

Restatement Second of Torts

§ 312. Emotional Distress Intended

If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause,

(a) although the actor has no intention of inflicting such harm, and

(b) irrespective of whether the act is directed against the other or a third person.

Mass. Ann. Laws ch. 265, § 43 (2000)

§ 43. Stalking.

(a) Whoever (1) willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress, and (2) makes a threat with the intent to place the person in imminent fear of death or bodily injury, shall be guilty of the crime of stalking and shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars, or imprisonment in the house of correction for not more than two and one-half years or both. Such conduct, acts or threats described in this paragraph shall include, but not be limited to, conduct, acts or threats conducted by mail or by use of a telephonic or telecommunication device including, but not limited to, electronic mail, internet communications and facsimile communications.

Roseann DAWSON, Appellant,

v.

ZAYRE DEPARTMENT STORES.

Superior Court of Pennsylvania.

Argued June 18, 1985.

Filed Oct. 18, 1985.

Before ROWLEY, OLSZEWSKI and
DEL SOLE, JJ.

DEL SOLE, Judge:

Roseann Dawson appeals from an order granting appellee's preliminary objections in the nature of a demurrer and dismissing the complaint.

In April 1983, Appellant entered Zayre's Department Store intending to pick up a lay-away item. She became involved in a dispute with a store employee over the lay-away ticket. During the argument, the employee called the Appellant a "nigger". Appellant filed a complaint in trespass alleging that she suffered severe emotional distress as a result of this incident: wounded feelings; humiliation; physical harm; and that she cried and was unable to gain her composure for one-half hour. On June 12, 1984 the trial court granted Appellee's preliminary objections in the nature of a demurrer. We affirm.

Appellant argues that the lower court erred in holding that her complaint failed to establish a cause of action. The lower court held that Appellee's actions did not rise to the level of extreme and outrageous conduct required to sound in tort.

[1,2] Liability for intentional infliction of emotional distress is limited to those cases in which the conduct complained of is extreme and outrageous. *Jones v. Nissenbaum, Rudolph and Seidner*, 244 Pa. Super. 377, 368 A.2d 770 (1976). Further, it is for the court to determine, in the first instance, whether the defendant's conduct can reasonably be regarded as so extreme and outrageous so as to permit recovery. Restatement (Second) of Torts, § 46, comment (h) (1965).

Conduct which does not meet the requisites for liability is described in comment (d) of the Restatement (Second) of Torts § 46:

The liability clearly does not extend to mere insults, indignities, threats, annoy-

ances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

[3] We would find that the conduct outlined in Appellant's Complaint does not possess the degree of severity that is necessary to establish a cause of action. Although we by no means condone the derogatory and offensive language used by Appellee's employee, and while we understand Appellant's rightful resentment, we believe that this conduct merely constitutes insulting namecalling from which no recovery may be had. The Restatement cites the following example:

4. A makes a telephone call but is unable to get his number. In the course of an altercation with the telephone operator, A calls her a God damned woman, a God damned liar, and say that if he were there he would break her God damned neck. B suffers severe emotional distress, broods over the incident, is unable to sleep, and is made ill. A's conduct, although insulting, is not so outrageous or extreme as to make A liable to B.

Restatement (Second) of Torts, supra, § 46, comment (d) illustration 4. Similarly in this case, the Complaint alleges that a dispute arose with regard to a layaway ticket. In the course of the dispute Appellee's employee called Appellant a "nigger". Although this word is insulting and abusive, taken in this context it does not amount to the type of extreme and outrageous conduct which gives rise to a cause of action. Clearly the law cannot serve to redress all indignities. An Illinois court has held under similar circumstances that the plaintiff failed to state a cause of action for intentional infliction of emotional distress. In *Irving v. J.L. Marsh, Inc.*, 46 Ill.App.3d 162, 4 Ill.Dec. 720, 360 N.E.2d 983 (1977) the plaintiff sought to return merchandise and to obtain a refund. An employee of the retail store wrote on the refund slip

which he handed to the plaintiff: "arrogant nigger refused exchange/says he doesn't like product". The court found that the employee's conduct was insufficient to support a valid cause of action. The dismissal of a count in a complaint which attempted to state a cause of action for intentional infliction of emotional distress was also affirmed in *Lay v. Roux Laboratories, Inc.*, Fla.App., 379 So.2d 451 (1980). In that case, an employee of Roux Laboratories who was responsible for administering and policing parking spaces for the company's employees called plaintiff a "nigger" when an argument arose concerning a parking space. The court held that the employee's conduct did not reach such level of outrageousness and atrociousness as to serve as a predicate for the independent tort of intentional infliction of emotional distress. Likewise, the Court of Appeals in *Bradshaw v. Swagerty*, 1 Kan.App.2d 213, 563 P.2d 511 (1977), upheld a decision refusing to recognize a cause of action when during a heated argument over a debt collection the defendant called the plaintiff a "nigger", a "bastard", and a "knot-headed boy". The court noted that the trial court was fully justified in regarding the epithets complained of as mere insults.

