

# Moral Damages For Breach of Contract: The Effect On Recovery Of An Obligor's Bad Faith

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### Repository Citation

William Barret Conway Jr., *Moral Damages For Breach of Contract: The Effect On Recovery Of An Obligor's Bad Faith*, 42 La. L. Rev. (1981)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol42/iss1/12>

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law enforcement officials. From this standpoint, the *Payton* decision appears very sound indeed, for it grants individuals protections guaranteed by the Constitution and, at the same time, gives society the protection it needs in a time of greatly increasing crime.

*Paul E. Brown*

MORAL DAMAGES FOR BREACH OF CONTRACT:  
THE EFFECT ON RECOVERY OF AN OBLIGOR'S  
BAD FAITH

After hearing a strange noise emanating from his automobile engine, the plaintiff delivered his automobile, a Mercedes, to the defendant for repair. The defendant claimed to have corrected the problem, but the engine produced a louder and more disturbing sound when the plaintiff reclaimed his vehicle. Immediate attempts by the defendant to locate the source of the new sound were unsuccessful; consequently, the plaintiff was required to leave the car for additional repair. The defendant's failure to repair various defects eventually resulted in the plaintiff's being stranded on three separate occasions.<sup>1</sup> The plaintiff sued the defendant for breach of duty to repair and was awarded \$500 in non-itemized damages by the district court. On appeal, the defendant argued that the portion of the award evidently representing recovery of "moral damages"<sup>2</sup> under

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1. The Court stated:

The unfortunate part of these episodes is that, after each attempt at repairs, plaintiff's car broke down on the road, leaving him stranded on one occasion on Downman Road near the Lakefront Airport in New Orleans, once on Interstate 10 Highway in the swamp area past LaPlace and once on the Lake Pontchartrain Causeway. On each of these occasions, plaintiff and his companions had to arrange for an alternate method of returning home and plaintiff had to have the vehicle towed to the defendant's for repairs.

*Coddington v. Stephens Imports, Inc.*, 383 So. 2d 416, 417 (La. App. 4th Cir. 1980).

2. Moral damages, commonly known as nonpecuniary damages, may be defined as damages that repair prejudice to one's emotional equanimity. Since the \$500 award by the district court was not itemized, proving that the award included any moral damages is difficult, although this fact was implied by the district court judge. Reasons for Judgment, *Coddington v. Stephens Imports, Inc.*, No. 77-14942 (Dist. Ct. Orl. La. 1979). Moreover, on appeal both the plaintiff and the defendant assumed that moral damages had been awarded. Brief for Defendant-Appellant *Stephens Imports, Inc.* at 6, Brief for Plaintiff-Appellee *Coddington* at 6, *Coddington v. Stephens Imports, Inc.*, 383 So. 2d 416 (La. App. 4th Cir. 1980).

Louisiana Civil Code article 1934(3) was proscribed by the Louisiana Supreme Court's ruling on the award of such damages in *Meador v. Toyota of Jefferson, Inc.*<sup>3</sup> The Fourth Circuit Court of Appeal found *Meador* not to be controlling, the basis of its finding being the greater inconvenience suffered by the plaintiff in the instant case as compared to the inconvenience suffered by the plaintiff in *Meador*. Comparing the facts of the instant case to those in *Meador*, the court remarked, "[The inconvenience suffered by a] motorist who was stranded on the highways on three occasions . . . can hardly be likened to the inconvenience an owner may suffer while his car sits in the repair shop unduly."<sup>4</sup> *Coddington v. Stephens Imports, Inc.*, 383 So. 2d 416 (La. App. 4th Cir. 1980).

Article 1934 of the Louisiana Civil Code governs the awarding of damages for breach of contract. It provides the general rule that the measure of damages in a contract for anything other than payment of money is the amount of loss sustained by the creditor and the profit of which he has been deprived, subject to certain modifications.<sup>5</sup> Article 1934(1) provides that in cases of ordinary breach, damages are limited to those that were foreseen or can be supposed to have been foreseen by the parties at the time of contracting.<sup>6</sup> Article 1934(2), however, provides that when inexecution of the contract has been through fraud or bad faith, the debtor is liable for all the immediate and direct prejudice that the creditor has suffered, whether foreseen or not.<sup>7</sup> Finally, article 1934(3) specifies limited cir-

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3. 332 So. 2d 493 (La. 1976).

4. 383 So. 2d at 418.

5. The introductory paragraph of Civil Code article 1934 provides in part:

Where the object of the contract is any thing but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived, under the following exceptions and modifications.

6. Civil Code article 1934(1) provides:

When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. By *bad faith* in this and the next rule, is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill will.

7. Civil Code article 1934(2) provides:

When the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were, or might have been foreseen at the time of making the contract, but also to such as are the immediate and direct consequence of the breach of that contract; but even when there is fraud, the damages can not exceed this.

cumstances in which contractual prejudice, though not experienced in terms of pecuniary loss, may be repaired.<sup>8</sup> The damages that repair such prejudice are most accurately referred to as moral damages.<sup>9</sup> Article 1934(3) states in part:

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.

