

4-1-1950

# Damages -- Mental Anguish -- Action Arising Out of Contract

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## Recommended Citation

Charles E. Knox, *Damages -- Mental Anguish -- Action Arising Out of Contract*, 28 N.C. L. REV. 318 (1950).  
Available at: <http://scholarship.law.unc.edu/nclr/vol28/iss3/10>

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in the past,<sup>41</sup> could approach the intracorporate abuses rendered perpetuable by non-recognition or denial of the power.<sup>42</sup>

Thus far, the only situations to arise in which the courts have deemed it just and equitable to decree dissolution have arisen within the categories already mentioned. But these categories are mere collections of abuses already presented rather than inflexible limits of the rule; so that the real reason for applying the remedy in a particular case is now, as it was initially, that such action is just, equitable,<sup>43</sup> and socially desirable.

As previously noted, all the presently appropriate circumstances for dissolution are not covered by statute in North Carolina. If they were, then it would, presently, make no practical difference whether the court had "inherent power" or not; in that event the question would, for the time being, be academic. The history of the remedy, however, has shown that the growth of circumstances warranting dissolution is concomitant with the growth and variegation of corporate activity. Assuming that this concomitancy will continue, statutory coverage of the ground, however liberal, must assuredly lag behind the evolving demands of justice and equity.<sup>44</sup> It is hoped, therefore, that when confronted with an appropriate case the court will recognize and exercise its inherent power, refusing to construe the statute as exclusive.<sup>45</sup>

PARKER WHEDON.

### Damages—Mental Anguish—Action Arising Out of Contract

Plaintiff contracted with the defendant undertakers to bury plaintiff's deceased husband. Approximately four months after interment,

<sup>41</sup> Decisions refusing to decree dissolution, even in jurisdictions which recognize the power, disproportionately exceed the decisions granting the remedy.

<sup>42</sup> Alternative judgments to the effect that complainant be paid his pro rata share of the assets (or the "fair cash value" of his stock) or that the corporation be dissolved, may be a solution to this problem. CONN. GEN. STAT. §5228 (1949); W. VA. CODE ANN. §3093 (1943); *Riley v. Callahan Mining Co.*, 28 Idaho 525, 155 Pac. 665 (1916).

<sup>43</sup> The Companies Act of England provides for winding up where "... the court is of opinion it is just and equitable. . . ." The Companies Act, 1929, 19 & 20 Geo. V, c. 23, §168 (6).

<sup>44</sup> There is, however, one adequate statutory solution to the problem. By a Rhode Island enactment it has been expressly provided that the grounds for dissolution specified in the statute are not to be construed as limits on the general equity powers of the court and that the same relief may be obtained in equity. R. I. GEN. LAWS c. 116, §§61, 62 (1938).

<sup>45</sup> Analogous grounds for such refusal may be found in the case of *In re Hotel Raleigh*, 207 N. C. 521, 528-529, 177 S. E. 648, 652 (1935), where, in a proceeding under statute for the appointment of a receiver, the court said, "We do not hold that, in a proper case, the superior court of this state, in the exercise of its equitable jurisdiction, is without power to appoint a receiver of a corporation, whose business has been improperly conducted, with resulting loss to its creditors or stockholders, because of irreconcilable dissensions among its stockholders or directors. . . . We hold only that, in the summary proceeding provided by C. S. §1177, the judge of the superior court is without such power."

plaintiff discovered that the vault, during a very rainy spell of weather, had risen about six inches above the ground level, and mud had permeated the tomb. Plaintiff brought suit to recover damages for mental anguish caused by defendants' failure to bury her husband properly. The trial judge instructed the jury, in part, that plaintiff's alleged injuries to be actionable must have resulted from "unlawful, willful negligence and carelessness" of defendants. The North Carolina Supreme Court reversed, holding the case to be essentially an action for damages for breach of contract in which a recovery for mental anguish might be had without a showing of willful negligence.<sup>1</sup>

It is often stated as a general rule that, in actions for breach of contract, damages for mental suffering are not recoverable. In a majority of the jurisdictions, action for breach of contract to marry are repeatedly cited as the one exception to this general rule.<sup>2</sup> Following the majority rule, the Indiana Court,<sup>3</sup> in an action similar to the principal case, held that an action could not be maintained for mental anguish suffered because of defendant undertaker's breach of contract in failing to have a photograph made of plaintiff's deceased daughter before burial.

Even those jurisdictions which deny compensation for mental suffering resulting from a breach of contract will 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 a guest.<sup>4</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 in contract. These same jurisdictions also allow recovery of mental anguish damages against the proprietor of a public resort (not a "public calling") for publically ejecting a patron.<sup>5</sup> It seems that the prospects of recovery for mental anguish in these cases vary in direct proportion to the number of people who would probably be witnesses to the ejection.