This is not a case involving continuous malicious actions. See: *Bartanus v. Lis*, 332 Pa.Super. 48, 480 A.2d 1178 (1984). Nor, is this a case where there was a special relationship between the parties. See: Restatement (Second) of Torts, supra, § 48. Likewise the situation described herein is not one in which the actor knew of the other's susceptibility to emotional distress, by reason of some physical or mental condition or peculiarity. See: Restatement (Second) of Torts, supra, § 46, comment (f); *Zalnis v. Thoroughbred Datsun Car Co.*, — Colo.App. —, 645 P.2d 292 (1982). Rather, this case involves a party who during the course of a disagreement characterized another with an offensive term. The law does not invoke liability in a situation where, without other aggravating circumstances, one hurls an epithet at another during the course of a disagreement.

None of the cases cited by the dissent is based on a situation similar to the one found in the instant case. Although three of the cited cases involve a suit dealing with the offensive nature of spoken words,

in each of those cases other aggravating circumstances accompanied the insults. No such aggravating circumstances were alleged by Appellant in her complaint.

In *Alcorn v. Ambro Engineering*, 2 Cal.3d 493, 86 Cal.Rptr. 88, 468 P.2d 216 (1970), the plaintiff alleged that defendants who where "standing in a position or relation of authority over plaintiff, aware of his particular susceptibility to emotional distress ... intentionally humiliated plaintiff, insulted his race, ignored his union status, and terminated his employment, all without just cause of provocation." 86 Cal. Rptr. at 90, 91, 468 P.2d at 218, 219. The Supreme Court of California in *Alcorn* stated: "Although it may be that mere insulting language, without more, ordinarily would not constitute extreme outrage, the aggravated circumstances alleged by plaintiff seem sufficient to uphold his complaint as against defendant's general demurrer." 86 Cal.Rptr. at 97, 468 P.2d at 219 (emphasis added). Aggravated circumstances can also be found in the case of *Ruiz v. Bertolotti*, 37 Misc.2d 1067, 236 N.Y.S.2d 854 (1962). Therein, plaintiffs' complaint asserted that defendant expressed his anger at "colored persons" moving into the neighborhood, and threatened bodily harm to the home builder, to plaintiffs, and to plaintiffs' children if the sale of the house was consummated. Plaintiffs further alleged that fear of their personal safety and that of their children caused them to rescind the contract of sale. Similarly, in *Fisher v. Carousel Motor Hotel, Inc.*, (Tex.) 424 S.W.2d 627 (1963), the defendant's loud and offensive words were accompanied by conduct which the court found to constitute a battery. The court specifically held that the "plaintiff was entitled to actual damages for mental suffering due to the willful battery". 424 S.W.2d at 630.

The remaining cases cited by the dissent do not involve a situation where one party refers to another with an offensive term. These cases all deal with plaintiffs who were refused service or admittance in defendant's establishments because of their race. These cases can be further distinguished based on their individual holdings. In *Odom v. East Avenue Corp.*, 178 Misc. 363, 34 N.Y.S.2d 312 (1942) recovery was

based on the defendant's special duty as an innkeeper. See: Restatement (Second) Torts, *supra* § 48, comment (a). In *Amos v. Prom Inc.*, 115 F.Supp. 127 (N.D.Iowa 1953); it was held that a jury would be permitted to award exemplary damages; however, the court therein specifically relied on defendant's alleged illegal conduct in violating the Iowa Civil Rights Statute. Violation of the public accommodation statute, RWC 9.91.010(2), was alleged in *Browning v. Slenderella Systems of Seattle*, 54 Wash.2d 440, 341 P.2d 859 (1959). The *Browning* court held that the plaintiff had a cause of action under the public accommodation law to recover damages for injuries to her feelings, even though the statute was criminal in form. The court also found that the evidence failed to establish that plaintiff suffered severe emotional distress since defendant's discriminatory conduct did not occur in the presence of others.

Unlike the above cited cases, the circumstances alleged here merely involve one party who during the course of a dispute speaks to another in an "opprobrious, insulting and abusive manner". In this case, the speaker apparently lost her temper and resorted to namecalling. However unfortunate it may have been, conduct such as that engaged in by Appellee's employee is not so extreme and outrageous as to give rise to a cause of action for intentional infliction of emotional distress.

[4] Appellant also argues that the court below improperly dismissed her complaint under a theory of special liability of owners of public places, RESTATEMENT (SECOND) TORTS, § 48 (1965). We agree with the trial court that special liability under Section 48 has not been extended to conduct affecting an ordinary business invitee.

