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# Recovery for Mental Suffering in Louisiana

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One consistent point can be noted in all the Louisiana jury separation cases<sup>25</sup>—convictions are set aside only in instances where one or more jurors have passed out of surveillance of the court or its sworn deputies, thereby possibly exposing them to influence from outsiders. Though there be a physical separation of the jury, even for a period of several hours, a conviction will nonetheless be upheld if all jurors were constantly supervised by a deputy who can testify that they have had no outside contacts sufficient to prejudice their verdict. In view of this, the selection of mixed juries should cause no apprehension among Louisiana district attorneys, even though it be necessary for such juries to separate for sleeping and other purposes during the course of the trial. It is submitted that our Supreme Court would sustain a conviction made by such a separated jury if the requirement of constant supervision by deputies had been observed.

Charles W. Darnall, Jr.

## Recovery for Mental Suffering in Louisiana

The weight of authority at early common law<sup>1</sup> considered mental suffering, not accompanied by any other element of actual damage, insufficient grounds for a recovery of damages.<sup>2</sup> The statement in the famous case of *Lynch v. Knight*,<sup>3</sup> that “[m]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone,” was the generally accepted rule. In the absence of competent medical knowledge in the field, mental pain was regarded merely as a state of mind or feelings, hidden in the inner

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25. The cases discussed present the most frequently urged types of jury separations. The situations not presented add little to the pattern.

1. The growth of the law regarding mental suffering at common law may be traced through the following articles: Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 50 U. OF PA. L. REV. 141 (1902); Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Green, “*Fright*” Cases, 27 ILL. L. REV. 761 (1933); Hallen, *Damages for Physical Injuries Resulting from Fright or Shock*, 19 VA. L. REV. 253 (1933); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921), 57 AM. L. REV. 828 (1923); Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950); Comment, *Fright or Nervous Shock as a Basis for the Recovery of Damages*, 12 TULANE L. REV. 272 (1938).

2. *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896).

3. 9 H.L. Cas. 577, 598 (1861).

consciousness of an individual, and too subtle and speculative to be capable of measurement by any standard known to law.<sup>4</sup> Reliance has been placed by those who would deny recovery for mental suffering primarily upon the difficulty of proof and measurement of damage;<sup>5</sup> the "remoteness" of damage resulting from mental pain;<sup>6</sup> and the danger that the protection of such interests would "open the door," not only to fraudulent and fictitious claims, but to litigation in the field of bad manners and trivialities.<sup>7</sup>

The first contention, that the interest in mental tranquillity is not susceptible of proof and measurement, seems questionable in the light of the numerous decisions to the contrary. Moreover, even with classical Roman law, recovery was allowed for an outrage to the feelings under the concept of *injuria*.<sup>8</sup> Similarly, in early German and Anglo-Saxon law, compensation was given for an insult to one's sense of dignity. The forcible shaving of one's head, for example, subjected the wrongdoer to heavy damages.<sup>9</sup> Today, mental suffering is widely regarded as susceptible of satisfactory proof and certainly seems no harder to estimate in pecuniary terms than the pain arising from a broken leg, for example, for which recovery has always been allowed.<sup>10</sup>

With respect to the supposed "remoteness" of damage in the form of mental pain, it may be said that perhaps courts sometimes classify as remote those injuries for which they do not wish to allow recovery. Yet why should courts single out as remote certain injuries simply because they are not traditionally regarded as physical in character? Indeed, the belief is often expressed that in reality all mental suffering is physical in

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4. See *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896).

5. *Ibid.*

6. *Braun v. Craven*, 175 Ill. 401, 51 N.E. 657 (1898); *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897).

7. *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897); *Ward v. West Jersey & S.R.R.*, 65 N.J.L. 383, 47 Atl. 561 (1900); *Huston v. Freemansburg Borough*, 212 Pa. 548, 61 Atl. 1022 (1905); see *Throckmorton, Damages for Fright*, 34 HARV. L. REV. 260, 57 AM. L. REV. 328 (1921).