<sup>1</sup> *Lamm v. Shingleton*, 231 N. C. 10, 55 S. E. 2d 810 (1949).

<sup>2</sup> Many of the pertinent cases are reviewed in *Western Union Telegraph Co. v. Choteau*, 28 Okla. 644, 115 Pac. 879 (1911). Also see *McCORMICK, DAMAGES* §145 (1935); *SEDGWICK ON DAMAGES* §45 (9th ed. 1912); *Thrush v. Fullhart*, 230 Fed. 24 (C. C. A. 4th 1915).

<sup>3</sup> *Plummer v. Hollis*, 213 Ind. 43, 11 N. E. 2d 140 (1937).

The principal case cites *Renihan v. Wright*, 125 Ind. 563, 25 N. E. 822 (1890) (breach by undertaker of contract with next of kin to keep safely a corpse until next of kin desired to inter same) as supporting authority. This case, however, was overruled by *Western Union Telegraph Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 54 L. R. A. 846 (1901) which adopted the majority rule.

<sup>4</sup> *Indiana Ry. v. Orr*, 41 Ind. App. 426, 84 N. E. 32 (1907) (conductor gave plaintiff wrong transfer; plaintiff subsequently ejected from another street car of defendant's line); *Frewen v. Page*, 238 Mass. 499, 131 N. E. 475, 17 A. L. R. 134 (1921); *Boyce v. Greeley Square Hotel Co.*, 228 N. Y. 106, 126 N. E. 647 (1920).

<sup>5</sup> *Aaron v. Ward*, 203 N. Y. 351, 96 N. E. 736 (1911) (ejection from a public bath house).

North Carolina and a growing minority of jurisdictions<sup>6</sup> have taken a more liberal view and allow recovery for mental suffering in exceptional cases.

The North Carolina cases involving this question of mental anguish damages seem to be logically divisible into actions *ex contractu* and actions *ex delicto*. In the cases decided prior to the principal case the court made no such division but tended to emphasize the defendant's negligence as the basis for its decisions even though in some instances it was clearly a case of breach of contract.<sup>7</sup> The court, however, in the principal case ruled out the allegation of negligence and based recovery directly on breach of contract.<sup>8</sup>

### ACTIONS EX CONTRACTU

The cases falling within the general category of contracts may be divided into two classes, namely, actions where one of the contracting parties suffers mental anguish as a result of the breach, and actions where a third party beneficiary of the contract suffers mental anguish.

The principal case is representative of the first class, since here the plaintiff was one of the two contracting parties. In contracts which are personal in nature and are such that a breach thereof would naturally cause grief and distress of mind, the court allows recovery.<sup>9</sup> In such case, it is said, the party sought to be charged is presumed to have contracted with reference to the payment of damages of that character in the event such damages should accrue on account of his breach of contract.

Within the second class falls the so-called "telegraph cases" where the telegraph company fails or delays in delivering, or erroneously transmits a message and the recipient, not a party to the contract, as a con-

<sup>6</sup> *Loy v. Reid*, 11 Ala. App. 231, 65 So. 855 (1914) (defendant breached his contract to embalm properly body of plaintiff's child; held, plaintiff entitled to damages for mental anguish suffered because of decomposition of body prior to burial); *Westesen v. Olathe State Bank*, 78 Colo. 217, 240 Pac. 689 (1925) (bank breached contract to furnish plaintiff credit for trip to another state by refusing to honor his checks upon arrival there). See Note, 6 N. C. L. Rev. 322 (1928).  
". . . where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied to the ascertainment of damages flowing from the breach." *Wadsworth v. Western Union Telegraph Co.*, 86 Tenn. 695, 703, 8 S. W. 574, 576 (1888).

<sup>7</sup> ". . . an action may lie either in contract or in tort . . ." *Penn v. Western Union Telegraph Co.*, 159 N. C. 306, 309, 75 S. E. 16, 18 (1912); "It seems to us that this action is in reality in the nature of tort for negligence. . . ." *Young v. Western Union Telegraph Co.*, 107 N. C. 370, 385, 11 S. E. 1044, 1048 (1890).

<sup>8</sup> *Lamm v. Shingleton*, 231 N. C. 10, 13, 55 S. E. 2d 810, 812 (1949).

