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Kathryn Bloomfield

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COMMENTS

Recovering Nonpecuniary Damages for Breach of Contract Under Louisiana Law

Under the Louisiana Civil Code of 1870, the availability of nonpecuniary damages for breach of contract was a troublesome issue for the Louisiana courts. Conflicting interpretations of the governing Civil Code provisions, found in article 1934(3), prompted disarray, and even after the Louisiana Supreme Court announced a controlling interpretation, inconsistencies and uncertainty persisted. Additionally, cases involving not only contractual, but also delictual fault raised even more questions and produced even more discord. Against this backdrop of unpredictability, the Louisiana Legislature revised the obligations provisions of the Civil Code and eliminated the ambiguities inherent in the prior article. Thus, the confusion resulting from the conflicting interpretations of the earlier scheme should have been remedied. This article will examine the law prior to the revision, and the changes effected therein. Additionally, problems with respect to the disparity between delictual and contractual actions for the recovery of nonpecuniary damages will be discussed.

Meador and its Progeny

Prior to the revision, the Louisiana Supreme Court addressed the myriad interpretations[1] given to former article 1934(3) in *Meador v. Toyota of Jefferson, Inc.*[2] Although much of the court's analysis in *Meador* is supported by the terms and history of the article, the court drew a distinction between intellectual and physical gratification that is not. This latter aspect of *Meador* produced subsequent inconsistencies in the contractual realm of nonpecuniary damage recovery.

In *Meador*, a young girl sought recovery for nonpecuniary damages caused by a seven month delay in the repair of her first automobile.

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1. See Comment, Damages Ex Contractu: Recovery of Nonpecuniary Damages for Breach of Contract under Louisiana Civil Code Article 1934, 48 Tul. L. Rev. 1160 (1974), which reviews the strict, broad, and liberal lines of interpretation.
2. 332 So. 2d 433 (La. 1976).

The court phrased the issue in the following way: "May an automobile owner recover damages for aggravation, distress, and inconvenience from a repairman who has unnecessarily and excessively delayed completion of the vehicle's repair?"[3] The court looked to article 1934(3) which read:

> Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach; a 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.[4]

The analysis called for by this article is one which focuses on the cause of the contract; the availability of recovery turned on whether the cause was one of intellectual enjoyment. According to the majority opinion, this meant 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."[5] The court found the principal object of the contract to be the Toyota's repair and concluded that any "intellectual enjoyment" the plaintiff sought to sustain under the contract was at most an "incidental . . . contemplation of the . . . parties."[6] On this basis, the court denied recovery.

The supreme court's definition of "intellectual enjoyment" as being distinct from "physical gratification" may be criticized on several grounds. First, although the modern day meaning of "intellectual" contemplates mental, as opposed to emotional, faculties, at the time of the promulgation of the original version of article 1934(3), "intellectual" had a much broader meaning: "the appreciation of values other than economic."[7] Furthermore, that article drew no distinction between intellectual and physical enjoyment; instead, it spoke of objects "not appreciated in money,"[8] and of objects of "some convenience."[9] The

3. Id. at 433-34.

4. La. Civ. Code art. 1934 (1870).

5. 332 So. 2d at 437. The court aligned itself with a broad interpretation found in one line of jurisprudence that did not require the object to be exclusively intellectual. For other interpretations, see Litvinoff, Moral Damages, 38 La. L. Rev. 1 (1977); Note, Nonpecuniary Damages in Breach of Contract: Louisiana Civil Code Article 1934, 37 La. L. Rev. 625 (1977); Comment, Damages Ex Contractu: Recovery of Nonpecuniary Damages for Breach of Contract Under Louisiana Civil Code Article 1934, 48 Tul. L. Rev. 1160 (1970).

6. 332 So. 2d at 437.

7. Litvinoff, Moral Damages, 38 La. L. Rev. 1, 9 n.40 (1977).

8. La. Civ. Code art. 1934(3) (1870).

9. Id.

history of the latter term further supports the contention that the meaning of "intellectual" was not entirely devoid of concepts and values which have physical qualities. "Some convenience" is a mistranslation of the French term "commodite," which more properly translates to "personal comfort."[10] Undeniably, an important aspect of "comfort" is physical satisfaction. Finally, it is possible that the court's intellectual-physical dichotomy was influenced by article 1934(3)'s illustrative examples: "a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts."[11] As the history of article 1934(3) reflects, however, these examples were not intended to support the narrow construction of the phrase "intellectual enjoyment" imposed by the court.

The distinction drawn between intellectual and physical enjoyment did not only lack support from the legislative history; it also proved too abstract to apply with consistency. A review of some of the decisions which followed *Meador* emphasizes the elusiveness of the supreme court's test and the need for the legislative revision which ultimately occurred. In three of the decisions which are reviewed below, courts facing substantially similar factual scenarios used different analyses to reach three different conclusions. Two of the courts failed to analyze the cause of the contracts at issue completely, while another summarily distinguished *Meador* as providing absolutely no framework of analysis.

