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Torts - Negligently Inflicted Mental Anguish Occasioned By Injury to Another

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sales of immovable property was apparently made to depend upon *what* the viewer saw or could have seen; a prior viewing did not automatically convert the sale to one *per aversionem*.

According to the instant case, there must be visible markers of some sort to indicate the location of the boundaries before it can be inferred that the buyer intended to buy the property *per aversionem* with negligible regard for its areal extent. Article 2495 sets forth a mechanical test, dependent upon easily ascertainable factors, for determining whether a sale is *per aversionem*. Injection of the question whether the buyer viewed the property in order to classify the sale injects his actual intent and displaces the rigid requirements of the Code. However, if the use of this consideration is to continue, limiting the effect of the buyer's viewing to *what* he saw or should have seen should at least limit the degree of variance from the exacting requirements for a sale *per aversionem* contained in the Civil Code.

Allen L. Smith, Jr.

TORTS—NEGLIGENTLY INFLICTED MENTAL ANGUISH OCCASIONED BY INJURY TO ANOTHER

Plaintiffs sought damages for mental anguish suffered when their child became violently ill from having eaten rat poison placed in their home by defendant exterminator; they alleged that they could not secure a reliable antidote because the exterminator was unable to identify the poison's ingredients. The district court dismissed on exception of no cause of action. The court of appeal reversed and remanded.¹ *Held*, although generally one may not recover for mental anguish resulting from injury to another, plaintiffs stated a cause of action in this case since the exterminator owed a duty directly to them, independently of any duty owed their child, to be able to inform them within a reasonable time of the ingredients of the poison used in their home. *Holland v. St. Paul Mercury Insurance Co.*, 135 So. 2d 145 (La. App. 1st Cir. 1961).

However, when he cannot see, by buildings, or fences, or other marks or monuments just what the boundaries of the property are, it may be said that he is influenced by the surface area or by the measurements . . ." 134 So. 2d at 682.

1. The father also sued for the child's benefit for injuries allegedly sustained from eating the poison. The jury, however, ruled for defendants, and that claim was not appealed.

It is generally recognized that recovery may be had for mental anguish occasioned by intentional misconduct.² When mental anguish results from negligence, however, the courts are reluctant to allow recovery, apparently on the rationale that to do so would foster a multiplicity of suits and expose defendants to false and excessive claims. Also, many of the early cases dealt with traffic accidents, and the courts probably felt that to allow damages for negligently inflicted mental anguish would unduly burden traffic and transportation.³ These considerations apparently prompted the courts to formulate two general limitations on recovery of damages for negligently inflicted mental anguish. First, there can be no recovery for mental anguish unattended by physical manifestations thereof.⁴ Thus, no recovery is allowed for the mere unpleasant sensation of fright.⁵

