UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 49 | Number 1 Article 24

12-1-1970

Torts -- Mental Distress Damages for Racial Discrimination

Coy E. Brewer Jr.

The shareholder need not show a financial injury to maintain his cause of action, for such a requirement would frustrate the enforcement of the proxy solicitation rules.[35] Moreover, the two anti-fraud provisions of the Securities Act usually lend support to one another as the shareholder is increasingly given more protection. An unfortunate consequence of the judiciary's continued support of minority shareholders is evidenced by the power that they possess to control the outcome of corporate activities. Indeed, the day looms near when a corporation may stand at the mercy of one insignificant, discontented shareholder.[36] The corporate merger has become at best a tenuous relationship. As a matter of public policy, perhaps some degree of protection should be given a corporate merger already consummated.[37] Indeed, the judiciary should possibly reconsider their interpretation of the Securities Act.

E. L. KITTRELL SMITH

. . .

Torts—Mental Distress Damages for Racial Discrimination

In *Massachusetts Commission Against Discrimination v. Franzaroli*[1] the Commission Against Discrimination[2] found that Mandred Henry, a Negro, had been denied an apartment by the defendants solely because of his race. The commission ordered cessation of defendants' discriminatory rental practices[3] and awarded Henry compensation for his increased ex-

1970), was whether materiality should be determined by the jury or by the court. It was held that when reasonable minds could not differ, the question of materiality could be decided by the court. Although the judiciary has traditionally used this standard to withhold issues from the jury, it would appear that the jury is especially suited to determine whether a reasonable man would or would not have been misled. Indeed, when a merger may stand or fall on such a fine distinction as the materiality of information contained in a footnote of a solicitation, perhaps the question of materiality should always be for the jury.

[35] *Id.* at 1033.

[36] Perhaps the individual minority shareholder is not so powerful. In Rekant v. Dresser, 425 F.2d 869, 876 n.7 (5th Cir. 1970), the court noted that although the individual shareholder has a powerful weapon in section 10(b), he occupies a fiduciary relationship with other shareholders as a consequence of his bringing suit. This same fiduciary capacity is presumably shared by the plaintiff-shareholder in a suit under section 14(a).

[37] *See generally* 2 Loss 956-71.

[1] — Mass. —, 256 N.E.2d 311 (1970).

[2] See MASS. ANN. LAWS ch. 152B, §§ 1-10 (1957), which outlines the powers and duties of the anti-discrimination commission.

[3] *Id.* ch. 151B, § 4 (1946), which prohibits discrimination in apartment rental.

pense in commuting to work, his loss of time and his mental suffering.[4] The Massachusetts Supreme Court upheld the commission's order.[5] The compensation to Mr. Henry for his "considerable frustration, anger, and humiliation"[6] is particularly noteworthy. Mental distress is often the predominant and sometimes the only injury in discrimination cases,[7] and increased potential for redress of that injury must necessarily affect the nature and attractiveness of this type of litigation.

Compensation for mental distress in discrimination cases has been rare,[8] and has usually been based upon statute.[9] *Franzaroli* is, to a certain extent, in accord with this norm. The Massachusetts statute prohibiting discrimination in apartment leasing authorizes an award of

> damages not to exceed one thousand dollars, which damages shall include, *but shall not be limited to,* the expense incurred by the petitioner for obtaining alternative housing or space, for storage of goods and effects, for moving and for other cost actually incurred by him as a result of such unlawful practice or violation. . . .[10]

Since the statute does not specifically provide for compensation for mental distress, the commission's award of such damages may provide precedent for mental distress damages under similar statutes in other states.[11]

The Massachusetts Supreme Court could have concentrated its attention solely upon the statute and attempted to resolve its neutrality by an exercise in statutory interpretation.[12] However, the court buttressed its decision by resorting to common law precedent,[13] thereby broadening

[4] *Id.* ch. 151B, § 5 (Supp. Vol. 4-C, 1965), which provides damages for discrimination in apartment leasing.

[5] The superior court had modified the ruling of the commission by deleting damages. — Mass. —, —, 256 N.E.2d 311, 312 (1970).

[6] *Id.* at —, 256 N.E.2d at 312.

[7] *See* Duda, *Damages for Mental Suffering in Discriminaiton Cases,* 15 CLEV.-MAR. L. REV. 1, 6 (1966).

[8] *Id.* at 3.

[9] *See, e.g.,* Amos v. Prom, Inc., 115 F. Supp. 127 (N.D. Iowa 1953).

