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Torts - Damages For Emotional Distress

Byron Kantrow Jr.

quently, it seems possible for an heir to accept after the thirty-year prescriptive period.[19] Subsequent cases have followed this interpretation.[20]

Edwards v. Smith represents a reversion to the *Generes* interpretation by holding Article 1030 inapplicable to regular heirs.[21] Citing only a pre-*Sun Oil* case,[22] the court apparently failed to consider the more recent interpretations by the Supreme Court.[23] The instant case's interpretation of Article 1030 seems clearly erroneous because in conflict with that of *Sun Oil* and its progeny. However, since the instant decision could have been decided without reference to Article 1030 — plaintiff failed to establish her capacity of forced heirship — the instant case should not detract from the *Sun Oil* interpretation.[24]

John T. McMahon

TORTS — DAMAGES FOR EMOTIONAL DISTRESS

Defendant intentionally shot a mare, owned by plaintiff's son, to frighten it away from his yard. The next morning plain-

19. Since creditors can force heirs to accept or renounce after thirty days of the succession's opening, it is submitted that renunciation of a succession after thirty years from its opening is unlikely due to the improbability of a succession's owing debts at that late date. See LA. CIVIL CODE arts. 1050-1055 (1870).

Furthermore, it should be pointed out that LA. R.S. 9:5682 (Supp. 1960), not applicable in *Edwards*, provides that an heir or legatee who has not been recognized as such in a judgment of possession may not assert any rights against succession property acquired by a third person from an heir or legatee who has been so recognized, if such third person has possessed continuously and peaceably for ten years from the registry of the judgment of possession.

20. Succession of Lapene, 233 La. 129, 96 So. 2d 321 (1957); Succession of Seals, 142 So. 2d 629 (La. App. 2d Cir. 1962). *Cf.* Mestayer v. Cities Service Development Co., 136 So. 2d 513 (La. App. 3d Cir. 1961).

21. It is submitted that the court inadvertently used the term "forced" heir rather than "regular" heir.

22. 147 So. 2d at 423: "It is the firmly established jurisprudence that forced heirs do not lose by prescription their right of inheritance in failing to accept the succession within thirty years because, if they have not renounced it, they are presumed to have accepted it. Le mort saisit le vif. Dileo v. Dileo, 217 La. 103, 107, 46 So. 2d 53, 56 (1950)."

23. See note 15 *supra*.

24. It must be noted that *Edwards* is a court of appeal decision, whereas *Sun Oil* was rendered by the Supreme Court. Moreover, it is submitted that the *Sun Oil* interpretation premised upon the existence of a single option to accept or reject in all cases is the preferable interpretation, permitting a just and workable solution while avoiding the harsh French rule which makes all inactive heirs stranger to the succession after the lapse of thirty years. In any event, it would seem that stability in the law requires the Louisiana courts to consistently adhere to one interpretation.

tiff's son discovered the mare was suffering. The trial court allowed plaintiff to recover $100.00 on behalf of his minor son as damages for shock and mental anguish experienced. The Second Circuit Court of Appeal affirmed and increased the award of the damages. *Held,* an award of $250.00 for shock and mental anguish sustained by a minor resulting from observing the pain and suffering of his horse was justified on showing close attachment, fondness, and affection of the minor for his horse. *Brown v. Crocker,* 139 So. 2d 779 (La. App. 2d Cir. 1962).

In recent years courts have tended to recognize intentional infliction of mental or emotional disturbance as a separate tort.[1] This tort is in a process of growth; its ultimate limits have not yet been determined.[2] Indicative of this growth is Section 46 of The *Restatement of Torts,* amended in 1948, to provide that one who, without a privilege to do so, intentionally causes severe emotional distress to another is liable for such emotional distress, and for bodily harm resulting therefrom.[3] Recovery for mental anguish has generally been limited to instances of outrageous conduct directed at, or in the presence of, the plaintiff under circumstances in which the wrongdoer was considered as intentionally or recklessly causing the mental anguish.[4] Out-

1. PROSSER, TORTS § 11 (2d ed. 1955). The progress of the law may be traced in the following series of articles: Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact,* 41 AM. L. REG.(N.S.) 141 (1902); Throckmorton, *Damages for Fright,* 34 HARV. L. REV. 260 (1921), 57 AM. L. REV. 828 (1923); Goodrich, *Emotional Disturbance as Legal Damage,* 20 MICH. L. REV. 497 (1922); Bohlen & Polikoff, *Liability in Pennsylvania for Physical Effects of Fright,* 80 U. PA. L. REV. 627 (1932); Bohlen & Polikoff, *Liability in New York for the Physical Consequences of Emotional Disturbance,* 32 COLUM. L. REV. 409 (1932); Hallen, *Damages for Physical Injuries Resulting from Fright or Shock,* 19 VA. L. REV. 253 (1933); Hallen, *Hill v. Kimball — A Milepost in the Law,* 12 TEXAS L. REV. 1 (1933); Green, *"Fright" Cases,* 27 ILL. L. REV. 761, 873 (1933); Magruder, *Mental and Emotional Disturbance in the Law of Torts,* 49 HARV. L. REV. 1033 (1936); Harper & McNeely, *A Re-examination of the Basis for Liability for Emotional Disturbance,* 1938 WIS. L. REV. 426.