In *Whitener v. Clark*,[12] a contractor breached the implied obligation of good workmanlike performance in a contract to build a "distinctively planned residence" through delays, deviations from the specifications, and defective construction.[13] The second circuit awarded nonpecuniary damages to the homeowner for mental anguish caused by the disappointment of the dream of owning a beautiful home. The court was not only confronted with *Meador*, but also *Catalanotto v. Hebert*,[14] in which the fourth circuit had held that a building contract without more does not fit the category of objects the deprivation of which supports recovery for mental distress.[15] The facts of *Catalanotto* involved similar delays and defects as those found in *Whitener*. The court considered, but dismissed *Catalanotto*, announcing simply that the "second circuit differs with the fourth."[16] To satisfy *Meador*, the court abruptly held

10. See La. Civ. Code art. 1928 (1825) and Harrap's New Standard French and English Dictionary C-69 (1972). See also Free v. Franklin Guest Home, 463 So. 2d 865 (La. App. 2d Cir. 1985), citing Litvinoff, supra note 7, at 8.

11. La. Civ. Code art. 1934(3) (1870).

12. 356 So. 2d 1094 (La. App. 2d Cir.), cert. denied, 358 So. 2d 638 (La. 1978), 358 So. 2d 641 (La. 1978).

13. Id. at 1098.

14. 347 So. 2d 301 (La. App. 4th Cir. 1977).

15. Id. at 303.

16. 356 So. 2d at 1098.

the contract before it "greatly different" from the repair contract in *Meador*.[17] This terse announcement, although perhaps correct, provided no insight with respect to when the principal object of a contract is the intellectual enjoyment of the obligee.

Later, in *Ostrowe v. Darensbourg*,[18] the Louisiana Supreme Court was presented with a building contract which, like those in *Whitener* and *Catalanotto*, was for a house of distinctive design. The court held that the unique attributes of the home did not make the contract's object one of intellectual gratification, finding that even if intellectual enjoyment was *a* purpose of the home building contract, it was not *the* principal object. The principal object, according to the court, was the physical gratification received by having a place for living, shelter and comfort. The dissent in *Ostrowe*, written by Justice Calogero (author of the majority opinion in *Meador*), emphasized the lack of opportunity given to the plaintiffs to prove whether the principal object was in fact one of intellectual enjoyment.[19] The majority based its decision solely on the classification of the contract as one to build a home.[20] Such an analysis was not nearly as extensive as *Meador* seemed to require.[21]

The fundamental objection raised in this comment to the analysis established by the supreme court in *Meador* relates to a very specific aspect of that analysis—the interpretation of the term "intellectual enjoyment." From a general standpoint, however, the court proceeded correctly, in that it employed a cause-based analysis as required by article 1934(3). Nevertheless, the three cases just discussed represent a detraction from the cause-based analysis, which may be attributed to the difficulties inherent in applying *Meador*'s intellectual-physical framework.

Other Louisiana cases decided after *Meador* illustrate how the intellectual-physical distinction engendered a lack of proper concern for, and analysis of, the cause of contracts in actions for nonpecuniary damages. For example, in allowing a homeowner nonpecuniary damages from a carpet retailer, the third circuit stated that the nature of the loss was controlling.[22] Since the discoloration complained of did not affect the carpet's utility (a physical quality), the loss was characterized as intellectual. The court could easily have justified recovery on the basis of frustration of cause, since the carpet retailer knew that this homeowner/interior decorator was especially concerned with his home's

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17. Id.
18. 377 So. 2d 1201 (La. 1979).
19. Id. at 1204 (Calogero, J., dissenting).
20. Id. at 1203.
21. 332 So. 2d at 437.
22. McManus v. Galaxy Carpet Mills, Inc., 433 So. 2d 854, 858 (La. App. 3d Cir. 1983).

decor. In another case, the second circuit denied nonpecuniary damages for breach of a contract to stabilize the foundation of a house.[23] The court announced that a contract for the repair of an already defective thing does not support compensation for nonpecuniary losses.[24] As in *Ostrowe* and *Catalanotto*, the court saw fit to take a "labelling-of-the-contract" approach, in complete disregard of the requirement of employing a cause-based analysis.

Even in cases employing a cause-based analysis, unwarranted distinctions have surfaced. For example, in *B & B Cut Stone Co. v. Resneck*,[25] a wealthy couple contracted to have a massive marble fireplace installed in their bedroom. The court found an "intellectual artistic objective" in the contract, noting that the marble was chosen for its beauty and as a reflection of a particular housewide motif.[26] Aesthetics were clearly a cause of the contract. In an effort to insure satisfaction of *Meador*, however, the *Resneck* court distinguished this expensive, elegant, and massive fireplace from the "proletarian"[27] Toyota in *Meador*. The term "intellectual" is no more synonymous with "elegance" or "expense" than the term "physical" is with "proletarian." Expense and elegance, although perhaps indicative of a nonpecuniary interest, are not exclusively determinative of such an interest.

In sum, *Meador* spawned a vast amount of uncertainty. Subsequent cases drew improper distinctions, utilized conclusory and unilluminating methods of analysis, and often eschewed the causal emphasis of the codal scheme. Unfortunately, *Meador* was not the only catalyst of the confusion over the availability of damages for nonpecuniary loss. As much, if not more, chaos resulted from the disparity between tort and contract theories of recovering nonpecuniary losses.

