

8-1938

# Damages-Mental Anguish

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>



Part of the [Torts Commons](#)

## Recommended Citation

(1938) "Damages-Mental Anguish," *Indiana Law Journal*: Vol. 13: Iss. 6, Article 11.  
Available at: <http://www.repository.law.indiana.edu/ilj/vol13/iss6/11>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

DAMAGES—MENTAL ANGUISH.—Plaintiff contracted with defendant, an undertaker, to prepare for burial and to bury plaintiff's minor daughter. As part of the contract for which defendant was compensated, the defendant promised to have a photograph made of the deceased daughter before burial. Defendant knew that plaintiff had no picture of his daughter and knew plaintiff's purpose in having one made. Defendant negligently allowed the body to be buried without having the photograph made. Plaintiff stated these facts in his complaint, seeking to recover for mental anguish occasioned by the breach of contract. A demurrer to this complaint was sustained by the lower court. Plaintiff assigned error. Held: affirmed. A contract action cannot be maintained for mental anguish alone.<sup>1</sup>

Damages for emotional disturbance as distinguished from punitive damages are compensatory in nature and, when awarded, they are given as a matter of right.<sup>2</sup> No general rule has ever been devised which will satisfactorily reconcile all the cases where the problem of recovery or non-recovery of damages for mental suffering is presented. No difficulty is experienced where there has been an invasion of the plaintiff's personal physical integrity, and the resulting mental pain and suffering is a proximate consequence.<sup>3</sup> This is true irrespective of the intentional or negligent character of the defendant's conduct. Nor is there much conflict in the authorities where such elements of damages are allowed as compensation for a mental injury suffered from a wilful tortious act, especially in those cases where the wrong affects the liberty,<sup>4</sup> character,<sup>5</sup> reputation,<sup>6</sup> privacy,<sup>7</sup> or domestic relations<sup>8</sup> of the injured party. If the defendant acted with the intention of causing mental suffering,

---

<sup>27</sup> *Workman v. Mayor of City of New York* (1900), 79 U. S. 552, 21 S. Ct. 212; *Kaufman v. Tallahassee* (1922), 84 Fla. 634, 94 So. 697, 30 A. L. R. 471; *Evans v. Berry* (1933), 62 N. Y. 160, 186 N. E. 203; *Williams v. Jacksonville* (1935), 118 Fla. 671, 160 So. 15, 98 A. L. R. 513.

<sup>28</sup> *Supra*, Note 1.

<sup>1</sup> *Plummer v. Hollis* (1937, Supreme Ct. of Indiana), 11 N. E. (2d) 140.

<sup>2</sup> *State Ex Rel. Soby v. Stevens* (1885), 103 Ind. 55, 2 N. E. 214.

<sup>3</sup> *Cox v. Vanderbleed* (1863), 21 Ind. 164.

<sup>4</sup> *Harness v. Steele* (1902), 159 Ind. 286, 64 N. E. 875 (Action for false imprisonment).

<sup>5</sup> *Leach v. Leach* (1895, Tex. C. A.), 33 S. W. 703 (Rape).

<sup>6</sup> 90 A. L. R. 1175-1200 (Where the defamation is not actionable per se, no recovery can be had for mental suffering unless other injury or damages are proved).

<sup>7</sup> *Pavesich v. New England Life Ins. Co.* (1905), 122 Ga. 190, 50 S. E. 68.

<sup>8</sup> *Pickle v. Page* (1930), 252 N. Y. 475, 169 N. E. 650.

most courts allow recovery even if such elements of damage are the only ones present.<sup>9</sup>

In the field of actions *ex contractu* there seems to be no rhyme nor reason to the decisions respecting the granting or disallowance of compensation for injuries to the feelings. Actions for damages for breach of contract to marry are repeatedly cited as the one exception to the general rule that damages for mental suffering are not recoverable for a mere breach of contract. This unquestionably states the majority viewpoint, especially if the subject matter of the contract is merely of a pecuniary nature.<sup>10</sup>

A growing minority of jurisdictions, either as a result of judicial decision or by statute,<sup>11</sup> allow recovery for mental suffering in a contract action if the nature of the contract is such that a breach thereof would naturally cause grief and distress of mind.<sup>12</sup> The so-called "telegraph cases" where the telegraph company fails or delays in delivering, or erroneously transmits a message and the recipient as a consequence is subjected to mental anguish are the most representative of the cases supporting the minority rule.<sup>13</sup> Definite limitations, however, are put on the ability to recover. Mental suffering must be the direct and natural result of the breach. The defendant must have full knowledge of the facts—the peculiar condition and circumstance of the promisee.<sup>14</sup> Mere disappointment, embarrassment, vexation, or regret is not sufficient.<sup>15</sup> Further, if the contract was "purely and simply a business one," recovery is not allowed.<sup>16</sup>

Indiana at one time was definitely committed to the minority rule, but all the previous cases were overruled in 1901.<sup>17</sup> The instant case refers to the decision rendered in that year as unqualifiedly settling the law in Indiana.