2. See PROSSER, *TORTS* § 11 (2d ed. 1955). Such recoveries may be categorized in three general groups. The first involves mental anguish considered in awarding damages for other intentional torts. *Deevy v. Tassi*, 21 Cal.2d 109, 130 P.2d 389 (1942) (assault and battery); *Crowley v. New Orleans Brewing Co.*, 180 So. 232 (La. App. Or. Cir. 1938) (trespass); *Weatherford v. Birchett*, 158 Va. 741, 164 S.E. 535 (1932) (slander); *RESTATEMENT, TORTS* §§ 47(2) (amendments and additions, 1950), 905 (1939); 25 C.J.S., *Damages* § 63 (1941). The second is based on the intentional acts of common carriers. *Southeastern Greyhound Corp. v. Graham*, 69 Ga. App. 621, 26 S.E.2d 371 (1943) (threatening and abusive language); *Haile v. New Orleans Ry. & Light Co.*, 135 La. 229, 65 So. 225 (1914) (called plaintiff "a big fat woman"); *Medlin v. Southern R.R.*, 143 S.C. 91, 141 S.E. 185 (1928) (deliberately overcharged and insulted passenger); 13 C.J.S., *Carriers* § 692 (1939). The third group embraces those miscellaneous situations in which the essential element of the wrong is the outrageousness of the defendant's act. *Nickerson v. Hodges*, 146 La. 735, 84 So. 37 (1920) (famous "pot of gold" case); *Great Atlantic & Pacific Tea Co. v. Roch*, 160 Md. 189, 153 Atl. 22 (1931) (defendant wrapped up rat in package of groceries); *Wilkinson v. Downton*, 2 Q.B.D. 57 (1897) (defendant falsely told plaintiff that her husband had suffered serious injury); *Magruder, Mental and Emotional Disturbances in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); *Prosser, Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); *RESTATEMENT, TORTS* § 46 (amendments and additions, 1950). Frequently such cases involve abusive methods of collection of debt. *E.g.*, *Barnett v. Collection Service Co.*, 214 Iowa 1303, 242 N.W. 25 (1932); *Grandeson v. International Harvester Credit Corp.*, 223 La. 504, 66 So.2d 317 (1953); *Tuyes v. Chambers*, 144 La. 723, 81 So. 265 (1919); *Quina v. Roberts*, 16 So.2d 558 (La. App. Or. Cir. 1944); *Duty v. General Finance Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954); 66 U.S. L. REV. 349 (1932).

3. For a resumé of the development of the law in this area, see *Annots.*, 64 A.L.R.2d 100 (1959), 18 A.L.R.2d 220 (1951).

4. *Chicago, R.I. & P. Ry. v. Caple*, 207 Ark. 52, 179 S.W.2d 151 (1944); *Espinosa v. Beverly Hospital*, 114 Cal. App.2d 232, 249 P.2d 843 (1952); *Holland v. Good Bros.*, 318 Mass. 300, 61 N.E.2d 544 (1945); *Kaufman v. Israel Zion Hospital*, 183 Misc. 714, 51 N.Y.S.2d 412 (1944); *Gulf C. & S.F. Ry. v. Trott*, 86 Tex. 412, 25 S.W. 419 (1894); 52 AM JUR., *Torts* § 45 (1944); *Annots.*, 64 A.L.R.2d 100, 117 (1959), 18 A.L.R.2d 220, 224 (1951); *RESTATEMENT, TORTS* § 47 (amendments and additions, 1950).

5. See *Gulf C. & S.F. Ry. v. Trott*, 86 Tex. 412, 25 S.W. 419 (1894). However, when the mental anguish is so severe that it is evidenced by deleterious physical consequences most jurisdictions do allow a cause of action. *Central of Georgia Ry. v. Kimber*, 212 Ala. 102, 101 So. 827 (1924) (injury to nervous

Second, even if mental anguish is evidenced by physical manifestations, no recovery is allowed when it is occasioned by injury or fear of injury to another.⁶

Since the courts in adhering to these general limitations appear to have been motivated by the policy considerations of keeping false claims out of court and protecting the social in-

system); *Hanford v. Omaha & Council Bluffs Street Ry.*, 113 Neb. 423, 203 N.W. 643 (1925) (miscarriage); *Kenny v. Wong Len*, 81 N.H. 427, 128 Atl. 343 (1925) (became "sick" upon finding dead mouse in mouth); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) ("severe emotional and neurological disturbances with residual physical manifestations"); Annot., 64 A.L.R.2d 100, 143 (1959). While it may be argued that such damages are allowed for the physical consequences of the mental anguish and not the mental anguish itself (note the language of RESTATEMENT, TORTS § 313 (1934)), it would seem that in either event the result is the same. The former view was that man had separate faculties for "mental" and "physical" functions, but currently the human being is thought to be an essentially indivisible unit with its mental and physical functions interacting closely at all times. Hence, the determination of whether injuries are of a "physical" or a "mental" nature seems merely an exercise in choosing terms, since neither is adequately descriptive. See Annot., 64 A.L.R.2d 100, 104 (1959).

