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INTENTIONAL TORTS AND THE RESTATEMENT
A Petition For Rehearing

By PHILIP HALPERN*

I

The traditional view of the law of torts is that it consists of a series of separate categories of tort liability and that there can be no recovery in a tort action unless the case falls within one of the recognized categories. This view was dominant throughout the major period of the development of the law of torts. In the earliest stage of the law, the only torts which were actionable were those cognizable under the writs of nuisance, detinue and trespass. The writ of trespass was the most important; it covered assault, battery, false imprisonment and trespass to property.\(^1\) Beginning in the later years of the 13th century, the scope of the law of torts was greatly enlarged by the development of the action of trespass on the case but, even in that period, the law grew by judicial recognition of specific categories of tort liability.\(^2\)

However, while the traditional view correctly described the way in which the law had grown, there was dissatisfaction with it in modern times; it was criticized as making the substantive right of the plaintiff depend upon the availability of a procedural remedy. "Such is not the modern way of regarding legal duties or remedies."\(^3\) The modern view is that, if one is at fault in causing damage to another, he ought to be held liable for it. In modern times, general principles of tort liability have accordingly emerged. The concept of negligence was the first to find general expression and wide-spread acceptance.\(^4\) The formulation of a general principle of liability for intentional wrongdoing, strangely enough, lagged behind, although it was self-evident that "if there exists, then, a positive duty to avoid harm, much more must there exist the negative duty of not doing wilful harm; subject, as all general duties must be subject, to the necessary exceptions."\(^5\)

Sir Frederick Pollock first offered a formulation of the general principle in his work on the Law of Torts (1887). He asserted it to be "a general proposition of English law that it is a wrong to do wilful harm to one's neighbor without lawful justification or excuse."\(^6\) Lord Bowen shortly thereafter issued his much

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1. Fifoot, History and Sources of the Common Law 3 (1949).
2. There is a controversy as to the relation of the Statute of Westminster II (1285) to this development. One view is that the action of trespass on the case originated in the statute but others are of the opinion that the courts themselves undertook to issue appropriate writs in cases which were similar to, but did not fall within the precise terms of, the trespass torts and that the statute, at most, confirmed and stimulated the judicial practice. Fifoot, op. cit. supra note 1, at 66.
quoted dictum: "At common law there was a cause of action whenever one person did damage to another, wilfully or intentionally, and without just cause or excuse." On this side of the Atlantic, Justice Holmes, speaking for the United States Supreme Court, promulgated a similar doctrine: "It has been considered that, prima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."8

This principle has been widely applied in the fields of business competition and labor disputes but the principle is not limited to those fields. It is an expression of a general conviction that compensation ought to be awarded for actual damage intentionally caused by conduct which has no moral, social or economic justification.

The principle has come to be known as the prima facie tort theory, although as Justice Holmes indicated in the statement quoted from the Aikens case, supra, this is misleading if the term is taken to mean that the burden of justification as a procedural matter necessarily falls upon the defendant. The burden of proving the absence of justification may well rest upon the plaintiff, if the factual situation is one in which the defendant's conduct is ordinarily regarded as proper and as prima facie justifiable. In such a case, the plaintiff has the burden of pleading and proving that, under the special circumstances of the case, because of the defendant's motivation or for other reasons, the infliction of the damage was not justified. The phrase "without justification" means that, in the end, in order to entitle the plaintiff to recover, it must be found that, as a substantive matter, the defendant's conduct was not justified. However, for want of a better term, the expression "prima facie tort" has come into general use and, with the qualification noted, it may properly continue to be used.

Of course, under the prima facie tort doctrine, actual damage is essential to a recovery by the plaintiff, in addition to the elements of intention and absence of justification. The principal function of a tort action, as conceived in modern law, is to compensate for actual harm, not to redress a purely dignitary offense involving no actual damage.


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In England, the controversy as to the acceptability of the prima facie tort doctrine is still raging. The late Professor Winfield was its principal advocate after the death of Sir Frederick Pollock.9 On the other side, the leader was Sir John Salmond.10 Strangely enough, P. A. Landon, the editor of the 14th and 15th editions of Pollock’s Law of Torts, criticized Pollock’s view and approved Salmond’s, while Professor W. T. S. Stallybrass, the editor of the later editions of Salmond’s work, tended toward the rejection of his author’s theory and the acceptance of Pollock’s.11 The difference between the two schools of thought is largely one of semantics. The moderate members of the Salmond school agree that the law of torts is “expansible” but they maintain that expansion can take place only by the creation and naming of new torts, whereas the adherents of the Pollock view see no need for creating new categories; they rely upon the general principle as the basis of liability.12

In this country, the doctrine has had a much less stormy career. It has been widely accepted as the basic principle of tort liability. Dean Pound summed up the status of the doctrine in 1955 as follows: “As late as 1914 it was regarded as debatable whether one who intentionally does anything which on its face is injurious to another must repair the resulting damage unless he can justify his act under some social or public interest or assert a privilege because of a countervailing interest of his own which there is a social or public interest in securing. This now generally received proposition only got gradual and piecemeal recognition for a long time. It could not give a name to a precisely defined tort.”13 But by 1955, Dean Pound concluded, the doctrine was no longer open to debate.

The Court of Appeals of New York, after reviewing both sides of the English controversy, formally adopted the prima facie tort doctrine in 1946 in Advance Music Corporation v. American Tobacco Co.14 The doctrine had been previously applied by it in labor dispute cases,15 in a business competition case16 and in a case imposing liability for a nondefamatory malicious falsehood causing damage to the plaintiff.17 In the Advance Music Corporation case, the New York Court of Appeals held that the doctrine was a “general principle of liability in

10. SALMOND, LAW OF TORTS 15-17 (10th ed. 1945).
11. Id. at 17; POLLOCK, LAW OF TORTS 43-47 (14th ed. 1939).
tort" and was not limited to any particular class of cases. In that case, the plaintiff claimed that the defendants, with intent to injure the plaintiff, had arbitrarily listed certain songs in their weekly nation-wide broadcast as the ten most popular songs of the week and had deliberately omitted the songs published by the plaintiff, even though they were in fact among the ten most popular musical compositions of the week. It was alleged that the action of orchestra leaders, singers and other performers in the entertainment world was largely influenced by the selections and ratings which the defendants disseminated and that the plaintiff suffered a loss of profits as a result of the defendants' action. This was held to state a sufficient cause of action under the prima facie tort theory. In New York State, the doctrine has come to occupy a central place in the analysis and determination of tort problems.

