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OBLIGATIONS

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RECOVERY OF NON-PECUNIARY DAMAGES FOR BREACH OF CONTRACT

In an opinion published at the very beginning of the term under review in this symposium, the Louisiana Supreme Court severely limited the right to recover non-pecuniary damages for breach of contract. *Meador v. Toyota of Jefferson, Inc.*[1] was a proceeding brought by a daughter and her father for damages suffered due to the breach of a contract to repair her automobile. The repair took seven months, and the trial court awarded her reimbursement for her seven car notes and seven insurance premiums paid during this period. It also awarded her $700.00 in damages for "aggravation, distress, and inconvenience."

On appeal, the reimbursement awards were affirmed and eventually that judgment became final. However, the court of appeal held that the award for aggravation, distress and inconvenience could not be permitted, and reversed that portion of the judgment.[2] Granting a writ on this issue alone, the supreme court agreed that the contract had been breached but concluded that the award for these non-pecuniary damages was inappropriate and thus affirmed the appellate court's judgment.

The supreme court detected an error in the translation of article 1934(3) and felt that the article, properly translated, required that it not permit the award of such damages. The preceding paragraphs of the article contain the general rule that the damages awardable for breach of a contract consist of the amount of the loss the creditor has sustained, or of the gain of which he has been deprived. The third paragraph of the article, noting that this is the general rule, nonetheless provides that "there are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain . . . ." It then describes these cases:

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1. 332 So. 2d 433 (La. 1976).
2. 322 So. 2d 802 (La. App. 4th Cir. 1975).

> 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 . . . .[3]

The error, unfortunately for plaintiffs, apparently impaired one of the primary bases for their argument that the damages should be awarded. Properly translated, that portion of the article should read:

> Where the contract has for its object to confer to someone a purely intellectual enjoyment, such as those pertaining to religion, morality, taste, convenience or to all other sorts of satisfaction of this type, although these things are not appreciated in money by the parties, damages will nonetheless be due for violation of the agreement.[4]

Plaintiffs had argued that if a contract had for its object *either* "intellectual enjoyment" *or* "convenience," non-pecuniary damages could be awarded. The corrected translation convinced the court that "convenience" was only an example, and that non-pecuniary damages could not be awarded when the contract did not have for at least one of its principal objects some "intellectual enjoyment."

Distinguishing several earlier supreme court cases,[5] and failing to

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3. LA. CIV. CODE art. 1934(3).

4. The court's own translation is somewhat incomplete, though the incompleteness may not have been thought to be significant. The court translates the phrase "*à toute autre espèce de satisfaction de ce genre*" as "other gratifications of this sort," when it should more properly be translated as "all other sorts of satisfaction of this type."

5. The three cases specifically distinguished were Jiles v. Venus Community Center Benevolent Mut. Aid Assoc., 191 La. 803, 186 So. 342 (1939); O'Meallie v. Moreau, 116 La. 1020, 41 So. 243 (1906); Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903). It was said that the court had never adopted a firm policy on the question of non-pecuniary damages but had "reached results favoring" a broader interpretation of article 1934(3). 332 So. 2d at 435. *Lewis* is perhaps the best known of these decisions, concerning an award to a bride for her disappointment and humiliation due to the breach by the defendants of a contract to prepare certain dresses for the bride's trousseau. In affirming the award, the Louisiana Supreme Court did not find that both physical and intellectual enjoyment were objects of the contract. It simply held that the breach of the contract caused disappointment and humiliation, quoted article 1934(3) and permitted the recovery. But the *Meador* majority opinion characterizes the case as one involving a contract with both physical and intellectual enjoyment as objects.

O'Meallie is a very interesting decision, written in the inimitable style of Mr. Justice Provosty. It involved the breach of a contract to reserve the use of a facility

mention several appellate decisions, including two of its own,[6] the supreme court held that where "an object, or the exclusive object, of a contract, is physical gratification (or anything other than intellectual gratification) nonpecuniary damages as a consequence of nonfulfillment of that object are not recoverable."[7] And, per contra, "where a principal or exclusive object of a contract is intellectual enjoyment, nonpecuniary damages resulting from the nonfulfillment of that intellectual object *are* recoverable."[8]

It seemed to matter to the court that plaintiffs' case was one "sounding in contract," and it noted that damages of the type it was now disapproving would be approved in a case "sounding in tort." Mr. Justice Dixon, dissenting, wondered why this made any difference since in each case, there was a duty on the part of the defendant and the duty was breached; and since Louisiana employs fact pleading.[9] With all deference to the majority, there appears to be a considerable amount of merit in his quandary.

"Contract" and "tort" are labels which we give to causes of action to enforce an obligation which it is alleged the defendant had toward the plaintiff. In our Civil Code, an obligation may arise from a conventional agreement between the parties, or as a result of a delictual act by one of

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for a social club. In fact, much to the chagrin of the plaintiffs' social club, it had been reserved for a rival social club through error. It is difficult to see how one can conclude after reading the opinion that the contract had any "intellectual enjoyment" as a part of the object of the agreement. In fact, the phrase is never mentioned in the opinion. Yet the *Meador* opinion states that the contract had both physical and intellectual objects. In *Jiles*, again without reference to "intellectual enjoyment," damages for mental anguish were awarded to the parents of a child who was not seen by a physician due to the breach of a contract which the parents had with an association to provide such a physician.

