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RECOVERY OF DAMAGES FOR MENTAL ANGUISH ALONE IN BREACH OF CONTRACT ACTIONS

Before the late 1800's it undoubtedly would have been contrary to law to assert that damages for mental suffering might be allowed in breach of contract actions. However, near the beginning of the Nineteenth Century a few courts made what was considered to be a serious departure from the common law and allowed such damages in certain types of cases. The passing of years has brought about considerable, though incomplete, development in this phase of the law. Not only have legal writers failed to give this development the comment which its significance warrants, but the courts have failed to indicate the bases for their decisions on this question. Accordingly a great amount of confusion has enveloped the entire problem. It is the purpose of this note to attempt a logical categorization and discussion of the various rules which the courts apply to the problem, and to submit what precedent and socio-economic circumstances should be considered in determining the most desirable rule.

I. General Considerations

It was decided early that the damages which a court would grant for breach of contract should place the plaintiff in the position he would have been had the contract been fulfilled.[1] Stated in a more legalistic manner, the settled law in most jurisdictions is that the damages to which an injured party is entitled in breach of contract actions are those arising naturally from the breach or those which can reasonably be supposed to have been in the contemplation of the parties at the time they entered into the contract.[2]

The courts readily draw a distinction between "general damages," mentioned in the preceding paragraph, and "special damages," which are incidental, collateral or due to special circumstances. In order for a plaintiff to recover special damages, the special circumstances upon which reliance is placed must have been put within the existent knowledge of the parties at the time the contract was made.[3] One authority has said that, whether the damages sought are special or general, "the damages recoverable for breach of contract are restricted to compensation for pecuniary harm. This harm may be in the form of gains prevented by the breach or in the form of losses suffered — income prevented or outgo caused."[4]

1. McCormick, Damages 560 (1935).
2. Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854).
3. Roberts v. Graham, 6 Wall. 578, 18 L. Ed. 791 (U.S. 1868); Chesson v. Keickheffer Container Co., 216 N.C. 337, 4 S.E.2d 886 (1939).
4. 5 Corbin, Contracts 355 (1951).

The common law was more liberal in allowing recovery for mental suffering in tort actions, although limiting it to cases where the mental suffering was the natural and proximate result of a physical injury sustained by the plaintiff through the negligent act of the defendant and to cases where the mental suffering was the result of a willful wrong committed by the defendant.[5] These rules seem to have received general acceptance in American jurisdictions;[6] as stated by one court, "The doctrine that mental suffering accompanying personal injury or physical pain is always the subject of compensation is so firmly established in the jurisprudence of the several states as to become a legal maxim."[7]

It was the general rule at common law that, since the award of damages was restricted to compensation for pecuniary harm, there could be no recovery for mental suffering growing out of the breach of a contract.[8] However, the common law was not so exacting as to deny exceptions. Originally, courts following the common law rule made an exception in only one case — breach of promise to marry.[9] However, in the now famous case of *So Relle v. Western Union Telegraph Co.*,[10] decided in 1881, So Relle sued the telegraph company for the negligent breach of a contract to transmit and deliver a message announcing the death of his mother. The only damages alleged were mental suffering due to his being unable to attend the funeral. The Supreme Court of Texas, citing as its only authority a text on negligence, allowed the plaintiff to recover general damages as being within the contemplation of the parties at the time the contract was made.[11] The *So Relle* case had a turbulent history within its own jurisdiction;

5. Spiegel v. Evergreen Cemetery Co., 117 N.J.L. 90, 186 Atl. 585 (1936); Nichols v. Central Vermont Ry., 94 Vt. 14, 109 Atl. 905 (1919). For the development of the right to recover for mental anguish in tort actions, see Magruder, *Mental Disturbance in Torts*, 49 HARV. L. REV. 1033 (1936).

6. See note 5 *supra*.

7. Adams v. Brosius, 69 Ore. 513, 139 Pac. 729, 730 (1914).

8. Spiegel v. Evergreen Cemetery Co., 117 N.J.L. 90, 186 Atl. 585 (1936); Western Union Tel. Co. v. Choteau, 28 Okla. 664, 115 Pac. 879 (1911); McCORMICK, DAMAGES 592 (1935).

9. See, *e.g.*, Goldstein v. Young, 156 Fla. 500, 23 So.2d 730 (1945); Scharringhaus v. Hazen, 269 Ky. 425, 107 S.W.2d 329 (1937). See also Brown, *Breach of Promise Suits*, 77 U. OF PA. L. REV. 474 (1929); Cousens, *The Law of Damages as Applied to Breach of Promise of Marriage*, 17 CORNELL L.Q. 367 (1932); Note, 21 TENN. L. REV. 474 (1950).

10. 55 Tex. 308 (1881).

11. "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages, on account of the want of strict commercial value in the messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot be easily estimated in money, but for which a jury should be at liberty to award fair damages." So Relle v. Western Union Tel. Co., 55 Tex. 308, 312 (1881), quoting SHEARMAN AND REDFIELD, NEGLIGENCE (1879). It is of worth to note that the authors of this text did not cite any authority to sustain this proposition.

it was overruled in 1883[12] and reaffirmed in 1885.[13] Thus out of this tumultuous background came the rule that is today known as the "Texas doctrine."