8. DIGEST 47.10.1 cites *Labeo's* writings. See LEE, *THE ELEMENTS OF ROMAN LAW* 382 (3d ed. 1952). See also *Stewart v. Arkansas Southern R.R.*, 112 La. 764, 768, 36 So. 676, 677 (1904) ("In our Code [Articles 2315-2317] the wise precept of the Institutes of Justinian are incorporated in substance, to wit: 'Juris praecepta sunt, alterum non laedere, suum cuique tribuere. . .' [looks to the liability of all damages].")

9. *Laws of Ethelbert*, nos. 33-61 (circa 600), found in POUND & PLUCKNETT, *READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW* 46 (3d ed. 1927).

10. McCORMICK, *DAMAGES* 315 (1935); *Yates v. South Kirkby Collieries*, 2 K.B. 538, 79 L.J.K.B. 1035 (1910); *Hargis v. Knoxville Power Co.*, 175 N.C. 31, 94 S.E. 702 (1917).

character. Darwin described the physical symptoms of fright as follows: "The frightened man at first stands like a statue, motionless and breathless, or crouches down as if instinctively to escape observation. . . . The heart beats wildly, or may fail to act and faintness ensues; there is a death like pallor; . . . utter prostration soon follows, and the mental powers fail. . . ." <sup>11</sup> Some authorities consider it impossible to experience fear as a purely emotional thing <sup>12</sup> and maintain that not only fright and shock, but also grief, anxiety, rage, and shame, are actually "physical" injuries and produce well-marked symptoms readily detected by the medical expert. <sup>13</sup>

The third and strongest objection to allowing recovery for mental suffering is based upon the problem of judicial administration which such a policy might present. <sup>14</sup> It is often stated that protection of the interest in mental tranquillity by allowing damages for mental suffering is reasonably certain to result in a vast increase in litigation. <sup>15</sup> However, the fear of the "flood of litigation" which may result from "opening the door" should not prevent recovery for a wrong. Nevertheless, since mental suffering can be easily simulated, it must be admitted that there is some danger of fictitious claims and vexatious suits. <sup>16</sup> Moreover, as one author very aptly stated, "against a large part of the frictions and irritations of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be." <sup>17</sup> But in the final analysis, especially in view of the advance of medical knowledge, there seems to be no reason for denying recovery for a given mental injury which is proved to be both genuine and serious in character. <sup>18</sup>

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11. DARWIN, *EXPRESSION OF EMOTIONS IN MAN AND ANIMALS*, quoted by CRILE, *THE ORIGIN AND NATURE OF THE EMOTIONS* 26-28 (1915).

12. *Id.* at 60 ("fear influences every organ and tissue").

13. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); *Chiuchiolo v. New England Wholesale Tailors*, 84 N.H. 329, 150 Atl. 540 (1930).

14. "Whatever justification there may be rests in the courts' fear that unscrupulous lawyers with the aid of equally unscrupulous doctors may obtain from sympathetic juries verdicts upon purely fabricated evidence." Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 733 (1937).

15. *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896).

16. *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897).

17. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

18. *Pecoraro v. Kopanica*, 173 So. 203, 204 (La. App. 1937) ("Even though there may be no actual objective symptoms of injury, there may be recovery for nervous shock if the evidence concerning such nervous condition is sufficient to warrant the belief that such injuries were actually sustained.")

These general considerations apply to recovery for mental suffering in Louisiana. However, our jurisprudence is technically based upon two articles of the Civil Code.<sup>19</sup> Article 2315 of the Civil Code of 1870 provides that

“Every act whatever of man that causes damage to another, obliges him by whose fault it happens to repair it. . . .”

In *Quina v. Roberts*<sup>20</sup> and *Laird v. Natchitoches Oil Mill*,<sup>21</sup> it is stated that Article 2315 contemplates redress to all who suffer injury, including mental pain and suffering, in consequence of another's wrongful or negligent act.<sup>22</sup>

Article 1934,<sup>23</sup> which provides the measure of damages for the breach of contractual obligations, states in part:

“. . . [T]here are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party. Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality—or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach; . . . a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.”