<sup>9</sup> In *Thomason v. Hackney*, 149 N. C. 298, 74 S. E. 1022 (1912) defendant photographer lost films taken of plaintiff's deceased child. The mother was denied recovery for the resulting anguish. The court, however, based its decision on the fact that the aunt, who delivered the film to defendant, did not inform him that she was acting as agent for the mother. Had this been done it seems clear that recovery would have been allowed.

sequence is subjected to mental anguish.<sup>10</sup> It was this type of action which introduced the first exception to the general rule in actions for breach of contract. The Texas Court, in 1881, allowed recovery for mental suffering in contract actions by awarding damages to a son for mental anguish caused by the failure of the telegraph company to deliver a message announcing the death of his mother, whereby he was prevented from being present at her burial.<sup>11</sup> North Carolina adopted this exception in 1890,<sup>12</sup> and this is still the law as to intrastate messages.<sup>13</sup> If the telegraph message is sent across state lines, the federal rule applies and a claim for damages for mental distress due to the delay cannot be maintained by the person affected even in the courts of a state which allows such damages.<sup>14</sup>

### ACTIONS EX DELICTO

The cases, where no contract is involved but the action sounds in tort only, may be divided into three groups: first, actions where mental pain and suffering results from a willful, wanton, or intentional act; second, actions where there has been a negligent breach of a duty, resulting in physical injury accompanied by mental suffering; and third, actions where there is a negligent breach of a duty resulting in mental anguish only.

In cases where the mental pain was caused intentionally,<sup>15</sup> or in the ordinary personal injury cases where there is a physical injury accompanied by mental suffering, the court has been willing to allow mental anguish damages. Mental disturbance alone, however, where there is

<sup>10</sup> See *Green v. Western Union Telegraph Co.*, 136 N. C. 489, 504, 49 S. E. 165, 171 (1904) for a list of the states affirming and states repudiating the right to recover damages for mental suffering due to negligent delay in the delivery of telegrams.

<sup>11</sup> *So Relle v. Western Union Telegraph Co.*, 55 Tex. 308, 40 Am. Rep. 805 (1881).

<sup>12</sup> *Green v. Western Union Telegraph Co.*, 136 N. C. 489, 49 S. E. 165 (1904) (defendant company late delivering wire informing addressee to meet sender's young daughter upon arrival of her train; no one met her when she arrived after midnight; recovery allowed for mental suffering and fright upon finding herself alone and unprotected at such a late hour in a strange city despite fact that no actual harm befell her); *Young v. Western Union Telegraph Co.*, 107 N. C. 370, 11 S. E. 1044 (1890); *Thompson v. Western Union Telegraph Co.*, 107 N. C. 449, 12 S. E. 427 (1890).

<sup>13</sup> *Russ v. Western Union Telegraph Co.*, 222 N. C. 504, 23 S. E. 2d 681 (1943).

<sup>14</sup> *Western Union Telegraph Co. v. Speight*, 254 U. S. 17, reversing 178 N. C. 146, 100 S. E. 351 (1919) (death message sent from point in North Carolina and directed to another point in North Carolina, but routed by defendant through an out of state office; held, interstate message, no recovery for mental anguish).

<sup>15</sup> It seems the trial judge attempted to place the principal case in this group since he charged the jury, in part, that plaintiff's alleged injuries to be actionable must have resulted from "unlawful, willful negligence and carelessness" of defendants. *Lamm v. Shingleton*, 231 N. C. 10, 13, 55 S. E. 2d 810, 812 (1949); *Kirby v. Jules Chain Stores Corp.*, 210 N. C. 808, 188 S. E. 625 (1936) (defendant called plaintiff a deadbeat and yelled threats of arrest from an automobile causing plaintiff to have miscarriage). See Note, 18 N. C. L. Rev. 71 (1939).

no showing of impairment of health or loss of bodily power,<sup>16</sup> cannot serve as a basis for recovery.<sup>17</sup>

The premises upon which recovery is denied where the physical injury is lacking are (1) the difficulty of measurement, and (2) the danger of fraudulent claims. The first objection is of doubtful validity since the measurement of mental anguish alone is no more difficult than its measurement accompanied by a physical injury. The second objection is also vulnerable. Courts should not refuse to hear and decide the merits of just claims merely to avoid the possibility of fraudulent ones. To do so is plainly an admission of their inability to detect fraud.<sup>18</sup>

There is one North Carolina case<sup>19</sup> which could be classified as an action *ex contractu* or *ex delicto*, but perhaps better falls within the former category. In this case the plaintiff husband was allowed to recover mental anguish damages sustained while watching his wife suffer as a result of improper care by defendant hospital. Even though the court stressed negligence, the breach of contract to care for the wife properly was lurking in the background and offered a peg upon which the court could hang mental suffering damages.