Disparity Between Delictual and Contractual Actions

Perhaps anxious to find a legal basis to support awards for nonpecuniary loss, Louisiana courts have often used tort, rather than contract, theories of recovery. To further complicate matters, the terms used to describe the various degrees of delictual fault have often also been used to describe contractual fault. To understand the dichotomy between recovery under the law of torts and recovery under the law of

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23. Seymore v. Louisiana Soil Stabilization Co., 381 So. 2d 571 (La. App. 2d Cir. 1980).

24. Id. at 573.

25. 465 So. 2d 851 (La. App. 2d Cir. 1985).

26. Id. at 859. Compare Martin v. AAA Brick Co., 386 So. 2d 987 (La. App. 3d Cir. 1980), denying a nonpecuniary claim for breach of a fireplace construction contract since evidence did not show that the contract had intellectual enjoyment as its principal object.

27. *Resneck*, 465 So. 2d at 859, n.6.

contracts, two distinct concepts must be recognized: delictual fault is the intentional or negligent causing of damages, while contractual fault is the mere avoidance of a conventional obligation.[28] The difference between tort and contract principles of recovery emerges when one analyzes cases which find delictual fault for acts of negligence, for intentional infliction of harm, and under strict liability, when a contractual relationship exists between the parties.

The mere existence of a contract between parties does not bar an action in tort for damages arising from their contractual relationship. Indeed, a contractual obligee may have two separate actions against his obligor. For example, in *Franklin v. Able Moving & Storage, Co.*,[29] a contract called for an estimated four hour in-town move of household furnishings. The moving company breached this contract by taking seventeen hours, stretched over two days, to complete the job. In addition, through negligent handling, the company damaged the furniture. Thus, the obligee had available two distinct actions against the obligor: one in contract for the delay, and another in tort for the physical damage. The court clearly recognized the independent bases of recovery, and awarded nonpecuniary damages only for the tortious damaging of the furniture. Other Louisiana courts, however, have been less successful in keeping the bases of recovery separated.

For example, the court in *Pike v. Stevens Imports, Inc.*[30] awarded damages for nonpecuniary loss based on the "negligent breach" of a contract to repair a Mercedes-Benz. The defendant had excessively delayed performance of the repair contract by waiting eighteen months before undertaking the work. The court's resort to a delictual basis of recovery was clearly motivated by the similarity of the facts to, and the holding of, *Meador*. Finding a "negligent breach," however, does not necessarily support a finding of delictual fault. Many breaches of contract result from what may be characterized as a "contractual negligence": the obligor fails to perform either because he is incapable of doing so at all, or because he merely fails to perform on par with his capabilities. Nevertheless, some act beyond a mere failure to render the promised performance is required to find delictual fault, because otherwise, every breach of contract would be delictual.

These cases illustrate that recovery for delictual and contractual fault can and should be distinguished. Such a distinction is not as easily

28. 2 S. Litvinoff, Obligations § 184, at 347, in 7 Louisiana Civil Law Treatise (1975).

29. 439 So. 2d 489 (La. App. 1st Cir. 1983).

30. 448 So. 2d 738 (La. App. 4th Cir. 1984). See also Childers v. Davis, 444 So. 2d 692 (La. App. 5th Cir. 1984); Coddington v. Stephens Imports, Inc., 383 So. 2d 416 (La. App. 4th Cir. 1980); Patton v. Precision Motors, Inc., 352 So. 2d 341 (La. App. 4th Cir. 1977).

discerned, however, when recovery is sought on the basis of the breach of the implied warranties which are operative under certain contracts. The reason for ambiguity in this area is that such a breach effectively results in the *strict liability* of the party owing the warranty. The term "strict liability," however, has connotations of delictual fault. Nevertheless, the strict liability of implied warranties arises out of contract law; therefore, recovery should be governed by the articles of the Civil Code controlling contractual damages.[31] Louisiana courts, however, have not always seen it this way.

The Louisiana Supreme Court's decision in *Gele v. Markey*[32] demonstrates the tendency of the Louisiana jurisprudence to obscure the difference between contractual and delictual fault in the area of implied contractual warranties. In *Gele*, the plaintiffs leased a building from the defendant for the operation of a grocery store. When a defective ceiling collapsed, the plaintiffs' equipment and merchandise was so damaged that they had to close down their business permanently. The trial court found the defendant liable under Civil Code article 2695 and awarded the plaintiffs both pecuniary and nonpecuniary damages. Article 2695 provides:

> The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects, at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee; and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same.

The court of appeal agreed that the defendant-lessor was liable under article 2695, but, applying article 1934(3) as interpreted in *Meador*, reversed the lower court's award of nonpecuniary damages.[33] The sole issue before the supreme court was the availability of nonpecuniary damages.