6. Vogel v. Saenger Theatres, Inc., 207 La. 835, 22 So. 2d 189 (1945) (damages for humiliation and embarrassment suffered by plaintiff, a cripple, when he was denied admission to a theatre, after having purchased a ticket); Graham v. Western Union Tel. Co., 109 La. 1069, 34 So. 91 (1903) (mental anguish for defendant's failure to deliver promptly to plaintiff's wife a telegram informing her of the serious illness and impending death of her son); Mitchell v. Shreveport Laundries, Inc., 61 So. 2d 539 (La. App. 2d Cir. 1952) (award for mental anguish when defendant failed to return plaintiff's suit which he intended to wear to a wedding; plaintiff was of unusual size and was forced to wear an old and soiled suit). *See also* Grather v. Tipery Studios, Inc., 334 So. 2d 758 (La. App. 4th Cir. 1976) (award for mental anguish for breach of contract to provide suitable wedding pictures).

7. 332 So. 2d at 437.

8. *Id.*

9. *Id.* at 439 (Dixon, J., dissenting).

them toward the other, or from certain other sources.[10] Whatever the source, the obligation is synonymous with a duty which the obligor has toward the obligee.[11] If the source is a convention between the two parties, that convention takes the place of law between them, and must be performed in good faith.[12] If it is not, damages are awardable for the breach.[13]

With this point the majority opinion in *Meador* would be in agreement. But the court felt that it could not, in the face of the language of article 1934(3) quoted earlier, award non-pecuniary damages unless "intellectual enjoyment" appeared as a principal or the exclusive object of the contract.

For once, we cannot blame this peculiarity of our law on the French. There is no similar provision in the Code Napoléon. After some early authority to the contrary, the French have for a number of years permitted what they term "moral damages" for breach of contract.[14] It is of course noted by French authorities that such awards might be less frequent than in cases involving delictual obligations, but that there is no reason in principle to deny such damages.[15]

The only reason why Louisiana apparently is not supposed to have the same rule is the reference in article 1934(3) to "intellectual enjoyment" as an object of the agreement. But it is as plausible to see this as merely a reference to *non-business agreements*, as it is to see it as establishing some limitation on the types of damage which may be awarded. The fact that many articles in this section give examples by referring to commercial or business agreements suggests that the redactors considered that these rules would be, for the most part, applied to business agreements.[16] The general rule of measuring damages given at the beginning of article 1934 is one of a business nature: the loss sustained, or the gain of

10. LA. CIV. CODE arts. 1760, 2292.

11. *Id.* art. 1756.

12. *Id.* art. 1901.

13. *Id.* arts. 1803, 1930.

14. 8 C. BEUDANT & P. LEREBOURS PIGEONNIÈRE, COURS DE DROIT CIVIL FRANCAIS 603 (2d ed. 1934); A. WEILL & F. TERRÉ, DROIT CIVIL, LES OBLIGATIONS, ¶ 391 *et seq.* (1975). Some of the types of cases in which such awards have been made are noted in JURIS CLASSEUR CIVIL, arts. 1146-1155, fasc. 25-A: for breach of a contract to sell kosher meats; for defective functioning of some equipment; and for breach of a contract to restore certain family portraits.

15. 8 C. BEUDANT & P. LEREBOURS PIGEONNIÈRE, *supra* note 14, at 603.

16. *See* LA. CIV. CODE arts. 1806, 1807, 1816, 1817, 1833, 1843, 1844, 1847(4), 1915 & 1916.

which the party was deprived. In a business agreement, such damage is fairly susceptible of pecuniary measurement.

But lest it be thought that only those damages susceptible of pecuniary measurement be considered cognizable by the law, the redactors added a paragraph making it clear that even when there was no way to measure the damage in pecuniary terms, some award could still be made, the amount being left to the "much discretion" of the fact finder.[17] It is significant that the phrase used describes contracts intended to confer "*purely* intellectual enjoyment." This may have meant only that completely non-business agreements might nonetheless be considered appropriate for the judicial machinery, with damages measured by the discretion of the judge or jury. It will be recalled that a proper translation of the phrase "purely intellectual enjoyment" includes the mentioned examples as well as "*all other* sorts of satisfaction of this type."[18] This is hardly limiting language; rather, it is consistent with an effort to describe non-business agreements to assure that a proper scope of protection would be afforded to them as well.

