

TORT LIABILITY FOR THREATENING OR INSULTING WORDS

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In general, where words give rise to liability in tort, either alone or together with actions, it is because of their falsity. False words may cause pecuniary or other material loss to someone who hears them and acts in reliance on them, whether those words are uttered intentionally¹ or negligently;² and false words may also cause pecuniary loss to someone when they are spoken to a third party.³ False words may cause the hearer shock, resulting in physical harm, and liability will exist if this is the effect calculated by the speaker;⁴ and false words may cause injury to the reputation when communicated to a third party.⁵

In contrast, the mere *speaking* of words very seldom gives rise to liability in tort. Words may not be false, but they may threaten or provoke physical violence or they may injure the dignity; in neither case, according to orthodox principles, does liability result. The law confirms the old adage that sticks and stones may break one's bones, but words will never hurt.

It is the object of this article to examine this rule about non-liability for the speaking of words. We shall consider two separate situations:

- 1) where the words threaten imminent physical violence on the hearer's person and so possibly provoke physical retaliation — this involves a consideration of the tort of assault and its limits;
- 2) where the words do not threaten imminent physical violence, and may or not provoke retaliation, but certainly cause injury to the dignity.

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¹ *I.e.*, the tort of deceit.

² *I.e.*, *Hedley Byrne & Co. v. Heller & Partners*, [1964] A.C. 465; in England see also Misrepresentation Act 1967, c. 7, s. 2(1).

³ *I.e.*, the tort of injurious falsehood.

⁴ *Wilkinson v. Downton*, [1897] 2 Q.B. 57.

⁵ *I.e.*, the tort of defamation.

I. *Threatening Words: Assault.*

(1) *Assault and its Rationale.*

A primary concern of any system of law must be to impose a measure of public order among the citizens. Physical violence must be punished, or better still prevented; by the provision of adequate legal remedies, people must be encouraged to settle their disputes peaceably — in court — and discouraged from taking the law into their own hands. Today, we would view keeping the peace as the task of the criminal law; but in the early days, the law did not make nice distinctions between criminal and civil liability; and, in any case, the most effective safeguard against resort to violence was the provision of a private remedy by means of which the injured person could obtain compensation from the wrongdoer.

It was for these reasons that, in early English law, first the local courts and then the royal courts developed two separate private remedies — battery, by means of which redress could be obtained for any hostile contact with the person of another, and assault, which covered any act by which that person was put in apprehension of a hostile contact.⁶ These remedies appear very early on,⁷ and it is clear that the reason for their existence was the need to promote public order.⁸

⁶ See S. F. C. Milsom, *Historical Foundations of the Common Law* (1969), pp. 244-270; *Trespass from Henry III to Edward III* (1958), 74 L.Q. Rev. 195, 407, 561.

⁷ See Milsom, *Trespass from Henry III to Edward III*, *op. cit.*, *ibid.*, at p. 207, showing that battery is first found in the Plea Rolls in 1237, and assault in 1255. The first assault case reported in the Year Books is *I. de S. et ux. v. W. de S.* (1348), Y.B. 22 Ass. 99, 60.

⁸ There is some suggestion that assault originated as attempted battery, and that the notion of apprehension developed only later. The suggestion arises particularly with respect to criminal assault, which Hawkins defined as "An attempt or offer, with force and violence, to do a corporal hurt to another." Hawkins P.C. (3rd ed., 1739), vol. i, p. 134; see R. M. Perkins, *An Analysis of Assault and Attempts to Assault* (1962), 47 Minn. L. Rev. 71. There has certainly been confusion between the two concepts, illustrated by oft-repeated statements like "Every battery involves an assault"; Hawkins, *op. cit.*; East, P.C. (1803), vol. i, p. 406; and see *R. v. Baker* (1844), 1 C. & K. 254; *R. v. James* (1844), 1 C. & K. 530, and, in the United States, *Chapman v. State* (1887), 78 Ala 463; but it is submitted that J. W. C. Turner has conclusively proved that criminal assault, like civil assault, has always been based on apprehension: see J. W. C. Turner, *Assault at Common Law* (1939), 7 C.L.J. 56, reprinted in *Modern Approach to Criminal Law* (1948), p. 344.

Of these two, assault is the one which interests us here.^{8A} Assault is exceptional in nature because it allows a person to recover damages not for any material harm suffered (and battery and the other trespass torts contemplated, in the main, material physical harm) but for a purely mental reaction — the apprehension of imminent physical contact. In the modern law, when criminal sanctions are a sufficient deterrent to physical violence, it may seem odd that a civil remedy is available to a person who apprehends imminent personal violence, when such apprehension has eventually proved to be unfounded; but in mediaeval conditions it was obviously useful, in addition to outlawing actual violence on the person of another, to proscribe *threats* of such violence.

This policy of proscribing threats of violence found expression not only in the action for assault, but in another rule. A person who apprehended an imminent hostile contact might not wait to see whether his apprehension was well-founded, but immediately take retaliatory action. The law recognized that a person in this position had a defence to an action for battery — apprehension of a blow justified retaliation because, in the words of the court in an early case allowing this defence, "Perhaps it will come too late afterwards".⁹

The tort of assault thus owes its origin to the need to preserve public order. This justification is now obsolete, in view of the development of a separate body of criminal law which achieves this purpose. Why should a civil remedy for assault still exist?

This question cannot be answered without taking into account not only the ordinary case where the victim of the assault is the plaintiff who has sued following an apprehension of imminent contact, but also the case where the victim of the assault has retaliated and become the defendant in an action for battery. It

^{8A} It is still the practice in England, when dealing with tort liability (though not in criminal law), to differentiate between assault and battery and reserve the word "assault" for the causing of an apprehension of bodily contact. This is the sense in which the term is used in this article. In *Gambriell v. Caparelli* (1974), 7 O.R. (2d) 205, the court contrasted the English position with that in Canada, where, it said, the distinction between assault and battery had been blurred, and that it was now common, even in relation to the civil law, to speak of assault as including a battery. In *Fillipowich v. Nahachewsky* (1969), 3 D.L.R. (3d) 544 the court had taken a similar view, holding that the distinction between assault and battery was important only where the acts in question fell short of actual physical contact.

⁹ *Chapleyn of Greye's Inn's Case* (1400), Y.B. 2 Hen. IV 8, 40.

still seems reasonable to allow a person to retaliate when a blow is apprehended but before it is struck; it may not always be reasonable to allow an award of damages for an apprehension which proves unfounded.¹⁰ The courts seem to have recognized this, for substantial damages are allowed only where it would not have been prudent to retaliate, as where the defendant is armed with a gun or other deadly weapon,¹¹ or where it would not be seemly, as for example where the assault was committed in a church;¹² in most other cases courts award nominal or even contemptuous damages.¹³

So assault, though the product of conditions which have now ceased to exist, still has a valuable function to perform in some cases. So far, however, we have been dealing with threatening actions. We must now see to what extent, if any, there can be liability in assault for the speaking of words.

(2) *Words and Assault.*

Words may be very relevant in determining liability in assault, in that they may characterize apparently hostile conduct as innocent, or vice-versa; but, according to the orthodox view, words by themselves cannot amount to an assault.

A few words on the function of words in explaining conduct are in order before returning to the general rule about words. First, a movement which would otherwise amount to an assault may be explained away by words preceding or accompanying it which make it clear that the actor acted only in jest, or that the threat is only for the future. A leading example is *Turberville v. Savage*,¹⁴ where the plaintiff put his hand on his sword and said to the defendant, "If it were not assize time I would not take such language from you", whereupon the defendant struck the plaintiff and put out his eye. It was held that the plaintiff's

¹⁰ See J. A. Weir, *Casebook on Tort* (3rd ed., 1974), p. 255. Mr. Weir was my Ph.D. supervisor at Cambridge, and my thoughts on this particular point, and on some others in this section, were originally inspired by discussion with him.

¹¹ E.g., *I. de S. et ux v. W. de S.* *supra*, footnote 7 (hatchet); *R. v. St. George* (1840), 9 C. & P. 483 (Eng.); *Bruce v. Dyer* (1966), 58 D.L.R. (2d) 211, *aff'd* (1970), 8 D.L.R. (3d) 592n (Can.) (firearms).

¹² *Inglefield v. Merkel* (1873), 9 N.S.R. 188.

¹³ E.g., *Stephens v. Myers* (1830), 4 C. & P. 349 (a shilling); *Read v. Coker* (1853), 13 C.B. 850 (a farthing); *Osborn v. Veitch* (1858), 1 F. & F. 317 (a farthing).

