter decision, he did not mention the former. The failure to deal properly with it has contributed to the difficulties evident in succeeding cases.

In *Mayor of Bradford*, the House of Lords rejected a principle propounded by Bowen LJ in *Mogul Steamship Company v McGregor Gow and Co*,[6] that "intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that person's property or trade, is actionable if done without just cause or excuse".[7] In *Mayor of Bradford*, the question was whether an injunction could go to restrain the defendant from diverting a stream of underground water which otherwise would have flowed into the city's catchment. It was alleged that in so doing, the defendant was acting maliciously - so that the city would be forced into

4 [1895] AC 587. (Hereafter referred to as *Mayor of Bradford*).
5 (1888) 13 App Cas 222.
6 (1889) 23 QBD 598.
7 *Ibid* at 613.

purchasing his land.[8] The Lords did not require counsel for the defendant to make submissions. They summarily rejected Bowen LJ's principle, with Lord Halsbury stating:

> This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it ... Motives and intentions in such a question as is now before your Lordship's house seem to me to be absolutely irrelevant.[9]

This dictum was extended by the House of Lords in *Allen v Flood.*[10] Lord Watson stated that 'the law of England does not ... take into account motive as constituting an element of civil wrong'.[11] The House insisted upon the identification of an act unlawful in itself in order to ascribe tortious liability. However, the Lords were fighting a rearguard action and failed adequately to explain the emergence of a number of torts derived from the old action on the case, such as conspiracy and malicious prosecution, which were essentially based upon abuses of rights to act.[12]

The decisions created an obvious difficulty for Justice Wright. Downton's conduct was ostensibly legal in character - he was merely playing a joke upon Mrs Wilkinson. On what basis could liability be imposed other than to say that intention made the difference? Justice Wright had available to him at least one firm basis for distinguishing the case before him from *Mayor of Bradford.* His Lordship stressed that Mrs Wilkinson had a right to personal safety,[13] whereas the House had been at pains to point out in *Mayor of Bradford* that the city had no right to receive underground water. But the presence of a protected interest was (and remains) merely a precondition to recovery, rather than sufficient in itself.[14] Wright J continued by stating that the "defendant has ... wilfully done an act calculated to cause physical harm to the plaintiff" which, when combined with the resulting injury, gave rise to a cause of action.[15] This appears to conform to Lord Bowen's rejected principle.[16] However, Wright J stressed that "no malicious purpose ... [nor] any motive of spite is imputed to the defendant".[17] An intention to cause such a physical harm could, instead, be *imputed* from the circumstances[18] because Downton's words could not have

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8 Note 4 *supra* at 595.

9 *Ibid* at 594. See also *ibid* at 598 per Lord Watson, at 599 per Lord Ashbourne and at 601 per Lord Macnaghten.

10 [1898] AC 1.

11 *Ibid* at 92: Lord Watson was referring to malice as synonymous with intention, that is denoted by the commission of an act 'done knowingly and with a view to its injurious consequences'. See also *ibid* at 123-4 per Lord Herschell, at 154 per Lord Macnaghten, at 167 per Lord Shand and at 171 per Lord Davey.

12 See G Fridman, "Malice in the Law of Torts" (1958) 21 *Modern Law Review* 484 at 492.

13 Note 2 *supra* at 59.

14 See *Northern Territory v Mengel* (1995) 185 CLR 307 at 354 per Brennan J, especially in reference to the quotation from *Rogers v Rajendro Dutt* (1860) 15 ER 78 at 90.

15 Note 2 *supra* at 58-9.

16 See P Handford, "*Wilkinson v Downton* and Acts Calculated to Cause Physical Harm" (1986) 16 *Western Australian Law Review* 31 at 37.

17 Note 2 *supra* at 59.

18 *Ibid.*

"fail[ed] to produce grave effects ... upon any but an exceptionally indifferent person".[19] In other words, the external qualities of his acts gave rise to a reasonable inference of an intention to produce the result.

Justice Wright's attempt to distance himself from concern about the malice residing in Downton's conduct was of the most superficial kind. Downton's conduct was ostensibly lawful, but it was also reckless as to the effect it had upon the plaintiff. In other words, he recklessly caused her harm. Such recklessness was readily identifiable with actual intention, so that it is easy to conclude that the form of liability established was typical of the new actions on the case, which were predominantly concerned to defeat intended harms where no other remedy would otherwise have been available.[20] Such actions can be seen as exemplifying Lord Bowen's generalised principle.

The other obstacle was the decision of the Privy Council in *Victorian Railways Commissioner v Coultas*.[21] The Judicial Committee had denied recovery for negligently caused nervous shock on the basis that such could not be considered 'a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper".[22] The Committee expressed concern about the ability of the courts to specify adequately the causes of any particular psychiatric condition and also to calculate a sum in compensation of harm caused.[23] But Wright J rejected this reasoning, preferring instead to follow an Irish decision in *Bell v Great Northern Rail Co of Ireland*.[24] That case left open the possibility of compensation for nervous shock upon the adduction of sufficient scientific or medical evidence.[25]

The decision in *Wilkinson v Downton* was a logical development in the law of torts. The tort of assault had been fostered, not in order to protect mental integrity, but rather to prevent battery or breaches of the peace.[26] Assault operated in limited circumstances only, such that the plaintiff must have been instilled with an apprehension of imminent physical contact.[27] There was no remedy for assault in respect of threats to harm in the future or for harms indirectly caused.[28] Yet the law already offered limited redress for mental harms occasioned as a consequence of the commission of nominate torts. As Street

19 *Ibid.*

20 See A Kiralfy, *The Action on the Case* (1951). The only condition which attached to the creation of a new wrong by way of an action on the case was that it should be capable of analogy with one of the existing actions in trespass: E Dix, "The Origins of the Action of Trespass on the Case" (1937) 46 *Yale Law Journal* 1142 at 1172.

21 Note 5 *supra*.

22 *Ibid* at 225.

23 *Ibid* at 226.

24 (1890) 23 LR (Ir) 428.

25 *Ibid* at 441.

26 See H Smith, "Relation of Emotions to Injury and Disease: Legal Liability for Psychiatric Stimuli" (1944) 30 *Virginia Law Review* 193 at 194.

27 *Stephens v Myers* (1830) 4 C & P 349.