With the passing of years the rule of this case has been adopted by the courts of nine states,[14] while the majority of courts have rejected it.[15] However, most of the courts have admitted a good many exceptions to the rule of no recovery. The most prominent are: (a) where the breach was wanton or reckless,[16] (b) where there was physical injury occasioned by the breach,[17] (c) where the defendant was engaged in a business of public or quasi-public nature.[18] The various rules which the courts will apply to the differing fact situations will be discussed subsequently.

The cases have not stated any concrete definition of mental suffering, and since any breach of contract usually results in mental vexation and feelings of disappointment in the plaintiff, a definite standard would be most advantageous to the courts. The generality most frequently made is that "before recovery can be had, it must be shown that the mental perturbations of the plaintiff were more than ordinary regret or annoyance, and what is commonly denominated mental anguish, and the mental anguish or distress of mind must be shown to have been a necessary and natural result of the breach of contract."[19] All the courts seem to agree that if the mental suffering is caused solely by pecuniary loss, damages will always be refused.[20]

It should be noted that in many, perhaps most, of the cases to be discussed hereafter, the plaintiff has a cause of action in tort as well as in contract. Where the two actions coexist, the first problem facing the court is a determination of the theory upon which the plaintiff is proceeding. The test usually used has been stated in this manner:

> "When an act complained of is a breach of specific terms of the contract, without any reference to the legal duties imposed by law upon the relationship created thereby, the action is in contract, but where there is a

12. Gulf, C. & S.F. Ry. v. Levy, 59 Tex. 563 (1883).

13. Stuart v. Western Union Tel. Co., 66 Tex. 580, 18 S.W. 351 (1885). See also JONES, TELEGRAPH AND TELEPHONE COMPANIES 753 (1916).

14. MCCORMICK, DAMAGES 592 (1935).

15. North Dakota, Florida, Georgia, Illinois, Indiana, Kansas, Minnesota, Mississippi, Missouri, New York, Ohio, Alabama, Virginia, West Virginia. See MCCORMICK, DAMAGES 592 (1935). See also 63 CENT. L.J. 341 (1906).

16. *E.g.*, Hall v. Jackson, 24 Colo. App. 225, 134 Pac. 151 (1913); Gulf, Mobile & N.R.R v. Thornberry, 185 Miss. 576, 188 So. 545 (1939).

17. *E.g.*, Stevenson v. John J. Grier Hotel Co., 159 Ark. 44, 251 S.W. 355 (1923); Grayson v. St. Louis Transit Co., 100 Mo. App. 60, 71 S.W. 730 (1903).

18. *E.g.*, Aaron v. Ward, 203 N.Y. 351, 96 N.E. 736 (1911); Buenzle v. Newport Amusement Ass'n, 29 R.I. 23, 68 Atl. 721 (1908). See RESTATEMENT, CONTRACTS § 341 (1932).

19. City of Dallas v. Brown, 150 S.W.2d 129, 131 (Tex. Civ. App. 1941). See also HALE, DAMAGES 169 (2d ed. 1912); JONES, TELEGRAPH AND TELEPHONE COMPANIES 766 (1912); SEDGWICK, DAMAGES § 43a (1920).

20. See 5 CORBIN, CONTRACTS 358 (1951); HALE, DAMAGES 162 (2d ed. 1912); MCCORMICK, DAMAGES 593 (1935).

> contract for services which places the parties in such a relation to each other that, in attempting to perform the promised service, a duty *imposed by law as a result of the contractual relationship between the parties* is violated through an act which incidentally prevents the performance of the contract, then the gravamen of the action is a breach of the legal duty, and not of the contract itself, and in such case allegations of the latter are considered mere inducement, showing the relationship which furnishes the right of action for the tort, but not the basis of recovery for it, and in such cases the remedy is an action *ex delicto*."[21]

That is to say, every contract creates a relationship between the parties upon which the law imposes certain duties, such as the common law duty to perform the thing agreed to be done with care, skill, reasonable expediency and faithfulness. Consequently, a failure to perform any of these duties gives rise to the possibility of a tort as well as a contract action.[22] Some courts in determining whether an action is in tort or contract have drawn a distinction between misfeasance and non-feasance. That is, if the defendant does not attempt to perform the contract at all, only a contract action will lie, but if he commences performance and fails to use proper care, there may be an action in tort.[23] If there is any doubt as to whether a particular action is a tort or contract, the courts indicate that the doubt will be resolved in favor of the latter, with the possible exception of the carrier cases.[24]

In the cases treated subsequently, either the plaintiff has apparently elected to proceed upon the contract, or the court has construed the pleadings as if this were the case. Where only the material facts are pleaded, as under modern code pleading, the plaintiff may recover upon any theory that happens to fit the particular facts, and declaring in either tort or contract would appear to be unnecessary. However, whether the action is tort or contract may have a vital effect on other matters, such as the amount and kind of damages, the statute of limitations or the court in which the action is brought.[25]

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21. McClure v. Johnson, 50 Ariz. 76, 69 P.2d 573, 578 (1937). *Cf.* Banfield v. Addington, 104 Fla. 661, 140 So. 893 (1932); Harper v. Interstate Brewery Co., 168 Ore. 26, 120 P.2d 757 (1942).