¹⁴ (1669), 1 Mod. 3.

conduct did not amount to assault, so justifying the defendant's battery, since he had clearly said that he would not strike the defendant because the judges were in town. However, it is not true on the basis of this ruling to say that no conditional threat can amount to assault¹⁵ — it all depends on the nature of the condition imposed.¹⁶ In *Turberville v. Savage*, the condition referred to a totally extraneous matter — if it were not assize time — which the defendant knew not to be fulfilled. In other cases the condition imposed related to the plaintiff's future conduct. Where there is no right to impose the condition — as where someone is told that he will be hit if he moves¹⁷ — the defendant will be liable in assault; but where the defendant has a right to impose the condition his conduct should not amount to an assault. These principles are supported by American authority¹⁸ and have been adopted in the *Restatement of Torts*;¹⁹ English law, however, adds a further qualification, that an assault is committed where someone demands something to which he has a legal right by a threat, if the threat is an improper way of enforcing that right. This stems from *Read v. Coker*,²⁰ in which assault was held to be committed where the defendant, who had taken over the plaintiff's premises, ejected him by gathering his workmen and threatening to break the plaintiff's neck if he did not go. This case is open to criticism — though no more than reasonable force should be used to eject trespassers, it does not necessarily follow that a threat of extreme force should be unlawful.²¹

It is equally possible that conduct which is innocent in itself may be preceded or accompanied by words which lend it a hostile character. The majority of the cases on this point deal with immoral suggestions to women.²² In accordance with general

¹⁵ As was argued in *U.S. v. Richardson* (1837), 5 Cranch C.C. 348 (U.S.A.) and *Police v. Greaves*, [1964] N.Z.L.R. 295 (N.Z.).

¹⁶ This was recognized as early as 1459 by Prisot J. in *Paston v. Ledham* (No. 2) (1459), Y.B. 37 Hen. VI 19, 8. See *infra*.

¹⁷ *Blake v. Barnard* (1840), 9 C. & P. 626 (Eng.); *Police v. Greaves*, [1964] N.Z.L.R. 295 (N.Z.).

¹⁸ *State v. Myerfield* (1867), 61 N.C. 108.

¹⁹ *Restatement of Torts Second* (1965), s. 30.

²⁰ *Supra*, footnote 13.

²¹ G. L. Williams, *Assault and Words*, [1957] *Crim. L. Rev.* 219, at p. 221.

²² See Annotation, *Indecent Proposals to Women as Assault* (1950), 12 A.L.R. 2d 971.

principle, the suggestion alone does not amount to an assault;²³ but an assault will be committed where there is some overt act in execution of the threat, as in *Fogden v. Wade*,²⁴ where the defendant stepped out of the darkness and said to a WAAF girl walking up to her hostel, "Don't go in yet, you've got time for a quick one"; and in *Newell v. Whitcher*,²⁵ where the defendant at night entered the room of a blind girl and, leaning over the bed, repeatedly urged her to have sexual intercourse with him. Only two cases depart from these principles and hold that words alone are sufficient; both are North Carolina cases involving indecent proposals by negroes to white women.²⁶

Our main interest, however, is in words unaccompanied by actions. The traditional view is that the mere speaking of words can never give rise to liability for assault. This was the view expressed by ancient authorities such as Hawkins:²⁷ "It seems agreed at this day, that no words whatsoever can amount to an assault"; in the United States, this view was incorporated in the original *Restatement of Torts*.²⁸

The judicial authority for the rule is in fact weaker than might be expected. In England and the Commonwealth the case usually relied on as supporting the proposition is *R. v. Meade and Belt*.²⁹ In this case the Scarborough boatmen, who had threatened to pull the defendant's house down, came by night and surrounded the house, singing menacing songs and using violent language. The defendant fired a pistol into the crowd and killed a boatman. Holroyd J. told the jury that any force used in retaliation had to be reasonable, and attacking the man's house at night might constitute assault, "But no words or singing are equivalent to an assault, nor will they authorize an assault in return". The jury convicted. Holroyd J's statement is really only *obiter dictum*, but it has been followed in subsequent cases which seem to regard it as concluding the matter.³⁰ So, a very important rule has been erected on "little more than a direction to a jury".³¹

²³ *Prince v. Ridge* (1900), 66 N.Y.S. 454; *Reed v. Maley* (1903), 74 S.W. 1079 (Ky); *Davis v. Richardson* (1905), 89 S.W. 318 (Ark.).

²⁴ [1945] N.Z.L.R. 724.

²⁵ (1880), 53 Vt 589.

²⁶ *State v. Williams* (1923), 120 S.E. 224 (N.C.); *State v. McIver* (1949), 56 S.E. 2d 604 (N.C.).

²⁷ *Op. cit.*, footnote 8.

²⁸ *Restatement of Torts*, s. 21(1), and see also s. 31.

²⁹ (1823), 1 Lew. 184.

³⁰ *E.g.*, *R. v. Byrne*, [1968] 3 C.C.C. 179.

³¹ *Williams, op. cit.*, footnote 21, at p. 223.

Given the weakness of this authority it is surprising that more has not been made of cases supporting the contrary view. In *R. v. Wilson*,³² Lord Goddard C.J. said that the words "Get out knives" would themselves be an assault, and this authority seems at least as strong as the dictum as Holroyd J. Further, in a recent Australian case, *Barton v. Armstrong*,³³ it has been held that threats to attack and kill the plaintiff were an assault, even though the threats were delivered over the telephone and the threatener was some distance away. This case seems inconsistent with the accepted notion of assault as involving apprehension of imminent contact — but the contrast between the position there taken and the accepted rule about words remains striking.

In the United States, the case regarded as the leading authority, *State v. Davis*,³⁴ simply adopts the statement of Hawkins quoted earlier,³⁵ and later American cases reiterate this principle.³⁶ In Canada, again, the statement of Hawkins has been accepted as sufficient authority for the view that words cannot amount to an assault or justify an assault or battery in retaliation;^{36A} and modern cases simply accept this principle without question.^{36B}

The judicial authority for the rule is thus rather less than compelling. The rule must stand or fall, not on the authorities, but on principle. Can this rule be justified in principle?

Assault, as has been said, originated as a remedy designed to assist in the keeping of the peace. In such circumstances the reluctance of the courts to attempt to deal with threatening words as well as with threatening actions is very understandable. In the words of Prosser:³⁷

³² [1955] 1 W.L.R. 493, at p. 494. Cf. the same judge in *Fairclough v. Whipp*, [1951] 2 All E.R. 834, at p. 834.

³³ [1969] 2 N.S.W.R. 451.

³⁴ (1840), 23 N.C. 125.

³⁵ *Supra*, text and footnote 27.

³⁶ See *Prince v. Ridge*, *supra*, footnote 23; *Kramer v. Ricksmeier* (1913), 139 N.W. 1091 (Ia); *Brooker v. Silverthorne* (1918), 99 S.E. 350 (S.C.); *Johnson v. Sampson* (1926), 208 N.W. 814 (Minn.); *Continental Casualty Co. v. Garrett* (1935), 161 So. 753 (Miss.); *Cucinotti v. Ortman* (1960), 159 A. 2d 216 (Pa).

^{36A} See *Evans v. Bradbury* (1915), 25 D.L.R. 611.

^{36B} *Soon v. Jong* (1968), 70 D.L.R. (2d) 160; *Fillipowich v. Nahachewsky* *supra*, footnote 8A.

³⁷ W. L. Prosser, *Torts* (4th ed., 1971), p. 40.

In the early days the King's courts had their hands full when they intervened at the first threatening gesture, or in other words, when the fight was about to start; and taking cognizance of all the belligerent language which the foul mouths of merrie England could dispense was simply beyond their capacity.

Now that other justifications must be found for the existence of a civil remedy for assault, we must find a different reason for the rule of non-liability for words. It has been suggested that words are not assault because words do not justify retaliation by the hearer;³⁸ but this reason is never mentioned in the cases — and, as we shall see, in certain special circumstances a remedy for words has been provided precisely because the words are likely to provoke physical violence.³⁹

In fact, words may cause a person an apprehension as great as the gestures that constitute assault. The rule about words would mean that there could never be an assault in darkness, when the plaintiff can only hear menacing words spoken — what if the WAAF girl in *Fogden v. Wade*⁴⁰ had not seen the man in the darkness moving towards her? Furthermore, there are cases where the plaintiff may be severely frightened by threats made by a defendant who stands completely motionless. There could not be a better illustration of this than *Cucinotti v. Ortman*,⁴¹ where the defendants, showing blackjacks,⁴² threatened the plaintiffs with physical harm, as a result of which they became ill. It was held that there was no liability in assault, since there was no gesture or movement capable of being an assault.