The supreme court affirmed the denial of nonpecuniary damages on the basis that no nonpecuniary loss had been proven.[34] In so holding, however, the court indicated that proof of a deprivation of "intellectual enjoyment" was not the only method available to the plaintiffs to support a claim for damages based on mental distress. According to the court, the plaintiffs could have recovered upon a showing of *either* "real, substantial emotional distress, *or* loss of intellectual enjoyment because

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31. La. Civ. Code arts. 1994-2012.
32. 387 So. 2d 1162 (La. 1980).
33. 379 So. 2d 763, 764 (La. App. 4th Cir. 1979).
34. 387 So. 2d at 1163, 1164.

of the ceiling's collapse."[35] The court also stated that: "the application of the *Meador* interpretation of Article 1934(3) to this case seems to work real injustice, if the Geles suffered real, substantial emotional distress *or* loss of intellectual enjoyment because of the violation of the lessor's obligation."[36]

The problem with the court's analysis is that it strongly implied the availability of noncontractual damages when the only duty that was identified as having been breached was the warranty owed under the contract of lease. Although it is not altogether clear from the opinion, the court indicated that it found a delictual element in the violation of article 2695, which, and this is again not altogether clear, it derived from the strict liability imposed by that article.

It is perfectly reasonable to characterize the liability imposed under article 2695 as strict, for the lessor owes the duty regardless of the reasonableness of his actions. What is not reasonable is the conclusion that, because that liability is "strict," it is also delictual. Every contract breach arguably results in a form of strict liability, since the obligor need only establish the contract's existence, its nonperformance, and the ensuing damages. The sole purpose of strict liability in warranty actions is to relieve the plaintiff from the problems of proof inherent in pursuing warranty remedies for damages from hidden defects.[37] What is most important to recognize is that the breach of warranty action arises out of the lease contract. Recovery is still controlled by the articles governing contractual damages. For the court to suggest otherwise, without identifying the breach of some noncontractual duty, was error.

That the court in *Gele* seemed inclined to classify the strict liability imposed by article 2695 as delictual is not surprising in light of the role of strict liability in redhibition actions brought against manufacturers. As with the enhançement of the lessor's contractual obligations through article 2695, article 2520 enhances the seller's obligations through the warranty against hidden defects in things sold. When the vendor *knows* of the hidden defect, "the vendor's act of delivering a defective thing . . . amounts to fraud and, besides the contractual, gives rise to a delictual liability."[38] This knowledge has been imputed to manufacturers since the recognition by Louisiana courts of strict liability for defective products.[39] The intermixing of tort and contract in redhibition actions

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35. Id. at 1164 (emphasis added).
36. Id. at 1163 (emphasis added).
37. See DeBattista v. Argonaut-Southwest Ins. Co., 403 So. 2d 26 (La. 1981), cert. denied, 459 U.S. 836, 103 S. Ct. 82 (1982); Loescher v. Parr, 324 So. 2d 441 (La. 1975).
38. 2 S. Litvinoff, Obligations § 252, at 477, in 7 Louisiana Civil Law Treatise (1975).
39. Weber v. Fidelity & Casualty Ins. Co., 250 So. 2d 754 (La. 1971).

against manufacturers has since rendered the two theories of liability virtually indistinguishable.[40]

Courts have imposed delictual fault for a breach of warranty based on imputed knowledge of defects in order to equalize the positions of purchasers and third parties. Whereas third parties with no privity of contract with the manufacturer would have an easy route of recovery on the basis of strict products liability and the imputed knowledge doctrine, purchasers might have been disinclined to pursue redhibition remedies without the benefit of imputed knowledge. Furthermore, purchasers would otherwise have had to satisfy the requirements of article 1934(3) before recovering nonpecuniary damages, while third parties could recover in tort upon a showing of only foreseeability of nonpecuniary harm.

The supreme court seemed to close whatever chasm existed between the tort and contract bases for redhibition actions in *Philippe v. Browning Arms Co.*[41] In this case, Dr. Philippe sued a manufacturer under a strict products liability theory after shooting his finger off with a defective gun. The court awarded nonpecuniary damages under the delictual theory of strict products liability,[42] and attorney's fees pursuant to Civil Code article 2545, which permits such recovery against sellers in bad faith. The imputed knowledge doctrine of strict products liability placed the defendant manufacturer in bad faith even though the plaintiff did not specifically plead redhibition. The court deemed redhibition to have, and treated it as having, both contractual and tortious overtones.

Recently, the Louisiana Supreme Court in *LaFleur v. John Deere Co.*[43] provided a possible limitation on the intermixing of tort and contract as theories underlying actions in redhibition. In this case, two farmers sued the seller and manufacturer of a grain drill which failed to plant seeds at the desired depth, thus causing the intended crops to fail. Fontenot, the plaintiff who purchased the drill, was planting the first crop on his newly acquired farm, as well as the crop of Lafleur,

40. When the seller is in good faith, there is no delictual element to his responsibility for selling a redhibitory thing. Indeed, damages may not be recovered from a good faith seller in an action in redhibition, as the Civil Code only obligates him to return the purchase price and any "expenses occasioned by the sale." See La. Civ. Code art. 2531.

41. 395 So. 2d 310 (La. 1980).