2. RESTATEMENT, TORTS § 46 (Tent. Draft No. 1, 1957). So fluid is the law in this area that the 1948 draft of Section 46 has already been modified by the 1957 draft. See note 3 *infra,* and accompanying text.

3. RESTATEMENT, TORTS § 46, amendment at V (student ed. 1950). The 1957 draft of Section 46 provides: "(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for emotional distress and for bodily harm resulting from it. (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress to another who is present at the time." RESTATEMENT, TORTS § 46 (Tent. Draft No. 1, 1957). It should be noted this is the first time the Restatement has recognized the possibility of a third person being allowed emotional damages for an act directed at another. *Id.* § 46(2).

4. See notes 5-16 *infra,* and accompanying text.

rageous conduct has been defined as that which would arouse resentment in an average member of the community and lead him to exclaim "Outrageous!"[5] People are expected to bear mere abuse without circumstances of aggravation, as it is not considered as being outrageous. The outrageous element of recovery was illustrated by a Louisiana case allowing damages to an elderly woman deceived into digging up a buried pot, supposed to be gold, under circumstances of extreme public humiliation.[6]

Emotional distress when it takes the form of grief, sorrow, or disappointment[7] has been approached cautiously by the courts.[8] Recovery has usually been denied unless the defendant at the time of his wrongdoing was in possession of facts indicating a particular likelihood that grief, sorrow, or disappointment would result from his act.[9] The requirement of special

5. RESTATEMENT, TORTS, Explanatory Notes § 46, comment *d* at 22 (Tent. Draft No. 1, 1957): "It has not been enough that defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress. . . . Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim "Outrageous!"

6. Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

7. Emotional distress covers various states. Illustrative are mental anguish, grief, sorrow, shame, humiliation, embarrassment, mortification, anger, chagrin, disappointment, worry, and nausea. RESTATEMENT, TORTS § 46, comment f at VI (student ed. 1950).

8. In numerous cases the Louisiana courts have denied recovery for grief, sorrow, and disappointment when it is caused by the injury to a loved one. *E.g.*, Sperier v. Ott, 116 La. 1087, 41 So. 323 (1906); Black v. The Carrollton R.R., 10 La. Ann. 33 (1855); Vinet v. Checker Cab Co., 140 So. 2d 252 (La. App. 4th Cir. 1962); Honeycutt v. American Gen. Ins. Co., 126 So. 2d 789 (La. App. 1st Cir. 1961); Covey v. Marquette Cas. Co., 84 So. 2d 217 (La. App. Orl. Cir. 1956); Hughes v. Gill, 41 So. 2d 536 (La. App. 1st Cir. 1949); Davis v. Consolidated Underwriters, 14 So. 2d 494 (La. App. 2d Cir. 1943); Seligman v. Holiday, 154 So. 481 (La. App. 2d Cir. 1934); Alston v. Cooly, 5 La. App. 623 (1st Cir. 1927); Barrere v. Schuber, 5 La. App. 67 (Orl. Cir. 1926); Knox v. Allen, 4 La. App. 223 (2d Cir. 1926); *cf.* Note, 23 LA. L. REV. 473 (1963).

9. An example of one court's reasoning which allowed recovery is found in Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145 (La. App. 1st Cir. 1961), 23 LA. L. REV. 473 (1963). The decision was based on the following cases: Haile v. New Orleans Ry. & Light Co., 135 La. 229, 65 So. 225 (1914); Graham v. Western Union Tel. Co., 109 La. 1069, 34 So. 91 (1903); Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903); Lafitte v. New Orleans City & L. R.R., 43 La. Ann. 34, 8 So. 701 (1890). These were used to evidence the proposition that "our courts have rejected the principle which denies recovery for mental pain and suffering unaccompanied by physical injury to plaintiff and have repeatedly and consistently permitted recovery in such cases provided it be found the worry and anguish for which damages are sought was occasioned by breach of a duty owed plaintiff by defendant and is not predicated solely upon breach of duty owed a party other than plaintiff." 135 So. 2d at 157. The court concluded: "We believe the foregoing views neither disturb nor deviate from the rule obtaining in this state to the effect a plaintiff may not recover for mental pain and anguish occasioned by injury to another. Excepted from said rule, however, are those instances wherein a plaintiff suing for mental pain and anguish occasioned

