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Damages -- Mental Anguish -- Action Arising Out of Tort

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While North Carolina has followed the general rules that a restriction to "residential purposes only" is not violated by the erection of or conversion into a multi-family house,[19] but that such an erection or conversion does violate a restriction to a "private dwelling" or "single-family house,"[20] our court has not decided the question involved in the principal case.[21] Past decisions indicate, however, that the decision, if and when rendered, would be substantially in accord with that in the instant case.[22] In view of the fact that the modern tendency is not to imply restrictions which might or ought to have been written in by the parties, it is submitted that the view taken in the principal case, although the stricter, is nevertheless the sounder view.[23]

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Damages—Mental Anguish—Action Arising Out of Tort

Recently, the North Carolina Supreme Court upheld a lower court decision that damages could be recovered for mental anguish resulting from the unauthorized removal of flowers from the grave of a deceased spouse. The court, in rendering its decision, held that the plaintiff could recover damages for the mental anguish endured by him as a result of the trespass to his burial lot regardless of whether or not he suffered physical injury.[1]

[19] De Laney v. Van Ness, 193 N. C. 721, 138 S. E. 28 (1927).

[20] East Side Builders v. Brown, 234 N. C. 517, 67 S. E. 2d 489 (1951).

[21] This question appeared, however, in East Side Builders v. Brown, 234 N. C. 517, 67 S. E. 2d 489 (1951), where the restriction was to "single-family residences." It was not answered, however, the case being reversed on other grounds. It has not been retried, pending the decision in Huffman v. Johnson, 236 N. C. 225 (1952). This latter case has recently been decided in favor of the free use of the land. It adds little to the law, and is distinguishable from the principal case and from East Side Builders v. Brown, *supra*, in that there was no allegation or proof of the installation of a second kitchen and the formation of a separate apartment, or that a separate apartment was in fact rented.

[22] The North Carolina view is that the covenant must be strictly construed, Starmont Co. v. Greensboro Memorial Park, 233 N. C. 613, 65 S. E. 2d 134 (1951), in favor of the free use of the land, Davis v. Robinson, 189 N. C. 589, 127 S. E. 697 (1925); and that restrictions should be created in plain and explicit terms, Ivey v. Blythe, 193 N. C. 705, 138 S. E. 2 (1927). A restriction to "residence" or "residential purposes" will not prohibit the erection of a multi-family house, De Laney v. Van Ness, 193 N. C. 721, 138 S. E. 28 (1927). A residence occupied by four families is no less a residential building. That it is intended to accommodate more than one family does not ipso facto bring it within what is forbidden. Charlotte Consol. Construction Co. v. Cobb, 195 N. C. 690, 143 S. E. 522 (1928). But see Bailey v. Jackson-Campbell Co., 191 N. C. 61, 131 S. E. 567 (1926) where the court held that an apartment house is not a "residence" within a covenant providing that "not more than one residence shall be built."

[23] It is suggested that if the intent of the parties is to restrict the property to single-family use only, the covenant should read: "Said property is restricted to the erection and maintenance of a single-family type residence, with the understanding said residence shall not be used by more than a single family." This or similarly worded restrictions leave no doubt as to the intent of the parties.

[1] Matthews v. Forrest, 235 N. C. 281, 69 S. E. 2d 553 (1952).

Actions to recover damages for mental anguish are based upon one of two causes of actions—ex contractu or ex delicto.[2] The general rule in the breach of contract cases is that no recovery will be allowed for mental anguish arising out of a breach of contract. The courts have established certain exceptions to this general rule most important of which are: the breach of marriage contract cases;[3] decisions involving indignities to passengers of common carriers,[4] and guests of modern day innkeepers;[5] and the "telegraph cases,"[6] where substantial recoveries for mental disturbance caused by the company's failure or negligent delay in delivery of intrastate messages.[7]

North Carolina and a few other jurisdictions have added another recent exception to the contract rule in the burial cases where plaintiffs are allowed to recover for mental anguish alone arising out of a breach of a burial contract by a defendant undertaker.[8] The limitation placed on such recoveries is that the parties must have reasonably anticipated that mental anguish would follow the breach.

The tort cases involving recovery of damages for mental anguish may be divided into actions arising out of intentional torts and those

[2] The North Carolina court made no distinction between the two types of actions prior to the decision of Lamm v. Shingleton, 231 N. C. 10, 55 S. E. 2d 810 (1949). Here they discarded the *ex delicto* cause and based their decision on the *ex contractu* cause of action. See 28 N. C. LAW REV. 318 (1950).