Other jurisdictions which have considered the question have also adopted the general principle.

Massachusetts had adopted the prima facie tort doctrine even before it had been formulated by Pollock in England. Thus in Walker v. Cronin, the court had laid down the general proposition that "The intentional causing of such loss to another without justifiable cause, and with the malicious purpose to inflict it is of itself a wrong." Justice Holmes later developed and applied the principle while he was a member of the Massachusetts Supreme Judicial Court. The recent cases in Massachusetts have reaffirmed the doctrine: "Intentional harm to the business of another... is a tort unless justified..."

In his opinion for the United States Supreme Court, in American Bank and

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19. See cases collected in 52 Colum. L. Rev. 503, 504 (1952). In the Codes of continental countries, there are statements of a fundamental tort principle similar to the prima facie tort doctrine. See Lenhoff, Note on Tests for the Legality of Concerted Action Under Foreign Law, Particularly of Strikes, in Mathews, Labor Relations and the Law 742, 745-748 (3d ed. 1953). Radin, Speculative Inquiry into the Nature of Torts, 21 Texas L. Rev. 697 (1942).


22. Saveall v. Derners, 322 Mass. 70, 72, 76 N.E.2d 12, 13 (1947); see discussion of the cases in Forkosch, An Analysis of the 'Prima Facie Tort' Cause of Action, 42 Cornell L.Q. 465, 474-75 (1957), and in Hale, Prima Facie Torts, Combination and Non-Feasance, 46 Colum. L. Rev. 196 (1946).
Trust Co. v. Federal Reserve Bank, Justice Holmes coined the striking phrase "disinterested malevolence" to describe the state of mind of a defendant who intentionally caused damage to the plaintiff without any social, economic or moral justification and who therefore was liable under the prima facie tort doctrine.

The general acceptance of the doctrine in this country may be due to the fact that not too much has been claimed for it. There has been no suggestion that the whole of the law of torts dealing with intentional wrongdoing ought to be recast in terms of the new doctrine. There has been general recognition that the courts must deal with the historical materials as it finds them, in the interest of disciplined thinking and orderly development. In the fields covered by the traditional torts, the question of what constitutes privilege or justification for damage-causing conduct has, to a large extent, been settled. The settled principles will ordinarily be followed, even if the plaintiff invokes the prima facie tort doctrine, with respect to situations covered by the traditional torts. The function of the prima facie doctrine is to supplement the traditional torts and not to supplant them.

The doctrine offers a useful approach to the solution of new problems, not an automatic solution of them. The principal problem to be resolved in a novel case is, of course, that of justification. "[J]ustifications may vary in extent according to the principle of policy upon which they are founded, and that while some, for instance, at common law, those affecting the use of land, are absolute, Bradford v. Pickens, [1895] A. C. 587, others may depend upon the end for which the act is done." The right of recovery in most cases brought under the prima facie tort doctrine will depend upon the court's decision of the issue of justification. This has led one eminent critic of the doctrine to take the view that the doctrine is so broad that it "means little, or nothing". While it is true, as Dean Prosser says, that the prima facie tort doctrine does not relieve the court of the burden of "balancing the conflicting interests of the parties, and determining whether the defendant's objective should prevail at the expense of the damage to the plaintiff," the doctrine nevertheless serves a useful purpose in bringing into the open the nature of the court's task, instead of concealing it in platitudinous phrases as to the plaintiff's "right" or the defendant's "wrong".

24. 52 COLUM. L. REV. 503, 505 (1952).
25. Aikens v. Wisconsin, 195 U.S. 194, 204 (1904). As Justice Holmes indicates in the quoted sentence, there are some freedoms which are absolute, for the exercise of which there is no liability even under the prima facie tort theory. The public interest in the preservation of the freedoms outweighs the damage which may be caused by their exercise. Hence, justification for the infliction of the damages is found to be present. See RESTATEMENT, TORTS §890, comments c,d (1934).
27. Id. at 23.
Under the category theory of tort law, there can be no recovery in a case which does not come within an established category, unless the court is willing to create a new named category. This approach seems to me to be an unfortunate one. There is a natural psychological barrier, particularly at nisi prius, against the creation of new categories of tort liability, a barrier which is not present when the question is put to the court in terms of applying a recognized general principle of tort liability. It may be objected that the prima facie tort doctrine gives the courts too great a policy-making power but unless we accept the extreme view of P. A. Landon, the editor of the 14th and 15th editions of Pollock on Torts, "that the categories of tort are closed" and that recourse must be had to the legislature for the creation of a new remedy in any case falling outside the established categories, we must recognize that the courts do have a real policy-making function in the development of tort law. The prima facie tort doctrine makes the power explicit and encourages the court to give open-minded consideration to all the conflicting factors involved in each case.

Even those who feel that the breadth of the concept of justification renders the prima facie tort doctrine valueless, or nearly so, have recognized the merit of a more restricted principle dealing with the intentional infliction of bodily harm. There the scope of justification is fairly well settled along simple and generally accepted lines, such as the right of self-defense, the defense of one's property and the like. Thus it has been stated that while "actions for assault, offensive but harmless battery, and false imprisonment" are restricted, even in modern law, to the technical ingredients of the ancient trespass action, a different view is taken, if actual bodily harm is intentionally (or negligently) caused. "If harm was done, the injured person could sue in case and recover even though the defendant's conduct did not amount to a trespass." Since the scope of privilege in this area is strictly limited, application of the prima facie tort doctrine is free from the ambiguities and vagueness necessarily inherent in the application of the doctrine in other fields in which the nature and scope of justification are open to debate. For example, economic self-interest, which may be a justification for the infliction of pecuniary damage, affords no justification for interference with bodily security or inviolability. The problem of justification presents no real obstacle to the application of the prima facie tort doctrine to cases of injury to the person.