The article then lists promises of marriages, contracts for artistic work, and contracts for religious or charitable foundations as examples of contracts whose breach gives rise to moral damages.<sup>10</sup>

In contractual actions, the awarding of moral damages by the Louisiana courts has for the most part been a matter of interpreting article 1934(3). Undoubtedly, the most important case in this area is *Meador v. Toyota of Jefferson, Inc.*<sup>11</sup> Prior to *Meador*, Louisiana courts disagreed over the extent to which a contract was required to have been made for "intellectual enjoyment," as stipulated by article 1934(3), in order to allow the award of moral damages for its breach.<sup>12</sup> In resolving this controversy, the supreme court said "[W]

8. Civil Code article 1934(3) provides in part:

Although the general rule is, that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, 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.

9. Such damages are not exactly nonpecuniary or nonpatrimonial since they are repaired in money. Moreover, terms such as "mental anguish" merely describe certain ways in which such damages arise. "Moral damages" suggest damages that are paid in compensation for something other than patrimonial prejudice. The term is a translation of the French equivalent, *dommage moral*. Litvinoff, *Moral Damages*, 38 LA. L. REV. 1, 1 (1977). The term "damages" refers to money that is paid in order to repair the injury attending a contractual breach. The term "damage" refers to the injury itself. In order to avoid confusion, the word "prejudice" will be used in place of "damage".

10. Civil Code article 1934(3) provides in part:

[A] contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.

11. 332 So. 2d 433 (La. 1976).

12. *Id.* at 435. The disagreement was caused by the indefinite language of Civil Code article 1934(3). The court in *Meador* characterized prior jurisprudence interpreting Civil Code article 1934(3) as being "liberal," see *Jack v. Henry*, 128 So. 2d 62 (La. App. 1st Cir. 1961) (moral damages were allowed for breach of a contract to build a home on the grounds that a home was "some convenience" as provided in Civil Code

clearly do not hold that the object of a contract must be *exclusively* intellectual enjoyment in order to trigger article 1934(3)'s non pecuniary damages. We do hold, however, that such intellectual enjoyment must be a *principal* object of the contract."<sup>13</sup>

Since *Meador*, the courts have been reluctant to award moral damages for contractual breach, a reluctance which is undoubtedly due to both the relatively obscure language of article 1934(3)<sup>14</sup> and a tradition against awarding such damages in the civil law.<sup>15</sup> When moral damages have been granted, the plaintiff either has clearly proven a principal purpose of intellectual enjoyment,<sup>16</sup> or he has recovered under another theory.<sup>17</sup>

Inevitably, the indefinite language of article 1934(3) has resulted in conflicting applications of the article to specific contractual situations by different appellate courts.<sup>18</sup> In *Ostrowe v. Darensbourg*,<sup>19</sup>

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article 1934(3)); "broad," see *Melson v. Woodruff*, 23 So. 2d 364 (La. App. 1st Cir. 1945) (when the defendant wrongfully sold a home that the plaintiffs intended to buy, moral damages were granted because a home exists for the "gratification of some intellectual enjoyment" as provided in Civil Code article 1934(3)); and "strict," see *Lillis v. Anderson*, 21 So. 2d 389 (La. App. Orl. 1945) (breach of a contract to renovate a bathroom could not give rise to moral damages because the contract was not for some "intellectual enjoyment").

13. 332 So. 2d at 437-38 (emphasis added). The court used the word "object" not in its civilian contractual sense, but to signify an end or purpose. This usage of the word is thus nearly identical to the concept of cause in contractual obligations.

14. For example, in *Meador* the specific controversy concerned the phrase "or some convenience" in Civil Code article 1934(3). The plaintiff argued that this phrase allowed recovery of moral damages regardless of whether the contract was made for intellectual enjoyment, a contention that the court rejected. *Id.* at 435. See note 12, *supra*.

15. With regard to this tradition in the common law, see A. CORBIN, 5 CORBIN ON CONTRACTS § 1076 (1964).

16. *E.g.*, *Smith v. Andrepont*, 378 So. 2d 479 (La. App. 1st Cir. 1979) (moral damages were granted for redhibition of a "show" horse).

17. *E.g.*, *Alexander v. Qwik Change Car Center, Inc.*, 352 So. 2d 188 (La. 1977) (moral damages were requested for contractual breach and allowed because of the tortious conversion of the plaintiff's car to the defendant's use); *Lacey v. Baywood Truck & Mach.*, 381 So. 2d 863 (La. App. 1st Cir. 1980) (damages for inconvenience were allowed in a redhibition suit on the theory that a reduced price should reflect what the buyer would have paid if he had known of the vehicle's defects).

18. The prime example is the differing treatment of redhibitory actions involving automobiles by the courts. Compare *Willis v. Ford Motor Co.*, 383 So. 2d 136 (La. App. 3d Cir. 1980) (inconvenience damages were allowed and Civil Code article 1934(3) was not mentioned) with *Wheat v. Boutte Auto Sales*, 355 So. 2d 611 (La. App. 4th Cir. 1978) (moral damages were denied under *Meador*).

19. 377 So. 2d 1201 (La. 1979).

the supreme court resolved one such conflict<sup>20</sup> by denying moral damages for breach of contract to build a distinctively designed home. Moreover, the court strongly implied that intellectual enjoyment must be *the* principal purpose of a contract, as opposed to a principal purpose, in order to permit the award of moral damages.<sup>21</sup> Thus, the criterion for recovery of moral damages under article 1934(3) appears to have been further restricted.

