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MENTAL ANGUISH IN THE LAW OF DAMAGES

By EDWARD L. DUGGAN

Throughout the different fields of law the subject of mental feelings is prominent. It is in the law of damages, however, that the question of most decided interest concerning mental suffering arises. There the legal treatment of anguish is seen in its many phases; the anguish sued upon may have been the only injury suffered or it may be merely an additional element of damage. In the former case the rules of the court are at variance. The general ruling denies the recovery of damages under such a combination of facts, but several exceptions have encroached upon the rule. There is a minority doctrine of recent origin, and it is interesting to trace its history and to study its growth and expansion. A comparison of the two rules suggests problems which have held the interest of many judicial tribunals. When the mental suffering is merely an element of damages most courts admit evidence of it as a basis for possible enhancement of the sum awarded. Because this element is taken advantage of as soon as an independent cause of action exists, however slight, it is termed parasitic, and great care has been taken that it might not develop too extensively.

The general rule is that mental anguish alone will not constitute a cause of action for the recovery of damages. *So. Exp. Co. v. Byers,* 240 U. S. 612; *McCarthy v. Boston El. R.* 112 N. E. 235; *Rowan v. Western U. Tel. Co.* 149 Fed. 550. This ruling follows the common law doctrine that where the only injury suffered is mental anguish a recovery of damages for such suffering is not allowed. The courts following this doctrine base their decisions mainly upon the ground that such damage is too remote, that it is easily simulated and that there is no adequate means of determining the damage suffered. These courts fear the inexpediency of allowing such a recovery, believing that the difficulties attending the adoption of a contrary ruling would be too great. The possibility of trumped up cases influences their decisions. It is contended that if the action be brought on a con-

tract the damages could not be said to have been within the contemplation of the parties at the time of entering into the contract—while if the action is that of tort it is maintained that such damages do not reasonably flow from the act committed. To allow such a recovery courts denying the rule contend, would be to abrogate a known principle of the common law which they consider a rigid thing and to the strictness of which they adhere. The injury is considered to be *damnum absque injuria.* The opinion of these courts is that the remedy for such suffering should be legislative rather than judicial.

There are certain exceptions to the general rule which refuses recovery of damages for mental anguish alone. Thus, it was early settled and is generally followed that in that class of tort actions in which there is an element of a malicious, intentional or wilful invasion of the plaintiff's rights there may be a recovery for mental anguish even though it is the only injury suffered. Following this ruling courts have allowed recovery:

In cases of rape, *Leach v. Leach,* 33 S. W. 703. In cases of malicious proscution, *McKinely v. Chicago etc. R. Co.* 24 Am. Rep. (Iowa) 748. In case of false imprisonment, *Chicago etc. R. Co. v. Radford,* 129 Pac. 834. In case of libel or slander, *Butler et ux v. Hoboken P. Co.,* 2 Atl. 1272. For the mutilation of a dead body, *Larson v. Chase,* 50 N. W. 238; *Lindh v. Gt. Nor. Ry. Co.,* 109 N. W. 823. Where plaintiff's father was thrown overboard without notification to plaintiff, *Finley v. At. Transport Co.,* 172 N. Y. App. Div. 907. Where plaintiff's landlord wrongfully entered her premises, frightening her badly, *Nordgren v. Lawrence,* 133 Pac. 436. Where a conductor wrongfully took up plaintiff's commutation ticket, following a public altercation with plaintiff who was a passenger, *Harris v. D. W. L. W. R. R. Co.,* 72 Atl. 50. For refusing admission to an union, *Carter v. Oster,* 112 S. W. 995.

So also mental anguish has been considered a proper basis for damages in particular cases on contracts. Exceptions to the general ruling on this footing are: Breach of promise to marry, *Sherman v. Rawson,* 102 Mass. 395; *Bird v. Thompson,* 9 S. W. 788. Breach of an undertakers contract to keep safely the body of a child, *Renihan v. Wright,* 125 Ind. 536. Breach of contract to transport a corpse,*Louisville v. Hull,* 68 S. W. 433; *Missouri, K. & T. Ry. Co. of Texas v. Linton,* 141 S. W. 129; *Hale v. Bonner,* 17 S. W. 605;

Wells Fargo Co. v. Fuller, 35 S. W. 824; *Contra: Long et al v. C. R. I. & P. Ry. Co.,* 86 Pac. 289; *So. Exp. Co. v. Byers,* 36 Sup. Ct. 410. Breach of contract to furnish trousseau on agreed day, *Lewis v. Holmes,* 34 So. 66. Breach of contract to deliver a suitable coffin and robe, *Dunn & Co. v. Smith,* 74 S. W. 576.