II

The interrelation of the prima facie tort doctrine with the traditional torts dealing with injury to the person (the trespass torts of assault, battery and false

29. SMITH AND PROSSER, CASES AND MATERIALS ON TORTS 3 (2d ed. 1957).
imprisonment) has not been given adequate attention. The principal function of
the doctrine in this area is to overcome the notion, to which the category ap-
proach may give rise, that recovery is necessarily barred because one of the
traditional elements of a conventional tort is lacking. The doctrine supplements
the trespass torts and allows a recovery for actual harm intentionally inflicted
in many situations in which recovery upon a trespass theory would not be sus-
tainable. The doctrine serves the useful purpose of calling upon the courts to re-
examine the cases which fall outside the historical limits of the traditional torts
and to determine, upon a fresh consideration of the nature of the defendant's
conduct and of the justification or lack of justification therefor, whether liability
ought to be imposed upon the defendant for the damage caused. The prima facie
tort doctrine thus opens the way to a more realistic approach to the question
of liability and overcomes many of the blind spots which may result from a too
close adherence to the category approach.

The principal characteristic of the trespass torts is that no proof of actual
damage is essential, whereas in the torts which developed by way of action on
the case, actual damage is essential to recovery. As has been noted, in modern law,
the principal function of the tort action is regarded as the redressing of actual
damage, not the vindication of purely dignitary interests. On the other hand,
the action for trespass to the person is a historical survival bearing the imprint
of its origin as a combined civil and criminal remedy, designed to vindicate one's
interest in the inviolability of his person. A recovery of nominal damages, at least,
is allowed for the offense to one's sense of dignity or freedom, even though no
actual harm was involved.30

The origin in the ancient writ of trespass has also left its mark in the strict
limitations of the trespass torts. An element of direct or immediate physical
violence, or the threat of such violence, is traditionally an essential ingredient
of these torts. The essential ingredients of the trespass torts were fixed historically
and, since modern courts are averse to extending liability for merely dignitary
offenses, they have remained largely unchanged.31

30. The same principle is applied to trespass to real property: a recovery
may be had without proof of actual damage (Restatement, Torts, §158 [1934]).
However, the principle does not apply to trespass to chattels. There actual harm
is required (Restatement, Torts, §218, comment f [1934]). Trespass to chattels
must therefore be deemed to be excluded from the discussion herein of trespass
torts.

The fact that a technical trespass had been committed may be of con-
siderable practical importance if damage accidentally occurred in the course
of the commission of the trespass. Recovery may be had for the damage on the
ground that it was incidental to the trespass, even though it had occurred
unintentionally and non-negligently. Restatement Torts §163, comment f, and §380
(1934).

31. Professor Bohlen expressed the traditional view in his notes to the first
draft of the Restatement: "Unless an established course of decision imperatively
requires it, American courts are properly averse to recognizing rights for whose
(Footnote continued on following page.)
However, even though one of the essential ingredients of trespass is lacking, recovery may be had under the prima facie tort doctrine, for actual harm which was intentionally inflicted by the defendant. Examples readily suggest themselves. The traditional tort of assault requires, as one of its essential elements, that there be a threat of an immediate bodily contact of an offensive or harmful character. If the defendant threatens bodily harm at a future time, it is not an assault, even though he knows that the victim is in frail health and that the mere threat will precipitate physical illness. If the conduct of the defendant can be characterized as outrageous and severe emotional distress is caused by it, there may be recovery for the new tort of causing emotional distress and, if physical harm results, there can be recovery for the harm as a consequence of the commission of the tort. The new tort of causing emotional distress represents an extension by the courts of the principle of the trespass torts allowing a recovery for a merely dignitary offense, an extension which runs counter to the general trend in modern law against the enlargement of actions for nominal damages. But if the conduct is not outrageous or the emotional distress is not severe, the new tort does not cover the case and no recovery can be had for the distress. Yet, in the case supposed, no one would doubt that, if physical illness resulted from the threat, the defendant would be held liable. Liability would not fall under the head of any of the traditional torts. The damage was not incident to an assault; it was not brought about by bringing the plaintiff's body into contact with any external force or substance, as traditionally required for the commission of the tort of battery. Quite apart from the new tort of causing emotional distress, and even in jurisdictions in which that tort is not recognized, there clearly would be liability for the physical harm upon the ground that it had been intentionally caused. Even in jurisdictions in which the new tort is recognized, it should not be necessary to invoke it or to rely upon a finding of the outrageousness of the defendant's conduct or the severity of the emotional distress in order to sustain a recovery for the physical harm. Liability is clearly dictated by the principle that violation without more an action lies and for which therefore nominal damages are recoverable." American Law Institute, Treatise No. 1, p. 130. There are, however, instances in which the development of modern law has run in the opposite direction, i.e., that of giving greater importance to purely dignitary interests. See, for example, section 46 of the Restatement of Torts, discussed infra. Perhaps there is a need for some form of action or proceeding other than an action for damages to vindicate interests in one's personality and reputation.

32. Restatement, Torts §46 (Supp. 1948), and see Restatement 2d, Torts §46 (Tent. Draft No. 1 1957). This formulation perpetuates the distinction generally accepted in the law between emotional disturbances and physical harm. "The point has been long ago made that, as a scientific matter, all severe emotional disturbances create bodily changes which are measurable. See Goodrich, Emotional Disturbances as Legal Damage, 20 Mich. L. Rev. 487 (1922). But, for the practical business of the law, the distinction still prevails, and emotional distress is treated differently from physical trauma or bodily illness not primarily emotional." 1 Harper and James, Law of Torts 666 n. 5 (1956).

Bodily harm is defined in section 15 of the Restatement of Torts as excluding emotional disturbance.
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one who intentionally causes bodily harm to another without a privilege to do so is liable therefor.

To take another example: the defendant, falsely and with intent to injure, shouts "Fire" to a person whom he knows to be suffering from a bad heart. The fear inspired by this type of conduct does not come within the scope of the traditional tort of assault and no recovery could be had for the fright alone, except possibly under the new tort of outrageous conduct causing emotional distress. But if the heart patient collapsed as a result of the fright and suffered aggravation of his illness or even death, there would be no question but that the defendant would be held liable. Liability in this and in the preceding case might possibly rest upon the ground of negligence, since the defendant by his conduct unreasonably created the risk of illness. But it ought not to be necessary to invoke the theory of negligence in such a case. The defendant's wrong is a much more serious one than mere negligence. The harm was intentionally inflicted and liability ought to be rested squarely upon that ground, both in the interest of sound analysis and in order to enable the plaintiff to recover punitive damages in an appropriate case.

