Moral Damages

Saul Litvinoff
MORAL DAMAGES

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TERMINOLOGY

In the French tradition, the expressions *dommage moral* and *préjudice moral* are commonly used to designate damage inflicted to interests or assets that are not exactly patrimonial. As is generally known, not all rights are of a patrimonial nature. Very important ones such as family rights or rights of personality are not regarded as part of a person's patrimony. The infringement of such nonpatrimonial rights, however, may give rise to claims for reparation which are clearly patrimonial assets. Therefore, to speak of *nonpatrimonial* damages is not perfectly accurate. Nor is it entirely clear to speak of *nonpecuniary* damages since damages are commonly repaired in money. From a different vantage point, it becomes clear that the infringement of certain rights is bound to have an impact on the emotions of the holder of such rights. That is something clearly expressed by courts in the English-speaking world when they refer to "mental anguish," "mental suffering," "humiliation" or even "emotional distress." 

There is no semantic obstacle to borrowing from the French tradition and speaking of "moral damages" to mean damage that cannot be technically viewed as sustained by a person's patrimony, or damage to an interest for which a current market-value cannot be readily ascertained, as is always the case when the injury sustained consists, in whole or in part, in the experience of a negative state of emotional distress.

With those qualifications, the expression "moral damages" will be used in the following discussion.

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3. Id.

THE PROBLEM

In the vast majority of instances the nonperformance of an obligation results in injury to the obligee's body or property. At times, however, the impairment affects an interest beyond the scope of the obligee's patrimony, that is, the damage is of a moral nature as clarified above. The question about recovery for such damage is closely connected to the question whether an obligation must always have a patrimonial object. As shown elsewhere, the answer given by modern doctrine is that any interest worthy of protection, even if not of a patrimonial nature, may be the object of an obligation. It should then follow that damages of a moral nature are unquestionably recoverable. Indeed, there is no reason to contend that injury to a moral interest is not a loss within the meaning of articles 1149 of the French and 1934 of the Louisiana civil codes even when that which has been lost is a positive state of emotional gratification, or a neutral state of emotional balance which is always better than a negative state of distress. Even more clearly, there is a loss within the meaning of those articles when the injury is to reputation, though when the reputation involved is commercial good-name it is then possible to think in terms of patrimonial injury. It may be said, likewise, that injury to a moral interest can also be turned into deprivation of profit, within the meaning of the cited articles, since a state of emotional distress may prevent gainful activity and an injury inflicted upon a party's reputation may destroy his expectations of actual reward or profit. Be this as it may, reparation of such damage has presented some difficulties and given rise to some questions.

In the matter of delict and quasi-delict, French jurisprudence has had no hesitation in granting recovery for moral damages when those kinds of injuries are serious and real. In the matter of contract, the recovery of

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7. See Rouen, May 27, 1844, S. 44.2.550. See also 11 G. BAUDRY-LACAN- Tinerie ET E. BARDE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL—DES OBLIGATIONS 452 (2d ed. 1900).

8. See 1 L. MAZEAUD, J. MAZEAUD ET A. TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE 393-95 (5th ed. 1957); 6 M. PLANIOl ET G. RIPERT, supra note 1, at 753-55; P. WEILL, supra note 1, at 614. See also DORVILLE, DE L'INTÉRÊT MORAL DANS LES OBLIGATIONS (1901); MANTELET, RÉPARATION DU PREJUDICE MORAL (1907).
MORAL DAMAGES

Moral damages has been subject to debate. Quite often, indeed, contract is viewed in the context, or against the background, of interests of patrimonial nature. In a natural way, that approach leads to the conclusion that the damages sustained by the obligee as a result of the obligor’s nonperformance are taken into account and therefore give rise to reparation only when they are of a pecuniary nature. Strictly adhering to this manner of reasoning, a good many writers have asserted that no recovery may be granted for the nonperformance of a contractual obligation when it is attended only by injuries of a moral nature.9

Criticism has been voiced against that approach, however. A “moral” interest is only rarely found in contract, and even more rarely does a contract involve such an interest exclusively. In most instances it is closely linked with an interest of a pecuniary nature. That is the case, for instance, when an obligor must deliver a thing which, besides its value in money, is also of a sentimental—or “moral”—value for the obligee, as where family heirlooms such as portraits or documents, or works of art, are involved.10 At times, an obligor’s failure to perform may have an impact on the obligee’s credit or good name, as when a bank dishonors a check or a bill of exchange without a valid reason. There should be little doubt that in situations of that sort the damage inflicted upon a party’s good name or credit is immediately followed by other damage of a pecuniary nature, especially when the party is a merchant. Nevertheless, the fact that damage of an exclusively moral nature occurs only seldom is no justification for a denial of recovery where such damage has been proved.11 It has been said that, as shown by solutions reached in the delictual field, the law has passed the stage where only material values were taken into account.12 If full reparation is to be granted, as it should be, all interests of an obligee, whatever their nature, must be protected.13 The manner of repara-

9. 11 G. BAUDRY-LACANTINERIE ET E. BARDE, supra note 7, at 451-57; 7 T. HUC, COMMENTAIRE THEORIQUE ET PRATIQUE DU CODE CIVIL 209-10 (1894); 16 F. LAURENT, PRINCIPES DE DROIT CIVIL FRANCAIS 341-42 (2d ed. 1876); Meynial, De la sanction civile des obligations de faire et de ne pas faire, 56 REVUE PRATIQUE DE DROIT CIVIL FRANCAIS 385, 440 (1884).
10. See 7 M. PLANIOL ET G. RIPERT, supra note 1, at 187.
11. Id.
12. Id.
tion is, quite certainly, pecuniary. If that were an objection, however, it
would be as valid in the delictual as in the contractual field. In the one
and the other, nevertheless, the allowance of any reparation, even if
imperfect or inadequate, is better than no reparation at all.

The French jurisprudence reflects the same diversity of views. Some
decisions have rejected recovery outright when the damage is of a moral
nature exclusively. Others, taking a more moderate attitude, have grant-
ed recovery for a moral injury strictly connected to other damages of
pecuniary nature. Modern decisions finally have granted protection to
interests of an exclusively moral nature. Thus, an actress was granted
recovery for the damage sustained when her name appeared on posters in
small-size print. Similarly, members of a deceased’s family were al-

At common law the situation is not essentially different. In most
cases involving breach of contract, recovery is limited under that system to
compensation for patrimonial injuries in the form of either loss sustained
or gain prevented. A pecuniary satisfaction for a patrimonial injury is
sufficient, it is believed, to compensate a plaintiff for his actual loss and
also for the vexation and disappointment always involved in the breach of
a contract. In tort cases, however, damages for mental suffering are

14. M. PLANIOL ET G. RIPERT, supra note 1, at 188.
15. A well known decision rendered by the court of Paris on March 27, 1873,
D.P. 74.2. 129, S. 74.1.477, is indicative of this trend: A depositary failed to return a
painting. The depositor was allowed to recover the intrinsic value of the painting
but no recovery was granted for the loss of the sentimental value the painting had
for the depositor. The painting involved was a family portrait.
16. See Rouen, May 27, 1844, S. 44.2.550, involving a banker’s refusal to honor
a bill of exchange though the amount of the bill was covered by funds of the drawer
in the banker’s possession.
17. See P. WEILL, supra note 1, at 428.
20. See 5 A. CORBIN, CONTRACTS 426 (1964); 11 S. WILLISTON, CONTRACTS 214
(3d ed. 1968).
21. 5 A. CORBIN, supra note 20, at 426; C. McCORMICK, HANDBOOK ON THE
LAW OF DAMAGES 592 (1935). In re United States, 418 F.2d 264 (1st Cir. 1969); In re
FARNsworth, TEXTBOOK OF PSYCHIATRY 193-94 (1963) and J. JASTROW, CHARAC-
TER AND TEMPERAMENT 136-43 (1915); Rodrigues v. State, 472 F.2d 509 (Haw.
1970); Wilson v. Lund, 80 Wash. 2d 91, 491 P.2d 1287 (1971); Comment, 59 GEO. L.
J. 1237 (1971).
awarded when such suffering is the result of bodily injury. They are also awarded when suffering has been caused intentionally or in a wanton or reckless manner, as is the case in some wilful torts such as defamation, assault and imprisonment. Only very seldom do comparable situations appear in the contractual field.