28 Linden has commented that "[i]t was no credit to tort law that one could not be civilly liable for threatening to chop another person up into little bits in the future, even though this caused the plaintiff severe emotional distress": see A Linden, *Canadian Tort Law* (5th ed, 1993), p 50.

foresaw, what was once regarded as merely a parasitic element in the award of compensation came into its own.[29]

III. DEVELOPMENT OF DOCTRINE

The first case in which an English court followed the decision in *Wilkinson v Downton* was *Janvier v Sweeney*.[30] A private detective (the second defendant) had been employed by the first defendant in order to prove that letters held by a Miss Marsh were forgeries. The plaintiff was a lodger with Miss Marsh and the defendants hoped to use her in order to gain possession of the letters. The plaintiff had been engaged to a man who was later interned as a prisoner of war. The second defendant called upon the plaintiff one evening and stated: 'I am a detective inspector from Scotland Yard and represent the military authorities. You are the woman we want, as you have been corresponding with a German spy'. The jury found that this statement was calculated to cause physical injury to the plaintiff and that it was made maliciously, that is with the knowledge that it was likely to cause such injury. The plaintiff suffered a long period of nervous illness after the incident. Lord Justice Duke said that the case was a much stronger one than *Wilkinson v Downton*:

> In that case there was no intention to commit a wrongful act; the defendant merely intended to play a practical joke upon the plaintiff. In the present case, there was an intention to terrify the plaintiff for the purpose of attaining an unlawful object in which both the defendants were jointly concerned.[31]

From this, it is apparent that Duke LJ was aware that the acts committed in *Wilkinson v Downton* were not independently unlawful. Intention to harm was the *gravitas* of the action on the case there established. On the facts before him, his Lordship based liability on the motives of the defendants, indicative of their intention to harm. However, the other members of the court were uncomfortable in basing liability in intention alone. Lord Justice Bankes stated that it must be taken that the defendants' threats were made in order to induce the plaintiff to hand over the letters, which would have been a "gross breach of confidence",[32] that is, an unlawful act. But his Lordship's judgment is somewhat deceiving, as it is apparent that he was referring merely to a *contemplated* wrong and not to one actually committed. Justice Lawrence made the same mistake. Despite their hesitation, it would appear that both Bankes LJ and Lawrence J were ultimately concerned with the defendants' motive. They did not take the next step to find in the defendants an intention to harm. More fruitfully though, an argument against the award of damages made in the court below, based upon the allegedly spurious linkage between the words spoken and the illness, was rejected.

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29 T Street, *Foundations of Legal Liability* (1906), p 470.
30 [1919] 2 KB 316.
31 *Ibid* at 326.
32 *Ibid* at 321.

The most important of the early Australian decisions in which *Wilkinson v Downton* was pleaded was *Bunyan v Jordan*.[33] The plaintiff was an employee in the defendant's store. She entered the defendant's office one night and noticed a revolver on his desk. Also on the desk was a bottle marked 'Poison'. The defendant extracted the cartridges from the revolver while the plaintiff was in the room. After the plaintiff had walked out, she heard the defendant say to another employee that he was going to shoot 'someone'. Meanwhile, the defendant went to an adjoining building and soon a shot was heard. The plaintiff remained at the store counter. After closing, she took the takings to the defendant, who was obviously unhurt. The defendant tore up the pound notes and said that he would not be there in the morning to mend them and that the plaintiff and others would 'hear of a death' before then. As a result of these events, the plaintiff was taken ill and suffered a state of nervous exhaustion for the next six months.

In the High Court, the tension evident in the contest between the intention theorists and the unlawful act theorists surfaced in the judgment of Latham CJ. His Honour was adamant that the juridical basis of liability for any of the actions in tort lay in the presence of an intention to injure or in the breach of a duty of care.[34] Thus, it was not enough merely to state that the defendant wilfully did an act which produced an illness in the plaintiff[35] as this "would involve the principle that the mere fact that a man is injured by another's act gives him a cause of action".[36] Yet the Chief Justice later examined the defendant's acts in light of the principles enunciated in *Wilkinson v Downton* and stated:

> There is no evidence of any intention to cause injury to the plaintiff, but the absence of this particular intention is not material if the act was unlawful. If A, intending to hit B unlawfully, in fact hits C, there is no doubt as to A's liability to C.[37]

There appears to be no previous authority confirming the correctness of this illustration, although Balkin and Davis state that it might have been justified by reliance upon the doctrine of 'transferred intent', which involves a legal fiction.[38] More importantly for the purposes of this exposition, the nominate torts (to one of which Latham CJ was referring) are themselves actionable without proof of an intention to injure. Such 'intention' as is required goes merely to the commission of the act or to the speaking of the words in question.[39] Thus, the performance of an operation, although medically indicated, is a battery even if performed in the best interests of the patient.[40] An assault may be brought for threats which are merely careless.[41] And a person who intrudes onto another's

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33 (1937) 73 CLR 1.

34 *Ibid* at 10.

35 *Ibid* at 9-10.

36 *Ibid* at 10.

37 *Ibid* at 12.

38 See R Balkin and J Davis, *Law of Torts* (2nd ed, 1996), p 36.

39 See, generally, F Trindade, "Intentional Torts: Some Thoughts on Assault and Battery" (1982) 2 *Oxford Journal of Legal Studies* 211 at 219. See also H Luntz and D Hambly, *Torts: Cases and Commentary* (4th ed, 1995), p 627.

40 *In re F* [1990] 2 AC 1 at 73-4; *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 at 234.

41 F Trindade, note 39 *supra* at 229.

land, wrongly believing it to be his or her own, is guilty of trespass.[42] These torts can be seen to be based on a superficial form of intention, the policy of the law being to protect the physical interests of the person and his or her property. The action on the case for the intentional infliction of mental harm, having a different genesis, in fact requires proof of a intention to *cause harm*.

Despite this confusion, Latham CJ recognised the principle established in *Wilkinson v Downton*, the essential elements of which were an act "calculated to cause physical injury for which there is no lawful justification or excuse" and the causation of actual injury.[43] His Honour referred to the conduct in the principal case as having been objectively likely to cause injury, from which "it was found that there was an intention to alarm the plaintiff".[44] On the facts of the present case, it could not be said that the defendant's words were "calculated or likely to cause harm to any persons", particularly because the plaintiff was not present when they were spoken.[45]

The other significant judgment was delivered by Justice Dixon. His Honour espoused the view that "it is impossible to formulate any cause of action in which the reasonable likelihood of harm ... resulting from the act does not form an essential element".[46] His emphasis was upon the fact that the harm must have been a likely result, rather than merely foreseeable. A higher standard of proof was required than in negligence, reflective of the requirement that actual intention be proved. Justice Dixon quoted the following passage from Roscoe Pound:

> If the defendant intended to bring about the physical harm which followed, there would seem no occasion for requiring more [ie, an unlawful act]. If, however, the defendant did not intend the physical harm, but only a mild fright or mild nervous shock ... the accepted rule seems to be that there should be no recovery.[47]

In the result, the High Court ruled that the plaintiff was precluded from recovery on the basis that the only likely effect of his words would have been to frighten his sons, so that no intention to harm the plaintiff could be discerned. Linden has commented that the judges in *Bunyan v Jordan* required from the plaintiff "a substantial degree of self possession".[48] He believes that such conduct as occurred in that case would be actionable in Canada today.[49]

42 *Basely v Clarkson* (1681) 83 ER 565. See also, discussion in *Plenty v Dillon* (1991) 171 CLR 635 at 647, where Gaudron and McHugh JJ affirm the 'policy of the law' in respect of trespass to land.
43 Note 33 *supra* at 10.
44 *Ibid.*
45 *Ibid* at 12.
46 *Ibid* at 16.
47 R Pound, "Interests in Personality" (1915) 28 *Harvard Law Review* 343 at 361.
48 A Linden, note 28 *supra*, p 52.
49 *Ibid.*

IV. ELEMENTS

It is appropriate to draw together the elements of the tort of intentional infliction of mental harm, having discussed the most important of the early decisions. A cause of action will arise in respect of recognisable psychiatric illnesses which are the result of conduct intended by the defendant to cause the plaintiff harm and for which there is no lawful justification or excuse. This is not precisely how the tort was framed by Wright J in *Wilkinson v Downton*. Later cases have clarified the requirements.

