AN INDEPENDENT TORT ACTION FOR MENTAL SUFFERING AND EMOTIONAL DISTRESS

One of the areas in which the Iowa Supreme Court has been a forerunner among the courts of the nation is in the development of an independent tort action for mental suffering and emotional distress. This article is devoted to an analysis of the development of this action in Iowa. An attempt has been made to accomplish a threefold purpose: first, to acquaint the reader with the existence of the action and the rationale upon which it is based; second, to pose the question of what limitations, if any, should be placed on the action; third, to present a study of the manner in which a rule of law evolves.

THE ORIGINAL RULE

Early in the development of the law of torts a general rule was established that mental pain and anguish were not injuries for which an independent action for damages would lie.[1] The justification given for this rule was that injuries of this type were too difficult to prove, and once proved the damages would be too subtle and speculative for a jury to measure.[2] Furthermore, it was felt that any other rule would open the door to fictitious claims and result in a flood of litigation on trivialities and bad manners.[3] On the other hand, the traditional argument used in support of redressing such wrongs has been the always popular "for every wrong there must be a remedy".[4] Against this background may be made an interesting survey of Iowa cases that rather clearly point up a pattern, familiar to the law, of exceptions being made to a general rule until the rule itself disappears and a new rule of law is established.

As might be expected, the first situations in which courts recognized mental suffering as an element to be considered in assessing damages were those cases in which an actionable physical injury gave rise to the suffering.[5] In fact, it is doubtful there was ever any serious objection to considering pain and suffering in determining the amount of damages to be awarded for a physical injury.[6] However, in the early cases these injuries were only

1 Lynch v. Knight, 9 H.L. 577, 11 Eng. Rep. 854 (1861).
2 Chicago B. & Q. R.R. v. Gelvin, 238 F. 14 (8th Cir. 1916).
3 Mitchell v. Rochester R.R., 151 N.Y. 107, 45 N.E. 354 (1896).
4 Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).
5 Fry v. Dubuque & S.W.R.R., 45 Iowa 416 (1877); Collins v. City of Council Bluffs, 35 Iowa 432 (1872).
6 Lord Wensleydale in his opinion in Lynch v. Knight, 9 H.L. 577, 11 Eng. Rep. 854 (1861), recognized such damages in these situations when he stated: "Mental pain or anxiety the law cannot value and does not pretend to redress when the unlawful act causes that alone, though

recognized as factors to be considered in determining the amount of damages and were not compensated for separately.[7] It is now well accepted in Iowa, as in most states, that mental pain and anguish resulting from a physical injury are, in and of themselves, proper subjects for compensatory damages.[8] This rule has been extended further to include future pain and suffering arising from a physical injury.[9]

PARASITIC DAMAGES IN RECOGNIZED TORT CASES

In cases where no immediate physical injury is involved the Iowa Court, like the courts of the nation generally, has been reluctant to turn away from the general rule denying recovery solely for mental suffering and emotional distress.[10]. The first cases which awarded damages for mental suffering, not arising out of a physical injury, were those in which some recognized tort had been established, such as assault,[11] seduction,[12] false arrest,[13] and malicious prosecution.[14] The Court, being certain that a wrong had been committed and that some form of relief was in order, would permit redress for the mental suffering in the nature of parasitic damages.[15]

As early as 1858 the Iowa Court awarded a father damages for anxiety and wounded feelings resulting from the seduction of his daughter.[16] Although the opinion indicates that perhaps the Court was intending to award exemplary damages, this was, nevertheless, an unusual decision for that early date. It was not until about 20 years later, however, in *McKinley v. Chicago & N.W.R.R.*[17] that the Court really came to grips with the problem of allowing damages for mental pain and suffering not arising from a physical injury. This case involved an assault which did result in a physi-

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where a material damage occurs, and is connected with it, it is impossible that a jury, in estimating it, should altogether over look the feelings of the party interested."

[7] Collins v. City of Council Bluffs, 35 Iowa 416 (1877). The opinion states: ". . . yet they [physical pain and mental anguish] are not to be compensated for in the ordinary meaning of the word, but they stand as lights around the injury, in the focal rays of which we see more intensly and clearly the full measure and extent of the injury itself."