At any rate, distinguished authority asserts that when conduct that causes bodily harm is wrongful not because it is a breach of the general law of tort but because it is a breach of an express contract made by the defendant there is no reason for applying a different rule as to the damages that can be recovered. Following this trend of thought, section 341 of the Restatement of Contracts provides:

In actions for breach of contract, damages will not be given as compensation for mental suffering, except where the breach was wanton or reckless and caused bodily harm and where it was the wanton or reckless breach of a contract to render a performance of such a character that the defendant had reason to know when the contract was made that the breach would cause mental suffering for reasons other than mere pecuniary loss.

Even when a contract has been breached out of mere negligence rather than wilfulness or wantonness, some courts may reach the same results, provided the contract is such that the defendant could not have failed to know that its breach would cause mental suffering to the other party. The breach of a promise to marry is a typical example of such a situation. The same solution obtains in the case of contracts for the


24. 5 A. CORBIN, supra note 20, at 428.

25. Hattin v. Chapman, 46 Conn. 607 (1879); Parker v. Forehand, 99 Ga. 743, 28 S.E. 400 (1896); Benson v. Williams, 239 Iowa 742, 32 N.W.2d 813 (1948); Kugling v. Williamson, 231 Minn. 135, 42 N.W.2d 534 (1950); Klitzke v. Davis, 172 Wisc. 425, 179 N.W. 586 (1920).
carriage or proper disposition of human bodies. Contracts for the delivery of death messages also fall in that category.

It has been suggested, however, that the general practice is still to deny damages for mental anguish:

Mental suffering is not itself a pecuniary harm; and it can scarcely be said to be measurable at all in terms of money. Likewise, it must be differentiated from bodily injury and from the physical pain that a bodily injury may cause. The exact line between mental suffering and physical pain may be an invisible line, because the former, as well as the latter, may well be a disturbance in the bodily cells; but the courts have thus far made a rough practical distinction between them, and it will continue to be made until advancing science shows it to be ill-founded, or general dissatisfaction with results forces its abandonment.

Such a fluid stage of development of the law as to liability for mental anguish alone has been seen to be the result of certain trends not only in the law, but also in medicine. It has been stated, however, that "[t]here is a definite trend today in the United States to give an increasing amount of protection to the interest in freedom from emotional distress."

It must be said, to conclude, that whenever exemplary damages are allowed, mental suffering is taken into account. The dividing line between moral and exemplary damages is not very distinct.

THE LOUISIANA CIVIL CODE

Unlike the Code Napoleon, article 1934 of the Civil Code of Louisiana contemplates, in its third paragraph, damages of a non-patrimonial or moral nature:


27. Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930); Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N.W. 1 (1895); Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681 (1943); So Relle v. Western Union Tel. Co., 55 Tex. 308 (1881).

28. 5 A. CORBIN, supra note 20, at 426.

29. 11 S. WILLSTON, supra note 20, at 219.


31. 11 S. WILLSTON, supra note 20, at 215.
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. 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.\textsuperscript{32}

Immediately thereafter the article contains a relevant precept as to the manner in which such damages shall be measured:

In the assessment of damages under this rule, as well as in cases of offenses, quasi-offenses, and quasi-contracts, much discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages under the above rules as will fully indemnify the creditor, whenever the contract has been broken by the fault, negligence, fraud or bad faith of the debtor.\textsuperscript{33}

The English version contains a few departures from the French original.\textsuperscript{34} A more accurate translation would read:

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 granted without reckoning them at all on any pecuniary loss or on any

\textsuperscript{32} Emphasis added. This paragraph was introduced in the revision of 1825. There is no comparable language in the pertinent articles of the French Civil Code. See \textit{3 Louisiana Legal Archives} pt. II, at 1069-72 (1942).

\textsuperscript{33} \textit{La. Civ. Code} art. 1934(3).

\textsuperscript{34} The French original reads: "Quoique la règle générale soit que les dommages doivent être de la perte que le créancier a éprouvée, et du gain dont il a été privé, il est des cas où des dommages peuvent être accordés, sans les calculer en aucune manière sur la perte pécuniaire, ou la privation du gain que la partie peut avoir éprouvée. Lorsque le contrat a pour but de procurer à quelqu'un une jouissance purement intellectuelle, telle que celles qui tiennent à la religion, à la morale, au goût, à la commodité ou à toute autre espè ce de satisfaction de ce genre, quoique ces choses n'aient pas été appréciées en argent par les parties, des dommages n'en seront pas moins dus pour la violation de la convention. Un contrat, qui a pour but une fondation religieuse ou charitable, une promesse de mariage, ou l'entreprise de quelqu'ouvrage appartenant aux beaux arts, offre l'exemple d'un cas auquel cette règle peut s'appliquer."
deprivation of pecuniary gain the party might have sustained. When a
contract was made for the purpose of securing to a party a purely
intellectual enjoyment, such as that related to religion, morality,
taste, personal comfort or any other kind of satisfaction of that order,
though such things were not evaluated in money by the parties,
damages are nevertheless due for breach of the obligation. A contract
the purpose of which is a religious or charitable foundation, a prom-
ise of marriage, or the undertaking to do a work in any of the fine
arts, is an example of a case where this rule can be applied. 35

Thus translated, the French text of the precept offers a wider scope
and a greater generality than are reflected in the official English version.
That difference in generality and scope is of unquestionable importance
for a correct interpretation of the precept.

The source of that rule cannot be readily ascertained. 36 It may be

35 Emphasis added. From a contrast of this translation with the official one it
becomes clear that rather than "some intellectual enjoyment" the French text reads
une jouissance purement intellectuelle, that is, "a purely intellectual enjoyment."
Rather than "convenience" the French text reads commodité, of which "personal
comfort" is a more accurate translation. Rather than "other legal gratification" the
French words are toute autre espèce de satisfaction de ce genre, that is, "any other
kind of satisfaction of that order." Finally the official English version makes a
reference to the "object" of the contract while the French text speaks of but, that
is, end or purpose. Cf. Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433, 436-37
(La. 1976), where a different translation, and interpretation, is made of the original
French text. In a note on that case the following restatement is proposed:
Where the purpose of motive of the contract is primarily for personal, social,
or family interest including comfort and convenience and is within the contem-
plation of the parties at the time of the contract, recovery for non-pecuniary
damages will be given; however, where the purpose of the contract is primarily
commercial, economic, or otherwise based on a pecuniary motive, recovery
will not be given for nonpecuniary damages.

36 It has been suggested that the rule may be traced to a passage in Domat’s
work where, discussing the liability of an architect who failed to perform an
obligation to build a house for an owner who had already made a contract with a
tenant, the classical writer said that the architect was liable for three kinds of loss:
"That of the expense of rebuilding the house, the loss of the rent which the landlord
ought to have had, and that of the damages which the landlord will be liable for to
the tenant for disappointing him of his house." 1 J. DOMAT, THE CIVIL LAW IN ITS
NATURAL ORDER 776 (Cushing ed. Strahan trans. 1850) (emphasis added). See
Batiza, The Actual Sources of the Louisiana Projet of 1823: A General Analytical
Survey, 47 TUL. L. REV. 1, 80 (1972). See also Comment, Damages Ex Contractu:
Recovery of Nonpecuniary Damages for Breach of Contract Under Louisiana Civil
Code Article 1934, 48 TUL. L. REV. 1160, 1173 (1974) [hereinafter cited as Damages
Ex Contractu]. Though the English translation of Domat’s passage seems to sug-
possible however to trace it to a passage by Toullier where the French commentator most emphatically supports the view that the breach of a promise of marriage should give rise to damages, in spite of the difficulty that might be found in assessing them, a view he expounded against the strong current of opinion to the contrary which prevailed at the time. For Toullier, the matter could not be left outside the scope of operation of general principle. Since the failure to perform any obligation to do gives rise to damages and a promise of marriage entails such an obligation to do, damages are owed for the breach of such a promise. For that writer, then, what mattered as a logical antecedent for the granting of damages was the breach of the obligation and not the kind of expectation the unrendered performance was supposed to fulfill. The same reasoning is perfectly applicable to the breach of an obligation to give, which Toullier could not have taken into account in that passage because he was dealing with obligations which cannot be enforced through specific performance, as in the typical case of a promise of marriage.