<sup>9</sup> *Kline v. Kline* (1902), 158 Ind. 602, 64 N. E. 9. (Assault); *Great A. & P. Tea Co. v. Roch* (1931), 160 Md. 189, 153 A. 22 (Plf. ordered loaf of bread from defendant. Defendant put a dead rat in a package and sent it to plaintiff); *La Salle Extension Univ. v. Fogarty* (1934), 126 Neb. 457, 253 N. W. 424 (Threats to appeal to one's employer, made wilfully and intentionally for the purpose of producing mental pain and suffering in attempting to collect a debt).

<sup>10</sup> Many of the pertinent cases are reviewed in *Western U. Teleg. Co. v. Choteau* (1911), 28 Okla. 664, 115 P. 879.

<sup>11</sup> The minority rule has been adopted by legislative enactment in Arkansas (*Crawford & Moses, Digest, Sec. 10249*), Florida (*Comp. Gen. L., 1927, Sec. 6352*), Oklahoma (*Comp. St. 1921, Sec. 4951*), South Carolina (*Code, 1932, Vol. III, Sec. 8553*), Wisconsin (*Stats., 1929, sec. 180.19*), Louisiana (*Civil Code of Louisiana, 1825, art. 1928*).

<sup>12</sup> *Western v. Olathe State Bank* (1925), 78 Colo. 217, 240 Pa. 689 (Bank broke a contract to furnish plaintiff credit for a trip to another state by refusing to honor his checks after he got there); *Loy v. Reid* (1914), 11 Ala. App. 231, 65 So. 855 (Defendant breached his contract to embalm properly the body of plaintiff's child: held, plaintiff entitled to damages for mental anguish suffered because of the decomposition of the body prior to burial).

<sup>13</sup> *So. Relle v. Western U. Teleg. Co.* (1881), 55 Tex. 308, 40 Am. Rep. 805 (This case was the "mother" of all the succeeding cases). See 26 R. C. L. 606.

<sup>14</sup> *Western U. Teleg. Co. v. Goodwin* (1914, Tex. C. A.), 173 S. W. 1164.

<sup>15</sup> *Western U. Teleg. Co. v. Finbrach* (1916, Tex. C. A.), 191 S. W. 191.

<sup>16</sup> *Western U. Teleg. Co. v. Melvin* (1917), 175 Ky. 480, 194 S. W. 563.

<sup>17</sup> *Reese v. Western U. Teleg. Co.* (1890), 123 Ind. 294, 24 N. E. 163 (Adopted the doctrine of the *So. Relle Case*). In accord: *Renihan v. Wright* (1890), 125 Ind. 563, 25 N. E. 822 (breach by an undertaker of his contract

Even the jurisdictions which deny compensation for mental suffering resulting from a breach of contract permit recovery for such injuries in an action where the defendant is a common carrier, or an innkeeper whose servants have insulted or abused the plaintiff who was a passenger or guest.<sup>18</sup> The true basis for these decisions, however, is the breach of a public calling duty, and the action sounds as much in tort as contract. Those jurisdictions, also, allow recovery of mental anguish damages against the proprietor of a public resort (not a public calling) for publicly ejecting a patron.<sup>19</sup> It seems that the prospects for recovery of mental anguish in these cases vary in direct proportion to the number of people who would probably be witnesses to the ejection.

Certain objections are frequently put forward to denying recovery for mental suffering. First, there is said to be no legally recognized interest in being free from emotional disturbance, the invasion of which will support an independent cause of action. It is maintained that such damages are merely parasitic and can be awarded only in connection with a wrong which apart from such mental suffering constitutes a cause of action. One can readily see that this is merely stating a conclusion of law rather than a reason for the disallowance. Moreover, the argument is fallacious in that in many tort actions damages for injured feelings are the only damages recovered. Even if it were necessary to have such a peg on which to hang recovery, it appears that a breach of contract would be substantial enough. Second, it is said that such damages are too remote. This, too, has but superficial validity. The amount of consequential damages recoverable in an action of contract depends upon what was in the contemplation of the parties at the time the contract was made.<sup>20</sup> If the promisor had notice of the consequences of a breach, then this requirement is satisfied. Therefore it can hardly be said that the damages were too remote in such cases as the instant one where the very purpose of the contract was to appease the feelings of the promisee. Any thinking person could have foreseen the injuries which the plaintiff would sustain if the contract were not performed. Third, it is argued that such damages are too speculative and difficult to ascertain. This objection loses all of its force when one considers the many situations where the same thing might be said in reference to the attempt to value the loss of an eye in personal injury cases, or the loss of property which has no market value. The risk of the jury's awarding more than a sufficient amount as compensation for the plaintiff's injury should be one attendant on the wrongdoer's act, instead of