[8] See Ferguson v. Davis County, 57 Iowa 601, 10 N.W. 906 (1881); Redden v. Gates, 52 Iowa 210, 2 N.W. 1079 (1879); Muldowney v. Illinois Central Ry., 36 Iowa 462 (1873).

[9] Rice v. City of Council Bluffs, 124 Iowa 639, 100 N.W. 506 (1904); Kendall v. City of Albia, 73 Iowa 241, 34 N.W. 833 (1887).

[10] See Manning v. Spees, 216 Iowa 670, 246 N.W. 603 (1933) for a relatively recent decision which speaks of the ordinary rule as being that there can be no recovery for mental or physical suffering unless there is a physical impact.

[11] Hrnicek v. Chicago M. & St.P.Ry., 187 Iowa 1145, 175 N.W.30 (1919).

[12] Stevenson v. Belknap, 6 Iowa 97 (1858).

[13] Yount v. Carney, 91 Iowa 559, 60 N.W. 114 (1894).

[14] Davis v. Seely, 91 Iowa 583, 60 N.W. 183 (1894).

[15] For a discussion of mental suffering as parasitic damage in recognized tort cases see PROSSER, TORTS § 11 at 40 (2d ed. 1955).

[16] Stevenson v. Belknap, 6 Iowa 97 (1858).

[17] 44 Iowa 314 (1876).

cal injury and it could have been decided by merely allowing the mental suffering to be a factor considered in awarding damages for the physical injury, as was done in the earlier cases referred to in the previous section.[18] However, the lower court had instructed that damages could be awarded separately for the outrage and indignity put upon the plaintiff by the assault. The Supreme Court, in upholding this instruction, stated that mental anguish arising from the nature and character of the assault was as much an element of damages as mental pain and anguish arising from the physical injury.

This distinction, between mental suffering arising from the character of the wrong and that arising from the physical injury, was an important step toward allowing an independent action for mental suffering. The next step would be to apply this reasoning in cases not involving a physical injury, and this step was taken in *Parkhurst v. Mastellar*,[19] a malicious prosecution case where there was no immediate physical injury. The Court, citing *McKinley v. Chicago & N.W.R.R.* as authority, held that damages could be awarded for emotional and mental disturbance arising from the character of the wrong even though no immediate physical injury resulted. Following these two decisions it became a common practice in Iowa to award parasitic damages for mental suffering in recognized tort cases where there were no immediate physical injuries.[20] This was the first widely recognized exception to the original rule denying recovery for mental suffering not arising from a physical injury.

A SEARCH FOR NEW "PEGS"

Although the parasitic damage cases were an important exception to the original rule, they had a rather limited application in that some recognized wrong, in addition to the wrongful infliction of mental anguish, had to be established before any damages for the mental anguish could be awarded. In many cases the only alleged wrongful act was the infliction of mental anguish. Since this had never been the sole element of any recognized tort action the parasitic damage cases were of little benefit to the injured plaintiff. The Court, however, was inclined to be sympa-

[18] See cases cited at note 8, *supra*.

[19] 57 Iowa 474, 10 N.W. 864 (1881).

[20] Hrnicek v. Chicago M. & St.P.Ry., 187 Iowa 1145, 175 N.W. 30 (1919) (assault); Krehbiel v. Henkle, 152 Iowa 604, 129 N.W. 945 (1911) (unlawful search); Young v. Gormley, 120 Iowa 372, 94 N.W. 922 (1903) (false arrest); Yount v. Carney, 91 Iowa 559, 60 N.W. 114 (1894) (false arrest); Davis v. Seely, 91 Iowa 583, 60 N.W. 183 (1894) (malicious prosecution); Robertson v. Craver, 88 Iowa 381, 55 N.W. 492 (1893) (breach of contract to marry). An interesting limitation to the parasitic damage cases is found in *Tisdale v. Major*, 106 Iowa 1, 75 N.W. 663 (1898). In this case the Court denied defendant's counterclaim for mental suffering in an attachment action, distinguishing the parasitic damage cases as ones involving the violation of a personal right while here, the Court said, there was only interference with a property right.

thetic to the plaintiff in the more flagrant cases, and consequently attempted to find other "pegs" upon which to "hang" the damages, but without opening the door to all such claims.