A. Intention

The tort under consideration is truly an intentional one, requiring that the defendant be shown to have intended the harm caused or to have been recklessly indifferent as to its causation. Recklessness arises in circumstances where the defendant knows of the likelihood that harm will result from his or her conduct. Knowledge of a likelihood that harm will result from conduct has long been recognised by the criminal courts as equivalent to intention.[50] Trindade affirms in relation to tort law that "the dividing line between intention and recklessness is sometimes barely distinguishable".[51] In *Wilkinson v Downton*, intention was imputed to the defendant; but it is apparent that such imputation rested on the likelihood of harm being caused so as to bring the case within the bounds of recklessness.

It was in the later cases, such as *A v B's Trustees*,[52] *Janvier v Sweeney*[53] and *Johnson v The Commonwealth*,[54] where the ghosts of *Mayor of Bradford*[55] and *Allen v Flood*[56] re-emerged. Judges went out of their way in determining liability by reference to wrongful acts. In *Purdy v Woznesensky*,[57] Mackenzie JA summed up the authorities in 1937 as establishing that a cause of action would lie where the plaintiff proved: (i) a wrongful act or omission committed by the defendant, (ii) a nervous shock to the plaintiff, and (iii) some physical injury arising from the shock.[58] No mention was made of a mental element. Some academic writers believe that it was enough that the harm caused by the defendant in *Wilkinson v Downton* was a foreseeable consequence of a desire to inflict a transient emotion, such as fright.[59] Yet this is to obscure the true basis

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50 See *R v Crabbe* (1985) 156 CLR 464 at 469, where the High Court affirmed: "If an accused knows when he does an act that death or grievous bodily harm is a probable consequence, he does the act expecting that death or grievous bodily harm will be the likely result, for the word 'probable' means likely to happen. That state of mind is comparable with an intention to kill or to do grievous bodily harm.".

51 F Trindade, note 39 *supra* at 222.

52 (1906) 13 SLT 830.

53 Note 30 *supra*.

54 (1927) 27 SR (NSW) 133.

55 Note 4 *supra*.

56 Note 10 *supra*.

57 [1937] 2 WWR 116.

58 *Ibid* at 121.

59 See J Fleming, *Law of Tort* (8th ed, 1992), p 32; W Morison, C Phegan and C Sappideen, *Torts: Cases and Commentary* (8th ed, 1993), p 157.

of liability. As Finnis states, although "one may foresee those results, and may accept that one will be causing them, or the risk of them, one is not adopting them".[60] They are merely side effects.[61] Cases such as *Mayor of Bradford* and *Allen v Flood* ignored an elementary principle in moral philosophy: One's conduct will be regarded as 'right' only in the circumstance that both the means and the ends are themselves 'right':[62]

> [C]ountless acts cannot be truly identified for what they are (prior to assessment as right or wrong, lawful or unlawful) unless and until the outward behaviour which they involve is understood as the carrying out of such and such an intention.[63]

It is submitted that Dixon J in *Bunyan v Jordan*, was correct in emphasising the importance of actual intent in establishing the tort of intentional infliction of mental harm. The most recent of judicial expositions is in conformity with that view. In *Wodrow v The Commonwealth*,[64] Miles CJ stated that liability in such cases "looks at the subjective element of the defendant's intention without reference to the objective quality of the act (reasonableness)".[65]

B. Establishing Intention

Lord Bowen once remarked that "the state of a man's mind is as much a fact as the state of his digestion".[66] Yet traditional wisdom would regard a subjective fault element as a particularly onerous requirement in the proof of tortious conduct. Gutteridge, for instance, commented that subjectivity involved an investigation of a psychological order and noted that a person rarely acts with a single motive, so that it might well be impossible to disentangle a sole or even dominant 'impulse'.[67] True, there are cases in which difficulty might arise.[68] However, these difficulties must not be exaggerated. The process of proving actual intention or reckless indifference is the same as that undertaken in relation to intention objectively determined: "The reality is that a person's subjective state of mind is personal to the [defendant] and can only be determined as an

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60 J Finnis, "Intention in the Law of Tort" in D Owen (ed), *Philosophical Foundations of Tort Law*, (1995) at 244.

61 See also A Simester, "Moral Certainties and the Boundaries of Intention" (1996) 16 *Oxford Journal of Legal Studies* 445 at 452. The learned author states: "The reasons which explain our actions are those we adopt as part of our direct intentions. Reasons 'despite which we act' are not explanatory at all, but simply represent a subset of reasons which *in fact* applied to that action. Applicable reasons either for or against injuring someone subsist *irrespective* of whether they are adopted by, and explain, my behaviour. Indeed, they subsist even if the defendant does not notice them".

62 J Finnis, note 60 *supra* at 238.

63 *Ibid* at 239.

64 (1991) 105 FLR 278. (This decision was reversed without criticism of the extracted passage; see (1993) 45 FCR 52).

65 *Ibid* at 286. See also *Khorasandjian v Bush*, note 1 *supra* at 735 per Dillon LJ and Lord Justice Rose.

66 *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483.

67 H Gutteridge, "Abuse of Rights" (1933) 5 *Cambridge Law Journal* 22 at 26.

68 See *Hall v Fonceca* [1983] WAR 309, where the question was one of trying to establish intent from a combination of actions and attitudes.

adjudicated fact by resort to its objective manifestations".[69] Proof need only be on the balance of probabilities.

The requisite intention might manifest itself in the defendant's employment of either acts or words. *Johnson v The Commonwealth*[70] was a case in which acts alone sufficed. However, most cases arise in respect of words spoken. It does not matter whether the words themselves are true or false.[71] It has been said that a plaintiff will face greater difficulty in respect of statements which are true,[72] but this is not necessarily so. In *Boothman v Canada,*[73] the defendant undermined effectively the plaintiff's mental state by trumpeting her actual shortcomings. What matters is the *manner* in which the words are employed.[74] In other words, liability is determined by reference to what was the likely effect of the words in those circumstances. Factors which are relevant to establishing intention include: the presence or absence of the plaintiff when the words were spoken or the acts were committed; the relationship between the defendant and the victim or between the primary victim and the secondary victim; and knowledge by the defendant of the plaintiff's susceptibility to psychiatric illness in circumstances where others would not be affected to the same extent as the plaintiff.