Despite the uncertain meaning of article 1934(3), the fourth circuit's allowance of moral damages in the instant case is difficult to explain in light of the denial of such damages by the supreme court in *Meador v. Toyota of Jefferson, Inc.*<sup>22</sup> and the factual similarity of the two cases. In *Meador* suit arose when the defendant took an excessive amount of time to repair the plaintiff's Toyota automobile after it had been involved in an accident. The supreme court denied moral damages on the grounds that intellectual enjoyment had been only an incidental purpose of the contract for repair. However, the contractual purposes in *Meador* and *Coddington* were identical; each plaintiff wanted his car repaired. Thus, the same result logically should have followed in both cases in the absence of distinguishing facts relevant to the requirements of article 1934(3).<sup>23</sup> The fourth circuit, however, distinguished *Coddington* from *Meador* in terms of the differing degrees of inconvenience suffered by the plaintiffs, a distinction that is wholly irrelevant to any finding of "intellectual enjoyment." *Coddington* on its face is therefore anomalous.

One way to explain the instant case is to distinguish it from *Meador* on the basis of the automobile involved. One might argue

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20. Compare *Whitener v. Clark*, 356 So. 2d 1094 (La. App. 2d Cir. 1978) (\$5000 moral damages were allowed for breach of a contract to build a home) with *Catalanotto v. Hebert*, 347 So. 2d 301 (La. App. 4th Cir. 1977) (moral damages were denied for delay in a contract to build a home) and *Ostrowe v. Darenbourg*, 369 So. 2d 1156 (La. App. 1st Cir. 1979) (moral damages were denied for breach of a contract to build a distinctively designed home).

21. In referring to the contract in *Ostrowe*, the court said, "[C]arrying the reasoning still further, if such a contract has as a purpose intellectual gratification is that gratification *the* principal object of the contract? We think not." 377 So. 2d at 1203 (emphasis added). But see the dissenting opinion by Justice Calogero. 377 So. 2d at 1203 (Calogero, J., dissenting).

22. 332 So. 2d 433 (La. 1976).

23. This reasoning is supported by those cases which have denied moral damages in redhibitory actions involving automobiles. *E.g.*, *Muller v. A.K. Durnin Chrysler-Plymouth, Inc.*, 361 So. 2d 1257 (La. App. 1st Cir. 1978); *Bendana v. Mossy Motors, Inc.*, 347 So. 2d 946 (La. App. 4th Cir. 1977). See authorities cited in note 18, *supra*. The same reasoning is also shown by Judge Redmann in his dissenting opinion to the instant case where he says simply, "Non-pecuniary damages are not recoverable; *Meador v. Toyota of Jefferson, Inc.* . . ." 383 So. 2d at 418 (Redmann, J., dissenting in part).

that the principal purpose of owning a Mercedes, hence the principal purpose of having it repaired, is the intellectual enjoyment to be derived thereby. Conversely, the principal purpose of owning a Toyota, as stated in *Meador*, is its physical utility. Since Mercedes automobiles are well known for their technological perfection, a contract for repair of a Mercedes fits easily within the illustrative language of article 1934(3). For example, the contract in the instant case can be regarded as having been made for the gratification of "taste." Eminent authority supports the view that contracts concerning fine automobiles may be made for a principal purpose of "intellectual enjoyment."<sup>24</sup> However, the supreme court's opinion in *Ostrowe v. Darensbourg*<sup>25</sup> casts some doubt upon the validity of such a position. One is hard pressed to say that *the* principal purpose of owning a Mercedes is intellectual enjoyment and not merely the physical utility of transportation.

The result in *Coddington* can better be justified as a recovery of moral damages under article 1934(2) rather than under article 1934(3).<sup>26</sup> Article 1934(2) specifies that when breach of contract has occurred through fraud or bad faith, the debtor is liable for all "immediate and direct" damages.<sup>27</sup> Thus, the plain import of the language allows recovery of moral damages in the instant case since the inconvenience suffered by the plaintiff was clearly an immediate and direct<sup>28</sup> consequence of the defendant's failure to repair. This statutory basis for awarding moral damages is not unknown in Loui-

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24. Litvinoff, *supra* note 9, at 17.

25. 377 So. 2d 1201 (La. 1979).

26. An undiscussed alternative is to view the defendant's breach of contract in the instant case as a delictual matter since to do so would make moral damages freely awardable. This alternative interpretation would represent an extension of present law, because recovery in tort generally is conditioned upon the existence of property damage or personal injury to the plaintiff. *Meador v. Toyota of Jefferson, Inc.*, 332 So. 2d 433, 438 (La. 1976) (Dixon, J., dissenting). However, for a common law case that takes this alternative approach in a situation similar to the instant case, see *Hidschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 362 N.E.2d 845 (1977). The continental writers discuss the merging of delictual and contractual responsibility under the concept of *cumul*. See generally, J. VAN RYN, *RESPONSABILITÉ AQUILLENNE ET CONTRATS* (1933).