knowledge or foreseeability is exemplified by several Louisiana decisions, although they do not specifically enunciate the requirement.[10] In one case a store's failure to timely and properly deliver a bride's wedding trousseau was the basis of a award for the humiliation and disappointment caused plaintiff.[11] Similarly, Western Union's failure to deliver a message announcing the fatal illness and imminent death of plaintiff's son, which resulted in mental anguish when plaintiff was deprived of the opportunity of attending her son during his last illness, was deemed a sufficient ground for recovery.[12] Another case allowed damages for wounded feelings caused by the drilling of an oil well in a cemetery and the desecration and disturbance to the graves of plaintiff's near relatives.[13] Recently, this requirement of special knowledge or foreseeability was somewhat relaxed when a pest exterminator who placed poison in a home where children could reach it was held liable for worry caused the parents as a result of their believing the poison had been eaten by their child.[14] The determining factor in the decision was that the exterminator, knowing children resided in the home, had placed poison within their reach but had neglected to determine in advance the ingredients so that an antidote could be made available.[15] In each of the cited cases, allowing recovery, the defendant had knowledge which made it foreseeable that grief, sorrow, or disappointment would result from the conduct. Furthermore, the Louisiana courts have generally limited recovery for mental anguish to the victim; third persons generally have not been allowed recovery for their mental disturbance.[16]

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by physical injury to another does so on the breach of a primary legal duty and obligation owed by the defendant directly to the plaintiff seeking such damages." *Id.* at 158. See Note, 23 LA. L. REV. 473 (1963).

10. Humphreys v. Bennet Oil Corp., 195 La. 531, 197 So. 222 (1940); Graham v. Western Union Tel. Co., 109 La. 1069, 34 So. 91 (1903); Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903); Holland v. St. Paul Mercury Ins. Co., 135 So.2d 145 (La. App. 1st Cir. 1961).

11. Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903); *accord*, Mitchell v. Shreveport Laundries, 61 So. 2d 539 (La. App. 2d Cir. 1952) (laundry failed to return only suit of prospective groom in time for his wedding).

12. Graham v. Western Union Tel. Co., 109 La. 1069, 34 So. 91 (1903).

13. Humphreys v. Bennet Oil Corp., 195 La. 531, 197 So. 222 (1940); *cf.* Blanchard v. Brawley Auto Parts Service, 75 So. 2d 891 (La. App. 1st Cir. 1954) (negligent burning of their father's corpse). Common law courts often base liability upon a technical trespass to a "property right" in the dead body allegedly owned by the plaintiff. *E.g.*, Langford v. West Oakwood Cemetery Addition, Inc., 223 S.C. 350, 75 S.E.2d 865 (1953).

14. Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145 (La. App. 1st Cir. 1961), 23 LA. L. REV. 473 (1963). See also note 9 *supra*.

15. 135 So. 2d at 157.

16. See Knox v. Allen, 4 La. App. 223 (2d Cir. 1926) (parent not allowed recovery for mental suffering resulting from assault on her child), and other cases

In the instant case several factors usually considered essential to liability for mental anguish were absent. Although shooting a horse with a shotgun is likely to cause sorrow to someone, there was no showing that the defendant knew or should have known plaintiff's son would be unusually grieved. Neither was the injury inflicted in the presence of the plaintiff's son. If the injury under similar circumstances had been to the child's father, instead of his horse, prior cases indicate the child would not have recovered.[17]

The court based its opinion on several cases[18] which are distinguishable from the instant case in that they either involved insult,[19] nuisance,[20] shock or fright,[21] or wrongful death.[22] How-

cited in note 8 *supra*. *But see* Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145 (La. App. 1st Cir. 1961); Note, 23 LA. L. REV. 473 (1963); RESTATEMENT, TORTS § 46(2) (Tent. Draft No. 1, 1957).

17. See note 8 *supra*.

18. McGee v. Yazoo & M.V. R.R., 206 La. 121, 19 So. 2d 21 (1944) (mental anguish and property damage compensable in suit to abate a nuisance); Bourg v. Brownell-Drews Lumber Co., 120 La. 1009, 45 So. 972 (1908) (mental anguish due to son's wrongful death); Wolf v. Stewart, 48 La. Ann. 1431, 20 So. 908 (1896) (absent aggravating conduct, no recovery for mental anguish occasioned by additional height of fence); M. L. Byrne & Co. v. L. H. Gardner & Co., 33 La. Ann. 6 (1881) (set out in note 19 *infra*.); Holmes v. Le Cour Corp., 99 So. 2d 467 (La. App. Orl. Cir. 1958) (recovery for mental anguish caused by seeing defendant's truck crash into plaintiff's building); Pecoraro v. Kopanica, 173 So. 203 (La. App. Orl. Cir. 1937) (falling wall; recovery denied for failure to show plaintiff was in fear of impending physical injury).