C. Harm Caused

The likelihood of a plaintiff being afflicted with a psychiatric illness must be determined according to general notions of cause and effect, as understood at the relevant time. In law, causation is determined by a global view of the facts in accordance with notions of 'common sense'.[75] The High Court in *Bunyan v Jordan* refused redress because it was doubted that an ordinary person would have suffered mental harm in the circumstances. However, the judges indicated that the defendant would have been liable if he had had *special* knowledge of the plaintiff's susceptibility (assuming that the plaintiff established the other necessary elements in the cause of action).[76] Justice Dixon stated that there was no evidence that "if the plaintiff was peculiarly susceptible to nervous shock, the defendant was aware that that was the case".[77]

The conduct of the defendant must have caused harm to the plaintiff. The early cases, beginning with *Wilkinson v Downton*, spoke of physical injury

69 D Paciocco, "Subjective and Objective Standards of Fault for Offences and Defences" (1995) 59 *Saskatchewan Law Review* 271 at 272.

70 Note 54 *supra.*

71 Good reasons why this is so are given by F Trindade and P Cane, *The Law of Torts in Australia* (2nd ed, 1992), pp 69-70.

72 See *Mount Isa Mines v Pusey* (1970) 125 CLR 383 at 407, where Windeyer J rejects the possibility of liability for the intentional infliction of nervous shock through the callous breaking of bad news. See also R Magnusson, "Recovery for Mental Distress in Tort, with Special Reference to Harmful Words and Statements" (1994) 2 *Torts Law Journal* 126 at 163.

73 [1993] 3 FC 381.

74 See B Markesinis and S Deakin, *Tort Law* (3rd ed, 1994), p 368.

75 *March v Stramare Pty Ltd* (1991) 171 CLR 506 at 515, 522-3; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 412-13.

76 (1937) 57 CLR 1 at 14 per Latham CJ, at 17 per Dixon J and at 18 per Justice McTiernan.

77 *Ibid* at 17. See also *Timmermans v Buelow* (1984) 38 CCLT 136.

resulting from the defendant's act.[78] This was an obvious attempt to soften the blow delivered by *Victorian Railway Commissioners v Coultas.*[79] Mrs Wilkinson satisfied the jury that her hair had turned white. In *Janvier v Sweeney*,[80] the plaintiff suffered an obviously debilitating 'nervous illness'. The Canadian courts have, until very recently, insisted upon some visible manifestation of injury.[81] In *Bradley v Wingnut Films*,[82] Gallen J said that what was required to be proven was "something physical and having a duration which is more than merely transient".[83] However, British and Australian courts recognise mental harms in the form of some recognised psychiatric illness,[84] which may or may not have a physical manifestation.[85] Thus, in *Battista v Cooper*,[86] Bray CJ spoke of the distinction between mere grief or sorrow, which do not sound in damages, and "something which causes in addition some sort of physical, mental or psychological trauma with consequential effect[s] on physical or mental or psychological health".[87]

D. Remoteness

As to the question of remoteness, Magnusson has pointed out that, "[a]lthough overshadowed by the intention requirement ... remoteness is nonetheless an independent [element]".[88] Liability will only arise for such harm as would foreseeably result from the defendant's statement or action. One might ask why, in respect of the intentional infliction of mental harm, there is any need to consider the issue of remoteness: Uncontradicted proof as to intention being absent, proof of intention will almost always turn on the *likelihood* of harm arising, a higher threshold than mere foreseeability. Indeed, in *Wilkinson v Downton*, Wright J commented that "it is no answer in law to say that more harm was done than was anticipated".[89] In *Battista v Cooper*,[90] the court stated that

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78 Note 2 *supra* at 58-9.

79 Note 5 *supra*.

80 Note 30 *supra*.

81 *Rahemtulla v Vanfed Co-op* (1984) 29 CCLT 78 at 95 per Justice McLachlin. But see now *Frame v Smith* [1987] 2 SCR 99; *Hasenclever v Hoskins* (1988) 47 CCLT 225.

82 [1993] 1 NZLR 415.

83 *Ibid* at 419.

84 The term was first used in *Hinz v Berry* [1970] 2 QB 40 at 42 per Lord Denning.

85 *Bunyan v Jordan*, note 33 *supra* at 16 per Dixon J; *Battista v Cooper* (1976) 14 SASR 225 at 227 per Bray CJ, Jacobs and King JJ agreeing; *Wodrow v The Commonwealth*, note 64 *supra* at 286-7 per Miles CJ; *Khorasandjian v Bush*, note 1 *supra* at 736 per Dillon LJ and Lord Justice Rose.

86 *Ibid.*

87 *Ibid* at 227.

88 R Magnusson, note 72 *supra* at 161. This is confirmed by Lord Jauncey, referring specifically to the action on the case derived from *Wilkinson v Downton*, in *Page v Smith* [1996] 1 AC 155 at 177.

89 Note 2 *supra* at 59.

90 Note 35 *supra*.

"the intended consequences of a tort can never be too remote".[91] There is an element of policy in such statements.[92]

However, difficulties arise in cases such as *Bielitski v Obadiak*,[93] where the court found that the defendant intended to cause harm to the plaintiff by spreading false news of her son's suicide. Chief Justice Haultain dissented in finding that the plaintiff's injury was too remote because the news was "repeated by and through four other persons before it reached the plaintiff".[94] He stated that "[n]ot one of this series of unauthorised communications can reasonably be considered as the necessary consequence of the original statement of the defendant".[95] There is much to be said for this view of the facts. It is suggestive of the fact that remoteness might have a proper role in a situation where, intention being undoubted and causation proven, the facts reveal circumstances which make the impugned conduct of the defendant an improbable means by which he or she would have carried the intention into effect.[96] Liability would only arise where it was established that the particular words or acts were themselves intended to be the means by which the plaintiff was harmed. The advantage of such a separation of intention and remoteness is that, although the defendant may have had the intention to harm, if the impugned conduct was not itself the means by which harm was to be inflicted, there would have existed an opportunity for the defendant to repent - an opportunity which the law should not deny the prospective tortfeasor.

E. Without Just Cause or Excuse

There are intentional injuries which the law does not view as tortious.[97] In *Wilkinson v Downton*, Wright J adopted a composite notion of tortious responsibility, which involved consideration of both the actor's mental state and

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91 *Ibid* at 230. See also *Quinn v Leatham* [1901] AC 495 at 537 per Lord Lindley; *Bettel v Yim* (1978) 20 OR (2d) 617; *Allan v Mt Sinai Hospital* (1980) 28 OR (2d) 356 per Justice Linden. Compare with G Williams, "The Risk Principle" (1961) 77 *Law Quarterly Review* 179 at 200-1, where the learned author argues that such statements are probably 'too extreme'.

92 See *Smith v Scrimgeour Vickers* [1996] 4 All ER 769 at 791 per Lord Steyn.

93 (1922) 65 DLR (2d) 627.