42. See also Bourne v. Rein Chrysler-Plymouth, Inc., 463 So. 2d 1356 (La. App. 1st Cir. 1984), cert. denied, 468 So. 2d 570 (La. 1985); Hubbard v. General Motors Corp., 438 So. 2d 671 (La. App. 2d Cir. 1983). Compare the following which denied nonpecuniary damage recovery for failure to satisfy *Meador*: Paul v. Ford Motor Co., 392 So. 2d 704 (La. App. 3d Cir. 1980); Muller v. Durnin Chrysler-Plymouth, 361 So. 2d 1257 (La. App. 1st Cir.), cert. denied, 363 So. 2d 915 (La. 1978); Burns v. Lamar-Lane Chevrolet, Inc., 354 So. 2d 620 (La. App. 1st Cir. 1977); Stratton-Baldwin, Inc. v. Brown Carpets, 343 So. 2d 292 (La. App. 1st Cir. 1977).

43. 491 So. 2d 624 (La. 1986).

the other plaintiff, who had loaned Fontenot money to get Fontenot started as a farmer.

The court found the product was redhibitorily defective, i.e., so useless that the purchaser would not have bought it had he known of the vice.[44] The court also found, however, that recovery under strict products liability was unavailable, since the defect did not make the product unreasonably unsafe, and since the plaintiffs only suffered economic, and not personal, injuries. The facts thus presented the court with the opportunity to disassociate delictual fault from an action in redhibition brought purely because a product is useless. Nevertheless, the court expressly declined to take advantage of this opportunity. Furthermore, although Lafleur, who was not the purchaser of the grain drill, was permitted to recover for the economic damages he suffered due to his failed crop, the court failed to identify the basis for that recovery. On the one hand, the court did not find grounds for products liability; on the other, Lafleur had no standing to bring an action in redhibition. In the end, although it seems that the court may have taken a step toward making distinct the tort and contract underpinnings of the action in redhibition, that step was a short one.

Lafleur is significant not only for its treatment (or nontreatment) of the legal theories underlying the action in redhibition, but also because it expressly addressed both the revised Civil Code provisions regarding nonpecuniary damages and the rule of *Meador*. Having examined the interpretational problems which were experienced in applying article 1934(3) of the Code of 1870, as well as the additional complications engendered by the utilization of tort theories to support the award of nonpecuniary damages, the effect of the revision of 1984 will now be considered.

The Revision and Its Aftermath

In 1984, the Louisiana Legislature revised the obligations articles of the Civil Code, and in doing so replaced article 1934(3) with article 1998. Article 1998 provides:

> Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.[45]

44. La. Civ. Code art. 2520.
45. La. Civ. Code art. 1998.

Thus, nonpecuniary loss may not be recovered for breach of contract unless the contract is intended to gratify a "nonpecuniary interest." This straightforward approach eliminates the ambiguities inherent in "intellectual enjpyment," as found in former article 1934(3), and thereby removes the source of conflicting interpretations. Close analysis of article 1998 reveals that some, but not all of *Meador* remains good law. The article's emphasis on the nature of the contract parallels the causal approach in *Meador.* Article 1998 also retains the distinction recognized in *Meador* between contractual and delictual actions for nonpecuniary damages. The *Meador* dichotomy of intellectual and physical gratification, however, appears to vanish in light of the newly promulgated distinction between nonpecuniary and pecuniary interests.

No court has been required to render a decision on the basis of the revised article; however, as previously mentioned, the Louisiana Supreme Court did recently address the revision, as well as the status of *Meador,* in *LaFleur v. John Deere Co.*[46] In *Lafleur,* the buyer of a farm implement sued both the manufacturer and retailer for losses incurred as a result of the equipment's failure.[47] The purchaser sought nonpecuniary damages due to the devastating crop loss which he suffered. Although the plaintiff's lack of proof prevented his recovering for mental anguish under any theory, and although the case arose prior to the revision, Justice Calogero (author of *Meador*), writing for the majority, took cognizance of article 1998. By finding the substitution of the term "nonpecuniary interest"[48] for "the gratification of some intellectual enjoyment"[49] to be inconsequential, the court determined that the revision merely "make[s] more certain under the law the *Meador* resolution"[50] that "nonpecuniary damages are recoverable only where the contract has for its object gratification of intellectual enjoyment."[51] The court's rationale warrants criticism for two reasons. First, it fails to appreciate the meaning rightfully due "nonpecuniary interests" in light of the term's literal definition and historical context. Second, the court mistakenly found that the rejection of the original version of article 1998 supported its conclusion.

Article 1998 requires that the parties, through their contract, intend gratification of a nonpecuniary interest for there to be recovery for nonpecuniary losses. Webster's defines "pecuniary" as "consisting of

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46. 491 So. 2d 624 (La. 1986).
47. As noted, a third party, Lafleur, also sued. His action is irrelevant for present purposes.
48. La. Civ. Code art. 1998.
49. La. Civ. Code art. 1934 (1870).
50. *LaFleur,* 491 So. 2d at 629.
51. Id.

or measured in money."[52] Thus, nonpecuniary interests are those not measured in money, i.e., those without readily ascertainable market values. Article 1998 revives the true meaning of the term "intellectual" intended by the redactors of prior article 1934(3). The term "intellectual" encompassed a broad range of noneconomic values which pertained to much more than the faculties of the mind. Article 1934(3) itself addressed objects "not appreciated in money." The revision, therefore, aligns itself with the intent of the redactors of article 1934(3) and rejects *Meador*'s distinction between intellectual and physical gratification.