19. M. L. Bryne v. L. H. Gardner & Co., 33 La. Ann. 6 (1881). In this case the court found insulting conduct in the mode by which an illegal attachment was executed and stated that the great mortification, annoyance, and vexation caused the plaintiff were proper subjects in estimating the damages. Insulting conduct is often the basis for recovery as a form of outrageous conduct.

20. McGee v. Yazoo & M.V. R.R., 206 La. 121, 19 So. 2d 21 (1944); Wolf v. Stewart, 48 La. Ann. 1431, 20 So. 908 (1896). It is not unusual for courts to include mental anguish as an element of an interference with the use and enjoyment of property. See PROSSER, TORTS § 73 (2d ed. 1955).

21. Holmes v. Le Cour Corp., 99 So. 2d 467 (La. App. Orl. Cir. 1958); Pecoraro v. Kopanica, 173 So. 203 (La. App. Orl. Cir. 1937). The court denied recovery in *Pecoraro*, but stated in dictum: "In Louisiana, however, it is settled that 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 injury was actually sustained." *Id.* at 204. The court in *Holmes* allowed relief for fright and shock even though the damage was only to plaintiff's property. It is recognized that some courts allow damages for fright and shock if the injury is genuine, but this should not have affected the outcome of the instant case as there was no fright or shock involved; plaintiff's son did not discover his mare had been injured until the next day. See generally Note, 15 LA. L. REV. 451, 459 (1955) for a discussion of fright and shock cases.

22. Bourg v. Brownell-Drews Lumber Co., 120 La. 1009, 45 So. 972 (1908). Wrongful death actions, under Article 2315 of the Louisiana Civil Code, provide the sole exception to the denial of recovery for mental disturbance as the result of *negligent* conduct primarily affecting a third person. See Notes, 14 LA. L. REV. 713, 715 (1954), 15 LA. L. REV. 451, 461 (1955).

ever, *Brown v. Crocker*[23] presented the question whether damages should be available to the owner of a chattel for mental anguish resulting from an intentional injury to it. Prior to this case the answer seemed clearly to be that damages could not exceed the value of the chattel,[24] for monetary awards on the basis of sentimental value have not been allowed in Louisiana.[25]

It is submitted that relief for mental anguish should have been denied in the instant case for several reasons: defendant lacked special knowledge that plaintiff's son would suffer extraordinarily; the mental anguish resulted from conduct which did not primarily affect the minor son's person; and intentional injury to chattels does not warrant damages for mental anguish suffered by the owner.

Byron Kantrow, Jr.

TORTS — STRICT LIABILITY OF MANUFACTURER

Plaintiff was injured while properly using a combination power tool purchased by his wife from a retailer as a gift for him. He sued the retailer and manufacturer of the power tool for damages, and recovered from the manufacturer on evidence submitted under allegations of negligence and breach of express warranties.[1] Defendant manufacturer contended an action for breach of express warranty would not lie because of absence of

23. 139 So. 2d 779 (La. App. 2d Cir. 1962).

24. RESTATEMENT, TORTS, Explanatory Notes § 46, comment *d* at 24 (Tent. Draft No. 1, 1957): "5. *A* intentionally breaks a valuable vase owned by *B*, knowing the act is certain to distress *B*. *B* suffers severe emotional distress. Although *A* is liable to *B* for conversion of the case [vase], his conduct is not so extreme or outrageous as to make *A* liable to *B* for the emotional distress."

25. Huskey v. Maryland Cas. Co., 53 So. 2d 180, 181 (La. App. 2d Cir. 1951); ("We think the law is well established to the effect that a monetary award cannot be justified on the basis of sentimental value."); Lack v. Anderson, 27 So. 2d 653, 657 (La. App. 2d Cir. 1946) ("The actual value of the photograph is all that plaintiff can recover although we realize that no monetary value can adequately compensate him.").

1. Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 899 (Cal. 1963). Plaintiff did not recover from the retailer. Plaintiff's expert witnesses "testified that inadequate set screws were used to hold parts of the machine together so that normal vibrations caused the tailstock of the lathe to move away from the piece of wood being turned permitting it to fly out of the lathe." The court commented that it could not be determined whether the jury's verdict was based on the negligence or warranty cause of action or both, and said: "The jury could therefore reasonably have concluded that the manufacturer negligently constructed the Shopsmith. The jury could also reasonably have concluded that statements in the manufacturer's brochure were untrue, that they constituted express warranties, and that plaintiff's injuries were caused by their breach." *Ibid.*