22. Peterson v. Sherman, 68 Cal. App.2d 706, 157 P.2d 863 (1945); Flint & Walling Mfg. Co. v. Beckett, 167 Ind. 491, 79 N.E. 503 (1906); Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So.2d 791 (1944); Oklahoma Natural Gas Co. v. Pack 186 Okla. 330, 97 P.2d 768 (1939).

23. PROSSER, TORTS 204 (1941). *Cf.* Nevin v. Pullman Palace Car Co., 106 Ill. 222 (1883); Zabron v. Cunard S.S. Co. Ltd., 151 Iowa 345, 131 N.W. 18 (1911).

24. See, *e.g.*, Rosenthal & Doucette, Inc. v. United Last Co., 33 F. Supp. 213 (D. Mass. 1940); Green v. Industrial Life and Health Ins. Co., 199 S.C. 262, 18 S.E.2d 873 (1942).

25. SMITH AND PROSSER, CASES AND MATERIALS ON TORTS 722 (1952). For the development of the history between tort and contract, see AMES, LECTURES ON LEGAL HISTORY 164-66 (1913). See also Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 YALE L.J. 221 (1910). As to the effect of a contractual relationship between the deceased and the defendant in wrongful death actions see Notes, 80 A.L.R. 884 (1932), 115 A.L.R. 1026 (1938).

II. Specific Applications

A. *Telegrams*

The primary rule established by the *So Relle* case is that a telegraph company is liable for mental anquish resulting from the negligent breach of a contract to deliver or send a death message, even though mental anquish is the only damage suffered. Logically enough, it is the court's decision on mental anquish alone that has provoked the most disagreement.

The nine states that follow the *So Relle* view vary somewhat in their treatment of the problem. Alabama has restricted the right to recovery to cases where the relationship of sender and addressee is that of parent and child, husband and wife or brother and sister,[26] while Kentucky requires the kinship to be that of the first degree.[27] The remainder of the courts follow the *So Relle* case in not stressing the relationship of the parties. In these states it is undisputed that the sender of the message may recover; and a plaintiff who is an addressee is usually allowed to recover, either on the theory of a third party beneficiary contract[28] or as a matter of public policy.[29] Due to the common law requirement that the damages be within the contemplation of the parties, all the courts require that notice of the nature of the message be brought to the attention of the telegraph company, and this usually is easily ascertainable from the face of the message itself.[30] The courts say that damages for mental suffering are general compensatory damages; since the breach of contract gives rise to nominal damages, the damages for mental suffering are parasitic.[31]

The "Texas doctrine," or the holding of the *So Relle* case, has not

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26. See, *e.g.*, Western Union Tel. Co. v. Ayers, 131 Ala. 391, 31 So. 78 (1901).

27. See, *e.g.*, Denham v. Western Union Tel. Co. 27 Ky. L. Rep. 999, 87 S.W. 788 (1905). See also 63 Cent. L.J. 340 (1906).

28. See, *e.g.*, Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N.W. 1 (1895); Western Union Tel. Co. v. Eckhardt, 2 S.W.2d 505 (Tex. Civ. App. 1927). See also Note, 4 Baylor L. Rev. 71 (1951).

29. See, *e.g.*, Chapman v. Western Union Tel. Co., 90 Ky. 265, 13 S.W. 880 (1890). For a discussion of the right of a third person who is neither sender nor addressee of the message to recover from the telegraph company see Note, 72 A.L.R. 1192 (1931).

30. *E.g.*, Reese v. Western Union Tel. Co., 123 Ind. 294, 24 N.E. 163 (1890); Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N.W. 1 (1895); Barnes v. Western Union Tel. Co., 27 Nev. 438, 76 Pac. 931 (1904); McCollum v. Western Union Tel. Co., 180 Tenn. 403, 175 S.W.2d 544 (1943); Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 8 S.W. 574 (1888); Western Union Tel. Co. v. Brooks, 115 Tex. 168, 279 S.W. 443 (1926); Note, 23 A.L.R. 361 (1923). As to the amount of notice needed to bring the nature of the message to the knowledge of the company see Note, 4 Baylor L. Rev. 71 (1951). *Cf.* Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930) (plaintiff, although neither sender nor addressee, could recover because his name was mentioned in the message and the company thereby appraised of his interest).

31. See, *e.g.*, Western Union Tel. Co. v. Crumpton, 138 Ala. 632, 36 So. 517 (1903); Western Union Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419 (1890); *cf.* Thompson v. Western Union Tel. Co., 106 N.C. 549, 11 S.E. 269 (1890); 5 Corbin, Contracts 357 (1951).

been restricted solely to cases involving death messages. For example, damages have been allowed for mental suffering where a telegraphic money order from a mother to her son in need was negligently delayed;[32] where the failure to receive a telegraphic money order resulted in the miscarriage of plaintiff's wife;[33] and where a physician's report on a sick child was not delivered with the urgency which the occasion demanded.[34] However, such cases might be distinguished on the basis that they involve elements of physical injury.