27. See the text of Civil Code article 1934(2), cited in note 7, *supra*.

28. Whether prejudice is direct seems to depend upon the links of causation between the prejudice and the contractual breach. The classic example is given by Pothier. A merchant sells a sick cow to a farmer; the sickness is contagious and causes the farmer's herd to die. The loss of the herd prevents the farmer from cultivating his land. The loss of the herd is direct; the inability to cultivate the land is not. See 2 M. PLANIOL, *CIVIL LAW TREATISE* pt. 1, no. 249 at 150 (11th ed. La. St. L. Inst. trans. 1959).

siana jurisprudence<sup>29</sup> and has some doctrinal support.<sup>30</sup> Moreover, this explanation does not offend the two rulings by the supreme court on moral damages since they dealt exclusively with article 1934(3). Finally, such an interpretation suggests what was perhaps an unconscious foundation for the seemingly irrelevant grounds upon which the fourth circuit distinguished *Coddington* from *Meador*. When a contract is breached through fraud or bad faith, as will be shown was the case in *Coddington*, any resulting moral damage tends to be more severe than in instances of ordinary inexecution as in *Meador*.<sup>31</sup>

The use of article 1934(2) as statutory authority for the award of moral damages in the instant case is necessarily predicated on a finding of fraud or bad faith breach. Article 1934(1) defines bad faith as a "designed breach . . . from some motive of interest or ill will."<sup>32</sup> At first blush article 1934(1) would seem to require a conscious intention to breach on the part of the defendant. However, it is arguably within the permissible bounds of judicial interpretation to consider the defendant's repeated failure to repair as acts sufficient to warrant a presumption that the breach was "designed" within the meaning of article 1934(1).<sup>33</sup> Similar judicial definitions of article 1934(1) bad faith are to be found in Louisiana jurisprudence.<sup>34</sup> Moreover,

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29. See *Modisette v. American Integrity Ins. Co.*, 297 So. 2d 498 (La. App. 2d Cir. 1974) (the bad faith breach of an insurance contract by a company gave rise to moral damages under Civil Code article 1934(2)); *Smallpage v. Wagner & Wagner*, 84 So. 2d 863 (La. App. Orl. 1956) (the possibility of moral damages under Civil Code article 1934(2) was implied but damages were denied for lack of proof thereof); *Morse v. Oates*, 11 La. App. 462, 123 So. 439 (2d Cir. 1929) (the possibility of moral damages under Civil Code article 1934(2) was discussed but damages sought were denied because they were indirect).

30. Litvinoff, *supra* note 9, at 22.

31. This assertion must be true as a matter of probability. If an obligor negligently fails to perform his obligation or actively intends nonperformance, prejudice in general will tend to be more severe because the obligor is not looking after the obligee's contractual interests, or he is desiring actual harm of some sort to befall the obligee. If an obligor is in good faith, he will try to minimize prejudice to the obligee that stems from his nonperformance.

32. See the text of Civil Code article 1934(1), cited in note 6, *supra*.

33. This proposition is supported by Civil Code article 1848, which provides that contractual fraud may be a matter of legal presumption. However, application of the article and Civil Code article 1847, defining contractual fraud, to Civil Code articles 1934(1) and 1934(2) is questionable, for these articles concern fraud in the formation of contracts.

34. *E.g.*, *Friendly Fin., Inc. v. Cefalu Realty Inv., Inc.*, 303 So. 2d 558 (La. App. 1st Cir. 1974) (the defendant-lessor's lease of a parking lot to a third party in violation of the plaintiff-lessee's lease was in "legal bad faith" despite the defendant's protestations of honest error). Arguably, as a matter of proof the defendant's breach in the instant

among French writers and in French jurisprudence, contractual breaches characterized by gross negligence are generally treated as being made in bad faith.<sup>35</sup> This view is persuasive since sections (1) and (2) of article 1934 are taken directly from the French Civil Code.<sup>36</sup>

The strongest objection to allowing recovery of moral damages under article 1934(2) is that the positive provisions of article 1934(3) imply exclusivity by their existence. Since the code explicitly mentions one situation, it is difficult to argue that the redactors of the Louisiana Civil Code contemplated two situations in which moral damages might be awarded for contractual breach. Regardless of the original intentions of the redactors, however, the history of moral damages in the Civil Law provides ample reason for interpreting article 1934(2) to allow such damages.

#### The limited availability of moral damages for breach of contracts

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case was in fact consciously "designed." See *Modisette v. American Integrity Ins. Co.*, 297 So. 2d 498 (La. App. 2d Cir. 1974) ("sufficient evidence of motive, opportunity and irregular procedure" justified a finding of bad faith) (*Id.* at 500).

35. The equivalent concept in France is the incorporation of *faute lourde* into *dol*. In a contractual context *faute lourde* is defined as a breach "that reveals an unskillfulness or negligence pushed to an astonishing degree." 4 J. CARBONNIER, *DROIT CIVIL—LES OBLIGATIONS* n° 72 (7th ed. 1972) (Writer's trans.). *Dol* exists when "it is intentionally that the debtor does not execute his obligation." 1 H. MAZEAUD, L. MAZEAUD ET A. TUNC, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE* n° 674 (6th ed. 1965) (Writer's trans.). "It is necessary at least to presume in the absence of proof to the contrary that *faute lourde* is 'dolosive.'" *Id.* at n° 675-2 (Writer's trans.). *Faute lourde* "is, in general, regarded as equivalent in effect to *dol* . . ." J. CARBONNIER, *supra*, at n° 72 (Writer's trans.). Most often the French courts "apply the adage, *faute lourde* is equivalent to *dol*." H. MAZEAUD, *supra*, at n° 675-2 (Writer's trans.). See A. JOUANNEAU, *RECUEIL DE MAXIMES ET CITATIONS LATINES A L'USAGE DU MONDE JUDICIAIRE* nos. 684-5 (2d ed. 1924).

36. Article 1149 of the CODE NAPOLEON provides:

The damages and interest due to a creditor are, in general, to the amount of the loss which he has sustained or of the gain of which he has been deprived; saving the exceptions and modifications following.

CODE NAPOLEON art. 1149 (anonymous trans. 1824).