Formerly, even when there were physical manifestations of mental distress, recovery was denied unless the infliction of mental anguish was accompanied by a contemporaneous physical "impact." *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); *Mitchel v. Rochester R.R.*, 151 N.Y. 107, 45 N.E. 354 (1896); *Miller v. Baltimore & O. S.W. R.R.*, 78 Ohio St. 309, 85 N.E. 499 (1908). See Annot., 64 A.L.R.2d 100, 134 (1959). During the transitional years the impact requirement became only symbolic as even very slight touchings were sufficient to permit recovery. *Kentucky Traction & Terminal Co. v. Roman's Guardian*, 232 Ky. 285, 23 S.W.2d 272 (1929) (electric shock); *Porter v. Delaware, L. & W. R.R.*, 73 N.J.L. 405, 63 Atl. 860 (1906) (dust in the eye); *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke); *Clark Restaurant Co. v. Rau*, 41 Ohio App. 23, 179 N.E. 196 (1931) (swallowed small particles of glass).

It should also be noted that it is the well-accepted rule that mental anguish may be considered in assessing the damages to be awarded in conjunction with a physical injury inflicted other than through the medium of mental suffering, generally through direct physical impact. *Buch v. United States*, 220 F.2d 165 (2d Cir. 1955) (mental agony from paralysis resulting from fall); *Thompson v. Lupone*, 135 Conn. 236, 62 A.2d 861 (1948) (anxiety for future due to physical injury); *Thompson v. Minnis*, 201 Okla. 154, 202 P.2d 981 (1949) (mental anguish resulting from physical suffering of hunger and deprivation of a place to sleep due to defendant's negligent act); *Rosen v. Yellow Cab Co.*, 262 Pa. Super. 58, 56 A.2d 398 (1948); RESTATEMENT, TORTS § 47(2) (amendments and additions, 1950); PROSSER, TORTS § 37 (2d ed. 1955).

6. *Beaty v. Buckeye Fabric Finishing Co.*, 179 F. Supp. 688 (E.D. Ark. 1959); *Maury v. United States*, 139 F. Supp. 532 (N.D. Cal. 1956); *Resavage v. Davies*, 199 Md. 479, 86 A.2d 879 (1952); *Williamson v. Bennett*, 251 N.C. 498, 112 S.E.2d 48 (1960); *Smith v. Incorporated Village of Plandome*, 213 N.Y.S.2d 119 (Sup. Ct. 1961); *Van Hoy v. Oklahoma Coca-Cola Bottling Co.*, 205 Okla. 135, 235 P.2d 948 (1951); *Bedard v. Notre Dame Hospital*, 89 R.I. 195, 151 A.2d 690 (1959); *Nuckles v. Tennessee Electric Power Co.*, 155 Tenn. 611, 299 S.W. 775 (1927); *Carey v. Pure Distributing Corp.*, 133 Tex. 31, 124 S.W.2d 847 (1939); *Venske v. Johnson-Lieber Co.*, 47 Wash.2d 511, 288 P.2d 249 (1955); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935); Annot., 18 A.L.R.2d 220 (1951); 15 AM. JUR., DAMAGES § 180 (1938); Note, 21 LA. L. REV. 858 (1961).

terest in traffic and transportation, it is understandable that some exceptions have developed where there is sufficient reason to believe that the mental anguish is genuine and that the interest in transportation is not affected. Thus, a few jurisdictions have permitted recovery for mental anguish, unattended by physical consequences,⁷ caused by desecration of corpses or interference with burial places,⁸ and by faulty transmission of telegraph messages.⁹

Although Louisiana decisions contain broad statements to the effect that mental anguish unattended by physical consequences can give rise to a cause of action,¹⁰ recovery has generally been confined to the instances in which it is allowed in common law states.¹¹ Louisiana has allowed recovery for mental