The reasoning of these cases has been summarized thus: (a) a telegraph company is a quasi-public agency and should be held to a high degree of care in fulfilling its contracts with the public; (b) the common law rule of no recovery does not apply since such a contract was unknown to the common law; (c) every infraction of a legal right contemplates damage and a remedy, and such damages have long been allowed where they were coupled with a physical injury.[35]

The legislatures of Oklahoma, Arkansas, Florida, South Carolina and Louisiana by statute have changed the common law rule refusing recovery and thus bring to fourteen the total of states allowing recovery for mental anquish in telegram cases.[36] However, the majority of courts follow the common law rule[37] and do not allow recovery in this type of case. These courts maintain that allowance of such damages should only be accomplished by statute, that the amount of litigation brought on by the allowance of such damages would be excessive and that the measure of damages would be so indefinite as to subject the defendant to great oppression.[38] One court has said, "the Pandora box

32. Western Union Tel. Co. v. Brooks, 115 Tex. 168, 279 S.W. 443 (1926). *Contra:* Robinson v. Western Union Tel. Co., 24 Ky. L. Rep. 452, 68 S.W. 656 (1902).

33. Western Union Tel. Co. v. Estrada, 236 S.W.2d 846 (Tex. Civ. App. 1951).

34. Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743, 72 A.L.R. 1192 (1930). The rationale of these cases is that the serious nature of the message is brought to the telegraph company's attention. See, *e.g.*, Western Union Tel. Co. v. Brooks, 115 Tex. 168, 279 S.W. 443 (1926).

35. Kenner, *Mental Disturbance and the Consequence Thereof as Elements of Damage*, 60 CENT. L.J. 205 (1905).

36. "All telegraph companies doing business in this state shall be liable for mental anguish or suffering, even in the absence of bodily harm or pecuniary loss, for negligence in transmitting and delivering messages. . . ." ARK. STAT. ANN. § 73-1813 (1947). See also FLA. STAT. § 363.06 (1951); LA. CIV. CODE art. 1934 (1947) (such damages are allowed under the general statutory provisions pertaining to damages; OKLA. STAT. tit. 13, § 176 (1951); S.C. CODE § 8553 (1942); WIS. STAT. § 180.19 (1951) (plaintiff's recovery limited to $500).

37. See, *e.g.*, Chapman v. Western Union Tel. Co., 88 Ga. 763, 15 S.E. 901 (1892); Western Union Tel. Co. v. Halton, 71 Ill. App. 63 (1897); Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N.E. 674 (1901); Francis v. Western Union Tel. Co., 58 Minn. 252, 59 N.W. 1078 (1894); Morton v. Western Union Tel. Co., 53 Ohio St. 431, 41 N.E. 689 (1895); Western Union Tel. Co. v. Choteau, 28 Okla. 664, 115 Pac. 879 (1911); Connelly v. Western Union Tel. Co., 100 Va. 51, 40 S.E. 618 (1902); Corcoran v. Postal Telegraph-Cable Co., 80 Wash. 570, 142 Pac. 29 (1914); Summerfield v. Western Union Tel. Co., 87 Wis. 1, 57 N.W. 973 (1894); 5 CORBIN, CONTRACTS 364 (1951); MCCORMICK, DAMAGES 560 (1935).

38. See note 37 *supra*. See also 60 CENT. L.J. 205 (1906). For a case in which these arguments are refuted, see Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N.W. 1 (1895).

that has been opened by the Texas doctrine proves more forcibly than argument the wisdom of the common law rule."[39]

The federal courts have been the leaders among the courts refusing recovery,[40] for the same reasons as those given by their companion, state[41] courts. The earlier cases held in situations where jurisdiction was based upon diversity of citizenship, that the rights and duties under a telegram contract were matters of general law and, in the absence of a controlling state statute, the federal rule of no recovery would be applied, although the state courts of the particular state allowed such redress.[42] Although there are no decisions on the point since the Supreme Court decided *Erie R.R. v. Tompkins*,[43] at the present time the state law on the subject will undoubtedly be applied in cases where jurisdiction is based on diversity of citizenship.

In 1910 the telegraph companies were brought under the regulation of the Interstate Commerce Act[44] in an effort to achieve national uniformity in rates.[45] Consequently, a question arising as to the liability of a telegraph company on an interstate telegram creates a federal question, thereby giving the federal courts jurisdiction.[46] In such cases, the federal courts, using the same rule as was applied in diversity cases before the *Erie* doctrine,[47] uniformly deny recovery.[48] The

39. Francis v. Western Union Tel. Co., 58 Minn. 252, 59 N.W. 1078, 1081 (1894). For an argument to the effect that all mental suffering results in physical detriment, see Goodrich, *Emotional Disturbances as Legal Damages*, 20 MICH. L. REV. 497 (1922).