Article 1150 of the CODE NAPOLEON provides:

The debtor is only bound for the damages and interest which were foreseen or which might have been foreseen at the time of the contract, when it is not in consequence of his fraud that the obligation has not been executed.

CODE NAPOLEON art. 1150 (anonymous trans. 1824).

Article 1151 of the CODE NAPOLEON provides:

Even in the case where the non-performance of the contract results from the fraud of the debtor, the damages and interest must not comprehend, as regards the loss sustained by the creditor and the gain of which he has been deprived, any thing which is not the immediate and direct consequence of the non-performance of the contract.

in Louisiana is founded on the civilian tradition of awarding moral damages freely in delictual matters and precluding them absolutely in contractual ones.<sup>37</sup> This distinction between contractual and delictual liability rose to prominence in French legal thought through the influence of Pothier and Domat. These writers created the distinction in civilian doctrine because they incorrectly believed it to be a fundamental principle of Roman law. In fact, the Romans made no distinction whatsoever with regard to moral damages between contractual and delictual liability.<sup>38</sup> In France today this historical mistake is well recognized but is not important because, as a practical matter, French jurisprudence has long since conceded the general availability of moral damages in contractual actions.<sup>39</sup> In

CODE NAPOLEON art. 1151 (anonymous trans. 1824).

Compare CODE NAPOLEON arts. 1149-1151, *supra*, with LA. CIV. CODE art. 1934, the text of which is cited in notes 5-7, *supra*. Precisely, the pertinent parts of Civil Code article 1934 and the Code Napoleon articles share the same sources; the first three provisions of Civil Code article 1934 may be traced to passages in Toullier, Pothier, and Domat. See Batiza, *The Actual Sources of the Louisiana Projet of 1823: A General Analytical Survey*, 47 TUL. L. REV. 1, 79 (1972).

37. See note 36, *supra*. Since sections (1) and (2) of Civil Code article 1934 have their origins in the French Code Civil, their interpretation naturally has reflected the interpretation given the French articles.

38. Professor Mazeaud is explicit on this point:

Our ancient law recorded the Roman tradition, but it only recorded it in an imperfect manner, because the authors had only an imperfect knowledge of the texts. This gap led them to establish a distinction that roman law had never made between delictual liability and contractual liability . . . In the contractual domain, our ancient authors refuse categorically to admit the reparation of moral prejudice: inexecution of a contract only gave rise to damage interests to the profit of the creditor on the condition that he could establish that he suffered pecuniary prejudice. Domat and Pothier are explicit on this point; they rely, in ignorance, on the roman law.

H. MAZEAUD, *supra* note 35, at n° 299 (Writer's trans.).

If, behind the terms employed [in the French articles on contractual damages], one studies the spirit that guided the redactors, it must be acknowledged, it is true, that they were hostile to the reparation of moral damage in contractual matters. Is this a reason to refuse today to make the best of the fact that they did not expressly indicate their thoughts? No, because it is necessary to see the reason for their hostility.

It is due to the fact that Domat and Pothier, whom they followed faithfully here, refused categorically to repair moral damage in contractual matters.

*Id.* at n° 331 (Writer's trans.).

39. Professor Mazeaud cites several decisions in which the French courts awarded moral damages for breach of contract:

As for the courts, they have had little hesitation. If one can find some old decisions deciding to the contrary, the jurisprudence today unanimously admits the reparation of moral damage.

Louisiana the situation is different. In effect, the now discredited civilian tradition against awarding moral damages for breach of contract lives on in the interpretations currently given to articles 1934(1) and (2). The nearly uniform acceptance of this tradition by the Louisiana courts undoubtedly has been aided by the fact that article 1934(3), which has no equivalent in the French Civil Code,<sup>40</sup> mitigates the glaring failure of the tradition to protect the moral interests of contracting parties.<sup>41</sup> The mere existence of article 1934(3), however, taken in the context of early nineteenth century civilian thought, indicates the redactors' approval of moral damages in contractual actions and their willingness to depart from doctrine, then regarded as sacrosanct. Since this doctrine is now discredited throughout the civilian world, nothing should prevent expanded recovery of moral damages under the language of article 1934(2).<sup>42</sup>

The fact that there is no valid doctrinal bar to recovery of moral damages in contractual actions suggests that they could be awarded under article 1934(1) as well as under 1934(2); no language in either article restricts the scope of statutory coverage to pecuniary damages.<sup>43</sup> This extension would allow the awarding of all contractual damages under the same conceptual framework. However, as will be seen, the only situations in which moral damages could be awarded under article 1934(1) are already contemplated, at least in a conceptual sense, by article 1934(3). As a practical matter, a unified basis for awarding all contractual damages is realized simply by interpreting article 1934(2) in the manner previously suggested.

Moral prejudice can be conceptualized accurately in terms of the

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One can cite a certain number of particular decisions, sufficiently old. Indemnities were allowed: . . . in the case where inexecution of a contract by one of the parties did injury to the religious sentiments of the other party . . . , in the case where the improper breach of a contract for labor by a workman caused the employer to suffer moral damage to his authority as an employer . . . .

*Id.* at n° 334 (Writer's trans.).

40. 332 So. 2d at 436. The provision appears to have been inspired by a passage in Toullier. See Litvinoff, *supra* note 9, at 8.

41. One might speculate that the existence of Civil Code article 1934(3) has prevented the reappraisal of this tradition that has occurred in other civilian jurisdictions. See Litvinoff, *supra* note 9, at 28.