To take another example, which is free from the complication of possible overlapping with the new tort of causing emotional distress: The plaintiff is a victim of an incapacitating disease which makes it impossible for him to move from his bed. The defendant, with the intention of injuring him, removes from his reach needed medicine and, as a result of his being deprived of the medicine, the plaintiff's illness is aggravated. The defendant is obviously liable for the physical harm resulting from his act; yet his act was not an assault, a traditional battery, or a false imprisonment. Neither would it come under the new tort of emotional distress because the injury did not come about through the internal operation of emotion. The liability of the defendant must rest upon the general principle that one who intentionally causes bodily harm to another is liable therefor.

Similar illustrations in the field of false imprisonment are readily available. If one were compelled to remain in a designated place by the threat of infliction of a future injury, no action for false imprisonment would traditionally lie for the merely dignitary offense, because it was not brought about by one of the

33. Restatement, Torts §§312, 313 (1934).
34. Section 326 of the Restatement covers the case of one who intentionally prevents a third person from giving aid to another, necessary to his bodily security. It does not precisely cover the two-party situation discussed above. Because of the absence of any general provision dealing with the intentional infliction of bodily harm, section 326 is strangely placed under the heading of negligence. See also, for a similar classification of intentional misconduct under the heading of negligence, section 310 of the Restatement.
methods of imprisonment recognized as the bases of the tort. But if the plaintiff were compelled to remain in the designated place for several days and not given food or drink, there could be no doubt of his right to recover for the physical suffering and the bodily harm resulting from the imprisonment. If the plaintiff lost wages or other earnings for the period of the confinement, he could also recover for that pecuniary loss, under the principle that intentional infliction of harm is actionable in the absence of justification and, in the case supposed, no justification appears.

Under sections 35 and 42 of the Restatement of Torts, consciousness of restraint on the part of the victim is essential in order to sustain an action for false imprisonment. This rule has been applied even to an infant of tender years or an incompetent who was incapable of understanding when he was in a state of confinement and when he was free. But if such a person were confined for a period of several days and not given food or drink, the person causing the confinement would clearly be liable for the bodily harm thus intentionally caused.

One of the most firmly established requirements of the tort of false imprisonment is that the confinement must be circumscribing; there must be a fixed area beyond the limits of which the plaintiff is not free to go. If the plaintiff's freedom of movement is blocked only in a single direction and he is free to travel in other directions, no action may be maintained for false imprisonment. Yet, if we suppose a case in which the defendant, knowing that the plaintiff was in need of immediate medical attention, intentionally prevented the plaintiff from using the shortest and most expeditious route to his doctor's office, the defendant would clearly be liable if the delay caused by the plaintiff's taking a more circuitous route resulted in an aggravation of his illness. A similar conclusion would be reached if economic harm were caused by the defendant's act. If the plaintiff was on his way to attend a public auction and the defendant deliberately delayed him for the purpose of preventing him from getting to the auction on time, the defendant would clearly be liable for any pecuniary loss. These cases do not come under the head of any of the conventional torts; they do not come under the tort of false imprisonment; the law of nuisance does not cover them since the plaintiff was not the owner of any property in the vicinity of the place of obstruction.

35. In some jurisdictions, the concept of false imprisonment has been broadened to include any form of duress by means of which the confinement of the plaintiff is brought about. RESTATEMENT 2d, TORTS §40A (Tent. Draft No. 1, 1957). This is another illustration of an exceptional extension in modern times of the principle of the trespass torts, allowing recovery of nominal damage for a merely dignitary offense, but in a jurisdiction in which the traditional ingredients of the tort of false imprisonment are still adhered to, confinement by threats of future injury is not actionable as false imprisonment. RESTATEMENT, TORTS §40 (1934).

36. See the discussion infra of the amendment to section 42 proposed in 1957.

37. RESTATEMENT, TORTS §36 (1934).
access to which was interfered with. The liability for the damage actually suffered would have to rest upon the general principle forbidding the intentional infliction of harm without justification.

It is thus seen that the general principle envelops the whole area of liability for assault and battery and false imprisonment, fills in the gaps and provides a basis for imposing liability for actual harm intentionally caused in situations which are similar to, but do not fall precisely within, the conventional torts.

III

When the first volume of the Restatement of Torts was prepared in the years 1925 to 1934, the principle of the liability for the intentional infliction of harm had not yet won the general recognition in this country which it now enjoys. The first volume deals with "Intentional Harms to Persons, Land and Chattels." It does not begin with a statement of a general principle governing liability for intentional torts but plunges at once, after a chapter of definitions, into a detailed statement of the traditional ingredients of the torts of battery, assault and false imprisonment under the heading of "Intentional Invasions of Interests in Personality." There is no caveat that, if actual harm is intentionally caused, there may be a recovery in an action on the case, even though one of the ingredients of the technical trespass torts may be lacking. However, at a later stage of the preparation of the Restatement, when the subjects of trade practices and labor disputes were taken up, the principle of liability for the intentional infliction of harm in the absence of justification was recognized, insofar as it applied to the particular topics there dealt with, but the interrelation of the principle with the torts covered in the first volume was still not noted. Thus, for example, in section 709 (Vol. 3) it is stated: "One who engages in a business primarily for the purpose of causing loss of business to another and with the intention of terminating the business when the purpose is accomplished is liable to the other for the loss so caused." Section 766 states as a general principle that "One who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another, is liable to the other for the harm caused thereby." The general principle governing labor disputes is stated in section 775 as follows: "Workers are privileged intentionally to cause harm to another by concerted action, if the object and the means of their concerted

38. PROSSER, LAW OF TORTS 403-04 (2d ed. 1955), but see at 405: "The plaintiff should of course have no action for the infringement of a theoretical right which he shares with the public at large, but when that infringement causes him substantial harm, there is no very good reason for denying him relief."

39. But see discussion, infra, of section 17, which, if broadly construed, may serve as a statement of the general principle as applied to bodily harm.
action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper."

Near the end of its work, the Institute, in a division of the Restatement entitled "Miscellaneous Rules," adopted section 870 (Vol. 4), stating this general principle: "A person who does any tortious act for the purpose of causing harm to another or to his things or to the pecuniary interests of another is liable to the other for such harm if it results, except where the harm results from an outside force, the risk of which is not increased by the defendant's act." The presence of the adjective "tortious" before the word "act" makes it impossible to use this statement as a formulation of a general principle of tort liability, since the word "tortious" makes it necessary to refer to the whole of the rest of the Restatement to determine whether the conduct was actionable. But if the word "unjustifiable" were substituted for the word "tortious", section 870 would come close to being a formulation of the prima facie tort doctrine.