The term "nonpecuniary interests" depicts a much broader realm of protected interests than did the term "intellectual enjoyment" as interpreted by the court in *Meador*. A cause of a purely physical nature may now support nonpecuniary damage recovery. For example, a bridegroom who gets outfitted for his wedding by a tailor has a clear interest in his appearance on the fateful day. This interest, although it necessarily relates to a physical concern, is nonetheless nonpecuniary. The elimination of the narrowly drawn examples of article 1934(3) further evidences an intent to protect a wider range of interests than that protected by earlier interpretations of article 1934(3).

The *LaFleur* court's resuscitation of *Meador* erroneously rests in part on the rejection by the legislature of the original version of article 1998. That version premised recovery of nonpecuniary losses either on the nature of the contract *or* the circumstances surrounding its breach. Under the scheme adopted by the Louisiana Legislature, the contract's cause *and* the circumstances surrounding either the contract's breach or its formation govern the issue's resolution. The use of the conjunctive in the adopted version of article 1998, as opposed to the disjunctive in the original version, hardly supports the continued viability of the *Meador* distinction between intellectual and physical enjoyment. The adopted version, by emphasizing both the cause of the contract and the obligor's actual or constructive knowledge of the ensuing nonpecuniary loss, merely insures that the key to recovery of nonpecuniary loss is "contractual" foreseeability.

A Cause-Based Analysis

Since article 1998 specifically requires analysis of the nature of the contract, a determination of the cause of the contract is necessary. A noted authority defines cause as the end men seek to attain by contracting, and notes further that "this end varies with the nature of the contract."[53] The legislative history of article 1934(3) and *Meador* are

52. Webster's Ninth New Collegiate Dictionary 866 (1983).

53. 1 S. Litvinoff, Obligations § 217, at 388, in 6 Louisiana Civil Law Treatise (1969).

both consistent with the focus of article 1998 on the cause of the contract at issue. Although article 1934(3) required the contract's "object" to be intellectual enjoyment, courts correctly have used cause as the key to nonpecuniary damage recovery. *Meador* utilized cause by focusing on the "overriding concern of [the] plaintiff, evident to [the] defendant at the time [of the contract]."[54] Other courts have rightly looked to the "purpose,"[55] "reason,"[56] "motivating factor,"[57] and "cause"[58] of the contract. The term "object" is a mistranslation of the term "but" in the French text of the Civil Code of 1825.[59] "But" properly translates to "end," "purpose," or "motive,"[60] the same terms used to define "cause."[61]

The cause of a contract may be apparent from the contract itself, whether by implication or by express statement in the contract. In other situations, the circumstances surrounding the contract's formation may indicate the parties' intent. Thus, the particular facts and circumstances of each case determine the cause of each contract. Proper analysis looks beyond the type of contract involved and takes into account the fact that personal motives may enter the objective realm of contracts. Many post-*Meador* decisions used a cause-based analysis in applying article 1934(3); to this extent, those cases remain relevant to the application of article 1998.

Free v. Franklin Guest Home, Inc.[62] provides an example of a contract which clearly delineated the interests of the parties. This case involved a claim by a resident of a nursing home for nonpecuniary damages. The contract contained a "Patient's Rights" clause which listed patient dignity as one of those rights. From this provision the court

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54. 332 So. 2d at 437.

55. Schroeder v. DiPascal Cabinet Co., 467 So. 2d 1380 (La. App. 5th Cir. 1985); Smith v. Andrepont, 378 So. 2d 479 (La. App. 1st Cir. 1979), cert denied, 380 So. 2d 102 (La. 1980); Plaisance v. Dutton, 336 So. 2d 1034 (La. App. 2d Cir. 1976).

56. Robertson v. Jimmy Walker Chrysler-Plymouth, Inc., 368 So. 2d 747, 755 (La. App. 3d Cir.), cert. denied, 371 So. 2d 833 (La. 1979), 371 So. 2d 834 (La. 1979).

57. Ostrowe v. Darensbourg, 369 So. 2d 1156-58 (La. App. 1st Cir.), aff'd, 377 So. 2d 1201 (La. 1979).

58. Riche v. Krestview Mobile Homes, Inc., 375 So. 2d 133, 138 (La. App. 3d Cir. 1979).

59. The French version read: "Lorsque le contrat a pour *but* de procurer a quelqu'un une jouissance purement intellectuelle, telle que celles qui tiennent a la religion, a la morale, au gout, a la commodite ou a toute autre espece de satisfaction de ce genre . . . ."

60. Harrap's New Standard French and English Dictionary B-51 (1972). See also Note, supra note 5, at 630.

61. La. Civ. Code art. 1967, replacing La. Civil Code art. 1896 (1870). See also, 1 S. Litvinoff, Obligations § 240, at 435, in 6 Louisiana Civil Law Treatise (1969); 3 C. Toullier, Le Droit Civil Francais, Tit. III, ¶166, at 377 (1833).