Thus, the present state of the law seems to be that mental anguish damages are treated as parasitic in nature and can be awarded only in connection with a wrong, such as breach of contract or a negligent act resulting in physical injuries, which apart from such mental suffering constitutes a cause of action. Even if it were necessary to have such a peg on which to hang recovery, it appears that the negligent breach of duty without the physical injury would be substantial enough. This is especially true in view of the fact that a technical breach of contract was sufficient in the principal case.

The principal case represents an addition to the growing list of exceptions to the general rule disallowing recovery for mental anguish in

<sup>16</sup> See "While fright and nervousness alone, unaccompanied or followed by physical injury, do not constitute an element of damages, if this fright and nervousness is a natural and direct result of the negligent act of the defendant and naturally and directly causes an impairment of health or loss of bodily power, then this would constitute an element of injury to be considered by the jury." *Sparks v. Tenn. Mineral Products Corp.*, 212 N. C. 211, 213, 193 S. E. 31, 33 (1937).

<sup>17</sup> *Helmstetler v. Duke Power Co.*, 224 N. C. 821, 32 S. E. 2d 611 (1945); "It may be admitted that mental anguish, suffered in connection with a wrong which, apart from such mental pain, constitutes a cause of action, may be a proper element of compensatory damages. But the general rule is that mental suffering, unrelated to any other cause of action, is not alone a sufficient basis for the recovery of substantial damages." *Hinnant v. Tidewater Power Co.*, 189 N. C. 120, 128, 126 S. E. 307, 312 (1925).

<sup>18</sup> See Goodrich, *Emotional Disturbance as Legal Damage* 20 MICH. L. REV. 497, 505 (1922) where it is contended: "... skilled medical men have developed a technique for distinguishing the real sufferer from the fraudulent imposter."

<sup>19</sup> *Bailey v. Long*, 172 N. C. 661, 90 S. E. 809 (1916); *But cf. Benevolent Association v. Neal*, 194 N. C. 401, 139 S. E. 841 (1927) where a mother was refused mental anguish damages resulting from alleged malpractice of defendant on her son, the court held such damages to be too speculative and remote.

breach of contract actions. As in the case of any new development in the law, the process is one of slow and cautious growth, but at some future time the "general rule" may be swallowed up by the exceptions and the exceptions may become the rule.

CHARLES E. KNOX.

### Domestic Relations—Custody of Child— Rights of Natural Parent

One of the greatest responsibilities that can be placed upon a court is that of determining the proper custodian of a child. This is not a field of the law suited to the application of fixed rules or maxims, but rather one in which the courts should carefully weigh all the individual and social interests involved. These include the ultimate welfare of the child, the natural emotions of the parent and the interest of the state.<sup>1</sup>

The North Carolina Supreme Court in the recent case of *In re Cranford*<sup>2</sup> appears to have reached its decision without giving careful thought to all the individual and social interests involved. In that case, a habeas corpus proceeding was instituted by the mother of an illegitimate child to regain the child's custody from the mother's aunt. The lower court found that shortly after the birth of the child, the mother and the child went to the home of the mother's aunt and remained there until the mother's subsequent marriage to a person not the father of the child; that the mother then established residence elsewhere, abandoning the child by surrendering it to the unqualified custody of the aunt and asserting that she would make no further claim to it. It was further found that the aunt was a fit person to have the custody of the child and that her home was a proper place to rear it; and that the mother of the child was a woman of good character and that her home was a proper place for the child to visit. Upon these findings the lower court awarded the custody and control of the child to the aunt, allowing the mother to visit the child at stated periods.

The Supreme Court on appeal reversed on the grounds that they were not bound by the lower court's finding that there was an abandonment by the mother, and that the natural parent, unless shown to be unfit, has a legal right to the possession of the child.

One wonders what effect this and like decisions<sup>3</sup> will have on the willingness of persons to take helpless children into their homes in the

<sup>1</sup> See *Commonwealth v. Lindsay*, 156 Pa. Super. 560, 562, 40 A. 2d 881, 882 (1944) ("Lacking prescience, the choice is always difficult"); *Commonwealth v. Shannon*, 107 Pa. Super. 557, 164 Atl. 352 (1933).

<sup>2</sup> 231 N. C. 91, 56 S. E. 2d 35 (1949).

<sup>3</sup> In another recent case, *In re Adoption of Doe*, 231 N. C. 1, 56 S. E. 2d 8 (1949), the mother of an illegitimate child consented to its adoption; she married the reputed father; a temporary adoption order was entered; and then the mother revoked her consent. The court held that the child must be returned to the parents