40. See Western Union Tel. Co. v. Burris, 179 Fed. 92 (8th Cir. 1910); Western Union Tel. Co. v. Wood, 57 Fed. 471 (5th Cir. 1893); Mees v. Western Union Tel. Co., 55 F.2d 691 (S.D. Fla. 1932); Jones v. Western Union Tel. Co., 18 F.2d 650 (W.D. La. 1926); Ey v. Western Union Tel. Co. 298 Fed. 357 (N.D. Cal. 1924); Chase v. Western Union Tel. Co., 44 Fed. 554 (N.D. Ga. 1890); JONES, TELEGRAPH AND TELEPHONE AND TELEPHONE COMPANIES 756 (1912); 5 WILLISTON, CONTRACTS § 1340A (1937).

41. See note 40 *supra*.

42. See, *e.g.*, Western Union Tel. Co. v. Wood, 57 Fed. 471 (5th Cir. 1893); Mees v. Western Union Tel. Co., 55 F.2d 691 (S.D. Fla. 1932); Ey v. Western Union Tel. Co., 298 Fed. 357 (N.D. Cal. 1924); Chase v. Western Union Tel. Co., 44 Fed. 554 (N.D. Ga. 1890). For cases applying the state statutory rule on such damages, see Western Union Tel. Co. v. Burris, 179 Fed. 92 (8th Cir. 1910); Jones v. Western Union Tel. Co., 18 F.2d 650 (W.D. La. 1926).

43. 304 U.S. 64, 58 Sup. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938).

44. 24 STAT. 379 (1887), 49 U.S.C.A. § 1 *et seq.* (1929). See also REV. STAT. § 5263 (1866), 47 U.S.C.A. § 1 *et seq.* (1928) (Federal Communications Act).

45. *See* Southern Express Co. v. Byers, 240 U.S. 612, 614, 36 Sup. Ct. 410, 60 L. Ed. 825 (1916); Obrien v. Western Union Tel. Co., 113 F.2d 539, 541 (1st Cir. 1940). See also Note, 20 TEXAS L. REV. 229 (1941).

46. "The District Courts shall have jurisdiction as follows. . . . Eighth: Of all suits and proceedings arising under any law regulating commerce." 62 STAT. 930 (1948), 28 U.S.C.A. § 1331 (1949). For cases in illustration, see Western Union Tel. Co. v. Speight, 254 U.S. 17, 41 Sup. Ct. 11, 65 L. Ed. 104 (1920); Obrien v. Western Union Tel. Co., 113 F.2d 539 (1st Cir. 1940); Vaigneur v. Western Union Tel. Co., 34 F. Supp. 92 (E.D. Tenn. 1940). If telegram is in interstate commerce, state courts also deny recovery. See, *e.g.*, Western Union Tel. Co. v. Conway, 57 Ariz. 208, 112 P.2d 857 (1941); Burke v. Western Union Tel. Co. 137 Neb. 878, 291 N.W. 555 (1940). See also 5 WILLISTON, CONTRACTS 3771 (1937); Note, 20 TEXAS L. REV. 229 (1941).

47. See cases cited note 40 *supra*.

48. The federal courts allow damages for mental suffering on the innkeeper

anomaly created by these rules is that a plaintiff suing in a federal court for the breach of a telegram contract, where the only damage is mental suffering, will be denied recovery if the message crosses the state line, but may recover if it stays within the state — unless the state itself denies recovery.

B. *Carriers*

The courts have generally allowed recovery where a carrier has breached the contract of carriage and mental suffering is the only damage resulting.[49] The two most frequent situations in which such a breach occurs are where the passenger has received insulting treatment at the hands of the carrier's servant, and where the passenger has been expelled from the conveyance without justifiable[50] cause. It is generally said that the law imposes upon the carrier, as part of the agreement of carriage, respectful, decent and decorous treatment at the hands of those entrusted with the execution of its contract.[51] The primary reason given by the courts to justify their departure from the common law rule of no recovery is that a carrier is a quasi-public agent and owed a greater duty of performance to the public.[52] This rule has not been accepted wholeheartedly by all the courts, and some of them have required that the carriers conduct must be willful and wanton or that the passenger suffer some physical injury.[53] The courts tend to confuse the question of whether the action against the carrier is in tort or contract, and generally say that either remedy will be available.[54]

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and carriage contracts. See, *e.g.*, Emmke v. DeSilvia, 293 Fed. 17 (8th Cir. 1923) (innkeeper); Austro-American S.S. Co. v. Thomas, 248 Fed. 231 (2d Cir. 1917) (carriage contract).

49. Louisville & N.R.R. v. Quick, 125 Ala. 553, 28 So. 14 (1900); Arkansas Motor Coaches v. Whitlock, 199 Ark. 820, 136 S.W.2d 184 (1940); Bleecher v. Colorado & S. Ry., 50 Colo. 140, 114 Pac. 481. (1911); Haile v. New Orleans Ry. & Light Co., 135 La. 229, 65 So. 225 (1914); Babcock & Wilcox Co. v. Norton, 58 Nev. 133, 71 P.2d 1051 (1937); Burrus v. Nevada-California-Oregon Ry., 38 Nev. 156, 145 Pac. 926 (1915); Gillespie v. Brooklyn Heights R.R., 178 N.Y. 347, 70 N.E. 857, 66 L.R.A. 618, 102 Am. St. Rep. 503 (1904); Southeastern Greyhound Lines, Inc. v. Freels, 176 Tenn. 502, 144 S.W.2d 743 (1940); Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557 (1899); Pullman Co. v. Moise, 187 S.W. 249 (Tex. Civ. App. 1916).

