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Emotional Disturbance - Theater Proprietors - Duty of Courteous Treatment

John C. Morris Jr.

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spent apart from the abandoned spouse might properly be counted even though Mr. Hurry had "sped to court."[15] The court must have thought that some halt must be called in the rush for divorces and is certainly not to be criticized for acting conscientiously in a matter of such vital concern to the commonwealth. However, present conditions would indicate to the writer at least that this attempt to stem the tide has been and will be a deterrent of no value and should be abandoned. As a social policy the matter should be left to the time when the legislature may restate the law of divorce as a whole.

HARRIET S. DAGGETT*

EMOTIONAL DISTURBANCE — THEATER PROPRIETORS — DUTY OF COURTEOUS TREATMENT—Plaintiff, accompanied by his wife, presented tickets for admission to defendant's theater. An attendant refused to admit him on the ground that plaintiff was a cripple and that his presence during crowded hours involved a hazard to his safety. The refusal was apparently made in the presence only of the attendants and plaintiff's wife. *Held*, on appeal to the supreme court, that plaintiff is entitled to damages for emotional disturbances arising out of breach of contract. *Vogel v. Saenger Theatres, Incorporated,* 22 So.(2d) 189 (La. 1945).

Emotional disturbance is not usually recognized as an independent actionable wrong. However, the general rule that there can be no recovery without physical injury is clouded with exceptions. The exceptions created by the courts involve actions where the defendant has wilfully violated some right which the court recognizes. If a technical battery,[1] a trespass,[2] an invasion of the right of privacy,[3] a case of false imprisonment[4] or

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15. Hurry v. Hurry, 141 La. 954, 76 So. 160 (1917).

* Professor of Civil Law, Louisiana State University.

1. Spearman v. Toye Bros. Auto & Taxicab Co., 164 La. 677, 114 So. 591 (1927); William Small & Co. v. Lonergan, 81 Kan. 48, 105 Pac. 27 (1909); Davidson v. Lee, 139 S.W. 904 (Tex. Civ. App. 1911); Western Union Telegraph Co. v. Bowdoin, 168 S.W. 1 (Tex. Civ. App. 1914).

2. Matheson v. American Teleph. & Teleg. Co., 137 S.C. 227, 135 S.E. 306 (1926).

3. Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927); Rhodes v. Graham, 238 Ky. 225, 37 S.W.(2d) 46 (1931).

4. Shannon v. Sims, 146 Ala. 673, 40 So. 574 (1906); Ross v. Kohler, 163 Ky. 583, 174 S.W. 36 (1915); Chicago, R. I. & P. Ry. Co. v. Radford, 36 Okla. 657, 129 Pac. 834 (1913).

wrongful eviction[5] can be made out, the court is willing to attach parasitic damages for mental suffering. Often the orthodox wrong exists only in the most technical sense, and the substantial hurt is the ensuing mental anguish. For their failure to accord the interest in emotional security a direct and full protection the courts have offered several explanations.[6]

Breach of contract offers another peg upon which courts frequently hang mental suffering damages. Although the damages might arise as a consequence of the breach itself, in most cases it is the insolent conduct accompanying the breach that gives rise to mental anguish.[7] Thus in cases involving a common carrier of passengers the courts commonly speak in terms of an implied contract to accord passengers courteous treatment, and allow recovery for insult by an attendant[8] or abuse by other passengers.[9] In other cases where the contractual relation is equally clear the court will ignore it and allow recovery by referring directly to the public duty owed the passenger.[10] From the very nature of the business the carrier is in a peculiar position to inflict this injury, and courts are prone to allow recovery without serious regard to a choice of theories.[11]

The carrier offers a striking analogy to the theater operator.[12] The similarities are obvious. Both deal with the public en masse.

5. Dirmeyer v. O'Hern, 39 La. Ann. 961, 3 So. 132 (1887); Sandlin v. Coyle, 143 La. 121, 78 So. 261 (1918); Fillebrown v. Hoar, 124 Mass. 580 (1878).

6. Courts in some instances say the damages are too remote. Mental suffering is often termed too vague and easily simulated, too difficult to estimate, or recovery would open up a flood of litigation. Perhaps the best explanation is historical. In the modern age the feelings have come to be recognized as an important element of the personality and the increased complexities of life have caused plaintiffs to press this interest. In at least one case this has been noted. In Summerfield v. Western Union Tel. Co., 87 Wis. 1, 11, 57 N.W. 973, 975 (1894), the court said: "If, in the evolution of society and the law, this innovation should be deemed necessary, the legislature can be safely trusted to introduce it, with those limitations and safeguards which will be absolutely necessary, judging from the variety of cases that have sprung up since the promulgation of the Texas case."

7. Enders v. Skannal, 35 La. Ann. 1000 (1883). The plaintiff was driven from land on which he had contracted to cut timber. Court said it was not only a breach of contract, but a breach in such a way as to constitute an offense under the laws and allowed recovery for outrage to plaintiff's feelings.

8. Bleecker v. Colorado & S. Ry. Co., 50 Colo. 140, 114 Pac. 481 (1911); Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557 (1899).

9. Birmingham R. Light & P. Co. v. Glenn, 179 Ala. 263, 60 So. 111 (1912).

10. May v. Shreveport Traction Co., 127 La. 420, 53 So. 671 (1910); Haile v. New Orleans Ry. & Light Co., 135 La. 229, 65 So. 225 (1914); Lipman v. Atlantic Coast Line R.R. Co., 108 S.C. 151, 93 S.E. 714 (1917).