42. See note 38, *supra*. Mazeaud uses similar reasoning. His argument is stronger in Louisiana because the redactors of the Civil Code expressed some approval of moral damages in contractual matters, approval that was significant in the doctrinal milieu of the early nineteenth century.

43. Pecuniary damages are mentioned specifically in Civil Code article 1934(3) only in the definition of moral damages. See text of Civil Code articles cited in notes 6-8, *supra*.

loss suffered by an obligee and the profit of which he has been deprived, as provided for in the introductory paragraph of article 1934. Under this view the nonrealization of the positive emotional state that would accompany a contractual performance constitutes a "deprivation of moral profit." The obligee experiences this deprivation of moral profit in the form of disappointment, a negative emotional state. A negative emotional state which results from a contractual breach but which is not linked to any deprivation of moral profit constitutes a "moral loss."<sup>44</sup> The critical distinction between loss and deprivation of profit generally is that in the latter case one is denied something that one prospectively desires, whereas in the former case one experiences prejudice to the status quo, whether it be patrimonial or emotional. Deprivation of moral profit and moral loss comprise prejudice to the obligee's moral interest.<sup>45</sup> This interest may be defined as the obligee's continuing desire to maximize his emotional level of existence. In the case of moral profit, the

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44. *Contra*, Litvinoff, *supra* note 9, at 9-10. The Roman concepts of *damnum emergens* and *lucrum cessans* mentioned by Professor Litvinoff are equivalent to loss and deprivation of profit. 2 S. LITVINOFF, OBLIGATIONS 338-9 (1969). However, Professor Litvinoff incorrectly identifies "moral loss" as merely the loss of spiritual gratification that occurs in situations exemplified under article 1934(3) and "deprivation of moral profit" as the frustration of expectation in the same situations.

The only difference between these two concepts, as Professor Litvinoff defines them, is that deprivation of moral profit has an experiential dimension that is not shared by moral loss. Actually, the two concepts are more properly thought of as comprising the experiential and abstract components, respectively, of what is in fact deprivation of moral profit alone. The confusion arises from the fact that deprivation of moral profit seems like a loss. It is a loss, as deprivation of pecuniary profit is also a loss, but only in the sense that all damage is a loss because it is subjectively unpleasant. However, the characterization of damage in terms of deprivation of profit and loss within Civil Code article 1934 ultimately concerns differences in the way that damage arises as a matter of abstraction, not of experience. Deprivation of profit contemplates the nonrealization of something that one has desired to receive. The idea of loss, in the sense that it is used in the introductory paragraph to article 1934, contemplates the realization of something that an obligee has desired not to receive. In the case of pecuniary damage the essentially abstract nature of the two categories is obscured by the fact that there is a valid experiential distinction between them as well. An obligee generally does not have a problem distinguishing between money he has lost and money that he has been prevented from making. The distinction is made easily because pecuniary damage, though sometimes speculative, has an objective existence. Moral damage, on the other hand, can only be conceptualized subjectively; it has no real meaning outside of the context of internal experience. Since all damage is in some sense a loss, both deprivation of moral profit and moral loss are experienced as negative emotions. The ways in which the two species of moral prejudice arise are nevertheless conceptually distinct; the distinction between moral profit and loss accords with the distinction between the two kinds of pecuniary prejudice.

45. Litvinoff, *supra* note 9, at 10.

obligee's moral interest consists of an active desire for emotional satisfaction; in the case of moral loss, the moral interest consists of a passive desire to avoid emotional dissatisfaction. Analogous interests are possessed by an obligee in the context of pecuniary prejudice. Moreover, as is the case with pecuniary prejudice, nothing prevents the two kinds of moral prejudice from arising from the same contractual breach.

Reparation of both kinds of moral prejudice under the general contractual provisions of article 1934 is subject at the outset to two limitations that are implied by the nature of contract. The first one is that in order to be repaired, moral prejudice should be substantial.<sup>46</sup> This condition does not come from article 1934, but is more in the nature of a *sui generis* policy consideration.<sup>47</sup> Contracting parties, by the fact that they try to regulate the future in an uncertain world, must be deemed to accept the risk of experiencing a certain amount of vexation from contractual breach.<sup>48</sup> The second limitation is that moral prejudice should not be repaired if it is directly tied to the existence of pecuniary prejudice. Since pecuniary prejudice due to contractual breach generally is repaired, reparation of moral prejudice that is dependent strictly on the existence of pecuniary prejudice effectively would create a double recovery.<sup>49</sup>

Currently, all deprivation of moral profit that might be repaired under article 1934(1) is adequately repaired, at least in a conceptual sense,<sup>50</sup> under article 1934(3). A contract in which the obligee's cause

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46. The problem of deciding what constitutes "substantial" moral damage remains. The inquiry is similar to but not fraught with the same difficulties as trying to decide what is meant by the phrase "principally for intellectual enjoyment" under Civil Code article 1934(3).

47. See *Elston v. Valley Elec. Membership Corp.*, 381 So. 2d 554 (La. App. 2d Cir. 1980); *Litvinoff*, *supra* note 9, at 15.

48. Courts do not always follow this rule, as evidenced by the cases in which nominal damages are awarded for breach of contract.