It seems illogical in cases such as this to make the matter turn on whether some slight movement accompanies the verbal threat, when in each case the gist of the harm is the verbal threat. While it seems valid to deny recovery for mere verbal abuse, there would seem to be a distinction between mere verbal abuse and words which produce an apprehension of imminent contact. As Prosser says:⁴³

The only valid reason that words do not amount to an assault is that ordinarily they create no reasonable apprehension of imminent contact.

³⁸ Weir, *op. cit.*, footnote 10.

³⁹ *Infra*.

⁴⁰ *Supra*, footnote 24.

⁴¹ *Supra*, footnote 36. See W. A. Seavey, Threats Inducing Emotional Reactions (1960), 39 N.C.L. Rev. 74.

⁴² Leather-covered clubs with weighted heads and pliant shafts.

⁴³ *Op. cit.*; cf. H. Street, Torts (6th ed., 1976), p. 22.

But they may do so; and when they do, there should be no less of an assault than when the defendant shakes his fist. It may be suggested that a perfectly motionless highwayman, standing with his pistol pointed and his finger on the trigger, who cries "Stand and deliver!" or even merely appears to the plaintiff's view, commits an assault. It is the immediate physical threat which is important, rather than the manner in which it is conveyed.

This view illustrates a growing body of opinion in favour of allowing recovery in assault for words which, together with other acts or circumstances, do cause an apprehension of imminent contact. Such a view has now won acceptance in the United States; section 31 of the *Restatement Second* reads:

Words do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person.

The English courts should not be afraid to follow suit, when an appropriate opportunity arises.

The Menace Cases.

The statement of Hawkins quoted earlier,⁴⁴ that mere words do not amount to an assault, was prefaced with the words "Notwithstanding the many ancient opinions to the contrary". The "ancient opinions" to which he refers are a series of cases in the *Year Books* giving an action for a "menace". Do these old cases in fact controvert the traditional rule that words do not amount to an assault and are therefore not actionable? One very distinguished modern writer, Glanville Williams, certainly thinks so:

In medieval times there existed a special form of trespass for menaces, which was regarded as a kind of writ of assault though it lay for mere words. "Menaces" meant threats of immediate injury, whether coupled with a condition or not. This action has not only failed to make an entry into the modern works on tort and crime but is not even noticed in the legal histories. There is, however, no reason to suppose that it could not be successfully revived.⁴⁵

With the greatest respect, the present writer doubts whether such a cause of action can be read into these old cases. Some of them are actions for assault and battery in which a "menace" is alleged in the pleadings⁴⁶ — here it is plain that the word "menace" is just an embellishment. Other cases are actions for a menace proper, that is, a case where no assault is involved; but

⁴⁴ *Supra*.

⁴⁵ Williams, *op. cit.*, footnote 21, at p. 224.

⁴⁶ *E.g.*, (1357), Y.B. 30 Ass. 176, 14.

they are all cases involving financial loss. One group consists of menaces to third parties, causing them to depart from their tenancies or duties, or to cease to trade, to the damage of the plaintiff⁴⁷ — these are ancestors, not of assault, but of that form of intimidation consisting of threats against third parties damaging the plaintiff's trade.⁴⁸ The other group of cases deals with menaces of the plaintiff directly causing him financial loss⁴⁹ — these too are ancestors of intimidation.^{49A} Menaces alone are not sufficient for liability; in a case in 1468 Danby J. expressly stated that menaces were not actionable without some special damage,⁵⁰ and this was confirmed by Blackstone:⁵¹

[Injuries affecting the limbs or bodies of individuals] may be committed by threats and menaces of bodily hurt, through fear of which a man's business is interrupted. A menace alone, without a consequent inconvenience, makes not the injury; but, to complete the wrong, there must be both of them together. The remedy for this is in pecuniary damages.⁵²

The major case cited by Williams in support of his view⁵³ is *Paston v. Ledham*,⁵⁴ which brought together two famous

⁴⁷ *Mill v. Pickard* (1312), Selden Society, Select Cases on the Law Merchant (1908), i, pl. 91 (traders at fair); (1356), Y.B. 29 Edw. III 18B (traders at fair); Anon. (after 1401), Selden Society, Select Cases in Chancery (1896), pl. 51 (tenants); (1471), Y.B. 10 Edw. IV 6, 15 (tenants); (1475), Y.B. 14 Edw. IV 7, 13 (tenants); *Conesby's Case* (1494), Y.B. 9 Hen. VII 7, 4 (tenants); (1505), Y.B. 20 Hen. VII 6, 15, per King J. (tenants); *Garret v. Taylor* (1612), Cro. Jac. 567 (mason's customers).

⁴⁸ See Street, *op. cit.*, footnote 43, p. 356.

⁴⁹ Anon. (1200), Selden Society, Select Civil Pleas (1889), i, pl. 7; (1338), Y.B. 11 Ass. 32, 21; (1354), Y.B. 27 Ass. 134, 11; (1444), Y.B. 22 Hen. VI 48, 5; (1468), Y.B. 7 Edw. IV 24, 31; Brooke, Abridgment, Trespass 388.

^{49A} See Street, *op. cit.*, footnote 43, pp. 355-356.

⁵⁰ (1468), Y.B. 7 Edw. IV 24, 31; see also *Browne v. Hawkins* (1478), Y.B. 17 Edw. IV 3, 2, per Fairfax J. Nedham J. and Billing C.J. doubted whether an action would lie even where economic loss resulted.

⁵¹ W. Blackstone, Commentaries (15th ed., 1809), vol. iii, pp. 119-120.

⁵² American cases agree with the conclusions here reached. See *Brooker v. Silverthorne*, *supra*, footnote 36, citing this passage from Blackstone; *Grimes v. Gates* (1873), 47 Vt 594.

⁵³ Of Williams' other authorities (1354), Y.B. 27 Ass. 134, 11 (not 22 as cited by Williams) and Brooke, Abridgment, Trespass 388 have been explained above; and I have not been able to discover the relevance of Fitzherbert, Abridgment, Trespass 143.

⁵⁴ (No. 1) (1459), Y.B. 37 Hen. VI 2, 4; (No. 2) (1459), Y.B. 37 Hen. VI 19, 8.

antagonists of the fifteenth century.⁵⁵ Paston called Ledham a traitor, and Ledham replied that if Paston would bring an appeal of treason against him he would have to defend himself to the death of one of them. Paston thereupon sued Ledham. The judges had a long discussion on the question of whether Ledham should have spoken as he did before Paston actually brought the appeal, and eventually held, by a majority, that Ledham was not liable. This discussion based on the words spoken by Ledham, and the fact that no actions are mentioned in the report which can be construed as assaults in the modern sense, may suggest that the court contemplated the possibility of recovery for the speaking of threatening words; but it is suggested that the true explanation is that one or both parties made a threatening gesture which is not mentioned in the report. This impression comes over most strongly from the judgment of Prisot J., who is making the point (made earlier) that an assault may still be actionable even though it is qualified by a condition, if the condition is one which the speaker had no right to impose — it is clear that he is speaking of a situation where words are accompanied by threatening acts. He then gives another example, of a man who utters threats to another in a court or church, whereupon the other says that if the first will go outside and repeat what he said the other will strike him. To modern eyes this is not an assault, in the absence of a threatening gesture; and Prisot J. takes a similar view, saying:

For such words no appeal is given by our law, and consequently there can be no defence; for such matter belongs to the Constable and Marshall⁵⁶ and he determines it by the civil law, of which we cannot take notice.

He seems to be excluding the possibility of an action for words alone. Two other points also support this argument: first, all the judges talk of assault — no judge mentions the word “menace”, which appears only in the writ and in the plea of not guilty; second, it is strange that, if this was an action for mere words, nobody has tried to use the case as the basis of an argument in a subsequent case. Further, one would have thought it very strange that, in 1459, two deadly enemies should confront each other and say such things without making some threatening gesture. *Paston v. Ledham* cannot support William’s argument for the rediscovery of the menace cases as an action for mere words.

⁵⁵ See the Paston Letters, e.g., letter of William Paston II to John Paston I in late July 1454: N. Davis, *The Paston Letters* (World’s Classics ed., 1963), p. 38.