[3] Thrush v. Fullhart, 230 Fed. 24 (4th Cir. 1915); Benson v. Williams, 239 Iowa 742, 32 N. W. 2d 813 (1948); see MCCORMICK, DAMAGES § 145 (1935); 25 C. J. S. Damages § 64 (1941).

[4] Rydberg v. Mitchell, 87 F. Supp. 640 (1949); Southeastern Greyhound Corp. v. Graham, 69 Ga. App. 621, 26 S. E. 2d 371 (1943); Hardwick v. Southeastern Greyhound Lines, 306 Ky. 579, 208 S. W. 2d 733 (1948); Braswell v. Stokes, 191 S. C. 482, 53 S. E. 2d 173 (1939); *cf* Gulf Mobile and Northern R. R. Co. v. Thornberry, 185 Miss. 576, 188 So. 545 (1939).

[5] Milner Hotels, Inc. v. Brent, 207 Miss. 892, 43 So. 2d 654 (1949); Milner Hotels, Inc. v. Dougherty, 195 Miss. 718, 15 So. 2d 358 (1943); Kirstein v. Hotel Taft Corp., 183 Misc. 713, 51 N. Y. S. 2d 162 (Sup. Ct. 1944) *aff'd* 269 App. Div. 683, 54 N. Y. S. 2d 376 (1945) (held no cause of action set out for husband as he was not a guest of hotel); Boyce v. Greely Square Hotel Co., 181 App. Div. 61, 168 N. Y. S. 191 (1917) *aff'd* 228 N. Y. 106, 126 N. E. 647 (1920) (recovery allowed for mental anguish where husband had permission to visit room in which wife was registered and house detective demanded entrance at night while husband was present with wife and said, "You are using this place for a whore house!").

[6] Usually the messages involved relate news of serious illness or death of relatives although recoveries have been allowed in other situations. Russ v. Western Union Telegraph Co., 222 N. C. 504, 23 S. E. 2d 681 (1943); Green v. Western Union Telegraph Co., 136 N. C. 489, 49 S. E. 165 (1904) (decision cites holdings of states where recoveries are allowed for mental anguish and those where such recoveries are denied). See 79 C. J. S. Telegraphs and Telephones §§ 236, 245, 251 (1941).

[7] Western Union Telegraph Co. v. Speight, 254 U. S. 17, *reversing* 178 N. C. 146, 100 S. E. 351 (1919) (federal rule applies if message is sent across state lines and no action may be maintained on a claim for mental anguish even in the state where such damages are allowed).

[8] Chelini v. Nieri, 32 Cal. 2d 480, 196 P. 2d 915 (1948); Lamm v. Shingleton, 231 N. C. 10, 55 S. E. 2d 810 (1949). *Cf* Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941).

arising out of negligent torts. The common law and majority view today is that there can be no recovery for mental anguish unless it can be brought into the scope of some recognized tort.[9] Mental anguish, as an element of damages, has been liberally allowed from the beginning in actions for intentional torts such as assault, battery, false imprisonment, malicious prosecution, and seduction.[10] The general rule in the negligence cases is that damages for mental anguish are never allowed unless there is resulting physical injury.[11] A line of modern cases, however, has held defendants responsible for the intentional infliction of serious emotional distress even though no independent cause of action is stated and no physical injury accompanied the mental suffering alleged to have been experienced.[12] It must be pointed out that included as intentional acts are those acts which the defendant knows or should know will result in mental anguish to the plaintiff.

In deciding the instant case, the court seems to be following the old rule of finding an independent cause of action (the trespass to the burial lot) upon which to rest the mental anguish damages. Similarly, in the contract case of *Lamm v. Shingleton*,[13] the foundation of the action was the technical breach of contract. In both of these cases, it is evident that the plaintiffs are not interested in the nominal damages due them for the trespass or for the technical breach but are looking for the substantial damages caused by their mental suffering.

As far back as 1891, a Minnesota court refuted the technical cause of action theory and stated that the substantial wrong was the indignity to the dead and not the technical trespass or breach of contract.[14]

[9] Larson v. Chase, 47 Minn. 307, 50 N. W. 238 (1891); Bouillon v. Laclede Gaslight Co., 148 Mo. App. 462, 463, 129 S. W. 401, 402 (1910): "The doctrine is that though a mere mental distrubance of itself may not be a cause of action in the first instance, fright and mental anguish are competent elements of damage if they arise out of a trespass upon the plaintiff's person or possession . . . ".