[10] MASS. ANN. LAWS ch. 151B, § 5 (Supp. Vol. 4-C, 1965) (emphasis added).

[11] *See* COLO. REV. STAT. § 25-1, -2 (1953); ILL. ANN. STAT. ch. 14, § 9 (1963); MINN. STAT. ANN. § 327.09 (1966); PA. STAT. ANN. tit. 18, § 4654 (1963); WASH. REV. CODE § 9.91.010 (1961).

[12] A tenable argument may be made that the criminal fine provided in MASS. ANN. LAWS ch. 272, § 92 (1934), enforcing the prohibition against discrimination in public accommodations in MASS. ANN. LAWS ch. 272, § 98 (1934), indicates a legislative intent to compensate mental distress. Many of the situations covered by the statute would not involve pecuniary loss for the injured party. See also Crawford v. Robert L. Kent, Inc., 341 Mass. 125, 167 N.E.2d 620 (1960); Bryant v. Rich's Grill, 216 Mass. 344, 103 N.E. 925 (1914).

[13] — Mass. at —, 256 N.E.2d at 313.

the scope and import of *Franzaroli*. Recovery for mental distress has been allowed in Massachusetts as an aspect of "total compensation" in cases involving wrongful eviction,[14] unlawful expulsion from school,[15] and wrongful removal from public office.[16] Arguably, the fact situation in *Franzaroli* is distinguishable since original exclusion from a school, a job, or a home is not as disruptive and harmful as expulsion. Further, *Franzaroli* did not involve an existent contractual relationship, violation of which has been recognized as a basis for mental distress recovery.[17]

Courts have been quite willing to award damages for mental distress when a recognized cause of action is independently established.[18] Since in the fields of housing and public accommodations there is a statutory right to be free from racial discrimination,[19] a violation may establish an independent cause of action of sufficient import to provide a "peg"[20] on which to hang mental distress damages. An analysis of Massachusetts precedent seems to support this conclusion. In *Stiles v. Municipal Council of Lowell*[21] the Massachusetts court implied that a wrongful act—unlawful removal from public office—was actionable as a distinct tort[22] and recognized mental distress as a "natural consequence" of that act.[23] Since both *Franzaroli* and *Stiles* relied upon the same line of precedent[24] to support rewards for mental suffering, *Franzaroli* may reasonably be interpreted to be based upon the theory of recovery established by the language in *Stiles*.

---

[14] Fillebrown v. Hoar, 124 Mass. 580 (1878).

[15] Morrison v. Lawrence, 181 Mass. 127, 63 N.E. 400 (1902).

[16] Stiles v. Municipal Council of Lowell, 233 Mass. 174, 123 N.E. 615 (1919).

[17] Duff v. Engelberg, 237 Cal. App. 2d 594, 47 Cal. Rptr. 114 (1965) (interference with contract); Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957) (breach of contract).

[18] Gadsen Gen. Hosp. v. Hamilton, 212 Ala. 531, 103 So. 553 (1925) (false imprisonment); Trogdon v. Terry, 172 N.C. 540, 90 S.E. 583 (1916) (assault); Draper v. Baker, 61 Wis. 450, 21 N.W. 527 (1884) (battery).

[19] MASS. ANN. LAWS ch. 151B, § 4 (1946) prohibits discrimination in housing; MASS. ANN. LAWS ch. 272, § 98 (1934) prohibits discrimination in public accommodations.

[20] W. PROSSER, LAW OF TORTS 44 (3d ed. 1964).

[21] 233 Mass. 174, 123 N.E. 615 (1919).

[22] *Id.* at 184-85, 123 N.E. at 616.

[23] "The rule is well settled, however, that if the natural consequence of the wrongful act, done wilfully or with gross negligence, is mental suffering to the plaintiff, then that element may be considered in assessing damages." *Id.* at 185, 123 N.E. at 617.

[24] The precedent for each case was Lombard v. Lennox, 155 Mass. 70, 28 N.E. 1125 (1891); Fillebrown v. Hoar, 124 Mass. 580 (1878); Meagher v. Driscoll, 99 Mass. 281 (1868). *See* — Mass. —, —, 256 N.E.2d 311, 313 (1970); 233 Mass. 174, 185, 123 N.E. 615, 617-18 (1919).