⁵⁶ See *infra*.

II. *Insulting Words.*

We have seen that where words give the hearer good reason to fear imminent physical violence being visited upon his person, there are persuasive arguments in favour of giving him a right to recover damages, and to retaliate without incurring liability. What, however, if the element of threatened violence is absent — does any other possible justification for imposing liability exist? We shall see that in fact there may be two possible justifications — the preservation of public order and the enforcement of a standard of respectful treatment to be observed by the servants of public authorities. In general, however, no liability exists for the mere speaking of insulting words.

(1) *The General Rule.*

The common law has always denied liability for insulting words; the reasons for this are easily found. The law does not seek to impose universal peace of mind; it would be most undesirable — and, indeed, impossible — to intervene every time someone gives vent to his feelings with a stream of abusive language, or is guilty of inconsiderate conduct. Prosser makes this point in characteristic fashion:⁵⁷

There is no occasion for the law to intervene with balm for wounded feelings in every case where a flood of billingsgate is loosed in an argument over a back fence. The plaintiff must necessarily be expected and required to be hardened to a certain amount of rough language, and to acts that are definitely inconsiderate and unkind. There is still, in this country at least, such a thing as liberty to express an unflattering opinion of another, however wounding it may be to his feelings; and in the interest not only of freedom of speech but also of avoidance of other more dangerous conduct, it is still very desirable that some safety valve be left through which irascible tempers may blow off relatively harmless steam.

Another reason which has been put forward is the danger of trivial, fictitious and vexatious claims. This is a hardy perennial, as far as the area of mental distress is concerned; it would be wrong to allow this principle to defeat all claims involving mental distress and its consequences, and indeed the courts have not allowed anything like this to happen; yet, as regards mere indignities and the proper limits of legal liability, the principle has a grain of truth. To quote Prosser again:⁵⁸

When a citizen who has been called a son of a bitch testifies that the epithet has destroyed his slumber, ruined his digestion, wrecked his

⁵⁷ Prosser, *op. cit.*, footnote 37, p. 54.

⁵⁸ *Ibid.*

nervous system, and permanently impaired his health, other citizens who on occasions have been called the same thing without catastrophic harm may have legitimate doubts that he was really so upset, or that if he were his sufferings could possibly be so reasonable and justified under the circumstances as to be entitled to compensation.⁵⁹

The case law on both sides of the Atlantic accordingly refuses recovery for insulting language or hurt feelings. In England — and indeed in the Commonwealth — it has long been recognized that mere insult or vulgar abuse does not amount to defamation,⁶⁰ providing that the words are understood by hearers as such and not in any defamatory sense;⁶¹ and that insulting threats, without more, give rise to no liability in assault.⁶² The attitude in the United States is exactly the same. The older cases hold that insulting language amounts neither to assault (words not being sufficient for assault)⁶³ nor to slander.⁶⁴ More modern cases have to take into account the existence of the United States tort of intentional infliction of mental distress by outrageous conduct;⁶⁵ thus the more modern cases tend to say that there is

⁵⁹ A good example is *Halliday v. Cienkowski* (1939), 3 A. 2d 372 (Pa), where the plaintiff sued for shock and headaches necessitating a visit to Ireland to see her mother and the sale of her house at a sacrifice to move from the neighbourhood — all on account of being called a "Scotch bitch", a "bastard" and a "bum" by her next door neighbour. She did not recover damages.

⁶⁰ *Penfold v. Westcote* (1806), 2 B. & P. (N.R.) 335; *Thorley v. Lord Kerry* (1812), 4 Taunt. 355, per Lord Mansfield C.J., at p. 365: "For mere general abuse spoken, no action lies."; *Parkins v. Scott* (1862), 1 H. & C. 153; *Fields v. Davis* (1955), Times, 25th May, C.L.Y. 1543 (Eng.); *Johnston v. Ewart* (1893), 24 O.R. 116 (Can.); *Hodgson v. Bulpit* (1880), 6 V.L.R. 440 (Aust.).

⁶¹ See P. H. Winfield & J. A. Jolowicz, *Tort* (10th ed., 1975), p. 250; Street, *op. cit.*, footnote 43, p. 292. See the discussion in *French (Oscar) v. Smith*, [1923] 3 D.L.R. 902; *French (Elizabeth) v. Smith*, [1923] 3 D.L.R. 904; *Falconer v. Hill* (1975), 62 D.L.R. (3d) 745.

⁶² See *supra*. In *Lane v. Holloway*, [1968] 1 Q.B. 379, it was held that abusive words did not give the hearer the right to attempt to strike a blow. The same principle has been accepted in several Canadian cases: *Short v. Lewis* (1834), 3 O.S. 385; *Evans v. Bradbury*, *supra*, footnote 36A; *Soon v. Jong*, *supra*, footnote 36B.

⁶³ *Kramer v. Ricksmeier*, *supra*, footnote 36; *Republic Iron & Steel Co. v. Self* (1915), 68 So. 328 (Ala); *Brooker v. Silverthorne*, *supra*, footnote 36.

⁶⁴ *Republic Iron & Steel Co. v. Self*, *ibid.*; *Walker v. Tucker* (1927), 295 S.W. 138 (Ky); *Larson v. R. B. Wrigley Co.* (1931), 235 N.W. 393 (Minn.); *Flowers v. Price* (1939), 3 S.E. 2d 38 (S.C.); *Bartow v. Smith* (1948), 78 N.E. 2d 735 (Ohio).

⁶⁵ See Prosser, *op. cit.*, footnote 37, pp. 49-62. This tort has been developed from *Wilkinson v. Downton*, *supra*, footnote 4, the need for physical harm having been jettisoned.

no liability for insulting conduct because it fails to reach this higher standard.⁶⁶

(2) *Liability Imposed to Preserve Public Order.*

This, then, is the general rule. Where exceptions to this rule have been created, they are due, in the main, to the need to preserve public order.

We have seen that, even though at one time, before the separation of criminal and civil liability, the law used civil remedies for the purpose of enforcing public order, the common law never went as far as to make a person civilly liable for the mere speaking of threatening words. After the separation of civil and criminal liability, enforcing public order became the task of the criminal law. To this end, most common law jurisdictions have statutes creating criminal offences of threatening abusive or insulting words or conduct calculated to cause a breach of the peace,⁶⁷ and magistrates' courts usually have powers to bind a person over to keep the peace or be of good behaviour.⁶⁸ In such circumstances one would have thought that no civil remedy for threatening words would be needed. However, in various places at various periods, there has been a need for a civil remedy to deal with verbal threats. It is interesting that some of the Saxon codes which antedated the common law saw fit to provide money penalties for verbal insults, as part of the attempt to keep the peace.⁶⁹ Even after the emergence of the common law, with its general rule about words, civil actions for words have existed *outside* the common law. In the seventeenth century, the English Court of Chivalry created a civil remedy for scandalous words,

⁶⁶ *Wallace v. Shoreham Hotel Corp.* (1946), 49 A. 2d 81 (D.C.); *Slocum v. Food Fair Stores of Florida* (1958), 100 So. 2d 396 (Fla); *Browning v. Slenderella Systems of Seattle* (1959), 341 P. 2d 859 (Wash.).

⁶⁷ In England, see Public Order Act 1936, 1 Edw. 8 & 1 Geo. 6, c. 6, s. 5, as am. by Public Order Act 1963 and Race Relations Act 1965, 11-12 Eliz. 2, c. 52, s. 7. There is no equivalent provision in the Canadian Criminal Code.

⁶⁸ In England, see Magistrates' Courts Act 1952, 15-16 Geo. 6 & 1 Eliz. 2, c. 55, s. 91. In Canada see Criminal Code, ss 637, 717.

⁶⁹ See Laws of Hlothhere and Eadric, c. 11 (F. L. Attenborough, *Laws of the Earliest English Kings* (1963), pp. 20-21); Laws of Alfred, c. 32 (*ibid.*, pp. 76-77). It is interesting that most of the present article was written in Attenborough's study, the room occupied by the present writer in the Leicester University Law Faculty's former building, which was Attenborough's residence when he was Principal of the University College of Leicester.

to prevent duelling;⁷⁰ and similar social conditions in parts of the United States led to the creation of a statutory civil remedy for insulting words. In other cases, statutes creating a criminal offence of insulting words have been held to give rise to a civil action.