**INTERPRETATION**

There can be no doubt that, for purposes of the third paragraph of article 1934 of the Louisiana Civil Code, the loss of aesthetic gratification resulting from the breach of a contract to do a work in any of the fine arts, or the loss of spiritual satisfaction resulting from the breach of a contract made in contemplation of a religious or charitable purpose, is a loss within the scope of the initial paragraph of the same article. Likewise, the frustration of expectations of obtaining satisfactions or gratifications of the kind contemplated in the third paragraph must be considered in the same context itself as a possible source of Civil Code article 1934(3) the French original does not, as it reads, in the pertinent part: "et celle des dommages et intérêts qu'il devra à ce locataire," that is, "and the damages he will have to pay to the tenant." There is no mention of "disappointment" in the French text. 2 OEUVRES COMPLETES DE J. DOMAT, pt. II, at 127 (Remy ed. 1835).

38. Id. at 435. See also 2 S. LITVINOFF, supra note 6, at 303-24.
39. Id. at 298-303.
40. The expression "intellectual enjoyment" must be interpreted according to ideas prevailing at the time that language was introduced into the Louisiana Civil Code. It means, no doubt, the appreciation of values other than economic. Through semantic evolution, such an enjoyment would nowadays be termed "emotional" rather than "intellectual," since the psychological faculties of "thought," on the one hand, and "feeling" on the other are more carefully separated now. See J. CHAPLIN & T. KRAWIEC, SYSTEMS AND THEORIES OF PSYCHOLOGY 271-308, 357-80 (1960); E. HILGARD & R. ATKINSON, INTRODUCTION TO PSYCHOLOGY 365-95, 1963-86 (4th ed. 1967); N. MUNN, THE EVOLUTION AND GROWTH OF HUMAN BEHAVIOR 409-76 (2d ed. 1965).
category as a deprivation of profit under the initial paragraph of article 1934. Since profit is conceptually very close to benefit, and since the third paragraph of article 1934 is concerned with nonpecuniary benefits, that conclusion is warranted.

The Louisiana Civil Code has expressly envisaged in this manner the reparation of damage of a nonpatrimonial nature. The moral interest of parties to contracts has been thus protected. Furthermore, the two elements of damage, damnum emergens and lucrum cessans, with the modifications necessitated by such a peculiar matter, have been taken into account.41

A cursory glance at the original French text suffices to support the conclusion that the third paragraph of article 1934 was conceived in terms of wide generality. An expectation of "intellectual" enjoyment is protected not only when it relates to religion, morality, taste or personal comfort, but also when it derives from any other kind of satisfaction of that order. As a consequence, "intellectual" enjoyment also falls within the scope of that rule when it derives from the fulfillment of an interest in the advancement of science, or the betterment of society, or the preservation of the environment, since all these are simply other kinds of satisfaction of that order.

It is not only promises of marriage, or contracts having as a purpose a religious or charitable foundation or an undertaking to do a work in any of the fine arts, that are comprised within the purview of the rule, since such contracts are mere examples of the cases to which the rule can be applied.

Nevertheless, that paragraph of article 1934 gives rise to the question whether, to warrant application of the rule, the contract must have been made for the exclusive purpose of securing intellectual enjoyment to the party, or whether the application of the rule is warranted also when the contract, besides securing intellectual enjoyment, was made for another purpose also.42 No doubt, the examples offered in the paragraph itself are of contracts where intellectual enjoyment seems to be the exclusive purpose, as in the case of a contract with an artist. Such enjoyment, however, may very well be expected from the proper performance of a contract not exclusively made for such a purpose. Thus, a party buying a spacious and well-appointed house may do so as a good investment in protection of his economic interest, but he doubtless also anticipates enjoyment of the comfort such a place offers as a residence for himself and his family.43

41. See 2 S. Litvinoff, supra note 6, at 338-39.
42. See Damages Ex Contractu, supra note 36.
43. See Melson v. Woodruff, 23 So. 2d 364 (La. App. 1st Cir. 1945). See also Arquembourg v. Bourque, 243 So. 2d 92 (La. App. 1st Cir. 1971).
party buying a luxury automobile pursues other ends than the mere satisfaction of his transportation needs. Two reasons support a broad rather than a narrow interpretation of the language.

In the first place, the third paragraph of article 1934 speaks of a contract made for the purpose of securing to a party a purely intellectual enjoyment. It does not speak of a contract made for the exclusive purpose of securing such enjoyment. Exclusivity of the purpose may not then be read into the legal text; to do so would amount to alteration of the text for the alleged purpose of pursuing its spirit, which is in violation of the principle that governs interpretation when the law is clear. \(^{44}\) As the drafters of the French text took care to write the adverb "purely" before the adjective "intellectual," so they would have written the adjective "exclusive" before the noun "purpose" had they so intended. The situations named in the third paragraph of article 1934, as its own language clearly states, are mere examples of cases where the rule can be applied. To achieve their illustrative purpose, examples must be clear, definite and simple. That is the reason no doubt that prompted the redactors to select such examples. By definition, however, examples do not exclude other instances of the matter exemplified. In sum, that paragraph should be read, and it does actually read, to indicate that damages for breach may be recovered even when a contract has no other purpose than the satisfaction of a noneconomic interest. Such a situation was chosen as an example because it is the opposite extreme to another where the only purpose is satisfaction of an economic order, as in the case of a sale between merchants where the vendee buys for the purpose of reselling at a profit, the most typical situation where damages arise. \(^{45}\) Within such extremes there is a great variety of intermediate situations that cannot be regarded as falling outside the operation of the rule here discussed.

In the second place, a different conclusion as to the scope of the paragraph would leave a residuum of uncovered situations where the interest of an obligee would not be adequately protected, to the detriment of fairness. An example may contribute some clarity. If a party, for reasons other than pleasure, needs to cross the North Atlantic and chooses so to do in the first class of a luxury liner, he is not only endeavoring to fulfill his need of transportation related to his business, that is, an economic interest, but also to indulge in the comfort traditionally enjoyed by travelers in that category, that is, an "intellectual" enjoyment in the words of article 1934. Assuming now that because of a breach of the

\(^{44}\) See LA. CIV. CODE art. 13.  
\(^{45}\) See LA. CIV. CODE art. 1934(1).
contract by the steamship line he is forced, after departure, to travel steerage, it would be grossly unfair to grant him as recovery just the difference in the price of passage. Moreover, no reasonable court would deny him recovery for the inconvenience suffered.\textsuperscript{46} In Louisiana, the third paragraph of article 1934 of the Civil Code would furnish all necessary grounds for such recovery. A different conclusion would entirely disregard the obligee's motive, his reason for promising his own counterperformance, that is, the cause of his obligation which is an indispensable requirement for a valid contract in Louisiana law.\textsuperscript{47}

So far, the examples utilized involve the frustration of expected enjoyment, which is similar to the deprivation of expected material gain as an element of damages. The solution should not be different, however, when the breach causes an actual loss consisting in the negative alteration or dissipation of the obligee's emotional balance through mortification or unusual vexation, even though the contract was not intended to secure for him, in whole or in part, any particular intellectual enjoyment.\textsuperscript{48} A different conclusion would introduce an unwarranted limitation into the notion of loss as an element of damages.