One such "peg" is evidenced by the common carrier cases.[21] All of these cases involved the wrongful expulsion of passengers from trains. In these cases the Court had little difficulty in awarding damages for mental suffering inflicted by the employees of common carriers regardless of whether an assault was proved.[22] Although the Iowa Court's decisions were not expressly based on the fact that a common carrier was involved, similar cases arising in other jurisdictions have been accounted for in this manner.[23] It seems that a fair assumption would be that the Iowa Court also was using the extensive duties owed by common carriers to their passengers as a "peg" upon which to base damages for mental suffering.

Another line of cases that point up the willingness of the Iowa Court to compensate for mental and emotional distress are the cases arising over the failure of telegraph companies to properly transmit messages concerning the death of friends or relatives of the receiver. These cases are usually described as contract actions sounding in tort.[24] Generally it has been assumed that mental and emotional suffering can not be an element of damages in a contract action because these are not within the reasonable contemplation of the parties.[25] The Iowa Court, however, in *Mentzer v. Western Union Telegraph Co.*[26] held that where the nature of the contract is such that it deals with the sensibilities of individuals it is proper to allow damages for mental and emotional injuries. The decision in the *Mentzer* case was justified on

[21] Coine v. Chicago & N.W.R.R., 123 Iowa 458, 99 N.W. 134 (1904); Curtis v. Sioux City & H.P.Ry., 87 Iowa 622, 54 N.W. 339 (1893); Shepard v. Chicago, R.I. & P.Ry., 77 Iowa 54, 41 N.W. 564 (1889).

[22] The following statement taken from the Court's opinion in Curtis v. Sioux City & H.P.Ry., 87 Iowa 622, 54 N.W. 339 (1893), sounds as though an independent action for mental suffering existed at that early date: "The authorities seem to be somewhat in conflict, but we have discovered no reasoning to justify a distinction, nor can we imagine a reason why the law would compensate for a pain in the hand or foot as a result of a wrongful act and not for mental suffering, equally severe and dangerous, where it is not evidenced by physical injuries, nor 'indivisibly connected therewith'." This reasoning was not followed by the Iowa Court, however, in any cases other than those involving common carriers, such as in *Coine v. Chicago & N.W.R.R.*, 123 Iowa 458, 99 N.W. 134 (1904).

[23] See discussion and cases cited thereunder in PROSSER, TORTS § 11 at 41 (2d ed. 1955).

[24] Cowan v. Western Union Telegraph Co., 122 Iowa 379, 98 N.W. 281 (1904).

[25] Watchel v. National Alfalfa Journal Co., 190 Iowa 1293, 176 N.W. 801 (1920). Here the Court applied this traditional test of breach of contract damages to deny the plaintiff's claim for mental suffering resulting from the defendant's failure to send premiums to subscribers procured by the plaintiff.

[26] 93 Iowa 752, 62 N.W. 1 (1895). In this case the defendant telegraph company negligently failed to deliver a message, notifying plaintiff of his mothers death, in time to enable him to attend the funeral.

the basis that telegraph companies, being similar in nature to common carriers, should be liable to persons for mental anguish suffered as a result of their negligence in conveying messages entrusted to them.[27] This reasoning represents an exception to the widely accepted rule that there can be no recovery for mental suffering resulting from merely negligent acts unless there is an immediate physical injury or at least a physical impact.[28] This exception, established in Iowa by the *Mentzer* case, has not been recognized by a majority of the state courts nor by the federal courts,[29] another indication of the liberal attitude the Iowa Court has taken toward mental and emotional injuries.