94 *Ibid* at 628.

95 *Ibid*. Note that this case is pre *Wagon Mound (No 1)* [1961] AC 388 and that the issue of remoteness was decided as a matter of logical consequence rather than mere foreseeability.

96 This is not inconsistent with the ruling of the High Court of Australia in the neglience case of *Chapman v Hearse* (1961) 106 CLR 112 at 120 - where it was stated: "[I]n order to establish the prior existence of a duty of care with respect to a plaintiff subsequently injured as a result of a sequence of events following a defendant's carelessness, it is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable". It is agreed that the precise set of circumstances need not be foreseen. However, the defendant's intention to cause the harm on the occasion and by the general means in question surely must be established in every case. See *Thompson v Bankstown Corporation* (1953) 87 CLR 619 at 630 per Dixon CJ and Williams J; *Doughty v Turner Manufacturing Co Ltd* [1964] 1 QB 518; *Nader v Urban Transit Authority of New South Wales* (1985) 2 NSWLR 501; *Mounsey v Orange Grove Bricks Pty Ltd and Ors* [1996] Aust Torts Report 63, 446 (81-392). Note, though, that Linden has commented that it 'is no easy matter to determine when a consequence is of the same kind as the one foreseen, but occurs in an unforeseeable way and when the [act] is of a different type altogether': A Linden, note 28 *supra*, p 310.

97 G Fridman, note 12 *supra* at 488.

the law's view of the acceptability of his or her acts. An act intended to cause harm would not be categorised as tortious if there had been just cause or excuse for committing it. Magnusson believes that liability for the intentional infliction of mental harm is the exception rather than the rule. On his reading of the cases, liability will only arise "for socially worthless words or actions whose purpose or value does not excuse the defendant from the injuries thereby caused".[98] It is submitted that this interpretation is incorrect. *A priori*, one would not expect a justification or excuse to be available readily for a tort concerned with the intended infliction of harm. For that reason, it is not surprising to find that the courts have been reluctant to indicate where just cause might be found. There are other reasons for this reluctance. The degree of protection offered to the differing interests involved (liberty versus mental integrity) is likely to vary over time. Furthermore, where the line is drawn often depends upon the specific context within which the dispute arose.[99] The following are examples of where liability would be negatived. A *justification* arises where weighty reasons exist for engaging in the impugned conduct. There might be justification for conduct likely to cause mental harm where the plaintiff holds vital information which needs to be extracted, for example, in a case of sexual abuse. The process of extracting such information might involve triggering painful or injurious memories and might be open to an accusation of recklessly induced mental harm. However, the public interest in the administration of justice presumably would preclude such an accusation resulting in tortious liability. An *excuse* might be found where some authority can be pleaded giving exemption to the impugned conduct. Such exemption will not depend upon any weighing of competing interests. An excuse exists, for example, where legislation authorises a particular activity likely to cause mental harm, such as in time of war.

F. Liability to Secondary Victims

Liability in *Johnson v The Commonwealth*[100] arose in respect of a secondary victim. The Commonwealth was held responsible for the infliction of nervous shock upon Johnson's wife when its servants battered Johnson and carted him off to prison. Secondary victims were also present in *Battista v Cooper*,[101] where the primary victim was shot and killed in the presence of his wife during an armed robbery. The wife and her children (who were not present) all suffered from 'emotional disturbance' as a consequence of this act, which was of course the highly likely result. Chief Justice Bray (Jacobs and King JJ agreeing) stated:

> [A]n intentional tortfeasor is liable, not only for injury caused directly to his victim, but [for] injury indirectly caused to those connected with his victim or those witnessing the injury to the victim ... Probably some element of foreseeability must

98 R Magnusson, note 72 *supra* at 162.

99 See G Fridman, note 12 *supra* at 496.

100 Note 54 *supra*.

101 Note 85 *supra* This case concerned the payment of compensation under the *Criminal Injuries Compensation Act* 1969-1974 (SA). It was held that the definition of 'injury' in s 3 of the Act equated with that at common law. Common law principles were therefore examined in order to determine whether the plaintiff's mental harms were compensable.

> still be present, but I think that an intentional tortfeasor, who must, *ex hypothesi*, be directing his mind to his act, ought to foresee the possibility of injury to a wider class of persons than those whom a court might find to have been within the reasonable foreseeability of the negligent driver of a car.[102]

As argued, it is not enough that the act be wilful and that the defendant be made liable for all losses which are a "natural and probable consequence".[103] Such a test provides slender justification for the attribution of legal responsibility.[104] Liability in intentional tort is justifiable in respect of secondary victims where the defendant's mental state can be assimilated with the actual intention requirement, that is where he or she acts recklessly. Thus, in *Stevenson v Basham*,[105] the defendant landlord, who wanted the plaintiffs to vacate premises, was liable for the consequences of his threat to burn them out. The words were spoken to the male plaintiff outside the room in which the female plaintiff was resting in bed. Justice Herdman, sitting in the New Zealand Supreme Court, found that the defendant knew of Mrs Basham's presence and found that "he accepted the risk that those who heard him would take his word seriously and would believe that he intended to carry out his threat".[106]

G. Vicarious Liability

In none of the cases in which it might have been an issue[107] was vicarious liability denied on the part of an employer for the acts of his or her servants. Thus, in *Janvier v Sweeney*,[108] the first defendant was held liable for the acts of the second defendant in attempting to procure the letters. The second defendant was assumed to have been authorised to offer some inducement to achieve that end.[109] Lord Justice Bankes stated that if he "carried out his instructions by means of a threat, as being a more effective inducement than a bribe, Sweeney must be answerable for the manner in which Barker conducted himself".[110] In respect of a truly intentional tort, there may be difficulty in justifying the imposition of vicarious liability in circumstances where the causation of harm is not specifically authorised.[111] Unlawfulness depends upon the likelihood of harm occurring and, therefore, upon an assessment by the *actor* of a particular set of circumstances, perhaps unknown to the employer. Balkin and Davis suggest that liability is imputed in such circumstances on the simple basis that

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102 *Ibid* at 231.

103 See, especially, *Northern Territory v Mengel* (1995) 185 CLR 307 at 341 per Mason CJ, Dawson, Toohey, Gaudron JJ and Justice McHugh.

104 However, the test has been accepted by N Mullany and P Handford, *Tort Liability for Psychiatric Damage: The Law of 'Nervous Shock'* (1993), p 295.

105 [1922] NZLR 225.

106 *Ibid* at 230.

107 Especially *Janvier v Sweeney*, note 30 *supra* at 317; *Boothman v Canada* [1993] 3 FC 381.

108 Note 30 *supra* at 317.

109 Note 30 *supra*.

110 *Ibid*.