Accordingly, "'humiliation,' "'embarrassment,' "'emotional distress,' "'mental anguish' and comparable expressions intended to name a detriment of a peculiar kind, are merely descriptive of negative emotions

\textsuperscript{46} Consider in this connection a decision rendered by the commercial tribunal of Toulouse on July 1, 1889, D. 1891.3.39, recognizing the inconvenience and frustration of passengers of a train who were transported in freight-wagons. See also a decision rendered by the Seine court on October 10, 1903, Gaz. Pal. 1903, 2e. sem., 606, recognizing the humiliation and inconvenience of passengers who were crammed into a coach too small for their number.

\textsuperscript{47} See I S. Litvinoff, supra note 6, at 388-94.

\textsuperscript{48} Jiles v. Venus Community Center Benev. Mut. Aid Assn., 191 La. 803, 186 So. 342 (1944) (defendant corporation failed to provide medical services called for in the contract which resulted in the death of plaintiff's daughter; mental anguish as a distinct element of damages was found by the court); Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903) (breach of a contract for a bride's trousseau resulted in recovery for humiliation and mental anguish); Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145 (La. App. 1st Cir. 1961) (defendant's inability to supply information on the type of poison used violated an implied provision in an extermination contract and delayed toxicity treatments for plaintiff's child who had ingested some of the poison; the parents were awarded compensation for mental suffering); Mitchell v. Shreveport Laundries, Inc., 61 So. 2d 539 (La. App. 2d Cir. 1952) (breach of a contract to clean a groom's suit resulted in humiliation and mental suffering damage especially since because of his large size he was also unable to purchase a replacement suit in time for the wedding). Arguably, Vogel v. Saenger Theatres, Inc., 207 La. 835, 22 So. 2d 189 (1945), contained a contract for intellectual gratification; clearly however plaintiff did not recover moral damages because of the nature of the contract but rather because of the nature of the breach.
attending the frustration of certain expectations or the impairment of a state of normal adjustment to circumstances.\textsuperscript{49} Moral damage is an expression general enough to encompass all kinds of such negative emotions. When such emotions are inflicted as the result either of a breach of contract or a delict, moral damages is an apt designation for the pertinent recovery.

\textbf{LOUISIANA JURISPRUDENCE}

Concerning the recovery of moral damages, Louisiana courts have said, at times, that "[w]here 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."\textsuperscript{50} In spite of the courts’ awareness of differences between the French and English texts of the third paragraph of article 1934, that conclusion is based solely on a reading of the English version. For that reason, such damages were denied when sought as the result of excessive delay in the repair of a car.\textsuperscript{51} For the same reason, that kind of recovery was denied when requested as a consequence of the breach of a contract to repair a house.\textsuperscript{52}


\textsuperscript{50}. Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433, 437 (La. 1976) (emphasis added). See, however, the noteworthy dissenting views:

\textit{There is no logical reason to allow recovery of such damages when property is involved in cases delineated as "tort," and yet deny recovery of similar damages when property is involved (as in this case), simply because the cause of action is delineated as "contract." Both involve a duty and a breach. Louisiana employs fact pleading. A plaintiff need only state facts, which, if true, authorize recovery . . . . In the instant case, plaintiff has proved, to the satisfaction of the trier of fact, that she suffered inconvenience, distress and aggravation because of defendant’s breach of duty. She should recover therefore.}

\textit{Id. at 439 (Dixon, J., dissenting). See also Stephenson v. Smith, 337 So. 2d 570 (La. App. 2d Cir. 1976) (asserting that awards for inconvenience, harassment and mental anguish are authorized by article 1934(3) of the Louisiana Civil Code).}


\textsuperscript{52}. Sahuc v. United States Fidelity & Guar. Co., 320 F.2d 18 (5th Cir. 1963); Rigaud v. Orkin Exterminating Co., 236 So. 2d 916 (La. App. 3d Cir. 1970); Baker
On another occasion, nevertheless, dealing with the breach of a contract for the sale of a home, a Louisiana court said:

The contract had for its object the gratification of some intellectual taste and convenience on the part of the [plaintiffs], and it was reasonably within the knowledge of the defendant and the contemplation of the parties that this home was being bought by the [plaintiffs] not with the idea and purpose of an investment or for pecuniary gain, but primarily for the purpose of securing a home which was especially suited to their taste and convenience.53

Where the breach involved was of a contract to build a house, the Louisiana court said: "We believe that a contract for the construction of a home ... has as its object the convenience of the owner within the meaning and intendment of the phrase 'or some convenience' as used in Paragraph 3, Article 1934, LSA—R.C.C. entitling the owner of a residence to damages for inconvenience resulting from a contractor's breach of the obligation ...."54 A more flexible interpretation of the pertinent rule has thus been made in those cases, as it was applied to contracts not exclusively made for the purpose of securing an intellectual enjoyment for a party. In that vein, damages for humiliation were granted to a bride whose wedding-dress was not made of the right length; the bride also recovered for disappointment owing to the late delivery of the rest of her trousseau.55 Damages for humiliation were granted to an invalid who, having bought the required ticket, was refused admission to a theater for reasons related to his condition.56 Even in a contractual situation entirely

55. Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903). See also Mitchell v. Shreveport Laundries, Inc., 61 So. 2d 539 (La. App. 2d Cir. 1952) (plaintiff recovered for humiliation suffered as a result of a breach of contract to clean a suit to be worn at a wedding).
56. See Vogel v. Saenger Theatres, Inc., 207 La. 835, 22 So. 2d 189 (1945). Though some intellectual enjoyment is expected by a theater-goer, it is noteworthy that damages were granted not for the frustration of such expectation but for the humiliation and embarrassment suffered by plaintiff when rejected because of his physical condition. For that reason, this decision may not be taken as an example of strict interpretation of Civil Code article 1934(3). In this connection the court said: "In Louisiana consideration is to be given not only to pecuniary factors, but also to
unrelated to any sort of intellectual enjoyment, damages for mental anguish were granted to a plaintiff whose son underwent great suffering and danger in connection with defendant’s performance of that contract.57

GUIDE FOR THE APPLICATION OF THE RULE

The cursory review of the Louisiana jurisprudence just made shows some uncertainty and, at times, some contradiction. That is warranted, to an extent, by the manner in which the pertinent rule has been inserted in a very comprehensive article dealing with damages and also by the language and examples chosen by the lawmaker. Such hesitation and contradiction may be avoided, however, if certain steps are taken to determine whether a particular situation calls for the application of the rule. It is undisputed that there is always some frustration or vexation whenever an obligor fails to perform a contractual obligation. Nevertheless, not every breach of contract gives rise to moral damages. In the first place, parties to a contract reciprocally owe a certain cooperation, a duty of tolerance, based on social solidarity, that should suffice as a basis for the understanding that a recovery of damages is only remedial, and that absolute compensation for all sorts of loss is not possible.58 Thus, in the case of a regular commercial contract, a buyer who intended to resell at a profit the goods he ordered will be disappointed, and perhaps exasperated, by the non-delivery or untimely delivery of such goods. His contractual interest, however, was of

intellectual or mental elements in connection with the last of which recovery for humiliation and embarrassment is allowed, these constituting actual and legal damages. The prevailing common-law rule, on the other hand, does not recognize mental suffering from humiliation as an element of damage.” Id. at 845-46, 22 So. 2d at 192. See also Damages Ex Contractu, supra note 36, at 1169. In a comparable context, a decision by the court of Rennes on December 13, 1904, D.1905.2.430, granted damages for mental anguish to the bereaved relatives of a deceased person who was refused interment in a municipal cemetery on grounds that he had committed suicide. A decision of the court of Paris of October 21, 1902, D.1903.2.121, recognized the humiliation of a widow in whose favor a charitable collection was undertaken without her consent. In both cases the ground for decision is article 1382 of the French Civil Code, the equivalent of Louisiana Civil Code article 2315.