50. See cases cited note 49 *supra*.

51. *E.g.*, Bleecher v. Colorado & S. Ry., 50 Colo. 140, 114 Pac. 481 (1911); Southern Kansas Ry. v. Hinsdale, 38 Kan. 507, 16 Pac. 937 (1888); Humphrey v. Michigan United Ry., 166 Mich. 645, 132 N.W. 447 (1911); Lanson v. Great Northern Ry., 114 Minn. 182, 130 N.W. 945 (1911); Louisville & N.R.R. v. Bell, 166 Ky. 400, 179 S.W. 400 (1915).

52. See cases cited note 51 *supra*.

53. *E.g.*, Hines v. Miniard, 204 Ala. 514, 86 So. 23, 12 A.L.R. 238 (1920); Grayson v. St. Louis Transit Co., 100 Mo. App. 60, 71 S.W. 730 (1903); Burris v. Nevada-California-Oregon Ry., 38 Nev. 156, 145 Pac. 926 (1915). For a case holding that the passengers ejection and embarrassment are "constructive physical injuries," see Arkansas Motor Coaches v. Whitlock, 199 Ark. 820, 136 S.W.2d 184 (1940).

54. Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950). See also cases cited notes 49 and 53 *supra*. For a criticism of

If the carrier could reasonably foresee such conduct, it has generally been held liable for mental distress caused by plaintiff's fellow passengers, here the courts once again do not make it clear whether the action is in tort or contract.[55] It is interesting to note that some of the courts allowing recovery in the carrier cases are those which resolutely deny such an allowance in the telegram cases.[56]

C. *Admission to Public Places*

Closely akin to the carrier cases is a small group of cases involving rights under contracts of admission to public places. These cases can be divided into two groups: (a) those between innkeeper and guest and (b) those between the owner of a place of public amusement and the patron thereof.

It is generally stated that "one of the things which a guest for hire at a public inn has the right to insist upon is respectful and decent treatment at the hands of the innkeeper and his servants. That is an essential part of the contract whether it is express or implied."[57] If the innkeeper causes the guest mental suffering, even though that is the only damage present, the courts allow the action, admitting it as another exception to the common law rule, based upon the fact that a hotel-keeper is a quasi-public agent.[58] The usual case arises where the innkeeper or his servants enter the hotel room and accuse the plaintiff of reprehensible conduct.[59]

The same rules and reasoning are applied to cases where the patron of a place of public amusement, usually a theatre, is expelled or humiliated by the proprietor. The courts tend to allow recovery on the admission contract, saying the relationship with the public is the predominating factor, although mental suffering and humiliation are the only damages resulting from the breach.[60]

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the cases treating the carrier's liability as on the contract, see Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

55. *E.g.*, Payne v. MacDonald, 150 Ark. 12, 233 S.W. 813 (1921); Payne v. Combs, 198 Ky. 749, 249 S.W. 1031 (1923); Louisville & N.R.R. v. Bell, 166 Ky. 400, 179 S.W. 400 (1915); Texas & Pacific Ry. v. Hughes, 41 S.W. 821 (Tex. Civ. App. 1897). See generally, Note, 15 A.L.R.2d 133 (1951).

56. Compare cases cited note 49 *supra*, with those in note 37 *supra*.

57. De Wolf v. Ford, 193 N.Y. 397, 86 N.E. 527, 528-29 (1908).

58. See, *e.g.*, Emmke v. De Silvia, 293 Fed. 17, (8th Cir. 1923); Stevenson v. John J. Grier Hotel Co., 159 Ark. 44, 251 S.W. 355 (1923); Frewen v. Page, 238 Mass. 499, 131 N.E. 475 (1921); Milner Hotels v. Brent, 207 Miss. 892, 43 So.2d 654, 14 A.L.R.2d 710 (1949); Kellogg v. Commodore Hotel, 187 Misc. 319, 64 N.Y.S.2d 131 (Sup. Ct. 1946); Adam v. East Avenue Corp., 178 Misc. 363, 34 N.Y.S.2d 312 (1942); *cf.* Dixon v. Hotel Tutwiler Operating Co., 214 Ala. 396, 108 So. 26 (1926).

59. See cases cited note 58 *supra*. For the hotel-keeper's liability for insulting language, see Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950).