62. 463 So. 2d 864 (La. App. 2d Cir. 1985).

found that the resident had contracted for overall well-being as well as for physical gratification. In the sense of the patient's well-being and personal comfort, the principal object of the contract was intellectual enjoyment. Where a contract does not expressly declare all of the parties' motives, the court must look to the communicated intentions of the parties to ascertain the cause of the contract.

Although "anything not known or not intended by both parties remains outside of the contractual field,"[63] personal motives become constituent parts of contracts when they are communicated. In *Vick v. National Airlines, Inc.*,[64] the plaintiff contracted with the defendant to fly to Miami where he was to join his wife; the couple was then scheduled on a Caribbean flight for a sun-filled vacation. The airline failed to inform Mr. Vick that severe weather stretched across the initial flight path. This weather caused an extra stop, delaying Mr. Vick's Miami arrival, and ultimately prevented timely connection with the Caribbean flight. The fourth circuit held that since the airline knew of the Vicks' vacation plans, the principal object of the contract was intellectual enjoyment. When, however, a personal motive is not made known to the obligor, that motive remains outside of the contract absent an external circumstance indicative of such a motive.

For example, in *Bowes v. Fox-Stanley Photo Products*[65] a wine connoisseur was unable to recover damages for mental distress resulting from the defendant's improper processing of vacation pictures from French vineyards. The fourth circuit denied the plaintiff's claim, stating that plaintiff's failure to inform the processor of the "nature" of the film made physical gratification, the actual processing, the contract's principal object. The court limited recovery to the price of the film's replacement.

A particular contract may, by implication, support a finding of a nonpecuniary cause. For example, in the purchase of a family car, not only is a mode of transportation sought, but other conveniences are expected as well.[66] When carpet is selected to match a home's decor, appearances are by implication a part of the contract's cause.[67] A contract for the refinishing of kitchen cabinet doors has beautification as its purpose, as apparent from the contract itself.[68] All of these examples indicate that it is largely a question of fact as to whether nonpecuniary interests were intended to be gratified through the performance of the obligation.

63. 1 S. Litvinoff, Obligations §220, at 395, in 6 Louisiana Civil Law Treatise (1969).
64. 409 So. 2d 383 (La. App. 4th Cir. 1982).
65. 379 So. 2d 844 (La. App. 4th Cir. 1980).
66. For an interesting discussion of this example see Litvinoff, supra note 5, at 17.
67. McManus v. Galaxy Carpet Mills, Inc., 433 So. 2d 854 (La. App. 3d Cir. 1983).
68. Schroeder v. DiPascal Cabinet Co., 467 So. 2d 1380 (La. App. 5th Cir. 1985).

The Role of Foreseeability; Another Look at Delictual Fault

Every nonperformance may fairly be expected to result in some degree of nonpecuniary frustration. As noted in *LaFleur*, foreseeability alone is not the test for recovery. Under article 1998, breach of a contract may result in recovery of nonpecuniary damages only if such damages were foreseeable *and* the cause was the promotion of a nonpecuniary interest.[69] There certainly may be some overlap in these two inquiries. If the gratification of the obligee's nonpecuniary interest is the cause of the contract, and the obligor is aware that it is the cause, then it is foreseeable that the failure to perform as promised will result in nonpecuniary loss. Mere foreseeability of nonpecuniary damage, however, does not make the cause a nonpecuniary interest.

This notion of foreseeability plays an important role in the disparity recognized by many to exist between contractual and delictual fault in the realm of nonpecuniary damages. Concern over this absence of symmetry was eloquently expressed by Justice Dixon in his dissenting opinion in *Meador*: "We should not deny recovery for damages which are suffered, for which justice requires compensation, for the rather superficial reason that plaintiff's action is in contract, not tort."[70] Even the majority in *Meador* lamented that "[p]erhaps it would be better if damages for mental anguish in breach of contract cases were allowable just as in tort actions."[71] Nevertheless, the majority concluded that "such a matter directs itself to the lawmaker."[72]

The legislature did address the issue; article 1998 is evidence of that. An understanding of the policies underlying contract and tort theories helps to explain why the revision requires more than mere foreseeability for contractual nonpecuniary damage recovery. Foreseeability in tort actions is determined by a duty-risk analysis: whether damages are recoverable depends on the tortfeasor's having foreseen this injury to this plaintiff occurring in this manner.[73] In answering this question, courts balance policies of fairness, deterrence, and judicial efficiency.

By limiting recovery of nonpecuniary damage to contracts intended to gratify nonpecuniary interests, the legislature has, to a certain extent, served each of these policies. At the heart of every contract is the consent of the parties, an accord of the wills.[74] Unlike the "relationship"

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69. La. Civ. Code art. 1998 (1985).

70. 332 So. 2d at 438 (Dixon, C.J., dissenting).

71. 332 So. 2d at 438.

72. Id.

73. Crowe, Anatomy of a Tort-Greenian, As Interpreted by Crowe Who Has Been Influenced by Malone-A Primer, 22 Loy. L. Rev. 903 (1976).