57. In Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145 (La. App. 1st Cir. 1961), plaintiff’s son had ingested a poisonous substance utilized by defendant’s insured while performing a contract with plaintiff. When asked to disclose the nature of the poison so that the son could be accordingly treated, defendant’s insured was unable to do so. See Stone, Louisiana Tort Doctrine: Emotional Distress Occasioned by Another’s Peril, 48 TUL. L. REV. 782 (1974) where the suggestion is made that, in that case, proper recovery is in tort. But see Warr v. Kemp, 208 So. 2d 570 (La. App. 2d Cir. 1968) and Laplace v. Minks, 174 So. 2d 895 (La. App. 1st Cir. 1965) where the contract approach is asserted.

58. See 6 R. DEMOGUE, TRAITE DES OBLIGATIONS EN GENERAL 17-21 (1931); 2 S. LITVINOFF, supra note 6, at 9.
an economic nature and the damages he will recover, for the actual loss he sustained and for the profit of which he has been deprived, will protect, precisely, that economic interest.\textsuperscript{59} As a person in business he knew that matters of emotional gratification remained outside the contractual field. In the second place, there is always an assumption of a certain degree of risk in all fields of human endeavor and no recovery may be granted for any loss entailed by such risk.\textsuperscript{60} Finally, under such circumstances, there should be little doubt that where the objective is economic gain, vexation or disappointment is an indirect consequence of the breach, not recoverable when the obligor is in good faith.\textsuperscript{61}

For a breach to give rise to moral damages, then, either the contract or the breach must offer peculiar features, or must occur in a context of peculiar circumstances. Whether the rule allowing recovery for such damages is applicable depends, therefore, on a close examination of the purpose of the contract, the nature of the breach, and the special circumstances surrounding one or the other.

\textit{Purpose of the Contract}

When the breached contract is of the same kind as those offered as examples by the redactors of the third paragraph of article 1934 of the Louisiana Civil Code, there can be no difficulty in the outright application of the rule. That is, when a contract is made for the sole purpose of gratifying a non-economic interest, as in the case of a promise of marriage, or a contract for a work in any of the fine arts, recovery must be granted for the frustration of the obligee's expectation of intellectual enjoyment, as the article has it. Louisiana courts have shown no hesitation in granting recovery for moral damages in such cases, in protection of the interest of the disappointed obligee, an interest which, by hypothesis, is exclusively non-economic.\textsuperscript{62}

\textsuperscript{59} See \textsc{La. Civ. Code} art. 1934(1).

\textsuperscript{60} Compare \textsc{6 R. Demogue, supra} note 58, at 284; see also \textsc{5 A. Corbin, supra} note 20, at 426.

\textsuperscript{61} See \textsc{La. Civ. Code} art. 1934(1).

\textsuperscript{62} See \textsc{Johnson v. Levy, 122 La. 118, 47 So. 422 (1908)} (plaintiff was accorded the right to sue her departed fiance's succession for his breach of promise to marry her alleging "social ostracism and disgrace" suffered by herself and her child); \textsc{Smith v. Braun, 37 La. Ann. 225 (1885)} (the action for breach of promise to marry was held to be in form ex contractu); \textsc{Morgan v. Yarborough, 5 La. Ann. 316 (1850)} (holding that under article 1928 of the 1825 Civil Code—corresponding to present article 1934—reciprocal promises of marriage constitute a legal contract and the party reneging is liable in damages). \textit{But compare Daigle v. Fournet, 141 So. 2d 406 (La. App. 2d Cir. 1962)} (defendant was not entitled to damage for breach of promise to marry since defendant herself broke the engagement).
That non-economic interest, or expectation of intellectual enjoyment, must also be protected, however, when it is not the sole or exclusive purpose of the contract, lest, as already explained, the scope of operation of the rule be unwarrantedly curtailed. In that context, Louisiana decisions allowing moral damages for the breach of contracts to buy a house or to build one are praiseworthy for establishing the right and fair solution. For the same reason, Louisiana decisions denying that kind of recovery for the breach of a contract to repair a home must be criticized. The same criticism must be addressed to decisions barring damages for inconvenience resulting from frustration in the use of an automobile. As shown above, an automobile may be intended to gratify an interest other than the mere need of transportation. When the purchaser of an automobile complains of a breach of the warranty of fitness, the determination of his frustrated expectations must be made according to the kind, price and intended use of the thing. Clearly enough, a modest delivery-van will be used for a purpose quite different from a luxury sedan. Nevertheless, some convenience other than just physical transportation is expected from the use of even a modest family car. With a natural difference of degree, then, that non-economic interest merits the protection afforded by the lawmaker in the third paragraph of article 1934.

That the non-economic interest involved in such a situation must be protected seems quite clear. The frustration of the pertinent expectation is a different matter, however. As explained above, not every degree of disappointment or vexation may be taken into account. A certain amount

63. See Daguano v. Brady, 242 So. 2d 302 (La. App. 1st Cir. 1970) (after the sale of a house but before plaintiff could move in, defendant and her daughter destroyed much of the interior thus causing plaintiff great mental distress); Jack v. Henry, 128 So. 2d 62 (La. App. 1st Cir. 1961) (damages for discomfort and inconvenience were awarded on plaintiff's failure to perform satisfactorily a contract for the construction of a house); Melson v. Woodruff, 23 So. 2d 364 (La. App. 1st Cir. 1945) (defendant, after contracting to sell a home to plaintiff sold the house to another and plaintiff was granted damages for disappointment and inconvenience).

64. See Sahuc v. United States Fidelity and Guar. Co., 320 F.2d 18 (5th Cir. 1963) (moral damages are not recoverable for breach of a contract to install a hot water heater); Regaud v. Orkin Exterminating Co., 235 So. 2d 916 (La. App. 3d Cir. 1970) (damages for inconvenience would not be awarded where failure to inspect for termite infestation resulted in termite damage to a family residence); Baker v. Stamps, 82 So. 2d 858 (La. App. Orl. Cir. 1955) (damages for inconvenience and mental anguish in breach of contract to renovate a bathroom were refused); Lillis v. Anderson, 21 So. 2d 389 (La. App. Orl. Cir. 1945) (damages for mental anguish were denied in breach of a contract to repair a house).
of risk is always assumed. Thus, if under the warranty of fitness a car is taken to be repaired, the deprivation of the enjoyment of its use for the reasonable time such repairs may take is that sort of anticipated risk.\(^{65}\) Implied in the cooperation that parties to a contract reciprocally owe is the purchaser's duty to understand that automobiles are not perfect. It is different when the repairs take an unreasonable or inordinate time.\(^{66}\) In this case, it is unquestionable that the obligee's inconvenience and vexation, beyond the anticipated amount, are a foreseen consequence of the breach as the obligor cannot be unaware that his delay is bound to have such an effect on the obligee. It is also different when the breach is incurred in bad faith, as when the seller knew of the defects of the automobile or misrepresented the state of the thing.\(^{67}\) When this is the case, the purchaser's inconvenience and vexation, even though perhaps unforeseen by the seller, are doubtless direct consequences of the breach.\(^{68}\)

\(^{65}\) See LA. CIV. CODE arts. 2476, 2520, 2531, the latter as amended by 1974 La. Acts, No. 673.