49. This consideration takes care of a problem posed by moral prejudice as defined in the text at note 44, *supra*. To some extent every contractual breach involving pecuniary loss or deprivation of pecuniary gain will involve a corresponding degree of moral prejudice. In some cases the resulting negative emotional state will undoubtedly satisfy the requirement of substantiality. From a commercial standpoint, if nothing else, the reparation of all moral prejudice tied to pecuniary prejudice probably would have negative economic consequences. Reparation in these circumstances is unnecessary, however, because reparation of pecuniary prejudice generally will restore the obligee's emotional equanimity.

50. The type of contract contemplated by Civil Code article 1934(3) is clearly one that involves a deprivation of moral profit. However, the article by its language and the holdings in *Meador* and *Ostrowe* restricts recovery of moral damages to situations in which the obligee's contractual purpose is sufficiently related to the realization of

for contracting is the moral profit he will derive through performance constitutes the only situation in which a contractual breach can cause a deprivation of moral profit that fulfills the express and implicit requirement of article 1934(1) that prejudice be foreseeable and direct.<sup>51</sup> Such a contract is conceptually identical to one that is made for "intellectual enjoyment" under article 1934(3). When breach of this type of contract occurs, the negative emotions that the obligee experiences will be due primarily to disappointment at not realizing moral profit. Any moral loss will be in the form of negative emotions that arise from consequences of the breach other than nonrealization of moral profit.<sup>52</sup> In all cases under article

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moral profit (i.e., where the contract is one made principally for intellectual enjoyment).

51. Conceivably, deprivation of moral profit could result from breach of a contract that had not been made by the obligee for the purpose of satisfying his moral interest. As implied in the text at this note, however, such deprivation of moral profit would be neither foreseeable nor direct and thus would not be reparable.

52. An example is helpful to illustrate the manner in which moral prejudice arises and the practical problems involved in its reparation. Suppose that H is both an audiophile and a disc jockey who hires himself out to play records at parties. H contracts to have B build a sophisticated and powerful stereo system.

If B performs on time, H will realize a number of advantages. First, H will be able to make a large net profit since, in anticipation of the marvelous sound that the new system will produce, a number of party-givers already have contracted for H's services. A large net profit will result in a high level of emotional satisfaction for H, particularly since he has spent all his savings on the system. Moreover, H will realize additional emotional satisfaction because the system will enable him to listen to a recorded rock concert without any distortion.

Suppose that B in good faith is unable to perform. H has lost the money he paid for the system and the profit he would have made had B performed. H suffers emotional distress because he has no livelihood and no savings. Moreover, he is distressed by the fact that he cannot experience the listening pleasure that he was anticipating. Finally, to make matters worse, H's girlfriend will not date him anymore since H has no money; H is heartbroken.

Clearly, H has suffered pecuniary loss and deprivation of pecuniary profit in the money he has paid and the profits he has been prevented from making. This prejudice will be repaired according to its directness and foreseeability under article 1934(1). The moral prejudice that attends H's pecuniary prejudice is made up of both deprivation of moral profit and moral loss as they have been defined in the text at note 44, *supra*. This moral prejudice should not be repaired since its existence is strictly dependent on the existence of pecuniary damage. See note 49 and accompanying text, *supra*. The loss of the intellectual or emotional satisfaction that H would have gained by being able to listen to an undistorted recorded rock concert is experienced by H as disappointment. This loss of satisfaction constitutes a deprivation of moral profit. H's heartbreak, on the other hand, is a moral loss since it is a negative emotional state that arises from something other than the nonrealization of moral profit. Assuming that H's contract was made principally for intellectual enjoyment, H can recover for deprivation of moral profit under article 1934(3). Applying the criteria of article 1934(1), the deprivation of moral profit suffered by H is direct and, if B were aware of H's moral interest, foreseeable. The same cannot be said of H's moral loss. The loss probably

1934(3), deprivation of moral profit will be direct, since it is necessarily an immediate consequence of the breach of this kind of contract.<sup>53</sup> Moral loss in these circumstances will be direct if it is causally connected with the breach to a sufficient degree.<sup>54</sup> In most cases both kinds of moral prejudice will be foreseen since the obligee's desire for emotional satisfaction is his cause for having made the contract, and therefore his general moral interests presumably have entered the contractual field.<sup>55</sup> However, if moral prejudice is unforeseeable by the obligor, under article 1934(1) reparation should not take place. In at least one instance a Louisiana court has already applied this requirement of foreseeability to a suit for moral damages under article 1934(3).<sup>56</sup>

Although moral loss can arise from the same contractual breach that causes a deprivation of moral profit, moral loss also may result from non-performance of a contract whose performance would not cause the obligee to realize any moral profit. If such moral loss meets the requirements to article 1934(1), it should be repaired. When the obligor breaches in good faith, however, recovery may be denied because moral loss, though possibly direct and substantial, will have been unforeseen by the parties.<sup>57</sup> Contracts, being largely a means of regulating patrimonial affairs, do not create an awareness in contracting parties of the moral prejudice that can result from a breach. Unless a contract arguably is covered under article 1934(3) or its breach is handled as a delictual matter,<sup>58</sup> contracting

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could not be described as direct. See note 28, *supra*. Moreover, although B may be aware of H's active desire for emotional gratification and thus aware of H's moral interests in general, H's heartbreak is nevertheless unforeseeable and therefore not reparable. See note 55, *infra*. In any case, such questions primarily have abstract significance since reparation of any moral prejudice involves imprecise pecuniary valuation of subjective considerations.