7. A number of states, through interpretation of wrongful death statutes, also allow damages for mental anguish occasioned by negligently inflicted death. *Steele v. Miami Transit Co.*, 160 Fla. 363, 34 So. 2d 530 (1948); *Wolfe v. Lockhart*, 195 Va. 479, 78 S.E.2d 654 (1953); HARPER & JAMES, TORTS § 24.1 (1956); Annot., 74 A.L.R. 11 (1931). Louisiana courts interpret LA. CIVIL CODE art. 2315 (1870) to reach the same result. See *Silverman v. Travelers Ins. Co.*, 277 F.2d 257 (5th Cir. 1960); *Thompson v. New Orleans Ry. & Light Co.*, 148 La. 698, 87 So. 716 (1921); *Underwood v. Gulf Refining Co.*, 28 La. 968, 55 So. 641 (1911) (gives background and development of the statute in France and Louisiana); *Freeman v. United States Casualty Co.*, 88 So. 2d 423 (La. App. 2d Cir. 1956).

8. *St. Louis Southeastern Ry. v. White*, 192 Ark. 350, 91 S.W.2d 277 (1936); *Carey v. Lima, Salmon & Tully Mortuary*, 168 Cal. App. 2d 42, 335 P.2d 181 (1959); *Kyles v. Southern Ry.*, 147 N.C. 394, 61 S.E. 278 (1908). However, it appears that most jurisdictions require that recovery be based on intentional or wanton misconduct, or breach of contract. See 25 C.J.S., *Dead Bodies* § 8 (1941); 15 AM. JUR., *Dead Bodies* § 35 (1938).

9. The message has generally had to do with the death or approaching death of a family member. *Western Union Telegraph Co. v. Cleveland*, 169 Ala. 131, 53 So. 80 (1910); *Mentzer v. Western Union Telegraph Co.*, 93 Iowa 752, 62 N.W. 1 (1895); *Alexander v. Western Union Telegraph Co.*, 158 N.C. 473, 74 S.E. 449 (1912). While some of the telegraph cases allow recovery on a tort basis, the majority seem decided on a contract theory.

10. *E.g.*, *Quina v. Roberts*, 16 So. 2d 558, 561 (La. App. Orl. Cir. 1944), wherein it was said: "Article 2315 of our Code is broad in its scope and contemplates redress to all who suffer injury as a consequence of the commission of an offense or quasi offense. This includes recovery for mental pain and anguish for which compensatory damages will be awarded even though unaccompanied by physical injury." As in most instances in which such statements are made, the suit in this case was for damages occasioned by intentional misconduct and not negligence.

11. Other than the instances discussed below, no Louisiana cases were found actually allowing recovery where recovery would not also have been allowed in the more liberal common law jurisdictions.

In *Valence v. Louisiana Power & Light Co.*, 50 So. 2d 847 (La. App. Orl. Cir. 1951), recovery was allowed a husband for mental anguish and worry that his unborn child had sustained injuries and that there might be an abortion because of negligent injury to his wife. However, it appears that the principal issues discussed were whether the wife could recover for aggravation of her physical diseases and ailment and for her child's having been stillborn; the husband's claim appeared to be a subsidiary issue and was not given serious consideration by the court. *Accord*, *Jordan v. Fidelity Casualty Co.*, 90 So. 2d 531 (La. App. 2d Cir. 1956), in which the court again treated allowance of damages to the

anguish unaccompanied by physical manifestations when caused by negligent desecration of a corpse¹² and faulty transmission of a telegraph message.¹³ But prior to the instant case the rule precluding recovery for mental anguish occasioned by injury or fear of injury to another has been rigidly applied.¹⁴

husband as a subordinate issue. *Valence* was cited as authority.