The argument here is not that the language of article 1934(3) is clear and requires the above conclusion. Rather, it is susceptible of at least two interpretations.[19] The one given it by the supreme court in *Meador* is somewhat narrow, and has no other support in the Civil Code but that one statement in article 1934(3). The other, granting to the person to whom the obligation was owed the possibility of reparation for whatever harm he may have suffered, is supportable in other articles of the Civil Code.[20]

17. *Id.* art. 1934(3) states in part: "In the assessment of damages under this rule, as well as in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury, while in other cases they have none . . . ." Read in context, this appears to support the argument that the redactors were simply trying to point out that some flexibility in measuring damage should be recognized in considering breaches of those obligations which, when breached, would give rise to no readily ascertainable loss or deprivation of gain. Damages in the case of a delictual obligation which has been breached, for example, could hardly be ascertained by applying the rule mentioned at the beginning of article 1934; "much discretion" must be given to the jury or judge to determine what will "repair" the harm under article 2315 of the Civil Code.

18. See note 4, *supra*.

19. Three different interpretations are suggested in Comment, *Damages Ex Contractu: Recovery of Non-Pecuniary Damages for Breach of Contract Under Louisiana Civil Code Article 1934*, 48 TUL. L. REV. 1160 (1974).

20. LA. CIV. CODE arts. 1930, 2315. The latter article, for example, simply provides that the "damages to another" be "repaired" by the person whose "fault" produced the damage. The majority opinion correctly notes that non-pecuniary damages have been awarded under the authority of that article. But its

Moreover, it is much more in keeping with the Louisiana approach of pleading facts rather than theories of recovery. How sensible is it to say, for example, that a bus company must respond for mental distress proved to have been suffered by another driver due to the negligence of its bus driver in causing a collision, but not for the same distress proved to have been suffered by one of its passengers, because the former action "sounds in tort" and the latter "sounds in contract"? Those phrases simply are not in the Civil Code, and the whole fabric of the Code indicates that they are alien to its approach to obligations.

It would probably have been better to base the decision on article 1930 of the Civil Code, which provides:

> The obligations of contract [contracts] extending to whatsoever is incident to such contracts, the party who violates them, is liable, as one of the incidents of his obligations, to the payment of the damages, which the other party has sustained by his default.[21]

The rule of article 1934, supplementing this general principle, simply provides that the general rule of *measuring* these damages is by determining the amount of loss suffered, or gain of which the party was deprived. Sometimes even this general rule of *measurement* of damage cannot be applied, since some contracts are non-business agreements to which this rule would simply be irrelevant. In those cases, article 1934(3) approves an award of damages, measured simply by the "much discretion" of the judge or jury. It states that the damages "may be *assessed*" without calculating in any way on the pecuniary loss or privation of pecuniary gain.[22] This is "measurement" language, not language limiting damages to only certain types.

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statement about reparation is just as general as that contained in article 1930: the party who violates the agreement "is liable, as one of the incidents of his obligations, to the payment of the damages, which the other party has sustained by his default."

21. This article has no counterpart in the Code Napoléon.

22. There is also an error in the translation of this portion of the article from the French text of the Code of 1825. The French text provided, in pertinent part, "il est des cas où des dommages peuvent être accordés, sans les calculer en aucune manière sur la perte pécuniaire, ou la privation du gain que la partie peut avoir éprouvée." This was translated as "yet there are cases in which damages may be assessed without calculating *altogether* on the pecuniary loss, or the privation of pecuniary gain to the party." It should better have been rendered as "yet there are cases in which damages may be assessed without calculating *in any way* on the pecuniary loss, or the privation of pecuniary gain to the party." This is probably insignificant, but it would be more proper to state the article in the latter fashion.

Viewed in this light, article 1934(3) is not a prohibition against awarding non-pecuniary losses for a breach of the ordinary contract. It is simply a provision that when one cannot measure the loss in pecuniary terms, such as in a contract for "purely" intellectual enjoyment, one may measure the loss according to the discretion of the trier of fact. Article 1930 authorizes "damages" generally; article 1934(3) provides guidelines for measuring them, but does not contradict the general authorization of article 1930.

It is not likely that a great many parties to contracts will suffer mental distress because of their breach, and a court should properly be wary of a party who says that he has suffered such distress. But if he has, and can demonstrate that he has, article 1934(3) should not be interpreted to deny him that recovery.[23]

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23. The supreme court almost had a chance to reconsider its decision in *Meador* in a case involving a substantially larger amount of damage. In *Ward v. State Farm Mut. Auto. Ins. Co.*, 539 F.2d 1045 (5th Cir. 1976), a jury award of some $500,000 was affirmed, to plaintiffs who claimed that the excess liability judgment rendered against them as defendants in another action was due to the defendant insurer's arbitrary failure to settle the case within the policy limits ($10,000). An additional award to the plaintiffs (husband and wife) of some $650,000 for mental anguish, humiliation and embarrassment was viewed by the Fifth Circuit as an award of non-pecuniary damages for the breach of the insurance contract. Noting the *Meador* decision as well as others, the Fifth Circuit concluded that it should certify the question of the availability of such damages in a breach of contract action to the Louisiana Supreme Court, pursuant to LA. R.S. 13:72.1 (Supp. 1972) and Rule XII of the Louisiana Supreme Court. However, the case was settled before the Louisiana Supreme Court could express itself on the question.