53. Article 1934(3) contracts are by definition made for purposes of realizing moral profit.

54. See note 28, *supra*.

55. Moral loss, as it has been defined, see text at note 44, *supra*, is not an implied consequence of the breach exemplified in article 1934(3) as is the case with deprivation of moral profit. However, if an obligor is aware of an obligee's interest in obtaining emotional satisfaction through contractual performance, he is presumably made aware of the obligee's moral interests in general (i.e., the obligee's additional desire to avoid moral loss). As a general matter, contracting parties cannot be presumed to foresee the possibility of moral damage.

56. See *Bowes v. Fox-Stanley Photo Prods., Inc.*, 379 So. 2d 844 (La. App. 4th Cir. 1980).

57. See note 55, *supra*.

58. An example would be contracts in which the physical well-being of the obligee is at stake, such as contracts for medical treatment. In these situations the moral interest of the obligee is self preservation, and the obligor is naturally aware of this fact.

parties' minds tend to be focused on the potential for pecuniary prejudice. Even in the troublesome situation of car repair this tendency would seem to be true. Although one can say that moral loss in the form of great inconvenience is the inevitable result of a car becoming inoperative, the likelihood of a car becoming inoperative after it has been restored to running condition by a repairman working in good faith seems remote. Such a situation would appear to be the only one in which a repairman working in good faith could cause substantial moral prejudice. Such prejudice would not be contemplated by the parties because of the improbable manner in which it would have to occur. Therefore, except in the case of contracts under article 1934(3), all good faith occurrences of moral loss will be unforeseeable and not reparable under article 1934(1).<sup>59</sup>

Under article 1934(2) moral prejudice of both kinds would be repaired as long as the prejudice is direct and regardless of its foreseeability. As the foregoing analysis indicates, this interpretation of article 1934(2), in combination with the recovery allowed under article 1934(3), effectively awards moral damages according to the general framework for awarding pecuniary damages. The suggested interpretation accomplishes this result because moral prejudice will only be foreseen, as required by article 1934(1), in the situations contemplated by article 1934(3). The suggested interpretation of article 1934(2) has the additional advantage of contemplating many of the contractual situations in which moral damages are presently precluded, but in which equity demands that such damages be awarded.<sup>60</sup>

The conceptual situations that give rise to reparation of moral damages under articles 1934(2) and (3) are more fully contemplated by the Louisiana State Law Institute's proposed article on moral

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However, in general whether a contractual breach is handled as a delictual matter seems to depend upon the existence of personal injury or property damage. Concerning automobile repair in this respect, see *Patton v. Precision Motors, Inc.*, 352 So. 2d 341 (La. App. 4th Cir. 1977) (destruction of a sports car transmission during repair gave rise to moral damages under an implied recovery in tort); *Hunt v. Ford Motor Co.*, 341 So. 2d 614 (La. App. 2d Cir. 1977) (personal injury resulting from an accident caused by the failure to repair a car gave rise to recovery of moral damages in tort).

59. Foreseeability generally is considered to be a matter for case by case determination. 2 M. PLANIOL, *supra* note 28, at no. 250 at 151. But, with respect to moral damages, this rule should be different for the empirical reasons suggested.

60. Most of the egregious cases of moral prejudice that result from breach of contract involve repeated failure to perform as in the instant case. Breach of contract in these instances will almost have to be in bad faith and at least should be considered as such. See text at notes 35 & 36, *supra*.

damages which provides that, "Moral damages [Damages for nonpecuniary loss] may be recovered according to the nature of the contract, or according to the circumstances surrounding an obligor's failure to perform. Such damages may not be recovered for mere worry or vexation."<sup>61</sup> The comments to the article indicate that the first two provisions are intended to allow moral damages in situations similar to those under article 1934(3) and article 1934(2) as interpreted. The third provision makes express the requirement that moral prejudice be substantial in order to be repaired.<sup>62</sup> Enactment of the proposed article would make possible the development of comprehensive jurisprudence concerning moral damages in contractual actions. Such development would occur free of the historically limited application of article 1934(2) and the convoluted interpretations of article 1934(3).<sup>63</sup> The breadth of the language of the proposed article implies an intention to make moral damages more freely available and to allow judicial discretion in interpreting the articles.<sup>64</sup> It is hoped that the legislature will approve this measure when it is presented for their consideration. Should the proposed article be rejected, however, the courts may properly interpret Civil Code article 1934(2) in the manner suggested.

*William Barret Conway, Jr.*

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61. LA. ST. L. INST., REVISION OF THE LOUISIANA CIVIL CODE OF 1870 BOOK III—OBLIGATIONS, art. 5 (S. Litvinoff, rep.).

62. *Id.*, Official Revision Comments (b), (c) and (d).

63. The comments specifically indicate that the proposed article is intended to avoid the limitations on recovery of moral damages posed by the literal restrictiveness of Civil Code article 1934(2) and the phrase "intellectual enjoyment" in article 1934(3). LA. ST. L. INST., REVISION OF THE LOUISIANA CIVIL CODE OF 1870 BOOK III—OBLIGATIONS, art. 5 (S. Litvinoff, rep.), Comments (a) and (c).

64. This discretion should be agreeable to the Louisiana judiciary. In *Meador* Justice Calogero, speaking for the majority, said, "Perhaps it would be better if damages for mental anguish in breach of contract cases were allowable just as in tort actions. However, such a matter directs itself to the lawmaker. Our responsibility is to interpret and apply the law, not to enact it." 332 So. 2d at 438.