\(^{66}\) But see Meador v. Toyota of Jefferson, Inc., 332 So. 2d 422 (La. 1976) (no recovery of damages for loss of use, aggravation, distress or inconvenience even though defendant delayed five months in making repairs on wrecked automobile); Moreau v. Marler Ford Co., 282 So. 2d 852 (La. App. 3d Cir. 1973) (in an action for specific performance of a sale of a truck, plaintiff was entitled to diminution in value of the vehicle, but damages for humiliation, anxiety and inconvenience associated with deprivation of use were disallowed); DiGiovanni v. April, 261 So. 2d 360 (La. App. 1st Cir. 1972) (no damages for inconvenience and loss of use of an auto due to replacement of the engine, which was necessitated by service station operator negligence, where the owner had sustained no actual expense or pecuniary loss other than repair costs); Cadillac Service Garage v. Shushan, 123 So. 175 (1929) (defendant was entitled to recover only the diminution in value of his auto caused by plaintiff's unreasonable delay in making repairs).

\(^{67}\) In Tauzin v. Sam Broussard Plymouth, Inc., 283 So. 2d 266 (1973), plaintiff sued in redhibition to rescind the sale of a car represented as new though it was not and which defendant knew had been previously damaged in an accident and repaired. Despite defendant's evident bad faith the court awarded only a reduction in price, perhaps because the only defect was the auto's lack of "newness," and refused to award damages for embarrassment, mental anguish or suffering. In Aiken v. Moran Motor Co., 165 So. 2d 662 (La. App. 1st Cir. 1974), an action in redhibition for rescission of the sale of a "like new" demonstrator auto resulted in judgment for plaintiff in view of defendant's misrepresentations and bad faith, but no recovery for damages for worry, inconvenience and annoyance was permitted. See Sunseri v. Westbank Motors, Inc., 228 La. 370, 82 So. 2d 43 (1955); Johnson v. Heller, 33 So. 2d 776 (La. App. 2d Cir. 1948); Cockrell v. Capital City Auto Co., 3 La. App. 385 (1926).

\(^{68}\) Courts should not fail to take into account that, even when granted for vexation or mental suffering, damages still are foreseen or unforeseen under article 1934(1).
MORAL DAMAGES

So far, however, Louisiana courts have not made that kind of analysis in situations involving automobiles. In one decision it was said that "[w]ith regard to the award for worry, inconvenience and annoyance, unless these items can be translated into a calculable pecuniary loss, as for example where the buyer is required to rent a car to use in place of the defective vehicle, no amount may be recovered therefor. This case does not come under the exceptions of LSA—C.C. Article 1934, subd. 3."\(^{69}\) That approach is not correct. If another car is rented to substitute for the defective one, annoyance and inconvenience are thereby prevented and the problem disappears, though the decision does not say that recovery of such expense would have been granted had it been incurred. Further, if the court is deterred by the difficulties involved in the pecuniary calculation of such a loss, that obstacle is expressly eliminated in the last part of the third paragraph of article 1934 where great discretion is allowed to a court in the assessment of damages of that kind.

A more accurate analysis of the interests involved, a better determination of the elements falling within the contractual field in each particular situation and a more definite understanding of the true scope of the rule, which includes the discretion allowed to the court, would lead to fairer solutions.\(^{70}\)

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70. A correct analysis of circumstances as unusual as they are dramatic can be found in Hoffman v. All Star Ins. Corp., 288 So. 2d 388 (La. App. 4th Cir. 1974), where the court reached the conclusion that mental anguish suffered while an ordeal is in progress is legally compensable. Plaintiff invited three friends along on a fishing trip to the Gulf aboard his new boat constructed by defendant's insured. While 15 to 20 miles away from shore, the motor failed and the boat was found to be taking water. In addition, the bilge pump became inoperative because of the water and all aboard began to bail manually. One member of the party became afflicted with chest pains and feared a heart attack, another was so stricken with mal de mer as to be of no assistance whatsoever. After 4 hours of constant fear of drowning, the boat having drifted within sight of an oil rig, plaintiff tied a rope about his waist, swam through shark-inhabited waters towing the craft, and shinnied up a barnacle-encrusted piling to the floor of the platform, sustaining "extensive painful and ugly cuts over a great part of his body." The Coast Guard later effected rescue and this suit was filed for the purchase price of the vessel, loss of use of the boat, physical injuries with attendant mental anguish and the great mental anguish and fear of death while the ordeal was in progress. On the product liability action the court found that the rationale of Media Pro. Consult., Inc. v. Mercedes-Benz of N.A., Inc., 262 La. 80, 262 So. 2d 377 (1972) applied and that a purchaser could not be deprived of the warranty of reasonable fitness for intended use, provided in articles 2475 and 2476 of the Louisiana Civil Code, without an express waiver. The recovery of purchase price was thus based on contractual grounds but unfortunately the
Commercial Contracts

It would follow that when a contract is of a nature that excludes any non-economic interest, as in the case of a commercial or business contract, recovery of moral damages may not be granted. Though that conclusion is correct in general terms, attention must be paid to special elements present in unusual situations. Thus, even when a contract has been entered into by merchants in the course of their business activity and in the sole contemplation of profit, moral damages must be awarded when the obligor's breach results in an injury to the obligee's reputation, commercial good name or prestige, as such an injury effects an unquestionable negative impact on the obligee's future business and expectation of profit. That is a situation where frustration of a non-economic interest is closely connected to actual pecuniary loss. It must be remembered here that even those French writers who are opposed to the granting of recovery for moral damages have nevertheless recognized that such damages must be awarded in that sort of case.\footnote{7}

Significant language found in some Louisiana decisions furnishes adequate grounds for the conclusion that damages resulting from injury to reputation may be recovered when proved.\footnote{72} The same conclusion has
obtained where the injury to reputation, together with embarrassment and humiliation, was the result of a malicious attachment of property. Damages have also been awarded for the failure to list a telephone number in a directory. It is beyond doubt that where commerce or the professions are involved, such a listing offers features that bring it very close to the notion of reputation. Though damages must be proved in cases of injury to

because the majority of the court found that defendant had the legal right to cancel the contract. It seems plain however that defendant’s breach was calculated to injure plaintiff’s business reputation and that a vindictive breach could well cause actual humiliation and mental suffering. In Noyes v. F.A. Noullet & Co., 118 La. 888, 43 So. 539 (1907), the court rejected defendant’s reconvensional demand for $5,000 in damages due to injury to defendant’s reputation and business resulting from plaintiff’s defective execution of the contract, apparently not because of a general impediment to recovery, but because the court only found “no sufficient evidence to warrant a judgment.” In Whitney v. Parish of Vernon, 126 La. 13, 52 So. 176 (1910), recovery of damages to plaintiff’s reputation was denied based on a prior invalid contract. In dicta the court asserted that even if the contract had been valid plaintiff would not have been able to recover since it did not appear in what respect he had been damaged in his reputation. Plaintiff would have failed then not for inability to obtain non-pecuniary damages, but for failure of proof of loss. See also Enders v. Skannal, 35 La. Ann. 1000 (1883) (plaintiff recovered for “outrage to his feelings” after defendant’s vicious breach of contract even though only plaintiff’s employees, and not plaintiff himself, were threatened).

In American Steel Bldg. Co. v. Brezner, 158 So. 2d 623 (La. App. 3d Cir. 1963), plaintiff sued on a writ of attachment to force quick payment of a claim in full, despite offsets claimed by defendant. An award of $2,000 to defendant was sustained on appeal for “humiliation, inconvenience and harassment” in view of the fact that, because of its rarity, the attachment received widespread notice in the construction industry in which defendant was engaged, coupled with plaintiff’s bad faith. Despite the existence of a contract between the parties, the court’s decision is couched in the language of tort and seems to indicate that the damages were awarded because of the malicious bringing of the suit. Citing General Motors Acceptance Corp. v. Sneed, 167 La. 432, 119 So. 417 (1929), the court found that when the plaintiff “makes use of this powerful legal weapon he must be ready to respond in damages if it be found that the writ was wrongfully used,” thereby affirming the tort notion here.