74. 1 S. Litvinoff, Obligations § 240, at 435, in 6 Louisiana Civil Law Treatise (1969).

between parties resulting from a delict, parties to a contract agree to their respective rights and obligations, and can predetermine the costs of the relationship. If an obligee intends to have a nonpecuniary interest satisfied, he will pay a higher price than the obligor may otherwise demand in light of the potential liability for nonpecuniary damages. By eliminating nonpecuniary liability in instances where the parties did not intend to facilitate nonpecuniary interests, the legislature has removed a potential source of exorbitant consumer prices. Under traditional contract theory, "anything not known nor intended by the parties remains outside of the contractual realm."[75] Therefore, if an obligor were faced with nonpecuniary damage liability when nonpecuniary interests were not intended to be served by the contract, unfairness, overdeterrence and a fundamental inconsistency with the theory of contracts would result.

Judicial efficiency is also served, in a certain degree, by the legislative policy limiting nonpecuniary damage recovery to specific contracts. The limitation relieves the courts from facing nonpecuniary damage claims in each action for contract breach. Anytime that a contract is not fully performed, the obligee suffers frustration to some extent. The courts would be more burdened than they already are if nonpecuniary damages were allowed each time a breach occurred.

Legislative policy-making of this type is arguably inappropriate in tort. Policies in tort actions are best served through a case by case approach. Delictual relationships arise unilaterally, either accidentally (negligence) or intentionally (intentional torts); these relationships result from an infinite number of causes (torts). It is impossible to predict whether such relationships will support recovery for nonpecuniary damages, except, of course, when nonpecuniary damages were intentionally caused.

With respect to intentionally caused nonpecuniary damages, the Legislature has aligned contractual fault with delictual fault. Article 1998 reads in pertinent part: "Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee."[76] The obligor must not only intend to breach, but must also intend to aggrieve the obligee's feelings.[77] This dual requirement is proper because often a party may, on business grounds for example, breach a contract, yet not intend to injure the obligee's feelings. In this situation, the first paragraph of

75. S. Litvinoff, supra note 61, at 395.

76. La. Civ. Code art. 1998.

77. See, e.g., Stipelcovich v. Mike Persia Chevrolet, 391 So. 2d 582 (La. App. 4th Cir. 1980) (The intentional breach did not give rise to the presumption that the obligor intended to aggrieve obligee's feelings.).

article 1998 governs nonpecuniary damage recovery. Interestingly, when certain activity constitutes both contractual and delictual fault, the obligee is able to take advantage of the longer prescriptive period applicable to contract actions although a delict is involved.[78]

In summary, nonpecuniary damages are not awarded in contract actions "just as they are" in tort actions. The balancing of conflicting policies present in both tort and contract is functionally different in both theories in light of the consensual nature of contracts as compared to the "unilateral" nature of torts. By requiring the cause of the contract to be the promotion of a nonpecuniary interest, the legislature has served legitimate policy concerns.

Conclusion

Despite the support in *LaFleur* for *Meador*'s continued viability, ample, even substantial, argument exists to discontinue use of the distinction established in *Meador* between intellectual and physical enjoyment. The court's failure to examine the meaning intended for "nonpecuniary interest" explains its finding in *Lafleur* that the language change of article 1998 was insignificant. The language change, however, is hardly inconsequential; the revision simplifies the process of applying article 1998, while broadening the interests protected. Under the proper interpretation of article 1998, courts no longer need resort to strained reasoning, conclusory analyses or inappropriate distinctions between contract and tort. The term "nonpecuniary" forces the correct analysis: is there a noneconomic value which was to be promoted by the contract? To answer this question, courts must ascertain whether the contract evidences an intent to gratify nonpecuniary interests as required by article 1998. This entails analysis of the parties' intent by looking to the contract itself, to the circumstances surrounding its formation, and to communications between the parties during its formation. The question is answered by a classification of the degree of fault involved in the breach only when there is an intentional breach. If such a breach is present, courts must then determine whether the obligor intended to injure the obligee's feelings by the breach. Although the legislature did a certain amount of policy balancing, courts should retain a vast amount of discretion in deciding damage issues. Article 1999[79] is especially useful in the nonpecuniary damage realm since, oftentimes, these damages are not susceptible of exact measurement. Nevertheless, recovery should not

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78. La. Civ. Code art. 1998.

79. La. Civ. Code art. 1999 (permitting the court much discretion when damages are insusceptible of precise measurement).

be thwarted merely because the damages cannot be calculated with a high degree of accuracy.[80]

Nonpecuniary damages need only be proven as any other element of damage; there is no need to impose an inordinate burden of proof on plaintiffs. Any doubt as to the exact dollar figure to place on the damage should be resolved through use of the court's discretionary powers.

Kathryn Bloomfield

80. The primary objection is that mental suffering can not be compensated with money. In tort cases, however, this is done every day and should be no different in contract cases. Difficulty is no reason for doing nothing at all. 2 M. Planiol, Traite Elementaire de Droit Civil No. 252, at 153 (11th ed. La. State L. Inst. trans. 1959).