It is also said in Louisiana decisions that recovery is allowed for mental anguish unaccompanied by physical manifestations when caused by unintentional invasions of property interests. *Fontenot v. Magnolia Petroleum Co.*, 227 La. 866, 80 So. 2d 845 (1955); *McGee v. Yazoo & M.V. R.R.*, 206 La. 121, 19 So. 2d 21 (1944); *Holmes v. LeCour Corp.*, 99 So. 2d 467 (La. App. Or. Cir. 1958). However, it should be noted that, except in *Holmes*, recovery was not based on invasion of a protected interest in the person (since no act was committed against the person), but on the basis of invasion of an interest in property. Consequently, the action is brought for discomfort and inconvenience rather than for what is popularly termed "mental distress and anguish." Damages of this nature have long been held recoverable at common law. *E.g.*, *Phillips Petroleum Co. v. Ruble*, 191 Okla. 37, 126 P. 2d 526 (1942); *Louisville & Terminal Co. v. Jacobs*, 109 Tenn. 727, 72 S.W. 954 (1902) (circumstances very similar to the *Yazoo* case). See generally 39 AM. JUR., *Nuisances* § 136 (1942); PROSSER, TORTS § 73 (2d ed. 1955). In *Holmes* the court stated that recovery was based on a personal injury and allowed recovery for mental anguish, although maintaining that if it were not for the jurisprudence establishing a right to recover in such instances, it would have felt constrained to refuse such damages. It is submitted that recovery could have been granted on the basis of inconvenience as in the common law states, provided, of course, that inconvenience could have been proven.

There is considerable authority, however, that injuries to mental feelings may be the subject of damages in some instances when it results from breach of contract. LA. CIVIL CODE art. 1934(3) (1870) provides in part that "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 . . ." See *Vogel v. Saenger Theatres, Inc.*, 207 La. 835, 22 So. 2d 189 (1945); *Jiles v. Venus Community Center Benev. Mut. Aid Ass'n*, 191 La. 803, 186 So. 342 (1939); *Johnson v. Levy*, 118 La. 447, 43 So. 46 (1907); *Graham v. Western Union Telegraph Co.*, 109 La. 1069, 34 So. 91 (1903); *Lewis v. Holmes*, 109 La. 1030, 34 So. 66 (1903); *Jack v. Henry*, 128 So. 2d 62 (La. App. 1st Cir. 1961); *Mitchell v. Shreveport Laundries, Inc.*, 61 So. 2d 539 (La. App. 2d Cir. 1952); *Melson v. Woodruff*, 23 So. 2d 364 (La. App. 1st Cir. 1945). *Rembert v. Fenner & Beane*, 175 So. 116 (La. App. Or. Cir. 1937) indicates that in order to recover it must appear that injury to the mental feeling could reasonably be anticipated by the parties at the time of the contract. *Baker v. Stamps*, 82 So. 2d 858 (La. App. Or. Cir. 1955) and *Lillis v. Anderson*, 21 So. 2d 389 (La. App. Or. Cir. 1945) indicate that, as to suits for breach of building contracts due to defects in construction, the provisions of Article 1934 requiring the object of the contract to be for the gratification of some intellectual enjoyment, etc., may be narrowly applied.

12. *Blanchard v. Brawley*, 75 So. 2d 891 (La. App. 1st Cir. 1954).

13. *Graham v. Western Union Telegraph Co.*, 109 La. 1069, 34 So. 291 (1903).

14. *Grier v. Tri-State Transit Co.*, 36 F. Supp. 26 (W.D. La. 1940); *Brinkman v. St. Landry Cotton Oil Co.*, 118 La. 835, 43 So. 458 (1907); *Sperier v. Ott*, 116 La. 1087, 41 So. 323 (1906); *Honeycutt v. American General Ins. Co.*, 126 So. 2d 789 (La. App. 1st Cir. 1961); *Covey v. Marquette Cas. Co.*, 84 So. 2d 217 (La. App. Or. Cir. 1956); *Hughes v. Gill*, 41 So. 2d 536 (La. App. 1st Cir. 1949); *Davies v. Consolidated Underwriters*, 14 So. 2d 494 (La. App. 2d Cir. 1943); *Seligman v. Holladay*, 154 So. 481 (La. App. 2d Cir. 1934); *Sherwood v. Ticheli*, 10 La. App. 280, 120 So. 107 (2d Cir. 1929); *Alston v. Cooley*, 5 La. App. 623 (1st Cir. 1927); *Barrere v. Schuber*, 5 La. App. 67 (Or. Cir. 1927); *Knox v. Allen*, 4 La. App. 223 (2d Cir. 1926).