111 See J Stapleton, *Product Liability* (1994), p 98, where the learned author states: "No theory of civil liability has yet ... been able to explain the two-layered liability involved in the vicarious liability of employers whereby the strict liability of the latter is dependent on the tortious (usually fault-based) liability of the employee".

the employer may be in a better position to pay.[112] Yet in *Caltex Oil (Aust) Pty Ltd v Dredge Willemstadt*,[113] Stephen J was adamant that "the task of the court remains that of loss-fixing rather than loss-spreading",[114] or imposing liability on another merely because he or she has the deepest pocket. Thus, Mahon J was moved to remark in *Auckland Workingmens' Club v Rennie*,[115] that a logical difficulty arose in the acceptance of a "unified liability shared by a blameless employer and a servant who has done an intentional wrong".[116] His Honour indicated that, in order to establish such liability, the plaintiff would need to prove: (i) that the servant was acting in the course of his or her employment, and (ii) that he or she had real or ostensible authority from the employer to undertake the injurious conduct.[117] This is the preferable approach.

V. FORM OF PROTECTION

The basic elements which comprise the intentional infliction of mental harm tort are shared by at least two other tort actions - conspiracy by lawful means and the American *prima facie* tort.

Conspiracy by lawful means was the subject of discussion in *Allen v Flood*, where the House of Lords indicated that it was an 'anomalous' cause of action.[118] It came to prominence after the decision in *Mogul Steamship v McGregor Gow*.[119] Generally speaking, it consists of an agreement between two or more persons whereby each intends to harm another and where that agreement is acted upon to the damage of the plaintiff without justification or excuse.[120] There may be liability "even though the ends were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong".[121] In *Crofter Hand Woven Harris Tweed Co Ltd v Veitch*,[122] Wright LJ commented that the doctrine of civil conspiracy "extends beyond trade competition and labour disputes".[123] In fact, his Lordship indicated that "the objects or purposes for which combinations may be formed are clearly of great variety".[124] If one of those objects is the doing of mental harm, an action might well lie. In this respect,

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112 R Balkin and J Davis, note 38 *supra*, p 814.

113 (1976) 136 CLR 529.

114 *Ibid* at 580. See also R Epstein, "Intentional Harms" (1975) 4 *Journal of Legal Studies* 391 at 401.

115 [1976] 1 NZLR 278.

116 *Ibid* at 282.

117 *Ibid*.

118 Note 10 *supra* at 123-4 per Lord Herschell, at 153 per Lord Macnaghten, at 168 per Lord Shand and at 172 per Lord Davey.

119 Note 6 *supra*; [1892] AC 25 (HL).

120 See especially, *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] AC 435; *Lonrho Plc v Fayed* [1991] 1 AC 448.

121 *Quinn v Leatham* [1901] AC 495 at 510 per Lord Macnaghten.

122 [1942] AC 435.

123 *Ibid* at 478.

124 *Ibid* at 479.

there is the potential for considerable overlap in the operation of conspiracy by lawful means and intentional infliction of mental harm.

The American *prima facie* tort takes the same basic form. It is incorporated into the *Restatement (Second) of Torts* (1965), s 870 of which states that "[o]ne who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances". According to the *Restatement*, the *prima facie* tort can be invoked where the actor intends to produce particular harm or where he or she "believes that the consequence is certain, or substantially certain, to result" from the act in question.[125] In this respect, the tort is concerned with the same mental states as those to which liability for the intentional infliction of mental harm attaches. Once intention and injury (which includes mental distress)[126] have been proven, the onus shifts to the defendant to provide a justification for his or her acts.

The preceding analysis illustrates how incorrect the decisions were in *Mayor of Bradford* and *Allen v Flood*. The law of torts does, in these actions and in others, pay regard to actual intention to injure. What is of greater interest though, is the fact that the intentional infliction of mental harm, conspiracy by lawful means and *prima facie* torts can probably all be regarded as examples of a general harm principle.[127] This is just the sort of general tort principle which Patrick Devlin saw the decision in *Allen v Flood* as having thwarted, to the detriment of justice itself.[128] It is both illuminating and comforting to know that such a principle *does* exist.

VI. DIMENSIONS OF PROTECTION

Having considered the general nature of the action for the intentional infliction of mental harm, it is appropriate to examine the dimensions of the protection which this tort offers and to make brief reference to further Commonwealth cases. Recent developments have underlined the utility of the tort in employment and harassment cases.

A. Employment Cases

It hardly needs to be said that a person's work is central to his or her life. However, most people do not have any great degree of control over their work, particularly with respect to the terms and conditions of their employment. As a result, workers are often faced with no choice but to endure all manner of inconveniences and demands in order to retain their jobs. The cases reveal that

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125 *Restatement (Second) of Torts* (1965), s 870, comment (b).

126 See *Beavers v Johnson Controls World Services Inc* 901 P 2d 761 (1995).

127 See, especially, G Fridman, note 12 *supra* at 500. The author concludes his important article with the words that 'a tort of intention should exist, can exist, and is beginning to exist'. The present article is supportive of such a view.

128 P Devlin, *Samples of Lawmaking* (1962), pp 11-3. See also J Heydon, "The Defence of Justification in Cases of Intentionally Caused Economic Loss" (1970) 29 *University of Toronto Law Journal* 139 at 177.

employers or their delegates may, at times, engage in deliberate conduct designed to harm workers, for varying reasons: in order to gain domination over them, in order to encourage their removal from a particular work area or to discourage their continued employment.

The first case in which an action for the intentional infliction of mental harm was relied upon in an employment context was *Rahemtulla v Vanfed Credit Union*,[129] a decision of McLachlin J sitting in the Supreme Court of British Columbia. The plaintiff had worked as a bank teller with the defendant and had received laudatory performance reviews. On a government payday, she arranged for the transfer of a large number of bills from another teller to herself, which required her supervisor's approval and also required him to 'key in' an authorisation. The procedure was not followed because the supervisor was busy. At the end of the day, the other teller indicated that she was $2 000 short. The supervisor came to the conclusion that the money must have been mistakenly transferred to the plaintiff and she was wrongly accused of taking it. She asked for an investigation of the matter, but a senior supervisor dismissed her. The plaintiff suffered a "severe emotional reaction" to these events, including depression and blackouts, for which she was hospitalised. Her experiences "changed her from a happy, outgoing, affectionate person to a gloomy person subject to outbursts of temper".[130] She found no alternative employment. Justice McLachlin said:

> It is difficult to conceive of an accusation more calculated to cause humiliation and anguish to a dedicated bank employee than that of the theft of the bank's funds. Moreover, the manner in which the plaintiff was dismissed was arbitrary and humiliating. Before her co-workers and family, at the beginning of what she hoped would be her career, she found herself branded a thief.[131]

In justifying the imposition of liability, her Ladyship stressed the reckless manner in which the defendant's senior supervisor conducted himself. His conduct was likely to cause shock and mental suffering[132] and was not excused by the fact that he sought to extract a confession from the defendant and thereby solve the mystery of the missing funds.[133] Justice McLachlin acknowledged the law's long recognition as tortious of "the uttering of false words *or* threats with the knowledge that they are likely to cause ... injury",[134] the implication being that the law is not necessarily concerned with the truth or falsity of the words in question. As the next case illustrates, the use of facts may be as harmful as the employment of falsities.