Although the *Mentzer* case is still followed in Iowa today, it has been limited in application to similar factual situations sometimes referred to as the "dead body" cases. It has not been extended to other contract actions[30] nor to tort actions where the wrongful conduct is merely negligent.[31] Although there has been some argument that the rule should be extended in the latter instance,[32] so far the Iowa Court has gone along with the majority of states[33] in requiring that to award damages for mental suffering arising from negligent acts there must be a physical injury, with some indication that a physical impact might be sufficient.[34]

BREAKING AWAY FROM THE LIMITATIONS OF THE PARASITIC DAMAGE CASES

While the common carrier and telegraph company cases provided the Court with additional "pegs" upon which to "hang" damages for mental suffering there still remained a large number of situations that would not fit into any of the recognized exceptions to the general rule denying recovery for such injuries. These

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27 See also Cowan v. Western Union Telegraph Co., 122 Iowa 379, 98 N.W. 281 (1904).

28 Lee v. City of Burlington, 113 Iowa 356, 85 N.W. 618 (1901). In this decision the Iowa Court established the rule that where the conduct is merely negligent no recovery may be had for resulting mental suffering and emotional distress alone.

29 See Western Union Telegraph Co. v. Speight, 254 U.S. 17 (1920).

30 Norlin v. Nolan, 195 Iowa 1208, 193 N.W. 544 (1923) (failure of defendant to remove cattle from pasture after lease expired); Zabron v. Cunard S.S. Co., 151 Iowa 345, 131 N.W. 18 (1911) (steamship company negligently failed to have railroad tickets available for plaintiff when she reached Russia). The Court in the *Zabron* case distinguished it from the *Mentzer* case on the basis that the contract in the *Zabron* case did not bear a direct relationship to the plaintiff's feelings as was true in the *Mentzer* case.

31 Mahoney v. Dankwart, 108 Iowa 321, 79 N.W. 134 (1899). In this case, where the defendant's conduct was merely negligent, the Court refused to apply the rule of the *Mentzer* case.

32 See *Liability in Iowa for Physical Effects of Fright*, 18 IOWA L. REV. 366 (1933) in which the author suggests that the rule in the *Mentzer* case should be applied in all negligence cases.

33 A discussion of the general rule followed by most courts in the United States can be found in PROSSER, TORTS § 37 (2d ed. 1955).

34 See Mahoney v. Dankwart, 108 Iowa 321, 79 N.W. 134 (1899) in which the plaintiff was denied recovery for fright caused by defendant negligently blasting rock on to plaintiff's land. The plaintiff was not

were the cases in which there was no wrongful act other than the willful infliction of mental suffering, and none of the other "pegs" were present upon which to base the damages for mental suffering.

The first case in this category to come before the Iowa Court was *Botkin v. Cassady*[35] in which the defendant, in the presence of the plaintiff, made threats concerning what he would do to the plaintiff's husband if he did not meet his obligations. The plaintiff alleged that she suffered great bodily pain and mental anguish and was greatly damaged in health and as a result of this suffered a miscarriage. Since there was no recognized tort committed it appeared the Court was faced with a situation where it would have to decide whether an independent action would lie for wrongfully causing mental and emotional suffering. However, the Court in this case side-stepped the question by holding that the petition was not properly worded so as to raise this issue. Subsequently the issue was raised in the case of *Watson v. Dilts*[36] in which the plaintiff brought an action for physical disabilities resulting from the fright of seeing the defendant fight with her husband. The Court, after discussing the rule that there could be no recovery unless there was a physical impact, cast the rule aside and held that where there is a wrongful act resulting in fright, which in turn results in a physical disability, then an action will lie for the resulting damage. This decision went beyond the parasitic damage cases[37] and allowed a recovery for fright resulting from causes not otherwise actionable as to the plaintiff. It should be remembered, however, that in the *Watson* case a physical disability resulted from the fright and so the authority of that case is limited to that extent.