This article provides a basis of recovery for damage which from its very nature is not susceptible of accurate and arithmetical appraisal.<sup>24</sup> The courts have interpreted Article 1934 as allowing recovery of damages for mental suffering<sup>25</sup> and have allowed such recovery in cases involving breach of contract,<sup>26</sup> wrongful death,<sup>27</sup> trespass to property,<sup>28</sup> and false imprisonment.<sup>29</sup>

19. Arts. 1934, 2315, LA. CIVIL CODE OF 1870.

20. 16 So.2d 558 (La. App. 1944).

21. 10 La. App. 191, 120 So. 692 (1929).

22. See also *Black v. Carrollton R.R.*, 10 La. Ann. 33 (1855).

23. Art. 1934, LA. CIVIL CODE OF 1870.

24. *Graham v. Western Union Telegraph Co.*, 109 La. 1069, 34 So. 91 (1903).

25. *Ibid.*

26. *Jiles v. Venus Community Center Benev. Mut. Aid Ass'n*, 191 La. 803, 186 So. 342 (1939) (failure of physician to perform services); *Lewis v. Holmes*, 109 La. 1030, 34 So. 66 (1903).

27. *Thompson v. New Orleans Ry. & Light Co.*, 148 La. 698, 87 So. 716 (1921).

28. *Tissot v. Great Southern Tel. & Tel. Co.*, 39 La. Ann. 996, 3 So. 261 (1887).

29. *Block v. McGuire*, 18 La. Ann. 417 (1866).

Louisiana has allowed recovery for mental suffering in other types of suits. While all these cases seem to have been decided for the most part without reference to each other, when viewed together, they prove significant. For purposes of discussion, they can be grouped under two general headings: (1) Intentionally Caused Mental Suffering, and (2) Negligently Caused Mental Suffering.

### *Intentionally Caused Mental Suffering*<sup>30</sup>

It is quite understandable that courts should allow recovery for the intentional infliction of mental suffering. Such conduct exists when the wrongful act in question is done for the express purpose of causing emotional distress or with knowledge on the part of the actor that it is substantially certain to follow. Courts confronted with cases in which the defendant has acted maliciously or intentionally may appreciate readily that the mental suffering usually caused by such conduct is real and substantial. In such cases, there is an element of outrage which is in itself an important guarantee that mental disturbance that follows is serious, and not merely feigned.<sup>31</sup> Thus the practical joker who playfully tells a woman that her husband has hanged himself should expect to be held liable for her resulting mental suffering.<sup>32</sup> The American Law Institute has expressed what is becoming the majority view: "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it."<sup>33</sup>

In many jurisdictions courts have been reluctant to award damages for mental suffering unless they could find an indication of an independent tort to use as a "peg" upon which to hang an award of damages. Under the common law of assault,<sup>34</sup> where the wrongful conduct of the defendant is calculated to produce an immediate apprehension of a harmful or offensive touching, such "parasitic"<sup>35</sup> damages received early recognition. Thus the rule permitted recovery for a movement of the hand that might

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30. See Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

31. *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897) ("he who acts 'wantonly' without regard to the consequences, will be subject to more extended liability for mental suffering.").

32. *Bielitski v. Obadiak*, 2 W.W. Rep. 283, 65 Dom. L. Rep. 627 (1922).

33. RESTATEMENT, TORTS § 46 (Supp. 1948).

34. *I de S v. W. de S*, Y. B. Lib. Assis. f. 99, pl. 60 (1348).

35. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 470 (1906).

frighten the plaintiff but slightly.<sup>36</sup> In Louisiana, the courts have been very liberal in awarding damages for mental suffering in assault cases.<sup>37</sup> In one recent decision,<sup>38</sup> the court held that the defendant, who merely snatched a rooster from the plaintiff's grasp, was liable in damages for the victim's mental shock. It seems clear that the court regarded the defendant's alleged assault and battery as a "peg" upon which to hang the real damage, mental suffering, incurred by the plaintiff. Such "parasitic" damages have not been limited to assault cases, however. Recovery has also been allowed where mental suffering has arisen from false imprisonment,<sup>39</sup> intentional breach of contract,<sup>40</sup> and defamation.<sup>41</sup> Similarly, the violation of a criminal blackmail statute has served as the basis of recovery for mental suffering.<sup>42</sup> However, some courts in other jurisdictions have discarded all "pegs" and held the defendant liable for the infliction of mental suffering alone.<sup>43</sup>

Some Louisiana cases have based liability upon a so-called "trespass" on the plaintiff's property. In *Humphreys v. Bennett Oil Corporation*,<sup>44</sup> the plaintiff was allowed to recover for mental suffering when the defendants drilled oil wells near the graves of his deceased relatives. In many such cases the common law courts base liability upon a technical trespass to a "property right"<sup>45</sup> in the dead body allegedly owned by the plaintiff. A very recent Louisiana district court decision allowed all six members of a family damages for their mental suffering caused by the negligent burning of the father's corpse by employees of a wrecker service.<sup>46</sup> One Louisiana court went so far as to grant

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36. *Trogdon v. Terry*, 172 N.C. 540, 90 S.E. 583 (1916).

37. *Bonneval v. American Coffee Co.*, 127 La. 57, 53 So. 426 (1910); *Carriek v. Joachim*, 126 La. 5, 52 So. 173 (1910); *Newsom v. Starns*, 142 So. 704 (La. App. 1932) (in action for tarring and feathering, plaintiff's feelings of humiliation and disgrace, together with physical pain, must be considered in determining actual and compensatory damages); *Hays v. Barcellona*, 142 So. 164 (La. App. 1932) (defendant who shoots at plaintiff is liable for terror caused).

38. *Brennan v. Hardy*, 172 So. 541 (La. App. 1937).

39. *Block v. McGuire*, 18 La. Ann. 417 (1866).

40. *Enders v. Skannal*, 35 La. Ann. 1000 (1883).

41. *Kennedy v. Item Co.*, 213 La. 347, 34 So.2d 886 (1948); *Jozsa v. Moroney*, 125 La. 813, 51 So. 908 (1910).

42. *E.g.*, *Tuyes v. Chambers*, 144 La. 723, 81 So. 265 (1919).

43. *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814 (1926) (defendants falsely charged plaintiff with having had sexual intercourse with various men).

44. 195 La. 531, 197 So. 222 (1940).

45. *Langford v. West Oakwood Cemetery Addition, Inc.*, 223 S.C. 350, 75 S.E.2d 865 (1953).

46. *Blanchard v. Brawley Auto Parts Service*, Civil No. 2711, 18th Judicial Dist. (La. 1954).

recovery when town employees unjustifiably cut up shade trees belonging to the plaintiff.<sup>47</sup>

Certain persons or corporations engaged in the business of public transportation have been regarded as being under a special duty to use care in protecting their passengers from mental as well as physical injuries. Accordingly, they have been held responsible for the conduct of their employees who insult or humiliate passengers in any unreasonable manner.<sup>48</sup> In such instances the common law courts have based recovery on an "implied contract to be polite."<sup>49</sup> Louisiana courts, although placing reliance on the articles of the Code, have reached similar results. In the case of *Haile v. New Orleans Ry. & Light Co.*,<sup>50</sup> the defendant's servant called the plaintiff a "big fat woman" and insinuated that she belonged in the rear of the bus. Damages were allowed because of the "humiliation" and "mortification" which the plaintiff suffered. The courts have also upheld actions against carriers who try to put white persons in the Negro sections<sup>51</sup> or who accuse passengers of trying to "beat the fare."<sup>52</sup> A similar rule of liability has been imposed upon theater owners<sup>53</sup> and hotel keepers.<sup>54</sup>

The relationships existing between landlords and collection agents and their respective clients have provided further bases of recovery for mental suffering. When a landlord maliciously harassed his tenant with unjustified "writs of ejectment," he was held liable for the tenant's outrage.<sup>55</sup> In a recent California case,<sup>56</sup> a plaintiff recovered damages from a landlord who used abusive language in evicting him. There, the court considered the plaintiff's mental suffering, the only damage shown, as independently actionable. In recent years Louisiana courts have allowed damages for mental suffering in certain collection cases. Thus in *Davis v. Lindsay Furniture Co.*,<sup>57</sup> an employer was held liable for the humiliation and mental suffering caused by his collection

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47. *Oglesby v. Town of Winnfield*, 27 So.2d 137 (La. App. 1946).