[10] Gadsden General Hosp. v. Hamilton, 212 Ala. 531, 103 So. 553 (1925) (false imprisonment); McVay v. Carpe, 29 N. W. 2d 582 (Iowa 1947) (false imprisonment); Anthony v. Norton, 60 Kan. 341, 56 Pac. 529 (1899) (seduction); Price v. Minnesota, D. & W. R. R., 130 Minn. 229, 153 N. W. 532 (1915) (malicious prosecution); Trogden v. Terry, 172 N. C. 540, 90 S. E. 583 (1916) (assault); Geissler v. Geissler, 96 Wash. 150, 164 Pac. 746 (1917) (battery).

[11] Erwin v. Milligan, 188 Ark. 658, 67 S. W. 2d 592 (1934); Kirksey v. Jerrigan, 45 So. 2d 188 (Fla. 1950); Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941); Manger v. Gordon, 22 Ohio Ops. 436, 70 Ohio Supp. 98 (1941).

[12] Clark v. Associated Retail Credit Men, 70 (App. D. C.) 183, 105 F. 2d 62 (1939); Herman Saks & Sons v. Ivey, 26 Ala. App. 240, 157 So. 265 (1934); State Rubbish Collectors Assn. v. Siliznoff, 240 P. 2d 282 (Cal. 1952); Bowden v. Spiegel, Inc., 96 Cal. App. 2d 313, 216 P. 2d 571 (1950); Emden v. Vitz, 88 Cal. App. 2d 313, 198 P. 2d 696 (1948); LaSalle Extension University v. Fogerty, 126 Neb. 451, 253 N. W. 424 (1934); Kirby v. Jules Chain Stores Corp., 210 N. C. 808, 188 S. E. 625 (1936). See RESTATEMENT, TORTS § 46 (1948 Supp.).

[13] 231 N. C. 10, 55 S. E. 2d 810 (1949).

[14] In Larsen v. Chase, 47 Minn. 307, 311, 50 N. W. 238, 239 (1891) in rendering its decision the court stated, " . . . it would be a reproach to the law if the plaintiff's right to recover for mental anguish . . . should be made

Wording of the decision in *Matthews v. Forrest*[15] indicates that the court felt that redress should be granted for mental suffering which is certain to follow from the desecration of a grave in plaintiff's burial lot.[16] Thus, with the law remaining as it is today, a daughter would be unable to recover damages actually endured for mental anguish arising out of an indignity to the deceased mother, because her brother, and not she, owned the plot in which the mother was interred.

To overcome inequities such as this, it is submitted that courts forget the requirement of a technical tort and recognize mental anguish as a separate and independent cause of action, where it is serious and intentionally inflicted.

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Eminent Domain—Violation of Restrictive Covenants Necessity of Compensation

In the recent case of *City of Raleigh v. Edwards*[1] the city instituted special proceedings to condemn certain lots for the erection of a water storage tank. Intervening as omitted claimants, the owners of adjacent lots sought compensation on the ground that the contemplated use by the city was in violation of covenants restricting the use of the property in that area to private dwelling purposes only. Considering this problem for the first time, the North Carolina Supreme Court held that such building restrictions created a vested interest in land in the nature of a negative easement on each lot for the benefit of, and appurtenant to, each other lot in the restricted area.[2] The court allowed compensa-

to depend upon whether in committing the act the defendant also committed a technical trespass upon the plaintiff's premises, while everybody's common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead."

[15] 235 N. C. 281, 69 S. E. 2d 553 (1952).

[16] *Id.* at 285, 69 S. E. 2d at 557. "The law must heed the realities of life if it is to fulfill its function. As Justice Barnhill so well said in his able opinion in *Lamm v. Shingleton*, 231 N. C. 10, 55 S. E. 2d 810, 'the tenderest feelings of the human heart center around the remains of the dead.' In recognition of this reality we hold compensatory damages may be awarded to a plaintiff for mental suffering actually endured by him as the natural and probable consequence of a trespass to his burial lot, even though his mental suffering may not be accompanied by physical injury."

[1] 235 N. C. 671, 71 S. E. 396 (1952).

[2] North Carolina has generally adhered to the principle that equitable easements are a property right. Vernon v. Realty Co., 226 N. C. 58, 36 S. E. 2d 710 (1946) (A restrictive covenant is contractual in nature and creates incorporeal property right); Turner v. Glenn, 222 N. C. 620, 18 S. E. 2d 197 (1942) (Restrictive covenant creates an interest in land which is within the Statute of Frauds); Pepper v. West End Development Co., 211 N. C. 166, 189 S. E. 628 (1937); Moore v. Shore, 208 N. C. 446, 181 S. E. 275 (1935); Moore v. Shore, 206 N. C. 699, 175 S. E. 117 (1934); Davis v. Robinson, 189 N. C. 589, 27 S. E. 697 (1925) (Building restriction creates negative easement which being an interest in land comes within the Statute of Frauds). *But see* St.