Another interesting point in the *Watson* case is that the Court did not expressly limit the rule stated to only intentional acts. However, earlier negligence cases were distinguished by the Court, and as a result of this subsequent decisions citing the *Watson* case have said it applies only to intentional acts.[38]

The full effect of the Court's decision in the *Watson* case was not immediately recognized. This was probably attributable to the fact that the wrongful act of which the plaintiff complained did constitute a trespass and assault as to the plaintiff's husband although not as to the plaintiff.[39] Consequently it was left open

present when the blasting occurred, but only returned and saw the effects. The Court indicated that had the plaintiff been present when the impact occurred perhaps there could have been recovery for the fright caused.

[35] 106 Iowa 334, 76 N.W. 722 (1898).

[36] 116 Iowa 249, 89 N.W. 1068 (1920).

[37] See note 20, *supra.*

[38] Holdorf v. Holdorf, 185 Iowa 838, 169 N.W. 737 (1918); Zabron v. Cunard S. S. Co., 151 Iowa 345, 131 N.W. 18 (1911).

[39] The defendant in the *Watson* case entered the home of the plaintiff and her husband and engaged the husband in a fight. The Court referred to this as being a trespass on the husband's property only. There-

for argument that the Court had extended the rule no further than had the parasitic damage cases, in that a recognized tort must still be proved. This would explain *Kramer v. Ricksmeier*[40] decided some 12 years after the *Watson* case. There the petition alleged the defendant willfully and maliciously made statements to the plaintiff over the telephone with an intent to provoke and injure her. The Supreme Court, in holding the petition did not state a cause of action, distinguished the *Watson* case as one involving an "unlawful" act, while in the *Kramer* case it was felt no "unlawful" act was committed. By "unlawful" act the Court was referring to the assault and trespass committed on a third person in the *Watson* case. The Court went on to state that claims of this nature were too speculative to furnish a basis for an action, which points up the doubts that beset the Iowa Court in awarding damages for mental suffering alone.[41]

THE INDEPENDENT ACTION BECOMES A REALITY

If there were any thoughts still lingering in 1932 that the Iowa Court had proceeded no further than the rule followed in the parasitic damage cases, these thoughts were shattered by the case of *Barnett v. Collection Service Co.*[42] This decision must be given the credit for striking the deathblow to the original rule and for giving birth to a new independent tort action for mental suffering and emotional distress. The case appropriately involved an elderly widow who was indebted to a coal company in the amount of $28.75. The defendant collection company, in an attempt to coerce her into paying had written several letters threatening, among other things, to contact her employer and to bring legal action. In her petition the widow asked for damages for the mental suffering she endured as a result of these letters. The defendant brought an appeal to the Supreme Court on the ground the petition failed to state a cause of action. Thus, the Court was directly faced with the question of whether a truly independent tort action existed for mental suffering alone. There clearly was no recognized tort to fall back on. No wrongful act was committed in the plaintiff's presence, nor was there any threat of physical harm. Most important of all, however, there was no allegation of any physical illness resulting from the mental suffering. Faced with these facts the Iowa Court took a bold step in

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fore, the plaintiff would not be the proper party to bring either a regular trespass action or an assault action.

[40] 159 Iowa 48, 139 N.W. 1091 (1931).

[41] See also Holdorf v. Holdorf, 185 Iowa 838, 169 N.W. 737 (1918) heard 16 years after the *Watson* case. This was an action for threats constituting an assault upon the plaintiff, causing mental suffering and resulting finally in a physical illness. The Court, citing the *Watson* case as authority, held for the plaintiff and passed the *Kramer* case off as one in which no assault was alleged.

[42] 214 Iowa 1303, 242 N.W. 25 (1932).

the field of tort law and held that an action would lie for mental suffering alone when inflicted by a willful act.[43]

Strangely enough, the Court apparently did not recognize that it was extending the traditional limits of tort actions since it referred to this rule as being well established.[44] Comments on the decision indicated that others did not consider the rule to be so well established, if in fact established at all.[45] Even locally it was recognized as a new development in tort law.[46] It is also significant to note that in similar cases arising in other jurisdictions one court cited the *Barnett* case as its sole authority,[47] and later, another court cited these two cases as being the only ones directly in point.[48]