60. See, *e.g.*, Interstate Amusement Co. v. Martin, 8 Ala. App. 481, 62 So. 404 (1913) (theatre); Vogel v. Saenger Theatres, 22 So.2d 189 (La. 1945), 6 LA. L. REV. 475 (theatre); Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938) (theatre); Aaron v. Ward, 203 N.Y. 351, 96 N.E. 736 (1911)

D. *Dead Bodies*

One of the most frequent situations giving rise to mental suffering is that involving a contract pertaining to a dead body. Little imagination is needed to see how the breach of such a contract would produce mental suffering. The parties are in a state of bereavement due to the death at the time the contract is made, and any further injury touching the emotions is likely to present a case of the most severe mental suffering. The two most frequent situations giving rise to this type of case are where the undertaker has breached the burial contract with the family of the deceased,[61] and where the carrier has breached the contract to transport the dead body.[62]

The courts, once again, have not been uniform in their approach to the problem. Consequently, three views, each with substantial adherents, have developed. A very definite minority applies the same rule as applied in the telegram cases and allow plaintiff to recover where the defendant has negligently breached the contract.[63] The majority of courts have been reluctant to make a complete departure from the common law, and allow the plaintiff to recover only if the breach of contract is willful and wanton.[64] The leading case illustrating this position is *Hall v. Jackson*,[65] decided in 1913. There the undertaker agreed to prepare the body of plaintiff's husband for shipment but did the work so negligently that when it reached its destination it was in an advanced state of decomposition. The widow sued for damages based solely on mental suffering. The court denied recovery on the

(bathhouse); Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 Pac. 209, (1904) (public resort); *cf.* Buenzle v. Newport Amusement Ass'n, 29 R.I. 23, 68 Atl. 721 (1908). Some of the courts hold the public proprietors to be quasi-public agents who should be held to a high degree of care in performing their contract with the public, *e.g.*, Aaron v. Ward, *supra*, while other courts reject or overlook this factor, *e.g.*, Vogel v. Saenger Theatres, *supra*.

61. *E.g.*, Fitzsimmons v. Olinger Mortuary Ass'n, 91 Colo. 544, 17 P.2d 535 (1932); Hall v. Jackson, 24 Colo. App. 225, 134 Pac. 151 (1913); Boyle v. Chandler, 3 Harr. 253, 138 Atl. 273 (Del. 1927); Plummer v. Hollis, 213 Ind. 43, 11 N.E.2d 140 (1937); Spiegel v. Evergreen Cemetery Co., 117 N.J. 90, 186 Atl. 585 (1936); Lamm v. Shingleton, 231 N.C. 10, 55 S.E.2d 810 (1949); Miller v. Gorman, 88 Okla. 229, 212 Pac. 983 (1923); Taylor v. Bearden, 6 Tenn. Civ. App. 33 (1915), Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925).

62. *E.g.*, Birmingham Transfer & Traffic Co. v. Still, 7 Ala. App. 556, 61 So. 611 (1913); Beaulieu v. Great Northern Ry., 103 Minn. 47, 114 N.W. 353 (1907); Lindh v. Great Northern Ry., 99 Minn. 408, 109 N.W. 823, 7 L.R.A. (N.S.) 1018 (1906); Hale v. Bonner, 82 Tex. 33, 17 S.W. 605, 14 L.R.A. 336 (1891); Nichols v. Central Vermont Ry., 94 Vt. 14, 109 Atl. 905 (1919).

63. *E.g.*, Lamm v. Shingleton, 231 N.C. 10, 55 S.E.2d 810 (1949), 2 BAYLOR L. REV. 373, 28 N.C.L. REV. 318 (1950), 22 ROCKY MT. L. REV. 192 (1950), 11 U. OF PITT. L. REV. 494 (1950); Hale v. Bonner, 82 Tex. 33, 17 S.W. 605, 14 L.R.A. 336 (1891).

64. *E.g.*, Birmingham Transfer & Traffic Co. v. Still, 7 Ala. App. 556, 61 So. 611 (1913); Fitzsimmons v. Olinger Mortuary Ass'n, 91 Colo. 544, 17 P.2d 535 (1932); Hall v. Jackson, 24 Colo. App. 225, 134 Pac. 151, 56 A.L.R. 657 (1913); Boyle v. Chandler, 3 Harr. 323, 138 Atl. 273 (Del. 1927); Spiegel v. Evergreen Cemetery Co., 117 N.J. 90, 186 Atl. 585 (1936); Gadbury v. Bleitz, 133 Wash, 134, 233 Pac. 299 (1925).

65. 24 Colo. App. 225, 134 Pac. 151, 56 A.L.R. 567 (1913).

basis that the undertaker was not willful or wanton in breaching the contract. A slowly diminishing minority of courts, using all of the arguments of the telegram case and mainly asserting that it is only a change which the legislature can make, still cling rigorously to the common law rule of no recovery.[66]

E. *Miscellaneous Cases*

Some courts have not been content to remain within the categories set forth above and have allowed recovery for mental suffering due to breach of contract in other situations, *e.g.*, where a dressmaker negligently failed to deliver a bride's trousseau in time for the wedding;[67] where a cleaner negligently delayed delivery of a bridegroom's wedding suit;[68] where a roof was not prepared in the manner contracted for and plaintiff was disturbed in her comfort;[69] where a bank failed to honor a draft;[70] and where a debtor wrote humiliating letters to the debtor's employer.[71] Damages for mental suffering have also been allowed in cases where the doctor or hospital breached the contract to provide the necessary care for the plaintiff.[72] The most recent development in this type of situation is *McGahey v. Baptist Memorial Hospital*,[73] decided in 1952 by the Supreme Court of Tennessee. Plaintiff sued the hospital for negligently confusing the children to the extent that he was not sure he had the child to which his wife had given birth. There were two counts in the declaration — one in tort and one in contract. Mental anguish was the only damage alleged and the lower court dismissed the suit. On appeal, the court of appeals held that the count