11. In Texas & P. R.R. Co. v. Jones, 39 S.W. 124 (Tex. Civ. App. 1897), the passenger had not yet purchased his ticket and recovery for insulting conduct was allowed. The court was satisfied to find that plaintiff was one who intended to become a passenger.

12. Aaron v. Ward, 203 N.Y. 351, 96 N.E. 736 (1911). The Louisiana court has often suggested the analogy in cases involving physical injuries to

Neither could operate without the congregating of large masses of people for the common purpose of transportation or amusement. In both instances there is an assumption of a high degree of care by the defendant, who occupies a superior position to patron or passenger, and the duty of civil treatment may well be said to be the same in all cases.[13]

However, several courts have rejected the carrier analogy in dealing with the proprietor of places of amusement and have denied damages to a patron who was excluded from a public theater.[14] The reason assigned is that the theater is a private business governed by such rules as the management makes, while the carrier operates under a franchise, obligated to take anyone desiring to become a passenger.

In the present case the court emphasized the breach of contract or revocation of license,[15] relying principally on *Lewis v. Holmes*[16] for supporting authority. In the latter case the plaintiff had contracted for delivery of a wedding trousseau and the damages suffered came from the failure to receive the wedding dress. The plaintiff did not get what she bargained for, and the mental suffering ensuing from the breach could reasonably have been anticipated by the defendant.[17] *O'Meallie v. Moreau*,[18] also relied on by the court, represents another case where the loss of bargain gave rise to mental suffering. The plaintiff in that action recovered for the disappointment, annoyance, vexation, and mortification caused by breach of a contract to furnish a picnic park for a long advertised outing of a social club. The court could readily appreciate the obvious disappointment of the victims in these

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theater patrons. Lonatro v. Palace Theater Co., 5 La. App. 386 (1927); Bentz v. Saenger-Ehrlich Enterprises, Inc., 197 So. 659 (La. App. 1940); Welcek v. Saenger Theatres Corp., 5 So.(2d) 577 (La. App. 1942).

13. See Weber-Stair Co. v. Fisher, 119 S.W. 195 (Ky. App. 1909); Boswell v. Barnum & Bailey, 135 Tenn. 35, 185 S.W. 692 (1916).

14. Luxenburg v. Keith & Proctor Amusement Co., 117 N.Y. Supp. 979, 64 Misc. 69 (1909); Buenzle v. Newport Amusement Ass'n, 29 R.I. 23, 68 Atl. 721 (1908).

15. It is the almost universal holding that a theater ticket is a mere license, revocable at the will of the proprietor. Marrone v. Washington Jockey Club, 227 U.S. 633, 33 S.Ct. 401, 57 L.Ed. 679 (1913). Louisiana, however, seems to hold that the manager must have good reason to believe one is creating a disturbance before he is privileged to revoke the license. Russo v. Orpheum Theatre & Realty Co., 136 La. 24, 66 So. 385 (1914); Planchard v. Klaw & Erlanger New Orleans Theatres Co., 166 La. 235, 117 So. 132 (1928).

16. 109 La. 1030, 34 So. 66 (1903).

17. In Garner v. Burnstein, 1 La. App. 19 (1924), the court denied recovery because the defendant did not have notice that the hat which plaintiff ordered was for a special occasion and distinguished the *Holmes* case. The court was careful, however, to point out that plaintiff had probably been injured.

18. 116 La. 1020, 41 So. 243 (1906).

cases, and the circumstances left little doubt as to the substantial nature of the resulting injury to the sensibilities. Loss of bargain sometimes offers a tangible basis upon which to estimate the damages of mental suffering. In the instant case, however, it is obvious the plaintiff was not suing for loss of the advantage of witnessing the performance. His claim was for discourteous treatment.

Although most courts prefer to seize upon the breach of contract idea or the public duty owed by the carrier or proprietor, several cases have proceeded more directly to the point. The courts in such cases often resort to such terms as "improper expulsion,"[19] or "wrongful acts"[20] or "wanton or shamefully gross wrong,"[21] offering no clue as to what is improper or wrongful. In one Louisiana case[22] similar to the present controversy, recovery was allowed without reference to any theory whatsoever. These decisions, although difficult to align with established torts doctrines, indicate nevertheless that here is an independent wrong which is on the way to achieving open recognition. Few decisions in the history of torts law have directly announced the advent on first trial of a complete new doctrine with boundaries fully defined. Usually the process is one of slow and cautious growth. Hence vagueness and uncertainty in these opinions is to be expected.

In conclusion it might be questioned whether the plaintiff in the instant case sustained any appreciable injury. The dedefendant was seeking to enforce a rule for the safety of his patrons, and the reported evidence that his conduct was excessive was meagre at best. The law cannot effectively protect overacute sensibilities without disregard of the hard actualities of modern living. On the facts as given it may be suggested that the court has overshot the mark.

JOHN C. MORRIS, JR.

PARENT AND CHILD—LIABILITY OF PARENT FOR MISUSE OF AIR RIFLE BY CHILD—DANGEROUS INSTRUMENTALITIES—Defendant's son, a boy of about ten years of age, fired at a target with an air rifle which he had borrowed from a friend. The shot ricocheted and

19. Aaron v. Ward, 203 N.Y. 351, 96 N.E. 736 (1911).
20. Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 Pac. 209 (1904).
21. Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938).
22. Planchard v. Klaw & Erlanger New Orleans Theatres Co., 166 La. 235, 117 So. 132 (1928).