Because of the discussion in the *Barnett* decision of the willfulness of the defendant's acts and his intention to produce mental pain and anguish, there may have been some who felt it would be only the rare and unusual cases in which an injured person could be compensated for mental suffering alone. Perhaps some inter-

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[43] In arriving at this conclusion the Court first reviewed the following Iowa cases making the comments indicated concerning them: Mahoney v. Dankwart, 108 Iowa 321, 79 N.W. 134 (1899) (damages denied because no proximate cause between blasting and mental shock); Lee v. City of Burlington, 113 Iowa 356, 85 N.W. 618 (1901) (no recovery for fright resulting from negligent act); Watson v. Dilts, *supra*, note 36 (allowed recovery for physical injuries produced by fright); Zabron v. Cunard S.S. Co., 151 Iowa 345, 131 N.W. 18 (1911) (no recovery for mental suffering disconnected from physical impact or injury); Holdorf v. Holdorf, 185 Iowa 838, 169 N.W. 737 (1918) (recovery allowed for fright caused by willful act as contrasted to negligent act); Kramer v. Ricksmeir, *supra*, note 40 (pleaded as an assault case and Court found no assault).

After discussing these cases the Court stated that none of them involved the same question as was presently before them. The Court then cited the following cases from other jurisdictions: Davidson v. Lee, 139 S.W. 904 (Tex. Civ. App. 1911); Jeppsen v. Jensen, 47 Utah 536, 155 P. 429 (1916); May v. Western Union Telegraph Co., 157 N.C. 416, 72 S.E. 1059 (1911); Gadbury v. Blietz, 133 Wash. 134, 233 P. 299 (1925); Stiles v. Municipal Council of City of Lowell, 233 Mass. 174, 123 N.E. 615 (1919); Rogers v. Williard, 144 Ark. 587, 223 S.W. 15 (1920); Whitsel v. Watts, 98 Kan. 508, 159 P. 401 (1916); Great Atlantic & Pacific Tea Co. v. Roch, 160 Md. 189, 153 A. 22 (1930); Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920). Apparently it was this latter group of cases upon which the Court based its conclusion that an action would lie for mental suffering inflicted by a willful act.

[44] 214 Iowa 1303, at 1312, 242 N.W. 25, at 28.

[45] 46 HARV. L. REV. 164 (1932). The author in discussing the *Barnett* case states: "The decision presents a complete departure from the usual rule denying recovery for emotional distress alone."

In, 39 W. VA. L.Q. 186 (1933), the following comment is made concerning the *Barnett* case: "The decision is contrary to the usual rule denying recovery for mental anguish and suffering alone even though intentionally inflicted." Both of these law review notes attempt to distinguish the cases from other jurisdictions cited by the Iowa Court.

[46] 18 IOWA L. REV. 397 (1933). The author states that most courts look for some "peg" and then allow recoveries for mental anguish as parasitic damages. However, the article does not show the hostility toward the decision that is demonstrated by the notes cited in note 45, *supra*.

[47] La Salle Extension University Chicago, Ill. v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934).

[48] Clark v. Associated Retail Credit Men of Washington, D.C., 105 F.2d 62 (D.C. Cir. 1939).

preted the reference to willful and malicious acts to mean only acts motivated by fiendish and sadistic desires. It remained for one final case, *Curnutt v. Wolf*,[49] to clarify this point. This case involved a breach of contract action brought by a discharged employee against his former employer. While this suit was pending the defendant-former employer, on receiving a request for information from the plaintiff's new employer, called the plaintiff and stated that if he would drop his breach of contract action he, the defendant, would write a favorable letter to the new employer. It was implied, although not expressly stated, that if the plaintiff did not drop his suit the letter would be otherwise than favorable. The plaintiff, instead of dropping his suit, amended his petition, adding a second count in which he alleged the defendant made this call willfully, wantonly and with malice for the purpose of producing mental pain, anguish and humiliation in the plaintiff. The defendant made repeated attempts in the district court to have the second count withdrawn from the consideration of the jury. The trial court, however, ruled that the law of Iowa permits one to recover for mental pain and anguish which proximately results from the willful and malicious conduct or words of another tending to result in such mental pain and anguish.[50] On appeal from a judgment for $7,500 on this second count, the Supreme Court upheld the lower court's rulings and instructions but reduced the amount to $4,000.