(a) *England.*

Although the common law gave no remedy for the mere speaking of words, there was a possibility of recourse to the jurisdiction of the Court of Chivalry — for some people at least.⁷¹ The Court of Chivalry was a court with a civil law, not a common law, jurisdiction — it was a prerogative court set up in the Middle Ages with jurisdiction in military matters. As *Prisot J.* hinted in *Paston v. Ledham*,⁷² even in the Middle Ages the court might have some jurisdiction in cases where words were spoken which had a tendency to incite others to violence, and in the seventeenth century the court greatly extended its jurisdiction, as part of an attempt by the authorities to stamp out duelling.⁷³ This jurisdiction formed the major part of its work in the years 1630-1641, and was the reason for the suspension of the court by the Long Parliament on the instigation of Edward Hyde, later Earl of Clarendon. From 1687 it assumed this jurisdiction again, until it was questioned in *Chambers v. Jennings*⁷⁴ in 1703, when the Court of King's Bench held that the jurisdiction did not exist. The Court of Chivalry itself ceased to exist after 1737, except for an isolated reappearance in 1954 in a heraldic matter.⁷⁵

⁷⁰ Duelling was still very much in the minds of the judges in the nineteenth century. In *Merest v. Harvey* (1814), 5 Taunt. 442 (an action for trespass to land, involving hunting on the land and using intemperate language) Heath J. said: "It goes to prevent the practice of duelling if juries are permitted to punish insult by exemplary damages." See also *Sears v. Lyons* (1818), 2 Stark. 317. In Canada, duelling is an offence under s. 72 of the Criminal Code. This provision was to be found in the original Code of 1892 (s. 101), and is perhaps an indication of a similar concern in Canada at a roughly similar period.

⁷¹ In preparing this section I have been much indebted to G. D. Squibb, *The High Court of Chivalry* (1959).

⁷² *Supra*, footnote 16.

⁷³ This period also saw a large number of actions for libel in another prerogative court — the Star Chamber. This was again due to the desire to suppress duelling; W. S. Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries* (1924), 40 L.Q. Rev. 302, 397, at p. 404.

⁷⁴ (1703), 7 Mod. 125; Squibb, *op. cit.*, footnote 71, pp. 101-102.

⁷⁵ See *Manchester Corp. v. Manchester Palace of Varieties*, [1955] P. 133.

The words for which liability was imposed did not vary much — the cases usually involved calling another a rascal, a rogue, a villain, and so on, coupled with suitably abusive adjectives.⁷⁶ The plaintiff had to prove publication to some third person,⁷⁷ but the words did not necessarily have to be spoken of himself — they could be spoken of his relations, since this would be just as likely to provoke him.⁷⁸ Provocation and privilege were both recognized as defences.⁷⁹ The major limitation was that the plaintiff, to apply to the court, had to be a gentleman⁸⁰ — not necessarily a bearer of arms, but a person who lived in the style and had the reputation of a gentleman.

(b) *United States* — “Actionable Words” in *Mississippi, Virginia and West Virginia*.⁸¹

Since the early nineteenth century, three American states have had “insult statutes” — statutes imposing civil liability for insulting words which lead to violence and breach of the peace.⁸² These statutes were produced by a social climate similar in many ways to that of England in the seventeenth century when the need to discourage duelling produced the special jurisdiction of the Court of Chivalry. It was in 1810 that Virginia passed the original statute which provided that: “All words which from their usual construction and common acceptance are considered as insults, and lead to violence and breach of the peace, shall hereafter be actionable.”⁸³ This provision was part of a much larger Act passed for the purpose of suppressing “the barbarous custom of duelling”.⁸⁴ Mississippi adopted a similar provision in 1822, for an exactly similar purpose, which was: “. . . to induce citizens who are maligned and whose honour is impugned to resort to the courts of the country for redress by money judgment as a salve for wounded honor rather than to the old time method of ‘pistols and coffee for two’.”⁸⁵ West Virginia inherited the Virginia provision when the State of Virginia split in 1849.

⁷⁶ Squibb, *op. cit.*, footnote 71, pp. 57-58.

⁷⁷ *Ibid.*, p. 168.

⁷⁸ *Ibid.*, pp. 144, 168.

⁷⁹ *Ibid.*, pp. 167-169.

⁸⁰ *Ibid.*, pp. 170 *et seq.*

⁸¹ See J. W. Wade, *Tort Liability for Abusive and Insulting Language* (1950), 4 Vand. L. Rev. 63, at pp. 82-92.

⁸² See now Miss. Code Ann. 1942, s. 1059; Va Code Ann. 1950, ss 8-630; W. Va Code Ann. 1961, s. 5572.

⁸³ Va Acts 1810, c. 10, s. 8.

⁸⁴ *Chaffin v. Lynch* (1887), 1 S.E. 803, at p. 806 (Va).

⁸⁵ *Landrum v. Ellington* (1929), 120 So. 444, at p. 445 (Miss.).

These statutes have to some extent developed differently. It is in Mississippi that the statute seems to remain closest to its origins. It has been held in that state that an action cannot be brought against a corporation because it cannot participate in personal violence.⁸⁶ In Virginia and West Virginia the statutes have become assimilated to defamation and are now treated as a new class of slander actionable *per se* — and, in the Virginia case in which a corporation was held liable under the statute,⁸⁷ it was said that the original object of the statute should now be disregarded when construing it.

The statutes provide a civil action in respect of all words which from their usual construction and common acceptation are insults and tend to violence and breach of the peace.⁸⁸ The words relied on may be spoken or written;⁸⁹ as in the English jurisdiction, the actual words vary little — “Goddam-son-of-a-bitch” is almost standard. Unlike the English jurisdiction, publication to some third party need not be proved.⁹⁰

It may be that these statutes were not entirely successful in preventing duelling — a person who would be moved to physical retaliation for an insult in the absence of a legal remedy would probably act in the same manner even though the law gave him a right to damages.⁹¹ However, it seems that the civil remedy given by these three statutes has worked satisfactorily. Actions are still brought, even at the present day,⁹² and it seems that the traditional fears have not been justified — there has not been a flood of litigation, and the courts have been perfectly well able to separate trivial from deserving claims.⁹³

(c) *Civil Actions Arising from Criminal Statutes.*

The Court of Chivalry exercised a prerogative jurisdiction, and the special actions in the three American states were created by statute; but in some jurisdictions the courts have been able,

⁸⁶ *Dixie Fire Insurance Co. v. Betty* (1912), 58 So. 705 (Miss.).

⁸⁷ *W. T. Grant Co. v. Owens* (1928), 141 S.E. 860 (Va.).

⁸⁸ In Mississippi, no innuendo can be proved: *Huckabee v. Nash* (1938), 183 So. 500 (Miss.).

⁸⁹ *Chaffin v. Lynch*, *supra*, footnote 84, involved a written insult.

⁹⁰ *Rolland v. Batchelder* (1888), 5 S.E. 965 (Va.).

⁹¹ C. Magruder, *Mental and Emotional Disturbance in the Law of Torts* (1936), 49 Harv. L. Rev. 1033, at pp. 1054-1055.

⁹² E.g., *Zayre v. Gowdy* (1966), 147 S.E. 2d 710 (Va.).

⁹³ See Wade, *op. cit.*, footnote 81, at pp. 90-91.

of their own motion, to create a civil remedy for insult out of statutes which provide criminal penalties for such conduct.

This has happened in England: in what seems to be the earliest example of the fashioning of civil remedy by this means, the statute *Scandalum Magnatum* of 1275, which created a criminal offence of slandering the great men of the realm, was held to give rise to a civil action.⁹⁴ This statute had long been obsolete by the time it was repealed in 1887.⁹⁵

The modern English Public Order Act of 1936,⁹⁶ which creates a criminal offence of threatening, abusive or insulting words or conduct likely to result in a breach of the peace, has not been so construed, nor has any similar legislative provision in Canada. However, similar statutes in some American jurisdictions have been held to give rise to a civil action.⁹⁷ Wade⁹⁸ suggests that the same could happen to any legislative provision of this type.

(3) *Liability Imposed in Respect of Public Callings.*

All the cases so far considered in which liability has been imposed for the mere speaking of words have been due to the need to preserve public order. The final exception to the rule is, however, completely different — liability is imposed not as a public order measure but because the law wishes to enforce a duty of respectful treatment. We refer to the development in the United States of a special liability placed on those professing common callings for insults and indignities inflicted on their customers. Nowhere else in the common law is such a liability recognized.