48. *May v. Shreveport Traction Co.*, 127 La. 420, 53 So. 671 (1910).

49. See *Wheat, The Liability of the Carrier to Passengers for Injuries by its Servants*, 14 MICH. L. REV. 626 (1916).

50. 135 La. 229, 65 So. 225 (1914).

51. *May v. Shreveport Traction Co.*, 127 La. 420, 53 So. 671 (1910).

52. *Carter v. New Orleans Ry. & Light Co.*, 135 La. 151, 65 So. 15 (1914).

53. *Vogel v. Saenger Theatres*, 207 La. 835, 22 So.2d 189 (1945).

54. *Moody v. Kenny*, 153 La. 1007, 97 So. 21 (1923) (wanton and malicious conduct of hotel employees).

55. *Deslonde v. O'Hearn*, 39 La. Ann. 14, 1 So. 286 (1887).

56. *Emden v. Vitz*, 88 Cal. App.2d 313, 198 P.2d 696 (1948).

57. 19 La. App. 169, 138 So. 439 (1931).



agent who attempted to recover furniture from the plaintiff's home in a forcible manner.

As early as 1903, Louisiana courts have permitted recovery for mental suffering in the "breach of contract" cases. In the famous "wedding dress" case,<sup>58</sup> a bride was granted recovery for the "mortification and humiliation" occasioned by the defendant's negligent breach of his contract to furnish her with her trousseau. The same position was taken in a recent case wherein a laundry failed to return the only suit of a prospective groom in time for the wedding.<sup>59</sup> In another case members of a social club were awarded damages for the mental suffering resulting from the defendant's breach of a contract to furnish them with a certain pavilion for a picnic.<sup>60</sup> Although in these cases no active intent on the part of the defendant to cause damage was shown, it seems that his knowledge of the importance and significance of fulfilling the contract was necessary to create liability.<sup>61</sup> Thus recovery has been allowed in a similar manner against a telegraph company for the negligent transmission of a message, the very contents of which suggest that damage may result.<sup>62</sup> It is frequently quite difficult to draw the line between fictitious and valid claims of this nature, yet Louisiana courts have not hesitated to deny recovery in several borderline cases.<sup>63</sup>

Some courts have allowed recovery for the consequences of practical jokes of a heartless, malicious type. In the famous English case of *Wilkinson v. Downton*,<sup>64</sup> the defendant jokingly told a woman that her husband had been seriously injured. There the court, in holding the defendant liable, assumed that he had "willfully done an act calculated to cause physical harm to the plaintiff."<sup>65</sup> Later, another defendant was held liable for the mental suffering of a sensitive customer to whom he presented a dead rat wrapped with groceries.<sup>66</sup> The Supreme Court of

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58. *Lewis v. Holmes*, 109 La. 1030, 34 So. 66 (1903).

59. *Mitchell v. Shreveport Laundries*, 61 So.2d 539 (La. App. 1952); see also *Johnson v. Levy*, 118 La. 447, 43 So. 46 (1907) (breach of marriage promise).

60. *O'Meallie v. Moreau*, 116 La. 1020, 41 So. 243 (1906).

61. *Garner v. Burnstein*, 1 La. App. 19 (1924).

62. *Graham v. Western Union Telegraph Co.*, 109 La. 1069, 34 So. 91 (1903).

63. Thus recovery was denied in the following "breach of contract" cases: *Lillis v. Anderson*, 21 So.2d 389 (La. App. 1945) (building alteration and improvement contract); *Norman v. Radio Station KRMD, Inc.*, 187 So. 831 (La. App. 1939) (breach of contract for radio advertising).