A minority view to the general doctrine has arisen in what is known as the telegraph cases. In many jurisdictions mental anguish caused by negligence of the telegraph companies in the deliverance of messages relating to sickness and death is a good cause of action alone for which damages are recoverable. The pioneer case adopting this view is that of *So Relle v. Western Union Telegraph Co.,* 55 Tex. 308, 40 Am. Rep. 805. The supreme Court of Texas in 1881 in that case held that the telegraph company was liable for injury to the feelings of a son by the wilful neglect of the company to deliver to him a message announcing the death of his mother whereby he was prevented from attending the funeral, even though he sustained no other damage. The court ruled in that case that mental anguish flowed naturally from the negligence of the telegraph company and could reasonably be said to have been within the contemplation of the parties when they entered into the contract. The court also laid emphasis on the fact that the telegraph companies enjoy special franchises and privileges and that the purpose of such organizations is to furnish for compensation means of rapid and prompt communication—the use of which is expensive and resorted to only in matters of importance, which ought to subject them to a duty of care over and above their contractual obligation. This ruling became known as the Texas doctrine and was bitterly attacked by other courts at the time of its creation. Critics of this assail the prior authority for this ruling, saying it was entirely unsupported—the mere statement of a textbook writer on negligence and two cases which are held to be unsupporting on principle. The doctrine of the So Relle case was overruled in Texas several years later but was reestablished and is now firmly settled in that state. It is followed in Alabama, Iowa, Kentucky, Nevada, North Carolina and Tennessee. It is recognized under the civil law of Louisiana, and in the states of Arkansas, South Carolina and Wisconsin statutes have been enacted allowing a recovery of such damages. In Indiana in the case of *Reese v.W. U.*

Tel. Co., 24 N. E. 163, decided in 1890, the court of that state followed the Solrelle doctrine stating that " the breach is not a mere breach of contract but is a failure to perform a duty which rests upon the company as a servant of the public". For 11 years this doctrine was followed in Indiana—11 actual cases adopting this principle. In 1901 in the case of *Western Union Tel. Co. v. Ferguson,* 60 N. E. 674. the Indiana Supreme Court overruled the decision of the Reese case, refused to adopt the rule of the Texas doctrine which was the basis of the ruling in the Reese case, and would not allow a recovery of mental anguish where it was the only damage suffered. A strong dissenting opinion was written in that case. In the Ferguson case it was held that where through the negligence of a telegraph company, failure to deliver a telegram announcing the death of plaintiff's grandmother, plaintiff was deprived of the opportunity of attending the funeral but suffered neither pecuniary nor bodily injury, he cannot recover for the mental anguish occasioned by the telegraph company's negligence. The court stressed considerably the inadequate means of determining the actual damage suffered although it admitted that damages might be recovered for such suffering if the mental anguish was accompanied by an independant cause of action. The Ferguson case has been since followed in Indiana—all subsequent cases citing it as a precedent.

Under a statute in Oklahoma awarding "all damages" it was held that mental anguish when unaccompanied by physical injury was not included, *Tiller v. St. Louis & Santa Fe,* 189 Fed. 994.

The Federal courts follow the general rule and deny recovery of damages for mental anguish alone. *So. Pac. v. Hetzer,* 135 Fed. 272; *Stafford v. Tel. Co.* 73 Fed. 273; *W. U. Tel. Co. v. Wood,* 57 Fed. 471.

The numerical weight of authority is decidedly in favor of the general rule which refuses to allow a recovery for mental anguish alone, but from the standpoint of logic the ruling of such courts may well be attacked. In the majority ruling the courts fear the impossibility of calculating the damages yet it seems that there should be no more difficulty to estimate the damages when the distress of mind is unaccompanied by a malicious, intentional or wilful invasion of one's rights than in the case where the mental suffering is the result of such evil intent. To deny

a recovery in the former and not the latter type of case is to reason on an illogical basis. The difficulty of determining the actual amount to be awarded though seemingly great in theory is not so in practice as few cases can be cited in which a recovery was held to be excessive on appeal. The other grounds upon which the majority ruling is based are vunerable to similar attacks. To deny a right lest it might result in much litigation through asserting that right does not seem to be properly within the province of the court. A breach by the telegraph company may well be considered to be more than a contractual breach—it is a failure to perform a public duty. The real purpose of making the telegraph companies liable in such cases is not the mere collection of a money value but to prevent the recurrence of such offences and to establish the proposition that one has no more right to outrage the feelings of another than to injure his person or destroy his property. To adopt the majority ruling is to recognize the common law to be a crystallized and rigid thing which cannot be adapted to arising conditions. The fault is not with the common law but the narrow manner in which it is applied. There is no reason why when the law protects mental security that damages for mental suffering alone should not to be given. The courts that follow the majority ruling elect to proceed on an arbitrary rather than a logical ground for the basis of their reasoning. These courts believe that the difficulties that would follow from adopting such a rule would be too great, yet if we consider the following of the minority view we will find that the courts have worked out a set of principles which is surrounded by limitations that insure a safe and sound reasoning Thus we see that the damage suffered must be the proximate result of the negligence—not that of an intervening agency—*W. U. Tel. Co. v. Briscoe,* 47 N. E. 473; *Landry v. W. U. Tel. Co.* 113 S. W. 10. The message on its face must show that such damage would result, it must show the necessity of prompt delivery so that the parties could reasonably contemplate that such damages would occur through the negligence of the company, *W. U. Tel. Co. v. Bryant,* 46 N, E. 358; *W. U. Tel. Co. v. Kibble,* 115 S. W. 643; *W. U. Tel. Co. v. Henly,* 54 N. E. 775; and, the parties must be close relatives, *Lee v. W. U. Tel. Co.,* 113 S. W. 55; *W. U. Tel. Co. v. Steinbergen,* 54 S. W. 829.