While recognizing the general principle that precludes recovery for mental anguish occasioned by injury to another, the court in the instant case held that the principle does not apply when one sues on "the basis of a breach of a primary legal duty . . . owed by the defendant directly to the plaintiff seeking such damages."¹⁵ The court reasoned that exterminators owe such a primary legal duty to householders to know the components of the poisons employed on their premises and thus are liable for mental anguish resulting from a breach of such duty, even though the mental anguish is occasioned by injury to a third person.

That one may recover for mental anguish occasioned by injury to another when the duty breached is a "primary legal duty" owed the plaintiff appears too broad a rule for application to other factual situations.¹⁶ Moreover, courts always find a duty to prevent a certain type of invasion of an interest when they are willing to afford it protection. When in the instant case the court allowed recovery for mental anguish occasioned by injury to plaintiffs' child, it determined that a duty *did* exist to avoid negligently causing mental anguish by injury to another. To say that this determination can be reconciled, on the finding of a "primary legal duty" owed directly to plaintiffs, with the rule that precludes recovery for mental anguish negligently occasioned by injury to another seems a subterfuge.¹⁷

The instant case differs from prior Louisiana jurisprudence on recovery for mental anguish in two respects: it authorizes recovery for negligently inflicted mental anguish unaccompanied by physical consequences in a case other than one involving desecration of a corpse or faulty transmission of a telegraph

15. 135 So. 2d at 159.

16. Although the court maintains that the rule is not to be understood as embracing third persons in general, it would seem that the rule would in fact extend to such persons. Consider the situation where *A*, a motorist, loses control of his automobile and strikes *B*, a pedestrian. *C*, another pedestrian, is nearby but in such a position that he does not fear for his own safety. However, being very sensitive to the sufferings of others, *C* suffers mental anguish because of the injury to *B*. Almost all authorities would agree that *A* should not be held for *C*'s mental anguish. See notes 6 and 14 *supra*. However, since *C* was also a pedestrian it is evident that *A* breached a "primary legal duty" owed him, *i.e.*, the duty to be careful. Consequently, the holding of the instant case would dictate that he be held liable. But in this hypothetical situation the accepted duty to *C* to be careful is the duty to be careful *so that he does not physically injure C*, and not so that he will not cause mental anguish to him by injury to *B*.

17. See PROSSER, TORTS §§ 38, 47, 48 (2d ed. 1955); Prosser, *Palagraf Revisited*, 52 MICH. L. REV. 1 (1953), reprinted in PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 191 (1954); Comment, 16 LA. L. REV. 391 (1956).

message,¹⁸ and it authorizes recovery for negligently inflicted mental anguish occasioned by injury to another.¹⁹ It would seem that, in determining the wisdom of allowing recovery in such instances, consideration should be given the previously mentioned factors underlying the limitations on recovery for mental anguish — the possibility of plaintiffs recovering for false and excessive claims, and the imposition of an unreasonable burden upon socially desirable activities such as traffic and transportation. Confined to its facts,²⁰ the rule of the instant case seems desirable. It is submitted, however, that if extended to the field of torts in general it could create formidable problems of administration.

Wendell G. Lindsay, Jr.

18. Louisiana courts, as mentioned earlier, also allow recovery for mental distress without physical manifestations in some instances when it is occasioned by breach of contract. See note 11 *supra*. As stated previously, the *statements* made by Louisiana courts appear to be misleading. As to actual recoveries, see note 11 *supra*.

19. It is submitted that this is the effect of the holding of the instant case. See text accompanying note 17 *supra*.

20. *I.e.*, parents suffering mental anguish for fear of death to their child as a result of an exterminator's failure to be able to inform them of the nature of the poisons used in their home.