64. [1897] 2 Q.B. 57.

65. *Id.* at 58.

66. *Great Atlantic & Pacific Tea Co. v. Roch*, 169 Md. 189, 153 Atl. 22 (1931).

Louisiana permitted recovery in a similar case, *Nickerson v. Hodges*.<sup>67</sup> There an old maid was tricked into digging up a buried "pot of gold" under circumstances of extreme public humiliation. Referring to Article 2315 as the basis of recovery, the court said "the mental suffering and humiliation must have been quite unbearable, to say nothing of the disappointment . . . which she carried to her grave."<sup>68</sup>

Although in certain limited situations the common law has permitted recovery where the plaintiff's mental distress is caused by an act intended to affect a third person,<sup>69</sup> Louisiana courts have consistently denied recovery in such cases.<sup>70</sup> However, it seems that the doctrine of "transferred intent"<sup>71</sup> as recognized in assault and battery cases, could be employed in some mental suffering cases supported by sufficient evidence.

#### *Negligently Caused Mental Suffering*

Where the conduct of the defendant is merely negligent, and the element of intentional or malicious action is lacking, the problem becomes even more difficult. Since most cases concerning intentionally caused mental suffering involve the element of humiliation and disgrace, or affect one's sense of honor, triers of fact are better able to appreciate such damage than the fright or shock caused by a negligent defendant who, for example, nearly causes an accident. However, since the courts should redress all wrongs, it seems that one guilty of neglect, or want of due regard for the feelings of another, should be responsible to the latter for whatever damage his conduct, though not malicious, has produced.<sup>72</sup>

Although cases involving negligently caused mental suffering can arise in a variety of situations, a large number arise as incidents to traffic and automobile accidents. Decisions allowing damages for negligently caused mental suffering arising from independent causes of action are also numerous.

*Fright and Shock.* The traditional view at early common law was that claims for mental suffering based upon fright and shock were not actionable.<sup>73</sup> However, due to the complexities

67. 146 La. 735, 84 So. 37 (1920).

68. *Id.* at 741, 84 So. at 39.

69. *Lambert v. Brewster*, 97 W.Va. 124, 125 S.E. 244 (1924).

70. *Knox v. Allen*, 4 La. App. 223 (1926); *Sperier v. Ott*, 116 La. 1087, 41 So. 323 (1906).

71. See PROSSER, A HANDBOOK OF THE LAW OF TORTS 47 (1941).

72. *Kernan v. Chamberlin*, 5 Rob. 116 (La. 1843).

73. *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896).

of modern society, numerous accidents giving rise to threats of mental as well as physical injuries have occurred. Today courts have realized, although with some hesitation, that many such claims are genuine and have accordingly allowed recovery for negligently caused mental suffering in the form of fright and shock. Again, the courts are faced with the administrative problem presented by allowing recovery for mental suffering. In order to solve this problem, they have adopted certain rules designed to guarantee that the mental suffering in question is genuine.

Some common law courts require that the actionable fright and shock experienced by the plaintiff be accompanied by a tangible physical injury.<sup>74</sup> It is universally agreed that recovery for mental suffering will be permitted in such cases,<sup>75</sup> probably because such injuries provide sufficient assurance that the mental injury in question is not feigned.

A majority of the courts at common law refuse to permit recovery when mental suffering is not preceded by a physical injury, unless some "impact" upon the plaintiff's person has occurred.<sup>76</sup> Again, it seems that this rule is required to afford some guarantee that the mental suffering is genuine. It is evident that, under this rule, some bona fide claims will be unjustly dismissed. There are several interesting Louisiana decisions allowing recovery for negligently caused mental suffering where no physical harm was involved. In *Laird v. Natchitoches Oil Mill, Inc.*,<sup>77</sup> recovery was allowed for mental suffering when a boy's bicycle was struck by the defendant's truck, even though the boy suffered no physical harm. Again, in *Klein v. Medical Bldg. Realty Co.*,<sup>78</sup> plaintiff's fright, caused by the falling of plaster from a ceiling, and resulting in traumatic hysteria, afforded the basis of recovery for mental suffering. One negligent truck driver, who collided with the car in which an expectant mother was riding, was forced to compensate for her mental anguish, caused by fear that her unborn child would be deformed at birth.<sup>79</sup>

In many instances "impact" has become a mere technical

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74. 1 STREET, THE FOUNDATIONS OF LEGAL LIABILITY 470 (1906).