This broad interpretation of section 870 finds some support in section 873, dealing with harm caused by intentionally false statements. Section 873 reads: "A person who, with knowledge of its falsity, makes an untrue statement concerning another which he realizes will harm the other is liable to the other for such resulting harm as he should have realized might be caused by his statement." The Comment to this section indicates that the section is an application of the general rule stated in section 870. As the Comment also indicates, section 873 to some extent overlaps the rules dealing with defamation. But, insofar as it deals with non-defamatory statements made with the intention of causing harm, it plainly rests upon the principle of liability for harm intentionally inflicted without justification.40 A non-defamatory statement does not come within the traditional tort of libel or slander but, here again, the prima facie tort doctrine envelops the conventional tort and supplements it so as to allow recovery for actual damage intentionally inflicted, even though the case does not fall within the precise requirements of the conventional tort.

It thus appears that, in a fragmentary and piecemeal fashion, the principle of liability for the intentional and unjustifiable infliction of harm was given recognition in the later volumes of the Restatement but the principle was never stated in a comprehensive manner indicating its full scope.41 This omission has

41. Judge Herbert F. Goodrich, the Director of the Institute, gave the following explanation when this point was raised at the meeting of the Institute on May 24, 1957: "DIRECTOR GOODRICH: May I state just a little history here, not speaking to the issue on this particular section. The thing that Judge Halpern has just mentioned does come in a later part of the Restatement of Torts. After Mr. Bohlen had ceased to be able to carry on the rest of the work, Mr. Seavey wrote part of it along toward the end. We started this thing with these old-fashioned, narrow technical intentional injuries, and Mr. Bohlen used to call (Footnote continued on following page.)
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resulted in a rather curious imbalance in the Restatement. Liability may be imposed in an action upon the case for damage suffered by the plaintiff upon any one of three grounds: (1) Intentional causing of the damage, (2) Negligence, (3) Ultrahazardous activity. The second and third grounds are fully covered in the Restatement but there is no comprehensive statement of the first ground.

IV

The American Law Institute is now engaged in revising the Restatements of the Law, including the Law of Torts, with a view to publishing Restatements Second. This second series is designed to bring the original Restatements down to date, by taking into account developments which occurred since the publication of the original volumes, and by making such other changes as seem warranted on reconsideration of the original text.

In view of the general acceptance which the prima facie tort doctrine has won in this country since the publication of the first volume of the Restatement and in view of the Institute's acceptance of the principle in the specific areas covered in later volumes, it is submitted that full account be taken of the principle in revising Volume I. My suggestion is that Volume I should begin with an introductory statement of the general principle of liability for harm intentionally and unjustifiably inflicted, not as a self-executing rule of law, but as an underlying principle, giving unity to the existing law and furnishing a guide to its future development. This should be followed by a statement of the specific application of the principle in the chapter dealing with intentional invasion of interests in personality. As we have seen, there can be no substantial controversy about the soundness of a section stating as a rule of law that all bodily harm intentionally caused is actionable, in the absence of consent or privilege.

I further suggest that after this section, a comment or a new section should be added dealing with economic harm brought about through the instrumentality of bodily harm or the threat thereof, stating the rule broadly enough to include cases not falling within the traditional torts of trespass to the person. This might

(Footnote continued from preceding page.)

them branches which no longer were flowering. He made the statement with that general point of view in mind about the whole first part of Torts. Then we found when we had been talking about intentional infliction of dignitary or physical harm, that there was a whole area which we had not covered, and we tried to generalize later.

This meeting will have to talk in a year or two about how successful the original generalization was, and how we can make it better.

This is by way of explanation, of why there wasn't something in the statement of broad principles in the start of this, instead of toward the end. We didn't dare make them as we began this work. 34 ALI Proceedings 264-65 (type-written transcript, 1957).
well be adapted from the present section 870 and might provide in substance that any person who intentionally and unjustifiably caused harm "to the things owned by another or to the pecuniary interests of another," by means of interference with bodily security or personal freedom or the threat of such interference, is liable for the harm caused, in the absence of consent or privilege. This rule, too, I think should be non-controversial since the infliction of bodily harm or imprisonment is permissible only in very limited, well recognized situations and the problem of justification presents no real difficulty; the invasion of bodily security or threats thereof may not be used to serve economic ends.\textsuperscript{42}

The Restatement would then continue with a statement of the requirements of the traditional trespass torts, as a specification of the special circumstances under which recovery could be had without proof of actual harm. It would be useful to insert, after these sections, a caveat to the effect that if actual harm is intentionally caused in a situation in which one or more of the specified ingredients is lacking, it may nevertheless be possible for the injured person to recover under the sections restating the general principle of liability for intentionally inflicted harm. It would thus be made clear, as Professor Seavey has said, "that today these actions [trespasses to the person] are of importance only because harm is unnecessary."\textsuperscript{43} In this way, the trespass torts would be placed in their proper perspective within the framework of the general principle of liability for intentional wrong-doing.

\textbf{V}

Two proposed changes in the Restatement of Torts which were presented at the meeting of the American Law Institute in May, 1957, bear upon the problem here under consideration.

\textsuperscript{42} Restatement, Torts \$870, Illustration No. 3 (1934), is a good example of the application of the principle forbidding the infliction of bodily harm for the purpose of causing a pecuniary loss: "A is desirous of making a will in favor of B and has already prepared but has not signed such a will. Learning of this, C, who is the husband of A's heir, kills A to prevent the execution of the will, thereby depriving B of a legacy which otherwise he would have received. B is entitled to maintain an action against C."

There is a caveat following section 35 in the present Restatement leaving open the question of whether the defendant may be held liable for negligently "causing a confinement of such duration or character as to make the other's loss of freedom a matter of material value" but there is no caveat referring to the \textit{a fortiori} case of one who intentionally causes economic loss by means of such a confinement under circumstances not coming within the definition of false imprisonment. This may well be due to the fact that a general principle of liability in negligence had been evolved at the time of the drafting of the first volume of the Restatement but the Institute was not yet ready to state a general principle with respect to intentional wrong-doing.

The first change related to section 17 of the original Restatement. Section 17 reads: "The rules which determine an actor's liability for the infliction of bodily harm otherwise than by harmful bodily contact are the same as those stated in sections 13 to 16 [dealing with the nature of the defendant's act, the definition of bodily harm and the character of the defendant's intent], as determining liability for the infliction of a harmful bodily contact."