See Loridans v. So. Bell Tel. & Tel. Co., 172 So. 2d 323 (La. App. 4th Cir. 1965) (a $1,000 award for failure to list plaintiff’s attorney’s name in his professional capacity under the title “Attorneys” in the yellow pages of the local directory was sustained as within the trial judge’s discretion under Louisiana Civil Code article 1934(3)); Mayeux, Bennett, Hingle Ins. Agency, Inc. v. So. Bell Tel. & Tel. Co., 148 So. 2d 771 (La. App. 4th Cir. 1963) (even though plaintiff agency was unable to establish loss caused by failure to list its name in the telephone directory, the court sustained an award of $2,500 in view of the fact that its business was conducted almost entirely by telephone); Scheinuk The Florist, Inc. v. So. Bell Tel. & Tel. Co., 128 So. 2d 683 (La. App. 4th Cir. 1961) (failure to list plaintiff’s name in the white pages of the phone book resulted in $1,500 recovery).
reputation, it must be kept in mind that courts enjoy great discretion in this respect.75

Nature of the Breach

Whatever its nature, regardless of whether it was made for the exclusive or inclusive purpose of securing any intellectual enjoyment to the obligee, a contract may be breached by an obligor in a manner calculated to inflict grief, vexation or inconvenience on the other party, as in the case of a vendor who, before delivery, destroys on purpose the interior of the house he has contracted to sell.76 In the terms of article 1934(1) of the Louisiana Civil Code, such breach is "designed" and prompted by "ill will." That is to say, a breach incurred in bad faith makes the obligor liable for all the direct consequences. Since the mental suffering of the obligee is intended by the obligor in such a case, that damage is obviously a direct consequence of the breach, in the terms of article 1934(2). Further, as an obligor in bad faith is liable for all direct consequences of his breach even when unforeseen, for greater reason he must be liable for direct consequences that must be regarded as foreseen because they were deliberately intended.

It clearly follows that whenever a breach of contract is such that it reflects an intent to cause a moral damage, the obligee must be granted recovery for such damage. That conclusion must prevail even in the context of a business or commercial contract, because situations of that sort are governed by the nature of the breach and not the nature of the contract. Louisiana courts support that conclusion. Thus, when the breach of a contract to build a sawmill was accompanied by threats of great bodily harm to the other party and his employees, plaintiff was allowed recovery for the outrage to his feelings.77

75. See Edwards v. Butler, 203 So. 2d 90 (La. App. 2d Cir. 1967); American Steel Bldg. Co. v. Brezner, 158 So. 2d 623 (La. App. 3d Cir. 1963); Mayeux, Bennett, Hingle Ins. Agency, Inc. v. So. Bell Tel. & Tel. Co., 148 So. 2d 771 (La. App. 4th Cir. 1963); Universal C.I.T. Credit Corp. v. Jones, 47 So. 2d 359 (La. App. 2d Cir. 1950). But see Morein v. G.J. Deville Lumber Co., 215 So. 2d 208 (La. App. 3d Cir. 1968) (no recovery for damages to good will and loss of profits because such damage was doubtful).


MORAL DAMAGES

The same solution prevails at common law when a breach of contract reflects wanton or reckless conduct by an obligor, though the tort approach is not absent from the rationale of decisions rendered under that system. 78

Special Circumstances Surrounding a Contract

Moral damages must be granted for the breach of contracts which, though not of the kind contemplated in article 1934(3) of the Louisiana Civil Code, either in its strict or its broad interpretation, are nevertheless surrounded by peculiar circumstances calling for special care in the rendering of an expected performance. Thus, a contract to have a suit of clothes cleaned and pressed may be regarded as one for the satisfaction of the economic interest of preserving the garments, whatever their cost. If the cleaned clothes were intended to be worn at the owner's wedding, however, that circumstance, known to the other party, casts a different light on the contract. 79 The situation becomes even more peculiar if the clothes involved are of an unusually large size, so as to fit a person of great weight for whom suitably fitting clothes are difficult to find. 80 Likewise, a contract for the furnishing of several custom-made pieces of clothing may

So. 46 (1907); American Steel Building Co. v. Brezner, 158 So. 2d 623 (La. App. 3d Cir. 1963).

78. See 5 A. CORBIN, supra note 20, at 427-37. See also Simons v. Busby, 119 Ind. 13, 21 N.E. 451 (1888) (mental anguish damages were recovered in compensation for plaintiff's "wounded feelings and dishonor" after defendant's callous breach of promise to marry); Aaron v. Ward, 203 N.Y. 351, 96 N.E. 736 (1911) (defendant breached his contract with plaintiff by ejecting him from a bath house and recovery was allowed for the "indignity"); Gadbury v. Bleitz, 133 Wash. 134, 233 P. 299 (1925) (the court granted damages in view of the fact that defendant refused to release possession of a dead body in order to coerce payment of plaintiff's daughter's preexisting debt).

79. In Mitchell v. Shreveport Laundries, Inc., 61 So. 2d 539 (La. App. 2d Cir. 1952), plaintiff delivered a suit for cleaning with the information that he was to be married on an upcoming date and wanted the suit back by that date; the suit was lost and never returned.

80. Id. at 539-40. Cf. Rembert v. Fenner & Beane, 175 So. 116 (La. App. Orl. Cir. 1937) (on rehearing of a suit between brokers of securities for mental worry, annoyance, and inconvenience and injury to plaintiff's reputation, caused by defendant's wrongful closing of plaintiff's account, the court reversed and remanded the case to determine whether the parties had contemplated such damages in the event of this type of breach); Garner v. Burnstein, 1 La. App. 19 (1934) (a milliner who failed to deliver a hat for which he had been paid, thereby causing the purchaser to appear at a dinner party in an inappropriate costume, was not held liable for damages for mental anguish since he had not been advised of the importance of the hat as a part of a special outfit to be worn at that party, distinguishing the case of Lewis v. Holmes). See note 92, infra.
be regarded as one for the satisfaction of the very material need of adequately covering the body. It is different however if such clothes are a bride’s trousseau, and that fact is known to the other party—and it invariably will be known, since one of the garments is, precisely, a wedding dress.\footnote{Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903).}

In that sort of situation the special surrounding circumstances reveal an unmistakable emotional involvement of the obligee which calls for special care in the rendering of the obligor’s performance, to the exclusion of that fault which is only slight in the terms of article 3556(13) of the Louisiana Civil Code.\footnote{LA. CIV. CODE art. 3556(13): Fault.—There are in law three degrees of faults: the gross, the slight and the very slight fault. The gross is that which proceeds from inexcusable negligence or ignorance; it is considered as nearly equal to fraud. The slight fault is that want of care which a prudent man usually takes of his business. The very slight fault is that which is excusable, and for which no responsibility is incurred. See also 2 S. LITVINOFF, supra note 6, at 348-53.} Furthermore, the obligor’s knowledge of the special circumstances makes the obligee’s disappointment, humiliation and embarrassment a \textit{foreseen}, besides being a \textit{direct}, consequence of the breach, a damage which must be compensated under article 1934(1) of the Louisiana Civil Code. Recovery would be granted under such circumstances at common law also, under the name of \textit{special} damages.