75. See PROSSER, A HANDBOOK OF THE LAW OF TORTS § 34(a) (1941).

76. *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896).

77. 10 La. App. 191, 120 So. 692 (1929).

78. 147 So. 122 (La. App. 1933). See also *Dyer v. Warwick*, 19 La. App. 354, 140 So. 254 (1934).

79. *Muller v. Herrin Motor Lines, Inc.*, 184 So. 406 (La. App. 1938).

requirement and seems to serve the same purpose that a technical "peg" serves in cases involving intentionally caused mental suffering. Thus in many jurisdictions the term "impact" has come to have slight and absurd meanings,<sup>80</sup> such as the entrance of dust in the eye, a slight blow, or contact with exhaled smoke. One Louisiana court found "impact" when the railway car in which the plaintiff was riding jolted, although she received no bruises and was not thrown from her seat.<sup>81</sup> However, one recent recovery for the plaintiff's alleged mental suffering when the decision takes a more conservative view which seems to restrict the meaning of "impact" to physical contacts with the physical person of the plaintiff. Thus the Louisiana Supreme Court denied defendant's brick wall fell against the plaintiff's house, and frightened her.<sup>82</sup> The court apparently felt that the evidence of mental suffering was insufficient to justify an award of damages. Several courts have repudiated the requirement of "impact" and have regarded the physical consequences of mental suffering as a sufficient guarantee of its reality.<sup>83</sup>

Last, a great many of the common law jurisdictions permit recovery in limited situations where mental disturbances occur as a result of negligent conduct primarily affecting a third person.<sup>84</sup> Louisiana courts have taken a contrary view. In *Black v. Carrollton R.R.*,<sup>85</sup> an early Louisiana case in which a father was denied recovery for mental anguish caused by the mutilation of his minor son in a railroad accident, one Justice said, "[L]et us bear in mind the difficulty which would result from recognizing the mental suffering of the third party as an element of damage. Where is any but an arbitrary limit to be found in extending its benefit?"<sup>86</sup> Wrongful death actions provide the sole exceptions to the above mentioned rule. Under Article 2315 of the Civil Code, Louisiana courts have, in wrongful death actions, allowed recovery by the spouse for the loss of consortium,

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80. *Homans v. Boston Elev. Ry.*, 180 Mass. 456, 62 N.E. 737 (1902); *Porter v. Delaware, L. & W.R.R.*, 73 N.J.L. 405, 63 Atl. 860 (1906); *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930).

81. *Favalora v. New Orleans Ry. & Light Co.*, 143 La. 572, 78 So. 944 (1918).

82. *Pecoraro v. Kopanica*, 173 So. 203 (La. App. 1937).

83. *Kenney v. Wong Len*, 81 N.H. 427, 128 Atl. 343 (1925); *Sundquist v. Madison Ry.*, 197 Wis. 83, 221 N.W. 392 (1928).

84. *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927 (1912); *Cohn v. Ansonia Realty Co.*, 162 App. Div. 791, 148 N.Y. Supp. 39 (1914). See also *Rasmussen v. Benson*, 133 Neb. 449, 275 N.W. 674 (1937).

85. 10 La. Ann. 33 (1855).

86. *Id.* at 42.

by the parent for the loss of the child's affection and fellowship, and by the child for the loss of the parent's advice and society.<sup>87</sup> The legislature apparently thought it necessary, however, as a sound administrative policy, to limit recovery in such instances to cases involving members of the immediate family of the plaintiff.<sup>88</sup>

*David M. Ellison, Jr.*

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87. Note, 14 LOUISIANA LAW REVIEW 713, 715, n. 12 (1954).

88. Art. 2315, LA. CIVIL CODE of 1870.