The meaning of this section is somewhat obscure but, if it is given a broad construction, it may well serve as a statement of the prima facie tort principle as applied to the subject of bodily harm. The language of the section is susceptible to this broad construction. The comment to section 17 indicates that the section was intended to cover all cases of bodily harm intentionally inflicted, whether they came within the traditional concept of battery or not.44

The broad construction suggested above is clearly supported by Comment a to section 279. The section deals primarily with causal relation but the first sentence of the comment reads: "As is in substance stated in §§13 to 17, the intentional causing of bodily harm to another subjects the actor to liability unless by the actor's consent or otherwise he is privileged to cause it." If this comment were placed in the black letter in place of section 17, it would be an adequate statement of the general principle as applied to bodily harm. This principle would cover all the hypothetical cases of bodily harm discussed above which did not fall within the traditional requirements of battery or false imprisonment but in which the liability of the defendant was clear. Thus it would cover the case of physical illness resulting from a threat of future injury and the case of aggravation of illness caused by the removal of necessary medicines or by blocking of one's access to a physician. It would also cover the case of the person who was not aware of his imprisonment but upon whom bodily harm was intentionally inflicted by means of the imprisonment.

In view of the usefulness of section 17, particularly if it is clarified and strengthened, it is indeed surprising that at the May, 1957, meeting of the American Law Institute, it was recommended that section 17 be eliminated. The Reporter's note to the Institute read in part: "So far as the Reporter and his

44. Section 17 did not appear in Tentative Draft No. 1 of the Restatement of Torts (1925) but there were other sections in the Tentative Draft, which were omitted from the final draft, which may have been intended to express the same idea. For example, section 1 of the Tentative Draft read in part as follows: "Causing bodily harm to another, unless privileged, subjects the one causing it to a liability to the other, if:

(a) except as stated in §10(2), it is directly or indirectly caused by an act done with the intention of bringing about bodily harm, an offensive touching or an apprehension of a harmful or offensive touching to the other or a third person, and except as stated in §5, it is not consented to by the other."
Advisers have been able to discover, this Section was intended to deal with the intentional infliction of emotional distress and its physical consequences, which is now covered in full in §46. . . . This Section is not an accurate statement of the present rule of law. No other application of it has been found. It is therefore omitted, at least until some reason for retaining it can be discovered."

The proposed omission was not brought up for discussion at the meeting of Institute but it was presumably approved sub silentio. It is submitted that the quoted note takes much too narrow a view of the function of section 17 and that the conclusion that the adoption of section 46 rendered section 17 unnecessary was ill-advised.

As is clear from Comment a to section 279 quoted above, the scope of section 17 is not limited to cases in which emotional distress is involved, which are dealt with in section 46. It covers all cases of bodily harm caused intentionally in a manner not coming within the traditional concepts of battery or false imprisonment. As has been pointed out, it covers the case of deprivation of medicine, food or drink, causing physical illness by means other than the infliction of emotional distress. Furthermore, the new tort of infliction of emotional distress under section 46 is a very limited one. Unless the conduct of the defendant is outrageous and unless the mental distress suffered by the plaintiff is severe, section 46 is not applicable. But if the mental distress resulted in physical illness which the defendant had intended to bring about, the defendant would be liable under the principle embodied in section 17, even though his conduct could not be characterized as outrageous or the plaintiff’s mental distress as severe.

In any event, the possible overlapping of section 17 and section 46 should not lead to a rejection of the principle of section 17. Sound analysis requires that the liability for intentionally inflicted physical harm should be clearly and forthrightly stated, despite the fact that liability in a particular case might be rested upon another ground as well. This is especially important in a Restatement which purports to cover the law of 48 states and the Federal jurisdictions. In some jurisdictions, the principle of section 46, insofar as it allows recovery for emotional disturbance alone, may not be accepted by the courts; they ought not to be left with the impression that, if they reject section 46, there is no basis for imposing liability for physical consequences intentionally brought about by means of emotional distress. The applicability to such a case of the principle of liability for intentionally inflicted harm ought to be clearly stated.45

45. Illustration No. 5 to section 870 of the Restatement of Torts is a good example of the usefulness of the general principle in jurisdictions rejecting (Footnote continued on following page.)
INTENTIONAL TORTS AND THE RESTATEMENT

It is submitted that section 17 should not only be retained but should be strengthened and clarified so as to state forthrightly the general principle of liability for all bodily harm intentionally and unjustifiably inflicted.\(^46\)

As has been suggested earlier, section 17 should also be supplemented by an additional section dealing with economic harms intentionally and unjustifiably caused by means of the infliction of bodily harm or the threat thereof in cases not coming within the traditional trespass torts. Such a section is necessary in order to provide a complete statement of the interrelation of the general principle of liability for intentionally inflicted harm with the traditional torts of battery and false imprisonment. The attention of the reader of the Restatement will thus be directed to the way in which the general principle supplements the traditional torts.

(B)

It was also proposed at the meeting of the Institute in May, 1957, that section 42 of the Restatement be amended. Section 42, in its original form read: "Under the rule stated in §35 [the definition of false imprisonment], there is no liability for intentionally confining another unless the person physically restrained knows of the confinement."

Dean Prosser, the Reporter for the Restatement of the Law of Torts Second, had expressed dissatisfaction with this section in an article published in 1955.\(^47\) Dean Prosser pointed out that section 42 rested upon one old English case of doubtful applicability and that a dictum in a later English opinion supported the contrary view.\(^48\) Much can be said for the proposition that an imprisonment brought about by barriers or physical force ought to be actionable without regard to consciousness of restraint on the part of the victim. If the tort is designed to protect one's actual freedom of movement against impairment, the tort is committed when one is confined whether he knows of it at the time or not. Upon this view, the tort of false imprisonment is like battery. One may be

(Footnote continued from preceding page.)

section 46 in whole or in part: "A beats B for the purpose of causing C, who is nearby, to sustain a severe shock. C suffers physical harm as a result of the shock. In a State in which there is ordinarily no recovery, for physical harm resulting from a shock produced by witnessing an assault on a third person, A is nevertheless liable to C."

46. While it may be true as the Reporter's note indicates, that no actual case has arisen illustrating the application of section 17 in situations not covered by section 46, the general principle is supported by cases dealing with analogous situations. The statement of the general principle thus comes well within the canons governing the formulation of the Restatement.