Under both the majority and minority ruling the mental anguish suffered must be more than mere inconvenience, vexation, worry, disappointment, regret, etc.—it must be actual and not the result of imagination or unfounded worry. *Root v. Des Moines City R. Co.,* 83 N. W. 904; *W. U. Tel. Co. v. McKenzie,* 131 S. W. 684. Also, the act committed must have been done to the plaintiff—there can be no recovery for mental anguish due to the mistreatment of another. *W. U. Tel. Co. v. Stratemeir,* 32 N. E. 871; *Cowden v. Wright,* 35 Am. Dec. 633.

As an element of damages, where a cause of action exists independent of such suffering, it is almost universally held that damages may be recovered for mental anguish where it is the natural and proximate result of a tort or a breach of contract. A very slight ground constituting a case of action will support recovery of accompanying mental suffering. Direct evidence of it is not required—it may be inferred from the surrounding facts and circumstances. The fact that it is not susceptible of accurate calculation will not constitute a bar to the award.

Where mental anguish is the natural consequence of physical injury damages are recoverable for such suffering. *McDermott v. Severe,* 202 U. S. 600. But where physical injury results from mental anguish, and, there is no actual injury to the person or property, damages for such physical injury are not recoverable in those states which do not allow the recovery of damages for mental anguish alone. *W. U. Tel. Co. v. Kagy,* 76 N. E. 793; *Curtin v. W. U. Tel. Co.,* 13 N. Y. App. Div. 253. The courts which deny a recovery in the latter case proceed on the ground that such damages are not the probable or natural consequence in the case of a person of ordinary physical and mental vigor and that the physical injury is not the proximate but rather the remote result of the defendant's wrongdoing.

In the case of fright or fear alone the general rule is that there can be no recovery of damages. *Mitchell v. R. Co.,* 45 N. E. 354; *Spade v. Linn,* 47 N. E. 88. In order to be a ground of recovery accompanying personal injury is required. Considering that fear is generally held to be a physical thing—harmful to human organisms—the general rule does not seem to be logical. Thus the Maryland court in *Green v. Shoemaker Co.,* 73 Atl. 688, allowed a recovery for fright alone which was caused by an explosion, and in *Holdorf*

v. Holdorf, 169 N. W. 737, a recovery for fright without physical impact but resulting in a physical injury, was allowed. These two cases take a more logical basis for reasoning than do those that follow the general rule in this respect.

In the case of a breach of contract mental anguish standing alone as the damage does not authorize a recovery with the exception that where from the nature of the contract resulting mental anguish would be a probable consequence of a breach. Cases in which recovery is allowed under the exception to this rule include: breach of promise to marry, breach of contract to transport a corpse, breach of contract of an undertaker to keep safely the body of a child; (for citation of cases see *supra*); and wilful ejection from a seashore bathhouse, *Aaron v. Ward,* 96 N. E. 736.

Where mental anguish is attendant to an injury to property no recovery is allowed unless the injury to the property was due to malice, fraud or like motives. *Buchanan v. Stout,* 123 N. Y. App. Div. 648.

Considering the general allowance of recovery of damages for mental anguish where it was merely an element of damages, we find another inconsistency in the ruling of those courts which refuse to allow the Texas doctrine, as promulgated by the So Relle case all the objections invoked by those courts against that doctrine might be just as well employed by them in the case where mental anguish is merely of damages, yet we see the same courts allowing a recovery for such suffering if an independent cause of action exists. There is no more adequate means of determining the actual damage due to mental anguish in the latter than in the former case. There is still the possibility of trumped up cases as far as mental anguish is concerned and it might be said that the difficulties of following such a principle would cause it to be inexpedient. To allow a recovery in one class of cases and to deny it in the other where the same objections might be equally appropriate in both classes establishes more fully the belief that the contrary decisions to the Texas doctrine are arbitrarily laid down and not the result of sound reasoning.