We have already stated that in the United States there is a tort of intentional infliction of mental distress by outrageous conduct⁹⁹ — in effect, *Wilkinson v. Downton*¹⁰⁰ minus the physical harm requirement. However, public utilities have to observe

⁹⁴ *Bishop of Norwich v. Pricket* (1581), Cro. Eliz. 1; *Earl of Lincoln v. Roughton* (1606), Cro. Jac. 196; *Say & Seal v. Stephens* (1628), Cro. Car. 136; *Townsend v. Hughes* (1677), 2 Mod. 150.

⁹⁵ By the Statute Law Revision Act 1887, 50-51 Vict., c. 59.

⁹⁶ 1 Ed. 8, 1 Geo. 6, c. 6.

⁹⁷ See *Johnson v. Sampson*, *supra*, footnote 36; *Levine v. Trammell* (1931), 41 S.W. 2d 334 (Tex.); *Herman Saks & Sons v. Ivey* (1934), 157 So. 265 (Ala.).

⁹⁸ Wade, *op. cit.*, footnote 81, at p. 109.

⁹⁹ *Supra*, footnote 65.

¹⁰⁰ *Supra*, footnote 4.

an even higher standard — in other words, the existence of the special relationship of public utility-customer grounds liability where otherwise none would exist. What is the basis of this liability, and how far does it extend?

The original justification may have been the following of a "common calling" — from 1823 the carrier¹⁰¹ and from 1908 the innkeeper¹⁰² have each been held liable for insults and indignities inflicted on their customers by their servants.¹⁰³ In earlier cases the liability was stated to be in contract;¹⁰⁴ but in later cases it became clearly established that the liability was in tort as well¹⁰⁵ — and tort would of course be the only available remedy where the insult occurred before the intending passenger or guest had entered into a contractual relationship with the carrier or hotel.¹⁰⁶ The cases may involve insulting or offensive language — but the liability is wider than this and includes offensive conduct, such as unjustifiable ejection¹⁰⁷ or racial segregation.¹⁰⁸ There is, of course, a minimum standard. There must be what the *Restatement* terms a gross insult¹⁰⁹ — in the words of Story J. in *Chamberlain v. Chandler*:¹¹⁰ "I do not

¹⁰¹ *Chamberlain v. Chandler* (1823), 5 Fed. Cas. No. 2,557, at p. 413; see *Gillespie v. Brooklyn Heights R. Co.* (1904), 70 N.E. 857 (N.Y.), for a detailed review of the authorities to 1904.

¹⁰² *De Wolf v. Ford* (1908), 86 N.E. 527 (N.Y.). In the earlier case of *Clancy v. Barker* (1904), in which there was assault and battery, the court at first instance (98 N.W. 440, Neb.) recognized a special liability on hotels, but on appeal (131 F. 161) this was rejected, the court saying that innkeepers should not be placed alongside carriers. However, as early as 1844, attention had been called to the similarity of the positions of carrier and innkeeper: *Commonwealth v. Power* (1844), 7 Metcalf 596 (Mass.).

¹⁰³ Note, however, that the special hotel liability is not recognized in Kentucky and Texas: *Ledington v. Williams* (1935), 78 S.W. 2d 790 (Ky.); *McBride v. Hosey* (1946), 197 S.W. 2d 372 (Tex.).

¹⁰⁴ E.g., *Chamberlain v. Chandler*, *supra*, footnote 101; *New York L.E. & W.R. Co. v. Bennett* (1892), 50 F. 496; *Knoxville Traction Co. v. Lane* (1899), 53 S.W. 557 (Tenn.); *Bleecker v. Colorado & S.R. Co.* (1911), 114 P. 481 (Col.) (carriers); *De Wolf v. Ford*, *supra*, footnote 102; *Frewen v. Page* (1921), 131 N.E. 475 (Mass.) (hotels).

¹⁰⁵ See *Goddard v. Grand Trunk R. Co.* (1869), 57 Me. 202; *Cole v. Atlanta & W.P.R. Co.* (1897), 31 S.E. 107 (Ga.) (carriers); *Boyce v. Greeley Square Hotel Co.* (1920), 126 N.E. 647 (N.Y.) (hotels).

¹⁰⁶ E.g., *Texas & P.R. Co. v. Jones* (1897), 39 S.W. 124 (Tex.).

¹⁰⁷ E.g., *St. Louis A. & T.R. Co. v. Mackie* (1888), 9 S.W. 451 (Tex.); *Dalzell v. Dean Hotel Co.* (1916), 186 S.W. 41 (Mo.).

¹⁰⁸ E.g., *May v. Shreveport Traction Co.* (1910), 53 So. 671 (La.).

¹⁰⁹ *Restatement of Torts*, s. 48; *Restatement of Torts Second*, s. 48.

¹¹⁰ *Supra*, footnote 101, at p. 415.

say that any slight aberration from propriety or duty, or that every act of unkindness or passionate folly, should be visited with punishment." Thus, a mere rough tone of voice,¹¹¹ and language which was rude but not abusive,¹¹² are insufficient. A modern case furnishes one of the best illustrations: in *Gebhardt v. Public Service Coordinated Transport*,¹¹³ there was no liability where a bus conductor informed a passenger that according to company rules her Chihuahua dog could not travel with her.

These carrier and hotel cases were the original cases; but any suggestion that this special liability existed because these were common callings were soon seen to be based on obsolete thinking — the common calling classification is a mediaeval one. A more modern justification is to classify the carrier and the hotel as "public utilities", which, because they cater for the general public, owe a greater duty to refrain from causing emotional distress than do other concerns or individuals. This is the justification adopted by the *Restatement*, which provides:¹¹⁴

A common carrier or other public utility is subject to liability to patrons utilizing its facilities for gross insults which reasonably offend them, inflicted by the utility's servants while otherwise acting within the scope of their employment.

One might ask why the plaintiff will suffer more from insults in such circumstances than in any other instance — but it has been suggested that in these circumstances the insults are especially humiliating because they are almost invariably made in the presence of third persons.¹¹⁵

If the special liability attaches to "public utilities", what other occupations fall into the same category? It was recognized earlier on that telegraph companies were liable for conduct such as mishandling messages communicating news of death, or making indecent proposals.¹¹⁶ It was suggested that this was because they were common carriers;¹¹⁷ but in a later case the liability was

¹¹¹ *New York L.E. & W.R. Co. v. Bennett*, *supra*, footnote 104.

¹¹² *Daniels v. Florida C. & P.R. Co.* (1901), 39 S.E. 762 (S.C.); *Meeder v. Seaboard Air Line Ry* (1917), 91 S.E. 527 (N.C.).

¹¹³ (1957), 137 A. 2d 48 (N.J.).

¹¹⁴ *Restatement of Torts*, s. 48; *Restatement of Torts Second*, s. 48.

¹¹⁵ R. C. Seitz, *Insults, Practical Jokes, Threats of Future Harm — How New as Torts?* (1940), 28 Ky L.J. 411, at p. 416.

¹¹⁶ *Magouirk v. Western Union Telegraph Co.* (1902), 31 So. 206 (Miss.), *Western Union Telegraph Co. v. Watson* (1902), 33 So. 76 (Miss.).

¹¹⁷ *Butler v. Western Union Telegraph Co.* (1901), 40 S.E. 162 (S.C.).

put on its modern basis — it was said that the liability exists because a telegraph company performs a public duty.¹¹⁸ Another sort of organization now accepted as a public utility is a theatre management whose servants subject its patrons to insult or abuse. Here there is a contract, although there may be a problem about awarding more than the price of the ticket as damages;¹¹⁹ the courts have preferred to rely on tort, holding that the theatre owed the plaintiff, as long as he conducted himself in an orderly and lawful manner, a duty of respectful and courteous treatment.¹²⁰ An exactly similar attitude has been taken in cases involving amusement parks¹²¹ and a surf-bathing establishment¹²² — it was clearly said in the latter case that the keeper of the place of public resort was in a similar position to a passenger or hotel guest. The final case probably takes the doctrine too far. In *Smith v. Leo*,¹²³ recovery was allowed on this ground when the plaintiff was turned out of a dancing class in a private dance hall. The common carrier analogy, the only justification for the decision cited by the court, seems a little far fetched — surely the only remedy for exclusion was in contract. A public dance hall might well be different. Another odd case is *O'Connor v. Dallas Cotton Exchange*,¹²⁴ where the defendants were held liable for excluding the plaintiff, a white woman, from the “white” elevator, on the grounds that they owed her a high degree of care similar to that imposed on common carriers of passengers. It may perhaps be that elevators are common carriers¹²⁵ — the building in question was a large one, the plaintiff had business on the fifteenth floor, and so the elevator could to some extent be likened to other forms of public transport; the only other

¹¹⁸ *Dunn v. Western Union Telegraph Co.* (1907), 59 S.E. 189 (Ga.).