Accordingly, we conclude that the Appellee's preliminary objections were properly sustained since Appellant failed to state a cause of action for intentional infliction of emotional distress.

Order affirmed.

OLSZEWSKI, J., dissents.

**MARI J. MATSUDA, PUBLIC RESPONSE TO RACIST
SPEECH: CONSIDERING THE VICTIM'S STORY**

87 Mich.L.Rev. 2320, 2336-2341, 2357-2358, 2374-2379 (1989).

Racist hate messages are rapidly increasing and are widely distributed in this country using a variety of low and high technologies. The negative effects of hate messages are real and immediate for the victims. Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide. Professor Patricia Williams has called the blow of racist messages "spirit murder" in recognition of the psychic destruction victims experience.

Victims are restricted in their personal freedom. In order to avoid receiving hate messages, victims have had to quit jobs, forgo education,

leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor. The recipient of hate messages struggles with inner turmoil. One subconscious response is to reject one's own identity as a victim-group member. As writers portraying the African-American experience have noted, the price of disassociating from one's own race is often sanity itself.

As much as one may try to resist a piece of hate propaganda, the effect on one's self-esteem and sense of personal security is devastating. To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. ...

The effect on non-target-group members is ... of constitutional dimension. Associational and other liberty interests of whites are curtailed by an atmosphere rife with racial hatred. In addition, the process of dissociation can affect their mental health. Dominant-group members who rightfully, and often angrily, object to hate propaganda share a guilty secret: their relief that they are not themselves the target of the racist attack. While they reject the Ku Klux Klan, they may feel ambivalent relief that they are not African-American, Asian, or Jewish. Thus they are drawn into unwilling complacency with the Klan, spared from being the feared and degraded thing. ...

Psychologists and sociologists have done much to document the effects of racist messages on both victims and dominant-group members. Writers of color have given us graphic portrayals of what life is like for victims of racist propaganda. From the victim's perspective racist hate messages cause real damage.

If the harm of racist hate messages is significant, and the truth value marginal, the doctrinal space for regulation of such speech is a possibility. ...

In order to respect first amendment values, a narrow definition of actionable racist speech is required. Racist speech is best treated as a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse. ...

The alternative to recognizing racist speech as qualitatively different because of its content is to continue to stretch existing first amendment exceptions, such as the "fighting words" doctrine and the "content/conduct" distinction. This stretching ultimately weakens the first amendment fabric, creating neutral holes that remove protection for many forms of speech. Setting aside the worst forms of racist speech for special treatment is a non-neutral, value-laden approach that will better preserve free speech.

In order to distinguish the worst, paradigm example of racist hate messages from other forms of racist and nonracist speech, three identifying characteristics are suggested here:

1. The message is of racial inferiority;
2. The message is directed against a historically oppressed group; and
3. The message is persecutorial, hateful, and degrading.

Making each element a prerequisite to prosecution prevents opening of the dreaded floodgates of censorship.

The first element is the primary identifier of racist speech: racist speech proclaims racial inferiority and denies the personhood of target group members. All members of the target group are at once considered alike and inferior.

The second element attempts to further define racism by recognizing the connection of racism to power and subordination. Racism is more than race hatred or prejudice. It is the structural subordination of a group based on an idea of racial inferiority. Racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship.

The final element is related to the "fighting words" idea. The language used in the worst form of racist speech is language that is, and is intended as, persecutorial, hateful, and degrading. ...

Under these narrowing elements, arguing that particular groups are genetically superior in a context free of hatefulness and without the endorsement of persecution is permissible. Satire and stereotyping that avoids persecutorial language remains protected. Hateful verbal attacks upon dominant-group members by victims is permissible. These kinds of speech are offensive, but they are, in respect of first amendment principles, best subjected to the marketplace of ideas. This is not to suggest that we remain silent in the face of offensive speech of this type. Rather, the range of private remedies—including counter-speech, social approbation, boycott, and persuasion—should apply. ...

The legal response to racist propaganda provides an interesting context for examination of the relation between law and racism. Legal protection of racism is seen in these doctrinal elements:

- (1) the limits of doctrinal imagination in creating first amendment exceptions for racist hate speech;
- (2) the refusal to recognize the competing values of liberty and equality at stake in the case of hate speech; and
- (3) the refusal to view the protection of racist speech as a form of state action. ...

When the legal mind understands that reputational interests, which are analogized to the preferred interest in property, must be balanced against first amendment interests, it recognizes the concrete

reality of what happens to people who are defamed. Their lives are changed. Their standing in the community, their opportunities, their self-worth, their free enjoyment of life is limited. To see this, and yet to fail to see that the very same things happen to the victims of racist speech, is selective vision.