66. *E.g.*, Plummer v. Hollis, 213 Ind. 43, 11 N.E.2d 140 (1937); Beaulieu v. Great Northern Ry., 103 Minn. 47, 114 N.W. 353 (1907); Miller v. Gorman, 88 Okla. 229, 212 Pac. 983 (1923); Nichols v. Central Vermont Ry., 94 Vt. 14, 109 Atl. 905 (1919); Kneass v. Cremation Soc. of Washington, 103 Wash. 521, 175 Pac. 172 (1918).

67. Lewis v. Holmes, 109 La. 1030, 34 So. 66, 61 L.R.A. 274 (1903); cf. Eller v. Carolina & W. Ry., 140 N.C. 140, 52 S.E. 305, 3 L.R.A. (N.S.) 225 (1905), where husband could not recover damages for mental suffering due to his wife's loss of baggage in which she carried her wedding trousseau; however, court intimated that the wife could recover in an action of her own. See also Note, 23 A.L.R. 361 (1923).

68. Mitchell v. Shreveport Launderies, 60 So.2d 86 (La. 1952).

69. Beecher Roofing Co. v. Pike, 230 Ala. 289, 160 So. 692 (1935); Beecher Asphaltum Roofing Co. v. Murphy, 224 Ala. 655, 141 So. 630 (1932).

70. Westesen v. Olathe State Bank, 78 Colo. 217, 240 Pac. 689, 44 A.L.R. 1484 (1925); cf. American Nat. Bank v. Morey, 113 Ky. 857, 69 S.W. 759, 58 L.R.A. 956 (1902). *Contra*: State Nat. Bank of Iowa Park v. Rogers, 89 S.W.2d 825 (Tex. Civ. App. 1936).

71. La Salle Extension University v. Fogarty, 126 Neb. 457, 253 N.W. 424, 91 A.L.R. 1491 (1934) (debtor allowed recovery for mental suffering on his cross complaint when creditor sued on the debt).

72. Head v. Moffett, 109 Miss. 757, 69 So. 664 (1915); Bailey v. Long, 172 N.C. 661, 90 S.E. 809 (1916); Coffey v. Northwestern Hospital Ass'n, 96 Ore. 100, 183 Pac. 762 (1919); cf. Adams v. Brosius, 68 Ore. 513, 139 Pac. 729 (1914).

73. Due to the rules of practice in the Tennessee Court of Appeals, this opinion will not be published, and in view of its excellent review of the authorities such is a definite loss to the profession. The Tennessee Supreme Court affirmed the result only, consequently it issued no opinion.

in tort was deficient for lack of physical injury; however, the court by way of dictum indicated that the contract doctrine of mental suffering should be extended to this type of case, but was unable to find a breach of the contract in view of plaintiff's subsequent conduct in regard to the child. The trial court was affirmed, and the supreme court affirmed the court of appeals in result only.

A unique case is presented where plaintiff recovered damages for mental suffering due to defendant's breach of contract to rent a park space in which plaintiff's social club could have a party.[74] Other courts have denied recovery in equally unusual cases.[75]

III. CONCLUSION

After an examination of the cases involving the question of mental suffering as an element of damages in actions for breach of contract, it is submitted that the courts allowing such actions have adopted the wiser policy. The reasons given by the courts denying recovery have all been ably refuted; they illustrate the tendency of courts to shield themselves behind the concrete bulwark of settled common law rules. When it is realized that recovery may be allowed for mental suffering in contract actions that might be denied in tort actions, this body of law will, and should, probably undergo further development. As our society continues to develop, new means will also develop to invade the tranquility of mind of the individual. The courts, as history indicates, will be called upon to grant relief. In order for the law to keep abreast of social change, the courts must not shirk their duty. As one court has said, "One of the crowning glories of the common law has been its elasticity and its adaptability to new conditions and new facts. . . . Should it ever fail to be adjustable to new conditions which age and experience bring, then its usefulness is over and a new social compact must be entered into."[76]

74. O'Meallie v. Moreau, 116 La. 1020, 41 So. 243 (1906).

75. Lillis v. Anderson, 21 So.2d 389 (La. App. 1945) (breach of contract to alter and improve a minister's residence); Furlan v. Rayan Photo Works, 171 Misc. 839, 12 N.Y.S.2d 921 (N.Y. Munic. Ct. 1939) (defendant negligently destroyed only picture of plaintiff's dead mother which he was to use in making a reproduction); Stratton v. Posse Normal School of Gymnastics, 265 Mass. 223, 163 N.E. 905 (1928) (defendant school failed to admit plaintiff as it had contracted to do).

76. Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N.W. 1, 2 (1895).