¹¹⁹ Especially because American courts have not followed *Hurst v. Picture Theatres*, [1915] 1 K.B. 1 in holding that contractual licences are irrevocable for their duration and that unjustified removal is a battery: see *Kelly v. Dent Theaters* (1929), 21 S.W. 2d 592 (Tex.).

¹²⁰ See *Kelly v. Dent Theaters*, *ibid.*; see also *Boswell v. Barnum & Bailey* (1916), 185 S.W. 692 (Tenn.); *Saenger Theatres Corp. v. Herndon* (1938), 178 So. 86 (Miss.); cf. *Interstate Amusement Co. v. Martin* (1913), 62 So. 404 (Ala) (suggestion that liability based on breach of implied term of contract).

¹²¹ *Davis v. Tacoma R. & P. Co.* (1904), 77 P. 209 (Wash.); *Malczewski v. New Orleans R. & P. Co.* (1924), 101 So. 213 (La.).

¹²² *Aaron v. Ward* (1911), 96 N.E. 736 (N.Y.).

¹²³ (1895), 36 N.Y.S. 949.

¹²⁴ (1941), 153 S.W. 2d 266 (Tex.).

¹²⁵ See E. W. Bishop, *Torts — Elevators as Common Carriers* (1969), 23 Ark. L. Rev. 307.

explanation is that this conduct at that time, in Texas, amounted to outrageous conduct, rather than a mere insult.¹²⁶

It is noteworthy that in recent years the number of cases under these heads seems to be declining.¹²⁷ It may well be that staff have become more polite, or patrons less sensitive.¹²⁸ However, one or two other considerations help to explain this decline.

We immediately gain a clue to this development when we examine the measure of damages commonly awarded in such cases. It is remarkable how many cases there are in which the damages amount to 500.00 dollars or thereabouts.¹²⁹ In a few cases the damages have been rather larger, but they have mostly been justified by the special circumstances of the case.¹³⁰ In one or two cases, inflated damages have been given for trivial acts — as in the ridiculous case of *Gulf C. & S.F.R. Co. v. Luther*,¹³¹ where the sum of 2,500.00 dollars was awarded against the employers of

¹²⁶ W. L. Prosser, *Insult and Outrage* (1956), 44 Cal. L. Rev. 40, at pp. 63-64.

¹²⁷ The most recent cases found are: *Gebhardt v. Public Service Co-ordinated Transport*, *supra*, footnote 113; *Brown v. Fifth Avenue Coach Lines* (1959), 185 N.Y.S. 2d 923 (carriers — the only cases since 1943); *Kirstein v. Hotel Taft Corp.* (1944), 51 N.Y.S. 2d 162; *Kellogg v. Commodore Hotel* (1946), 64 N.Y.S. 2d 131 (hotels).

¹²⁸ See Annotation, *Insulting or Abusive Words — Liability* (1951), 15 A.L.R. 2d 108, at p. 138.

¹²⁹ See *Chamberlain v. Chandler*, *supra*, footnote 101; *St. Louis A. & T.R. Co. v. Mackie*, *supra*, footnote 107; *Knoxville Traction Co. v. Lane*, *supra*, footnote 104; *Barbknecht v. Great Northern R. Co.* (1927), 212 N.W. 776 (N.D.) (carriers — a selection only); *Moody v. Kenny* (1923), 97 So. 21 (La.); *Milner Hotels v. Dougherty* (1943), 15 So. 2d 358 (Miss.) (hotels); *Boswell v. Barnum & Bailey*, *supra*, footnote 120; *Planchard v. Klaw & Erlanger New Orleans Theatres Co.* (1928), 22 So. 2d 189 (La.) (theaters).

¹³⁰ *Goddard v. Grand Trunk R. Co.*, *supra*, footnote 105 (\$4,850.00 — was assault, and company retained servant afterwards); *Hanson v. European & N.A.R. Co.* (1873), 62 Me. 84 (\$4,000.00 — assault, and court obviously influenced by the previous case); *Burrus v. Nevada-California-Oregon Ry* (1914), 145 P. 926 (Nev.) (\$5,000.00 — a particularly flagrant case: the plaintiff had booked a special train to go to hospital for treatment, but the train was late, went out of its way, and took on other passengers and cattle); *St. Louis S.F.R. Co. v. Clark* (1924), 229 P. 779 (Okla.) (\$1,500.00 — soldier on way to hospital, suffering from gas poisoning, suffered further harm as result of being delayed); *Saenger Theatres Corp. v. Herndon*, *supra*, footnote 120 (\$1,000.00 — fourteen-year old girl seriously affected).

¹³¹ (1905), 90 S.W. 44 (Tex.).

a negro servant who had upbraided the plaintiff's child for spilling water on the floor. The court said:¹³²

What could be more humiliating to a frail, delicate, sensitive woman, with a babe at her breast and her other little ones around her, than to be pounced upon, vilified and traduced by a negro servant in a railway depot, where her relation as a passenger to its owner entitles her to be treated with respect and kindness? Is it any wonder to those who can contemplate the effect of such an outrage that the poor woman for months afterwards, as she testified, could not close her eyes without that angry, threatening negro arising before her and murdering sleep?

If this special liability imposed on public utilities is going to lead to cases such as this, then its value is questionable. Fortunately, in the more modern cases liability is not imposed for such trivialities, and the courts' statements are moderate and reasonable. Even so, however, if the damages likely to be awarded are so small — and awards do not seem to have increased despite the falling value of money — it is hardly worthwhile bringing an action. Another factor is that a new avenue of redress has presented itself in the shape of statutes now adopted by a number of jurisdictions under which a criminal penalty is imposed upon carriers for insulting conduct by their employees.¹³³ If there is a criminal penalty at hand and the expected rewards from a civil action are minimal, it is small wonder that there has been a falling off in the number of civil cases.

(c) *The Position in England and the Commonwealth.*

Nowhere, outside the United States, is there any sign of a special duty to be respectful imposed on those providing public services — with the exception of two cases from Quebec.¹³⁴

The doctrine of common callings is of ancient origin in English law, and it seems that the main callings which were recognized as common were those of the carrier and the inn-keeper.¹³⁵ The distinguishing feature of a calling being recognized

¹³² *Ibid.*, at p. 48.

¹³³ Wade, *op. cit.*, footnote 81, mentions such statutes in fourteen states. There is also one in North Dakota: see *Haser v. Pape* (1949), 39 N.W. 2d 578 (N.D.).

¹³⁴ See *infra*.

¹³⁵ It may be that at one time the smith was regarded as professing a common calling: C. H. S. Fifoot, *History and Sources of the Common Law — Tort and Contract* (1949), pp. 157-158; also the sheriff: P. H. Winfield, *Province of Tort Law* (1931), pp. 152-153. Winfield draws attention to the shrinking list of common callings, saying that the attorney, the farrier and the tailor were once recognized as common callings but are no longer so.

as common was that an action on the case would lie if the person in question refused to exercise his calling.¹³⁶ The doctrine has survived to the present day — carriers¹³⁷ and innkeepers¹³⁸ are still recognized as professing common callings, provided that in fact they have undertaken to provide a service for everybody.¹³⁹

The duty of the carrier and the innkeeper is to carry or receive all persons who wish to avail themselves of their services. Thus, carriers have been held liable for ejecting passengers or refusing to carry them, and the consequences thereof;¹⁴⁰ and innkeepers have been held liable for refusing accommodation.¹⁴¹ The only exception to the rule is where the intending patron is not in a fit condition to be received, such as when he is intoxicated; here there is a discretion to refuse him.¹⁴²

Cases dealing with ejection or non-admission are not very useful since none of them are claims for mental distress suffered as a result, and since most of the important American cases concern conduct falling short of ejection. However, the liability of the carrier or innkeeper to his patron while on his vehicle or on his premises is expressed exclusively in terms of negligence — a duty to take due care to carry or lodge the patron safely.¹⁴³ Today, therefore, there is very little difference between the liability of

¹³⁶ Anon. (1502), Keil. 50, 4; *Jackson v. Rogers* (1683), 2 Show. K.B. 327.