In *Boothman v Canada*,[135] the plaintiff was employed by Canada Oils under the supervision of one Stalinski, who was aware of the plaintiff's history of ill mental health. On her first day, Stalinski commented that the plaintiff's lack of eye contact at the job interview suggested that "she had a lot of guilt and might

129 (1984) 29 CCLT 78.

130 *Ibid* at 83.

131 *Ibid* at 89.

132 *Ibid* at 95.

133 *Ibid* at 94.

134 *Ibid* at 93 (emphasis added).

135 [1993] 3 FC 381.

need time off for medical reasons".[136] Stalinski monitored the plaintiff's every move and refused to let her leave the office without permission. He insulted her in front of others, yelled profanities at her and threatened to bash her head in and to rip off her lips. Eventually the matter was brought to the attention of head office and an investigation was conducted. There was only an oral reprimand for Stalinski, who continued his campaign against the plaintiff. There was evidence that he aimed to exploit her sensitivities and that he took actions which he knew would bring about a severe emotional reaction. The plaintiff complained on a number of occasions to head office. Finally, head office decided that decisive action was required and dismissed the plaintiff. The plaintiff thereafter suffered anxiety attacks and depression, phobic apprehension of harassment and suicidal despair. In a claim for the malicious infliction of injury, damages were awarded by Noël J in the Federal Court. His Lordship held:

> When a person knowingly exploits another's emotional and mental vulnerability, thereby causing a severe and lasting mental breakdown, it is no answer to state that a normal person would not have been so adversely affected.[137]

An insight into the underlying utility of the tort here considered is revealed in Justice Noël's comment that Stalinski had been placed by his employer "in a special position of trust".[138] Although the position of trust is not fiduciary in nature, there are similarities in that there always is scope for an employer or delegate to misuse a position of power to the detriment of the vulnerable party. In such circumstances, the availability in tort of an action for the intentional infliction of mental harm is a necessary safeguard in regulating standards of behaviour.

B. Harassment Cases

Related to the type of case just discussed is that which has arisen in respect of harassing conduct. Although commentators upon the recent English cases have discussed developments as giving rise to a distinct tort of harassment,[139] the more cautious view is that developments are explicable in terms of the intentional infliction of mental harm.[140] This view also accords with the opinion of Lord Goff in the recent House of Lords' decision in *Hunter v Canary Wharf*.[141] The first cases arose from broken personal relationships, none of

136 *Ibid* at 385.

137 *Ibid* at 392.

138 *Ibid* at 393.

139 See J Murphy, "The Emergence of Harassment as a Recognised Tort" (1993) 143 *New Law Journal* 926; R Piotrowicz, "Private Lives and Private Nuisance in English Law: *Khorasandjian v Bush*" (1993) 1 *Torts Law Journal* 207 at 211.

140 See *Patel v Patel* [1988] 2 FLR 179 at 182 per May LJ and Waterhouse J; *Khorasandjian v Bush*, note 1 *supra* at 744 per Gibson J; J Bridgeman and M Jones, "Harassing Conduct and Outrageous Acts: A Cause of Action for Intentionally Inflicted Mental Distress?" (1994) 14 *Legal Studies* 180 at 203. *Contra Burris v Azadani* [1995] 4 All ER 802 at 809 per Bingham MR, Millett LJ and Lord Justice Schiemann.

141 [1997] 2 All ER 426 at 438. Lord Goff makes reference, in his opinion, to the 'back door' creation of such a tort by the majority judges in *Khorasandjian v Bush*, *ibid*.

which had resulted in marriage.[142] Just as positions of power may be abused in the workplace, so too may intimacy between couples allow either or both partners to develop a psychological hold over the other which might, should the relationship turn sour, be the cause of great emotional hurt and even mental harm. The courts have recognised the need to formulate principles which allow relief from harmful conduct in circumstances where no other tort may be applicable.

The first case to note is a decision of the Court of Appeal in *Pidduck v Malloy*.[143] The defendant assaulted the plaintiff over the entire course of their relationship, usually as a consequence of intoxication. He subsequently vowed to 'get' the plaintiff and to 'torch' her car. The judge at first instance granted an injunction restraining the defendant from, *inter alia*, threatening or molesting the defendant or approaching the plaintiff within 250 yards of her house or while in the street. The matter went back before another judge and it was found that the defendant had breached the terms of the injunction by threatening to bomb the plaintiff's home. For this the defendant was given a suspended prison sentence. He appealed.

In a judgment with which Stocker and Farquarson LJJ concurred, Lord Donaldson MR dealt with the fallacy that the law would not allow protection in respect of acts which could not be considered independently unlawful. The defendant had argued that the court should not prohibit him from merely talking to the plaintiff. The Master of the Rolls indicated that the situation had to be looked at globally:

> [It is a] fact that the past conduct of the defendant has suggested that, if he does speak to her, it is usually for the purpose of intimidating, threatening or abusing her, all of which are capable of amounting to crimes or torts.[144]

His Lordship put the defendant's non-tortious acts into their proper context, where they could be seen as likely to give rise to mental harm to the plaintiff. There was a risk that any right to talk to the plaintiff would be abused. However, his Lordship noted that, in the circumstance where the parties were the parents of a child, there was a reason why they might have needed to speak. Therefore, he modified the terms of the injunction to prohibit the defendant from speaking to the plaintiff "in an intimidating, threatening or abusive manner".[145]

Khorasandjian v Bush[146] was also a decision of the Court of Appeal. The facts revealed a concerted campaign of disruption to the plaintiff's life. She and the defendant had been friends for a few months, when the plaintiff decided that she wished to discontinue relations. The defendant responded with threats of violence, by following her around shouting abuse and by making numerous telephone calls to her parents' and grandmother's homes. A letter from the defendant revealed that his thoughts and actions were inspired by a 'pure hatred'.

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142 Therefore precluding recourse to the *Domestic Violence and Matrimonial Proceedings Act* 1976 (Eng), which did not apply to parties neither married nor living together.

143 [1992] 2 FLR 202.

144 *Ibid* at 205.

145 *Ibid.*

146 Note 1 *supra*.

After threatening to kill the plaintiff, the defendant was imprisoned for a short duration. A county court judge granted an interlocutory injunction restraining him from using violence or harassing, pestering or communicating with the plaintiff in any way. The defendant appealed on the ground that there was no jurisdiction to restrain the latter three categories of act because they involved the commission of no torts.