The selective consideration of one victim's story and not another's results in unequal application of the law. Unlike the victims of defamation and other torts, the victims of racist speech are not representative of the population at large. In making typical legal concessions to the first amendment, we burden a range of victims. In the case of flag-burning, we force patriots, veterans, and flag-lovers of all races to tolerate flag desecration as part of the price of freedom. In contrast, when victims of racist speech are left to assuage their own wounds, we burden a limited class: the traditional victims of discrimination. This class already experiences diminished access to private remedies such as effective counterspeech, and this diminished access is exacerbated by hate messages. Debasing speech discredits targets, further reducing their ability to have their speech taken seriously. The application of absolutist free speech principles to hate speech, then, is a choice to burden one group with a disproportionate share of the costs of speech promotion. ...

The failure to hear the victim's story results in an inability to give weight to competing values of constitutional dimension. The competing values recognized under international law are equality, liberty, and personality. Each person under that scheme is entitled to basic dignity, to nondiscrimination, and to the freedom to participate fully in society. If there is any central principle to the Bill of Rights, surely that is it. When white supremacist organizations with histories of violence have an active, protected presence in a community, that principle is sacrificed. ...

The third doctrinal pillar supporting racist speech is the refusal to recognize that tolerance and protection of hate group activities by the government is a form of state action. To allow an organization known for violence, persecution, race hatred, and commitment to racial supremacy to exist openly, and to provide police protection and access to public streets and college campuses for such a group, means that the state is promoting racist speech. ... Because racist speech is seen as private, the connection to loss of liberty is not made. State silence, however, is public action where the strength of the new racist groups derives from their offering legitimation and justification for otherwise socially unacceptable emotions of hate, fear, and aggression. The need for a formal group, for a patriotic cause, and for an elevation of the doubting self are part of the traditional attraction of groups like the Klan. Government protection of the right of the Klan to exist publicly and to spread a racist message promotes the role of the Klan as a legitimizer of racism.

Further, the law's failure to provide recourse to persons who are demeaned by the hate messages is an effective second injury to that person. ... The government's denial of personhood by denying legal recourse may be even more painful than the initial act of hatred. One can dismiss the hate group as an organization of marginal people, but the state is the official embodiment of the society we live in. ...

Outline of Class--9/19/77

1. What is battery? Any unauthorized touching.
2. What is assault? Intentional act that causes immediate apprehension of a harmful or offensive touching.
 - (a) does the contact threatened have to come from Δ ?
How about "look out for the falling rock"? Is it necessary that the touching, if it had occurred, would have been a battery?
 - (b) the injury against which one has legal protection is the experience of apprehension (revulsion doesn't count).
 - (c) but you can only recover if
 - i. it is apprehension of contact ("I will get you fired!" "I'll ruin your party!" don't qualify).
 - ii. and of immediate contact ("I will kill you next week!" doesn't qualify).
 - (d) judicially elaborated subrules include
 - i. words only don't count (but some cases hold otherwise).
 - ii. requirement that the apprehension be reasonable (Brooker)
3. How does discussion of these limits fit into the subject of "definition of legally protected interests?"
 - (a) the rules establish that you do have an interest in absence of apprehension, but only in these circumstances.
 - (b) Is Brooker (extrasensitive π) consistent with Vosburg (eggshell skull)?
 - i. If you are not extrasensitive, the Δ is still liable for all the consequences of the tort, no matter how unexpected.
 - ii. One could therefore say that Brooker merely modifies Vosburg to exclude one type of unexpected consequence.
 - iii. But one could also say that there was no invasion of a legally protected interest in Brooker, because the protected interest is only in freedom from the apprehensions of a reasonable person.
4. Why restrict the legal protection of emotional security or tranquility by requiring apprehension, immediacy, possible contact, more than words, and reasonableness of the π ?
 - (a) formal realizability
 - (b) sense that these define the limits of behavior that is really wrongful

5. There is a difficulty with the (4b) idea, since there have long been other circumstances
 - (a) in which recovery is allowed
 - i. for emotional harm other than apprehension of immediate contact
 - ii. with no limitation about words only
 - (b) these are
 - i. transferred intent-Bouillon
 - ii. parasitic damages-Bouillon
Ford v. Schliessman
6. When the courts began to allow recovery for emotional harm, they didn't go the whole way:
 - (a) compare Wilkinson v. Downton w. George v. Jordan Marsh
 - (b) Rest 46(2)a with Rest 46(2)b (p. 918)
7. What justification is there for the continuing impulse to limit liability?
 - (a) Formal realizability
 - (b) What's the other argument?
 - i. the notion of a gradual evolution of social custom (see Street quote, p. 918, and quote from the Clark case on p. 938) rather than a leap to full liability
 - ii. the argument that full liability would be unjust