The opinion in the *Curnutt* case is relatively short, presumably because it was felt the rule of law had been established in the *Barnett* case. In addition to the *Barnett* case, the Court also cited a 1948 amendment to the *Restatement of Torts*[51] and a law review article,[52] both of which speak of an independent action for the intentional causing of severe emotional distress. After discussing these authorities the Court concluded that the only question to be decided here was one of fact, namely, whether the telephone call constituted an intentional and malicious act, and it would not disturb the jury's findings on this point.

The extent to which the Iowa law had been changed is demonstrated by comparing *Kramer v. Ricksmeier*, decided in 1913, to the *Curnutt* decision. The *Kramer* case also involved a telephone call which the petition alleged was made willfully, maliciously, wantonly and negligently with an intent to provoke and injure the plaintiff. In addition it alleged that physical disabilities resulted from the mental suffering which was not alleged in the *Curnutt* petition. In holding that this petition did not state a cause of action the Court made the following statement:

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[49] 244 Iowa 683, 57 N.W.2d 915 (1953).
[50] Abstract of Record, p. 212, Curnutt v. Wolf, *supra*, note 49.
[51] RESTATEMENT, TORTS § 46 (Supp. 1948).
[52] Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

> "So far as we know it has been held uniformly that claims of this nature set forth in plaintiff's petition are too speculative and remote and improbable to furnish a basis for an action of damages."[53]

The decision in the *Curnutt* case definitely placed the Iowa Court far ahead of courts in other jurisdictions in allowing recoveries for mental suffering and emotional distress. Even Professor Prosser, never accused of being conservative in his views on the extension of tort actions, referred to the *Curnutt* decision as:

> "A much more doubtful case . . . where there was only the threat of pecuniary injury."[54]

Elsewhere Prosser makes the statement that except for the common carrier cases there are few instances in which there has been recovery in this area without proof of a physical illness resulting from the emotional disturbance.[55] In a footnote to this statement he lists seven cases which he says are the only ones that could be found in the entire United States where a recovery was allowed even though there was no proof of a physical illness.[56] Two of the seven are Iowa cases;[57] one cites as its only authority an Iowa case;[58] another is a collection case similar to the *Barnett* case;[59] two of the cases involved threats of physical violence that fell just short of a technical assault;[60] and the final case resulted from extreme acts of outrageous and humiliating conduct.[61] This again demonstrates that, for better or for worse, the Iowa Court must be recognized as a leader in developing an independent tort action for mental suffering and emotional distress.

LIMITING THE NEW ACTION

It will be recalled that one of the strongest objections raised against permitting an action for mental suffering was that it would open the door to fictitious claims and result in a flood of litigation on trivialities and bad manners.[62] It takes but little imagination to visualize the situation that would exist if some limits were not placed on such an action. The Iowa Court recognized this danger in the *Barnett* case when it said the door should not be opened too wide for such claims.[63] The Court did not, however, set out any

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[53] 159 Iowa 48 at 50, 139 N.W. 1091 at 1091.
[54] PROSSER, TORTS § 11 n. 76 (2d ed. 1955).
[55] PROSSER, TORTS § 11 at 46 (2d ed. 1955).
[56] PROSSER, TORTS § 11 n. 87 (2d ed. 1955).
[57] Curnutt v. Wolf, *supra*, note 49; Barnett v. Collection Service Company, *supra*, note 42.
[58] La Salle Extension University Chicago, Ill. v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934).
[59] Quina v. Roberts, 16 So.2d 558 (La. App. 1944).
[60] State Rubbish Collector's Ass'n v. Siliznoff, 38 Cal.2d 330, 240 P.2d 282 (1952); Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930).
[61] Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954) (officers stood by while woman in confinement was disrobed).
[62] See notes 2 and 3, *supra*.
[63] 214 Iowa 1303 at 1312, 242 N.W. 25 at 28.

limitations to guide future litigants except to require that the wrongful acts be willful rather than merely negligent.