Lord Justice Dillon (Rose LJ agreeing) dismissed the appeal. After discussing a widening of the action in private nuisance in respect of the telephone calls,[147] his Lordship turned to the cases involving the intentional infliction of mental harm. *Janvier v Sweeney*[148] was said to support the proposition that "the court is entitled to look at the defendant's conduct as a whole and restrain, on a *quia timet* basis also, those aspects of his campaign of harassment which cannot be strictly classified as threats".[149] There was no need to consider each ingredient in isolation where the court was concerned with a campaign of harassment.[150] Thus, the court again took a global view of the defendant's actions and contextualised those which appeared innocent. Lord Justice Dillon was fully prepared to make an order in the widest terms possible, on the basis that there was:

> ... an obvious risk that the cumulative effect of continued and unrestrained further harassment such as [the plaintiff] has undergone would cause [mental] illness. The law expects the ordinary person to bear the mishaps of life with fortitude ... but it does not expect ordinary young women to bear indefinitely such a campaign of persecution as that to which the defendant has subjected the plaintiff.[151]

All communication would be prohibited, there being no subject on which the parties needed to speak.[152]

The decision in *Khorasandjian v Bush* was followed by the Court of Appeal in *Burris v Azadani*.[153] The defendant had sought a close and intimate relationship with the plaintiff and made a number of unwelcome visits to her home,

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147 His Lordship decided that, in a time of changed social conditions, licensees were entitled to protection in private nuisance: 'it is ridiculous if in this present age the law is that the making of deliberately harassing and pestering telephone calls to a person is actionable ... if the recipient of the calls happens to have the freehold or a leasehold proprietary interest in the premises in which he or she received the calls". *Ibid* at 734. This basis for the decision in *Khorasandjian v Bush* was overruled in *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426. Lord Goff stated: "[W]hat the Court of Appeal appears to have been doing was to exploit the law of private nuisance in order to create by the back-door a tort of harassment which was only partially effective in that it was artificially limited to harassment which takes place in [the] home. I myself do not consider that this is a satisfactory manner in which to develop the law, especially when, as in the case in question, the step so taken was inconsistent with another decision of the Court of Appeal, *viz. Malone v Laskey* [1907] 2 KB 141, by which the court was bound. In any event, a tort of harassment has now received statutory recognition: see the *Protection from Harassment Act* 1997": *Ibid* at 438. See also at 468-9 per Lord Hope.

148 Note 30 *supra*.

149 [1993] QB 727 at 736.

150 *Ibid* at 739. J Bridgeman and M Jones acknowledge that "*Khorasandjian* indicates that a series of acts, which individually might not be tortious ... can amount to the tort of intentional interference with the person": note 140 *supra* at 203.

151 Note 149 *supra*.

152 *Ibid* at 737.

153 [1995] 4 All ER 802.

threatened to commit suicide and to harm the plaintiff and sent unwanted mail to her home. The plaintiff obtained an injunction to restrain the defendant from interfering or communicating with her, the terms of which also specified a zone of exclusion with a radius extending 250 yards from her home. It was proven that a number of breaches of the injunction had occurred and a judge ordered a suspended sentence of eight weeks imprisonment. Further breaches were proved after the defendant rode his bicycle to and fro past the plaintiff's home. On being informed of one of these transgressions, the plaintiff reportedly became "so frightened that she shook physically".[154] The defendant was thereafter ordered to be imprisoned and he appealed against the order, arguing that the injunction had, in respect of the exclusion zone, been too wide.

The Court upheld the validity of the injunction. Sir Thomas Bingham MR (Millett and Schiemann LJJ agreeing) noted that s 37 of the *Supreme Court Act* 1981 (Eng), which empowered the High Court to grant an injunction, was cast in the widest terms possible and was not limited to restraining tortious conduct. His Lordship stated that it would not:

> be a valid objection to the making of an exclusion zone order that the conduct to be restrained is not itself tortious or otherwise unlawful, if such an order is reasonably regarded as necessary for the protection of a plaintiff's legitimate interest.[155]

In deciding whether or not an injunction would go and what its terms would be, there were competing interests to be considered:

> One is that of the defendant. His liberty must be respected up to the point at which his conduct infringes, or threatens to infringe, the rights of the plaintiff. No restraint should be placed on him which is not judged to be necessary to protect the rights of the plaintiff. But the plaintiff has an interest which the Court must be astute to protect.[156]

The court, having regard to the defendant's previous conduct, was not prepared to interfere with the injunction in so far as it prohibited him from an exclusion zone. The Master of the Rolls noted that, if the defendant were allowed in the vicinity of the plaintiff's home, he would surely succumb to the temptation of acting so as to disturb her.[157] But Schiemann LJ cautioned the court, adding that there should be liberty to apply so that the defendant is not "precluded from exercising his normal rights if the fears which gave rise to the imposition of the injunction no longer have any basis in fact sufficient to justify its continuation".[158]

It is evident that the English courts have redirected attention away from the lawful status of the defendant's acts toward a consideration of their effect upon the plaintiff, who is seen to have a right to mental integrity. The developments can be seen to have created two tiers of protection for those rights. The first tier affords protection to all persons from acts which are likely to cause them

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154 *Ibid* at 806.

155 *Ibid* at 807-8.

156 *Ibid* at 810. For a somewhat puzzling response to this approach, see J Conaghan, "Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment" (1996) 16 *Oxford Journal of Legal Studies* 407 at 421.

157 Note 153 *supra* at 811.

158 *Ibid* at 812.

psychiatric illness. The second tier allows for more individualised protection, where there has been or continues to be some relation between the parties which creates the potential for the abuse of a position of ascendancy. In this latter category of case, the courts now seem willing to allow injunctive relief at least where there is a likelihood that psychiatric illness will arise.

It should be noted that the common law in England has now been supplemented by the *Protection from Harassment Act* 1997 (UK). Section 1 contemplates the availability of civil remedies for harassment going beyond the availability of such at common law. It contemplates a remedy where mere mental distress has been caused.[159] Another obvious departure from the common law arises with respect to the mental element required to establish liability. The test is an objective one, it being sufficient that a reasonable person, in possession of the same information, would regard the course of conduct as amounting to harassment. However, 'course of conduct' is defined to mean harassment on at least two occasions.[160] In this respect, the intentional infliction of mental harm cases remain relevant in dealing with single instances of egregious behaviour resulting in mental harm.

VII. CONCLUSION

Wilkinson v Downton was decided in a restrictive context. Appeal courts had denied the relevance of actual intention in the commission of torts. It was said that a lawful act could not be made unlawful by the mere presence of actual intention to harm. Justice Wright's attempt to conform to earlier authority, while finding Downton liable, resulted in a confused statement of principle. However, subsequent cases have indicated that actual intention (or reckless indifference) is a necessary element in the tort of intentional infliction of mental harm. The remaining elements are the causation of actual harm and the absence of just cause or excuse.

The intentional infliction of mental harm tort has proven particularly useful in harassment and employment cases. Those cases are indicative of the fact that courts are moving to a position whereby they offer redress to those who are especially vulnerable to mental harms due to their relationship (or former relationship) with the defendant. Redress is offered despite the otherwise lawful nature of the harmful conduct. Redress is not restricted to awards of damages - there has been noted an increasing willingness to grant injunctive relief in order to aid in the prevention of mental harm.

159 Section 7(2).
160 Section 7(3).