Louisiana courts have accepted that conclusion and granted recovery for moral damages where a contract is surrounded by peculiar emotional overtones. Contracts for the transmission of messages relating an emergency or a death, or for the handling of dead bodies, belong in the same category as those discussed above.\footnote{Cf. French v. Ochsner Clinic, 200 So. 2d 371 (La. App. 4th Cir.), \textit{writ refused}, 251 La. 34, 202 So. 2d 652 (1967); Blanchard v. Brawley, 75 So. 2d 891 (La. App. 1st Cir. 1954); Leleux v. Viator, 55 So. 2d 662 (La. App. 1st Cir. 1952) (where upon similar facts, moral damages were granted on a tort basis).} In such situations, indeed, the
obligee’s emotional state is as manifest as the obligor’s knowledge of the special circumstances is obvious.\textsuperscript{84}

\textit{Special Circumstances Surrounding a Breach}

Regardless of its nature and of the special circumstances that surround it, a contract may be breached in a manner that warrants the granting of recovery for moral damages. That is so when the breach itself, not precisely the contract, is surrounded by circumstances such that the obligor cannot ignore that some form of mental suffering will result for the obligee. That takes place, for instance, when, after the pertinent charge has been paid, admission to a theater is refused to a patron on the grounds of his physical condition as an invalid.\textsuperscript{85} The fact that such an incident is witnessed by the patron’s spouse and several lady employees of the establishment sufficiently establishes that a person in the condition of the patron cannot but experience embarrassment and mortification as such a refusal adds to the already heavy burden of his infirmity.\textsuperscript{86} In a situation of that sort the moral injury is neither caused by the fact of the breach, nor determined by the nature of the violated contract; rather it is effected by the manner in which the breach is incurred, by the circumstances that surround it. Had the plaintiff been given a polite and sympathetic explanation, in the privacy of an office, that for reasons of safety he could not be admitted to the theater, a breach of the contract might still have taken place, but the circumstances giving rise to the moral injury, resulting in

\textsuperscript{84} Where death messages or dead bodies are involved, rather than focusing on surrounding circumstances, the court might find the contract to be of a special nature. See note 74, \textit{supra}. That approach is prevented, however, by the language in which article 1934(3) has been couched, unless the expression “intellectual enjoyment” is very broadly interpreted to mean the gratification of any noneconomic interest. A reference to special surrounding circumstances, instead, seems a more realistic manner of bringing rule and facts together.

\textsuperscript{85} See \textit{Vogel v. Saenger Theatres, Inc.}, 207 La. 835, 22 So. 2d 189 (1945). In this most interesting decision the court said:

\begin{quote}
Obviously, therefore, the distinction between the law of this state and that of most of the other jurisdictions, relative to the right of a theatre ticket purchaser to recover for mental suffering upon the proprietor’s breach of contract without just cause, is found in the kind and character of the elements to be considered in the assessment of damages. \textit{In Louisiana consideration is to be given not only to pecuniary factors but also to intellectual or mental elements, in connection with the last of which recovery for humiliation and embarrassment is allowed, these constituting actual and legal damages.}
\end{quote}

\textit{Id.} at 192 (emphasis added). That language clearly supports a broad interpretation of article 1934(3).

\textsuperscript{86} \textit{Id.} at 192-93.
humiliation, would have been absent. A comparable situation, where the same conclusion must obtain, takes place when a contract to provide medical services is breached in spite of repeated notice, through special messenger, that a child is very ill and the presence of a doctor is immediately needed. It is the same when a contract for sanitary services is negligently performed by allowing poisonous substances to remain within the reach of children and the defaulting party fails to disclose the nature of the poison after a child has ingested it, thereby hindering the administration of proper emergency treatment. In those cases also, a breach incurred in the absence of such surrounding circumstances might not have caused a moral injury and might therefore have prevented such an award. Situations where vexation and humiliation are caused by the forceful repossession of property without the aid of a court belong in the same category.

When a breach occurs in such a context, the surrounding circumstances make the mental suffering of the disappointed obligee a foreseeable consequence of the obligor’s failure to perform and give rise to the kind of damages recoverable under article 1934(1) of the Louisiana Civil Code.

When damages for mental suffering are recoverable because of special circumstances surrounding the contract, such damages are foreseeable at the moment the contract is made. When recovery must be granted because of circumstances surrounding the breach, the moral damages are, or should have been, foreseeable at the moment of the breach. Nevertheless, a breach that is incurred in the context of special surrounding circumstances is very close to a breach in bad faith, of the kind already discussed. That is the reason why recovery must be granted though the damages become foreseeable only at the moment of the breach.

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88. Holland v. St. Paul Mercury Ins. Co., 135 So. 2d 145 (La. App. 1st Cir. 1961). When dealing with plaintiff’s charge of negligence on the defendant’s insured exterminating company, the decision, in part, sounds in tort. However, the determination also rests clearly upon the breach of an implied provision of the contract, under which the defendant should know the nature and composition of the poison to be used.
MORAL DAMAGES ARE COMPENSATORY

In the words of Louisiana courts, "In this State, mental anguish is recognized as a distinct element of damages and not merely an incident to be taken into consideration in addition to pecuniary loss. Such damages are considered as actual or compensatory." The idea, no doubt, is to signify that an award for moral damages is neither vindictive nor exemplary. That follows naturally from traditional views according to which the reason why damages are granted to the victim of a breach is to make compensation for a loss or to restore the balance broken by the obligor's failure to perform. Such views still prevail, although, with great candor, at least one eminent French writer has asserted that a shade of punishment taints every award of moral damages.

Be this as it may, the idea expressed by the Louisiana courts must be taken to mean that, in order to grant recovery for moral damages, that which must be taken primarily into account is not the obligor's conduct but its effect upon the obligee, even though the former may never be entirely overlooked in order to ascertain the latter. That some sort of mental suffering for plaintiff resulted from defendant's breach must therefore be shown. A plaintiff, however, does not have to show that any unusual state of depression was caused by the breach, or that psychiatric help was needed. If that was indeed the case, he would establish good grounds to recover for "material" rather than "moral" damage. It suffices for him to show circumstances indicative that as a consequence of the breach, a negative impact upon his emotions could not have been avoided by any normal person in plaintiff's position. As established by the Louisiana jurisprudence, it is from these circumstances that the court proceeds to weigh the obligee's disappointment.

90. Jiles v. Venus Community Center Benev. Mut. Aid Ass'n., 191 La. 803, 812-13, 186 So. 342, 345 (1939). See also Vogel v. Saenger Theatres, Inc., 207 La. 835, 846, 22 So. 2d 189, 192 (1945) ("recovery for humiliation and embarrassment is allowed, these constituting actual and legal damages"); Graham v. Western Union Tel. Co., 109 La. 1069, 1074, 34 So. 91, 93 (1903) ("mental pain and suffering, as to their existence, are certainly as actual, clear, and positive as are intellectual enjoyment and gratification, and the former are as susceptible of being ascertained and gauged as the latter"); Lewis v. Holmes, 109 La. 1030, 1034, 34 So. 66, 68 (1903) (damages for humiliation and disappointment were found to be "within the contemplation of the parties in entering into the contract").


92. In Lewis v. Holmes, 109 La. 1030, 1034, 34 So. 66, 68 (1903), the court stated, "In computing the damages the allowance must be restricted to what may reasonably be held to have been within the contemplation of the parties in entering
are compensatory in the sense that, under an express provision of the Louisiana Civil Code, the "intellectual" or "mental" element must be taken into account in awarding damages. As the third paragraph of article 1934 of the Louisiana Civil Code clearly states, great discretion is vested in the court and jury for the assessment of such damages.

**COMPARATIVE EXCURSUS WITH A VIEW TO CODE REVISION**

A survey of civil codes in general shows that specific provisions concerning moral damages in contract are sparse. Through a recent amendment, however, the Argentine Civil Code now provides: "In cases of contractual liability, the court may hold a party to the reparation of the moral damage he has caused, according to the nature of the facts giving rise to his liability and also according to the circumstances of the case." Argentine law thus has gone a step beyond the Swiss law where one article of the Code of Obligations allows reparation of the moral damage resulting from tort and another provides that the rules governing quasi-delictual liability are, by analogy, applicable to contract.

Such views are worthy of being taken into account for a revision of the Louisiana Civil Code.

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94. See article 2059 of the Italian Civil Code of 1942 and article 2105(2) of the Ethiopian Civil Code of 1960, both providing that recovery for moral damages may be granted only where the law so provides. The two codes are silent where recovery of such damages in contract cases is concerned.