Among those jurisdictions which allow recoveries for mental suffering alone, some have indicated that perhaps such actions should be limited to mental suffering resulting from fear of physical harm.[64] However, the more popular view seems to be that flagrant acts of a heartless nature that exceed all bounds of human decency should support such an action.[65] In the 1948 Supplement to the *Restatement of Torts,* cited by the Iowa Court in the *Curnutt* case, comment (g) limits the action as follows:

> "In short, the rule stated in this section imposes liability for intentionally causing severe emotional distress in those situations in which the actor's conduct has gone beyond all reasonable bounds of decency. The prohibited conduct is conduct which in the eyes of decent men and women in a civilized community is considered outrageous and intolerable."[66]

It is apparent the Iowa Court is not limiting this action to acts resulting in fear of physical harm since this was not present in either the *Barnett* case or the *Curnutt* case. Is the Iowa Court then limiting the action to only acts of a flagrant nature that exceed all bounds of human decency? Perhaps the *Barnett* case could be so classified, in that the letters written to the widow were of a rather cruel and heartless nature. It is more difficult, however, to bring the *Curnutt* case within this limitation. A reading of the record in that case fails to reveal anything said by the defendant that might be referred to as shocking to human decency.[67] A strict limitation on the action was urged by counsel for the defendant in the *Curnutt* case, who requested the court to submit the following instruction to the jury:

> ". . . but you must find before you can assess any damages against defendant that he did, without just cause or excuse and beyond all the bounds of decency, purposely cause

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[64] See State Rubbish Collector's Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952).

[65] In his article, *Mental and Emotional Disturbance in the Law of Torts,* 49 HARV. L. REV. 1033 (1936), Magruder gives the following description of such an action: "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 bounds of decency, purposely causes a disturbance of anothers mental and emotional tranquility 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."

Prosser, in his book PROSSER, TORTS § 11 (2d ed. 1955), makes the following statement concerning the action: "So far as it is possible to generalize from the cases, the rule which seems to be emerging is that there is liability for conduct exceeding all bounds usually tolerated by society, of a nature which is especially calculated to cause and does cause mental damage of a serious kind."

[66] RESTATEMENT, TORTS § 46, comment (g) (Supp. 1948).

[67] The following is the plaintiff's version of what the defendant said in the telephone conversation that gave rise to the mental suffering: "How are you? . . . Are you happy at Billings? . . . Do you want to stay

> mental and emotional disturbances in the plaintiff of so acute a nature that harmful physical consequences might likely result therefrom."[68]

Except for the part referring to the likelihood of harmful physical consequences this instruction would have set a limit on the action similar to the one provided by the *Restatement of Torts* as set out above. The following instruction, however, is the one submitted by the trial court and is much more general than either of the above two limitations:

> "One is entitled to recover for mental anguish which proximately results from willful and malicious conduct or words of another which the other intends to result in such mental pain and anguish."[69]

Although the failure to give the requested instruction was assigned as error, the Supreme Court did not discuss either of these instructions in its opinion nor in any other way indicate what limitations should be put on this action.

It appears, therefore, that this question is still open in Iowa. If, however, the instruction as given in the *Curnutt* case does contain the only limitation on such actions then it appears the door has been opened wide enough to be of real concern to individuals who, in their day to day conduct, tend to disregard the feelings of their fellow men.

H. RICHARD SMITH (January 1958)

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out there? . . . Well if you want to stay, do you know Carter Johnson? . . . Well if you want to stay out there better drop this suit in Mason City. . . . I am not going to discuss anything over the phone. . . . I will give you until tomorrow noon to make up your mind. . . . Carter Johnson wrote me a letter and asked me all about you. If you will drop that suit I will write him a good letter." Abstract of Record, p. 28, Curnutt v. Wolf, *supra*, note 49.

[68] Abstract of Record, p. 205, Curnutt v. Wolf, *supra*, note 49.

[69] Abstract of Record, p. 212, Curnutt v. Wolf, *supra*, note 49.