---

with next of kin to keep safely a corpse until the next of kin thereof desired to inter the same). However, these two cases were overruled by *Western U. Teleg. Co. v. Ferguson* (1901), 157 Ind. 64, 60 N. E. 674, 54 L. R. A. 846 which adopted the majority rule.

<sup>18</sup> *Indiana R. Co. v. Orr* (1907), 41 Ind. App. 426, 84 N. E. 32 (Conductor gave plaintiff the wrong transfer, and she was subsequently ejected from another street car of defendant's line); *Kolo and Sullivan v. Wm. Penn Hotel Co.* (1926), 86 Pa. Super. Ct. 359 (servant of the inn disturbed plaintiff in her room).

<sup>19</sup> *Aaron v. Ward* (1911), 203 N. Y. 351, 96 N. E. 736 (ejection from a public bath house); *Weber-Stair Co. v. Fisher* (1909, Ky. C. A.), 119 S. W. 195 (plaintiff expelled from theatre); *Smith v. Leo* (1895), 22 Hun. 242, 36 N. Y. Supp. 949 (expelled from dance hall).

<sup>20</sup> *McKibben v. Pierce* (1917, Tex. C. A.), 190 S. W. 1149.

being the basis for denying the injured party any recovery at all. Fourth, the objection is made that it would be necessary to use a subjective test and to inquire into the state of mind of the plaintiff. But is not this just what is being done in defamation cases where express malice has to be discovered in order to defeat a qualified privilege, or in fraud cases in proving scienter? Fifth, the most powerful and frequently reiterated argument is that to allow recovery for mental anguish in an independent action would open a regular "Pandora's box of evils" inasmuch as there would be a deluge of litigation. To state this objection is no more than an admission of incapacity on the part of the courts to dispose of the cases as they arise. There is here an implied recognition that a wrong has been suffered for which compensation should be made, but justice is not done merely because of the court's desire to make their work of administration less difficult.

The very fact that an increasing number of courts and legislatures are advocating the allowance of damages for mental suffering as an independent cause of action conclusively shows that the fears of those courts which deny such damages are not justified. In view of the complexity of modern society and the development and increased interest of humanity in more refined modes of living, the boast of the common law that there is a remedy afforded for every wrong should not be an idle one. Blind and arbitrary adherence to precedent should not defeat a rule for which both reason and natural justice are eloquent advocates.<sup>21</sup>

J. M. C.

PARENT AND SUBSIDIARY CORPORATIONS—SET-OFF AND COUNTERCLAIM.—Action by the successor of a reorganized bank upon a note executed by defendant corporation. Defendant claims the right to set off against its obligation a deposit credit maintained in the defunct bank by a subsidiary corporation. The subsidiary had established the account by resolution of its own board of directors, and withdrawal powers were confined to five officers of the subsidiary. However, the same five individuals were the controlling officers of the parent corporation. Moreover, the bank was frequently given reports of financial condition by the parent corporation, and in these reports the subsidiary was regarded as a mere division. Practically the management was the same, but the formalities of separate management were observed. Held, defendant is not entitled to set off the deposit credit of its subsidiary against its own indebtedness.<sup>1</sup>

The relationship between parent and subsidiary corporations causes considerable difficulty in the law.<sup>2</sup> Although for most purposes the two corpora-

<sup>21</sup> *Aetna Life Ins. Co. v. Burton* (Ind. App., 1938), 12 N. E. (2d) 360—decided subsequently to the instant case allowed recovery for mental anguish alone, resulting from the defendant's wilfully making an unauthorized autopsy of the body of plaintiff's husband. The language used by the court is sufficiently broad to be in conflict with the decision in the principal case—"Mental suffering need not be accompanied by physical injury where the act . . . resulted in the invasion of the legal rights of another." However, this is mere dictum because recovery was granted on the grounds pointed out above—Note 8.

<sup>1</sup> *Feucht v. Real Silk Hosiery Mills* (Ind. App. 1938), 12 N. E. (2d) 1019.

<sup>2</sup> For discussion of the general problem, see: Powell, *Parent and Subsidiary Corporations* (1931); Douglas and Shanks, *Insulation from Liability*