¹³⁷ Except that in England the nationalized railway and water authorities have been made private carriers by the Transport Act 1962, 10-11 Eliz. 2, c. 46, s. 43(6). (See O. Kahn-Freund, *Law of Carriage by Inland Transport* (4th ed., 1965), p. 453.)

¹³⁸ Hotels are similarly governed by statute — the Hotel Proprietors Act 1956, 4-5 Eliz. 2, c. 62 — but s. 1 of this Act provides that a hotel keeper is subject to the old common-law liabilities of the innkeeper.

¹³⁹ See, e.g., *S.M.T. (Eastern) v. Ruch*, [1940] 1 D.L.R. 190 (N.B.).

¹⁴⁰ *Seymour v. Greenwood* (1861), 7 H. & N. 355 (cited in *Goddard v. Grand Trunk R. Co.*, *supra*, footnote 105).

¹⁴¹ *Constantine v. Imperial Hotels*, [1944] K.B. 693 (Eng.); *Whiting v. Mills* (1848), 7 U.C.Q.B. 450 (Ont.).

¹⁴² *Murgatroyd v. Blackburn & Over Darwen Tramway Co.* (1886), 3 T.L.R. 180 (Eng.); *Booth v. Canadian Pacific R. Co.*, [1938] 1 W.W.R. 753 (B.C.) (carriers); *R. v. Ivens* (1835), 7 C. & P. 213 (Eng.) (innkeepers); *Anderson v. Sutherland*, [1955] 5 D.L.R. 361 (Sask.).

¹⁴³ *Readhead v. Midland Ry Co.* (1869), L.R. 4 Q.B. 379; *Barkway v. South Wales Transport Co.*, [1950] 1 All E.R. 392, per Lord Porter, at p. 399 (carriers); *Maclean v. Segar*, [1917] 2 K.B. 325 (innkeepers); *Hasson v. Wood* (1892), 22 O.R. 66; *Cosgrave v. Busk* (1965) 55 D.L.R. (2d) 98, reversed on a procedural point (1967), 59 D.L.R. (2d) 425 (Ont. C.A.).

those professing common callings and ordinary occupiers' liability.¹⁴⁴

Sometimes, a duty to promote the comfort of passengers is to be found in railway by-laws. In *Bayley v. Manchester, Sheffield and Lincolnshire Ry Co.*,¹⁴⁵ the railway by-laws placed such a duty on the porters, and this was a contributory factor in the finding that the railway was vicariously liable for the negligence of the porter in pushing a passenger on to the wrong train. In *Gentel v. Rapps*,¹⁴⁶ the defendant, a passenger, was held liable for profane language under the railway by-laws. It may be that the existence of by-laws such as these confirms that the general law attaches no liability for insults. Another case which seems to negative the existence of any general duty to promote the comfort of the passenger is *Hobbs v. London and South Western Ry Co.*¹⁴⁷ The defendants' train failed to stop at the plaintiff's destination, and so he recovered damages in contract for the physical inconvenience of having to walk a long way home — but there was no liability for annoyance or other mental suffering which this caused.¹⁴⁸ This non-existence of a duty is general throughout the Commonwealth jurisdictions; only in two Quebec cases can one discover anything remotely similar to the American liability. In *Tudor v. Quebec and Lake St. John R. Co.*,¹⁴⁹ the conductor was held liable to a passenger for insulting language and conduct — the court followed the American authorities and held that common carriers are liable for the insulting language and conduct of their servants to passengers, the damages depending on circumstances such as the sex and social standing of the party aggrieved, and the nature and gravity of the offence. Passengers, said the court, were to be treated with kindness and respect and were here entitled to be protected against insult, indignity and abuse. In *Leclerc v. Marti*,¹⁵⁰ where the conductor was prosecuted for common assault for tickling a child, it was held that the duty of a conductor was to be polite and courteous to the passengers,

¹⁴⁴ At least, in jurisdictions where the common law has been superseded by legislation, such as the English Occupiers' Liability Act 1957, 5-6 Eliz. 2, c. 31, which makes the occupier generally liable in negligence. This Act applies to moving vehicles: s. 1 (s) (a).

¹⁴⁵ (1873), L.R. 8 C.P. 148.

¹⁴⁶ [1902] 1 K.B. 160.

¹⁴⁷ (1875), L.R. 10 Q.B. 111.

¹⁴⁸ See *ibid.*, per Mellor J., at p. 122, per Archibald J., at p. 124.

¹⁴⁹ (1911), 41 Que. S.C. 19.

¹⁵⁰ (1917), 28 C.C.C. 160.

and that he had no right to become familiar with them and to neglect his duties.

Telegraph companies are not common carriers¹⁵¹ — merely agents of the sender.¹⁵² They will thus be liable under a contract with the sender.¹⁵³ It was said that there was no liability in negligence to the receiver,¹⁵⁴ although this is probably affected by *Hedley Byrne and Co. v. Heller and Partners*,¹⁵⁵ which creates a duty of care in cases where there is a "special relationship",^{155A} Pollock, however, suggested that a liability would exist for intentionally sending a false message.¹⁵⁶

Theatres and other places of public amusement are in a similar position. They are not a public service in the same way as are carriers or innkeepers.¹⁵⁷ The problem of damages for ejection has been solved by *Hurst v. Picture Theatres*,¹⁵⁸ in which it was held that the plaintiff had a contractual licence, which included a provision that the licence would not be revoked during its currency. Thus, Hurst was able to sue for battery when removed from a cinema during the middle of the performance. In Australia this case has been said to be wrongly decided,¹⁵⁹ but it has been confirmed by later cases both in England¹⁶⁰ and in

¹⁵¹ *Playford v. United Kingdom Electric Telegraph Co.* (1869), L.R. 4 Q.B. 706; *Dickson v. Reuter's Telegram Co.* (1877), 3 C.P.D. 1 (Eng.); *Baxter v. Dominion Telegraph Co.* (1875), 37 U.C.Q.B. 470, per Morrison J., at p. 482 (Ont.).

¹⁵² *Henkel v. Pape* (1870), L.R. 6 Ex. 7 (Eng.); *Ross v. Long* (1899), 40 N.S.R. 174 (N.S.).

¹⁵³ *Playford v. United Kingdom Electric Telegraph Co.*, *supra*, footnote 151 (on the facts, the contract excluded liability).

¹⁵⁴ *Dickson v. Reuter's Telegram Co.*, *ibid.*

¹⁵⁵ *Supra*, footnote 2.

^{155A} So far, *Hedley Byrne* has not been applied to telegraph companies, although similar bodies have been made liable under this principle: see, e.g., *Windsor Motors v. District of Powell River* (1969), 4 D.L.R. (3d) 155 (B.C.C.A.); *Hodgins v. Hydro-Electric Commission* (1972), 28 D.L.R. (3d) 174 (Ont.).

¹⁵⁶ F. Pollock, *Torts* (15th ed., 1952), p. 428, and see *Blakeney v. Pegus* (1885), 6 L.R. (N.S.W.) 223.

¹⁵⁷ *Said v. Butt*, [1920] 3 K.B. 497, per McCardie J., at p. 502.

¹⁵⁸ *Supra*, footnote 119.

¹⁵⁹ *Cowell v. Rosehill Racecourse Co.* (1937), 56 C.L.R. 605.

¹⁶⁰ *Winter Garden Theatre v. Millenium Productions*, [1948] A.C. 173; *Hounslow L.B.C. v. Twickenham Garden Developments*, [1971] Ch. 233. The latter case laid down the principle that, whether the licence is revocable or not, the court will not assist the licensor to break his contract.

Canada.¹⁶¹ If there was no technical assault or battery probably a patron would still be left with his remedy in contract, though his damages would be much smaller.

Conclusions

We have reviewed two possible justifications for imposing liability for hurtful words — threats to the public peace and injuries to dignity. The first is rather more worthwhile than the second. There are no really compelling reasons for placing liabilities for causing injuries to the dignity on public utilities or anyone else, and many against. This form of liability seems moribund in the United States anyway. However, words inviting or provoking physical retaliation demand closer attention. It is interesting how, at various times in the past, courts both in England and elsewhere have been prepared to grant a remedy for threatening words to deal with public order problems. Today it is unlikely that this particular problem would compel the court to grant a new remedy; however, if the problem of assault by words ever arises, the courts should not be afraid to overthrow existing authority, such as it is, and follow in the footsteps of the American *Restatement*.

¹⁶¹ *Adrian Messenger Services & Enterprises v. Jockey Club*, [1972] 2 O.R. 369.