47. Prosser, False Imprisonment; Consciousness of Confinement, 55 COLUM. L. Rev. 847 (1955).

held liable in battery for offensively touching another, even though the victim is not aware of the touching at the time.\textsuperscript{49} On the other hand, if, as seems to be assumed by section 42, the tort is designed to protect one's \textit{sense} of freedom of movement against impairment, just as the tort of assault is designed to protect one's interest in freedom from \textit{apprehension} of attack, there is no tort if there is no consciousness of the restraint because in that case there is no interference with one's sense of freedom. The retention or the rejection of section 42 thus depends on the choice which is made between these two conflicting concepts.

Section 42 in the form in which it appears in the original Restatement is based upon the view that false imprisonment is like assault, rather than battery.\textsuperscript{49a}

In requiring a showing that the victim was conscious of restraint, section 42 is particularly objectionable as applied to infants of tender years or to mentally incompetent persons who are incapable of appreciating the difference between freedom and restraint. Under section 42, it is impossible to commit a false imprisonment with respect to such persons. The only American authorities on the point are contrary to the Restatement.\textsuperscript{50}

Partly influenced by these cases, Dean Prosser, in his article, recommended that the requirement of awareness of restraint be eliminated as an essential element of the tort of false imprisonment. He was particularly troubled by the fact that bodily harm might well occur in the course of a confinement of which the victim was unaware and he was strongly of the opinion that in such a case there ought to be a recovery for the actual harm. All the cases put by Dean Prosser in his article were cases in which the occurrence of the actual harm was the inevitable result of the defendant's act or in which the harm was substantially certain to follow. The harm must therefore be deemed to have been an intended

\textsuperscript{49}. \textit{Restatement, Torts} §18, comment e. (1934).

\textsuperscript{49a}. Section 51 of Tent. Draft No. 1 (1925) referred to the "right to freedom from conscious confinement." Professor Bohlen in Treatise No. 1 (a) gives the following rationale of section 42, at 128-29: "The interest of personality most analogous to the interest in freedom from confinement is that of freedom from apprehension of a harmful or offensive touching. Here, too, the gist of the injury done by the defendant is the effect of his conduct upon the mind of the plaintiff. If, as stated in section 29, there is no liability for putting another in apprehension of harmful or offensive touching unless the other is aware of the attempt to inflict such a touching upon him before it is frustrated or abandoned, it would seem that there can be no liability for even a complete restraint of another's liberty of locomotion unless the restraint is known to the other while it is still imposed. In such case the injury caused by the plaintiff's subsequent discovery that the defendant has attempted to restrain him creates only the same sort of mental disturbance as results from the subsequent discovery of an unsuccessful attempt to inflict a harmful or offensive touching upon him."

\textsuperscript{50}. Commonwealth v. Nickerson, 87 Mass. 518 (1862); Robalina v. Armstrong, 15 Barb. 247 (N.Y. 1852); Barker v. Washburn, 200 N.Y. 280, 93 N.E. 958 (1911).
result under accepted principles.\textsuperscript{51} He made no reference to the principle of liability for intentionally inflicted bodily harm embodied in section 17 of the Restatement under which a recovery might be allowed for the bodily harm, even though the tort of false imprisonment had not been made out under section 42. Confronted by a choice, upon his analysis, between allowing a recovery in all cases in which the person restrained was unaware of the restraint (including cases in which no harm had resulted) and a denial of recovery in all cases (including those in which actual harm had resulted), he decided that it was better on balance to allow a recovery in all cases and he therefore recommended that section 42 in its original form should be rejected and that it should be held that consciousness of restraint was not an essential element of the tort. "As in the case of battery, the cost of redress for such genuine torts may be that in a few instances, where the invasion of the plaintiff's interests is wholly inconsequential, nominal damages may be recovered. But the greater outweighs the less, and thus the rule should be changed."\textsuperscript{52}

However, the amendment to section 42 submitted by the Council of the Institute to the members for discussion at the meeting in May, 1957, did not follow the recommendation made by Dean Prosser in his article. The Council had apparently decided to take an intermediate position and to draw a distinction between cases in which harm had resulted and those in which it had not. It had apparently decided that the element of consciousness of restraint should be retained as an essential element of the tort but that provision should be made for recovery in the event that actual harm resulted from the imprisonment. This presented an ideal situation in which to apply the prima facie tort doctrine and to base the liability for the harm upon the principle that one who intentionally inflicts bodily harm without justification is liable therefor. This would have relieved the Institute of the necessity of making any change in section 42. It would only have been necessary to add a note with a cross-reference to section 17 as retained and clarified. However, as has been pointed out, the Council had theretofore decided to eliminate section 17.

The Council proposed that the problem should be dealt with by adding the words "or is harmed by it" at the end of section 42 so that the section would read: "Under the rule stated in §35, there is no liability for intentionally confining another unless the person physically restrained knows of the confinement, or is harmed by it."

\textsuperscript{51} The requirement of an intent to inflict harm does not necessarily mean that the act must have been done for the purpose of causing the harm. In a two-party situation (the actor and the victim) such as that presented in the false imprisonment cases, it is sufficient that the act which caused the harm is intentionally done, with knowledge of the fact that the harm was substantially certain to follow. See Restatement, Torts §13, comment d (1934).

\textsuperscript{52} 55 Colum. L. Rev. 947, 850 (1955).
This proposal was obviously a compromise and it had the defects inherent in a compromise. It attempted to adopt simultaneously two conflicting theories of the tort of false imprisonment.

As has been pointed out above, if consciousness of restraint is retained as an essential element of the tort of false imprisonment, this means that the tort is conceived of as one designed to protect one's sense of freedom of movement against impairment. Under this concept of the tort, there can be no false imprisonment if the person restrained is not conscious of the restraint, since his sense of freedom is not impaired. The occurrence of damage cannot fill in the gap; it is wholly irrelevant to the tort of false imprisonment, so conceived. An action may be maintained for the damage, if damage is intentionally caused by means of the imprisonment but it is not an action for the tort of false imprisonment.

On the other hand, if the tort is conceived of as one designed to protect one's actual freedom of movement as distinguished from one's sense of freedom, the tort of false imprisonment may be committed whether the victim knows of it or not. Under this concept, there can be a recovery of at least nominal damages regardless of the victim's awareness of the restraint and, if actual harm results from it, there can be a recovery for the harm as a consequence of the tort. As has been pointed out above, under this concept of the tort, it resembles the tort of battery more closely than the tort of assault.

In Comment a to the proposed amended section 42, there is a confusing shift to the battery analogy despite the fact that consciousness of restraint is retained as a basic element of the tort. The Comment reads: "False imprisonment resembles battery rather than assault, in that it is possible for a confinement to occur without the plaintiff being aware of it at the time." This reasoning should logically have led to a rejection of the requirement of consciousness of restraint in toto. The Institute escapes from this dilemma in the remainder of the comment by laying down a new rule that, if no harm results from the confinement, it is "not of sufficient importance to justify vindication by the recovery of nominal damages." While this view is in accord with the modern tendency to restrict actions for nominal damages, it should be borne in mind that we are here concerned with a trespass tort and it is the dominating principle of

53. Dean Prosser stated this with his usual clarity in his Law of Torts at page 49 (2d ed. 1955): "Since the interest is in a sense a mental one, resembling the apprehension of contact in the assault cases, the Restatement of Torts has taken the position that there can be no imprisonment unless the plaintiff is aware of it at the time, arguing that the right is one of freedom to go where he pleases, and until he is aware of restraint there is no interference with it."
the trespass torts that, if a trespass is committed, an action is maintainable, even though no actual harm resulted, for the recovery of at least nominal damages.\textsuperscript{54}

Section 35 of the Restatement, for which no amendment has been proposed, specifically provides that an act which causes the confinement of another "makes the actor liable to the other irrespective of whether harm is caused to any legally protected interest of the other." Section 35 also provides that consciousness of restraint is an essential element of the tort. Presumably, an amendment will be proposed to section 35 to make it conform to the amended section 42 but I believe that it will be found to be very difficult to rephrase section 35 so as to bring it into agreement with section 42, in view of the conflicting concepts embodied in that section.

The amendment to section 42 distorts the restatement of the elements of the tort of false imprisonment as a trespass tort. It obscures the fact that the principal purpose of stating the elements of the traditional trespass torts as separate categories of tort liability in a modern Restatement, is to specify the circumstances under which a recovery may be had without proof of damage. To say that damage is a substitute for one of the elements is confusing. In my judgment, it would be preferable, as I have indicated, to state the elements of the traditional trespass torts in one group of sections and to state in a separate section the general principle which allows one who has been actually harmed by the intentional and unjustifiable act of the defendant, to recover therefor.\textsuperscript{55}

\textsuperscript{54} Comment \textit{d} to section 18 of the Restatement makes it clear that there may be a recovery for battery even though no actual harm occurred.

\textsuperscript{55} This argument was presented at the meeting of the Institute by the writer: "This is a fundamental question, because in recent years there has been such enormous development of the basic and underlying concept of tort liability for intentionally causing damage, which is not stated explicitly in the Restatement at this stage, but appears only when you come to such matters as interfering with contractual relations.

But it seems to me that that underlying and important concept not only overrides the requirement of knowledge of confinement in the false imprisonment tort, but it overrides many of the other elements as well, as we state the specific elements of various trespass torts.

I would suggest for the Reporter's consideration an approach like this, that there be stated even before these trespass torts or in immediate context, a fundamental principle that anyone who intentionally causes actual damages is liable for it, and that it is not necessary in order to impose that liability that the case come within any of the technical requirements of assault, battery, or false imprisonment . . . .

It seems to me lacking in logic and in symmetry to say that causing of actual damage is a substitute for knowledge of confinement. It is a broader principle. The causing of actual damage is an independent basis of liability and should not be distorted as a substitute for one of the elements of one of these trespass torts.

To put the thing in another way, there has emerged in modern law a principle of liability for the causing of damage intentionally, which is wholly independent of any of the requirements of these torts which originally grew up to protect only dignitary interests. So we ought to have a separate statement—as we do have now—of the elements of those dignitary torts, and knowledge of

(Footnote continued on following page.)
As a matter of fact, there is no authority for the allowance of recovery in the Illustrations given by the Institute in connection with the amended section 42, except the general principles of liability for the intentional or negligent infliction of bodily harm. As the Reporter frankly recognizes in his Note to the amended section 42, there is no case holding that, while consciousness of restraint is essential to the tort of false imprisonment insofar as the recovery of nominal damages is concerned, it ceases to be a required element if actual damage is involved, and a recovery may then be had in false imprisonment, without regard to consciousness of restraint. The cases cited in the Note deal with the imprisonment of infants and mentally incompetent persons. Recovery was allowed in those cases, not because the court found that actual damage had occurred but because the court proceeded upon the assumption that no consciousness of restraint was required.

Once it has been determined that consciousness of restraint is an essential element of the tort, it is a contradiction in terms to say that, even though the victim was unaware of the restraint, he can recover in false imprisonment if actual harm occurred. By definition, the harm did not occur in the course of the tort of false imprisonment and recovery cannot be had on the ground that the harm was incidental to a tort. If a recovery is to be had, it must be, not for false imprisonment, but for the causing of bodily harm under the general principles imposing liability for the negligent or intentional infliction of bodily harm.

Finally, the proposed amendment to section 42 is a piecemeal approach to what is essentially a unitary problem. It deals only with one of the traditional elements of the tort of false imprisonment. What of the other elements of the traditional tort? Consider the cases discussed above where one or more of the...
other elements were lacking,—for example, where the confinement was not circumscribing but actual harm was intentionally caused; where the threat was of a future injury but actual illness was caused by the mere threat (in a jurisdiction which does not adopt the proposed section 40A)—recovery must be allowed in those cases as well as in the case of the harm intentionally caused to the unconscious victim. If the piecemeal approach adopted in the amendment to section 42 is followed, then each of the sections dealing with the other elements of the tort will have to be amended so as to provide that the intentional infliction of actual harm may be accepted as a substitute for the particular element.

Both in the interest of sound analysis and in the interest of comprehensiveness of treatment, the elimination of section 17 and the amendment to section 42 should be reconsidered. The chapters of the Restatement dealing with battery and false imprisonment should be re-examined in the light of the overriding general principle of liability for the unjustified and intentional infliction of harm. The trespass torts should be kept in proper perspective as the traditional torts for which a recovery can be had without proof of actual harm. The general principle which supplements these torts and allows recovery for actual harm, in cases which do not come within their technical requirements, should be given a central place in the Restatement.57

57. In the gathering and examination of the cases cited, I have had the assistance of Lauren Rachlin, Esq., of the Buffalo, New York, bar.