A logical and crucial extension of the rationale in *Franzaroli* is the availabilty of damages under the common law tort of intentional infliction of mental distress.[25] When there is no physical impact, manifestation of physical injury, or other actual damages, mental distress as a distinct tort may be the only appropriate cause of action. However, the requirements for recovery for intentional infliction of mental distress are quite rigid. There must be either intentional or reckless disregard for the injured party's sensibilities, and the emotional harm must be severe. The conduct causing the injury must be such as a reasonable man would consider "outrageous."[26] It is doubtful that a single covert act of discrimination unaccompanied by aggravating conduct would be sufficient to meet the "outrageous"[27] or the "severe emotional harm"[28] test.

Nevertheless, in determining liability, all of the circumstances surrounding the alleged injury are important; courts have systematically categorized certain factors and recognized their effect upon recovery.[29] One such factor is the peculiar sensitivity of the plaintiff to emotional harm. Thus in *Nickerson v. Hodges*[30] an elderly woman, once an inmate in a mental hospital, was made the subject of a practical joke. The court, despite the absence of physical injury, allowed recovery because her age and state of mind made her vulnerable to the humiliation. Another line of cases[31] involving pregnant women and persons in poor health is analytically in accord with the rationale of *Hodges*. Although a factual

[25] *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965); *see also* State Rubbish Collection Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952); Great A & P Tea Co. v. Roch, 160 Md. 189, 153 A. 22 (1931); Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926).

[26] RESTATEMENT (SECOND) OF TORTS § 46 (1965).

[27] *But cf.* Holland v. Edwards, 307 N.Y. 38, 119 N.E.2d 581 (1954), in which Justice Fuld provides a reminder that when a man practices discrimination it is likely that "he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive . . . ." *Id.* at 45, 119 N.E.2d at 584.

[28] *But see* Colley, *Civil Action for Damages Arising out of Violations of Civil Rights*, 17 HAST. L.J. 189 (1965), for a contention that racial discrimination is "devastating and enduring when inflicted upon adults." *Id.* at 201.

[29] *E.g.*, Blecker v. Colo. & S.R.R., 50 Colo. 140, 114 P. 481 (1911) (relationship between common carriers and their passengers); De Wolf v. Ford, 193 N.Y. 397, 86 N.E. 527 (1908) (relationship between innkeepers and their guests).

[30] 146 La. 735, 84 So. 37 (1920).

[31] Clark v. Associated Retail Credit Men, 105 F.2d 62 (D.C. Cir. 1939); Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Patapasco Loan Co. v. Hobbs, 129 Md. 9, 98 A. 239 (1916); Continental Casualty Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935); National Life & Acc. Ins. Co. v. Anderson, 187 Okla. 180, 102 P.2d 141 (1940); Pacific Mut. Ins. Co. v. Tetirick, 185 Okla. 37, 89 P.2d 774 (1938). *Contra*, Bartow v. Smith, 149 Ohio St. 301, 78 N.E.2d 735 (1948).

distinction is possible since the emotional harm in each case had physical manifestations, no liability would have arisen except for the special condition of the plaintiffs.

Recognition of peculiar sensitivity to emotional harm seems particularly pertinent to instances of racial discrimination, and there is some precedent that applies this view. In a federal case,[32] involving a Negro woman who was required to move from a reserved seat to an "all colored" section of a train, the court alluded to the woman's particular vulnerability to embarassment. The court referred to the woman as a lady of "refinement"[33] which might, in part, explain her vulnerability in non-racial terms.[34] However, implicit in the case is that the inferior status connoted by defendant's action could have had an impact only upon the sensibilities of a Negro.

Of even more significance is *Alcorn v. Anbro Engineering, Inc.*,[35] a recent California case in which a Negro truck driver was subjected to abusive insults and racial slurs by his employer. The court recognized the special vulnerability of a Negro as a definite factor to be considered in determining whether the defendant's conduct was actionable.[36] *Alcorn*, of course, involved more blatant behavior than was present in *Franzaroli*. Furthermore, the plaintiff in *Alcorn* suffered physical manifestations of his emotional harm. The California court decided that the complaint was sufficient to withstand a demurrer,[37] but was inconclusive on whether less culpable behavior would have been actionable. However, the court did indicate that the presence of physical injury was not essential to recovery.[38] Since the California extension of peculiar susceptibility to persons exposed to racial discrimination is rationally sound, the decision may presage its general recognition in discrimination cases.

One problem inherent in the application of the peculiar susceptibility theory is whether it should be a factor considered in all mental distress cases involving racial minorities, or whether each case must be considered

[32] Solomon v. Pennsylvania R.R., 96 F. Supp. 709 (S.D.N.Y. 1951)

[33] *Id.* at 710.

[34] The recovery for mental distress may be also rationalized on the basis of the special obligation which a common carrier owes a passenger. *E.g.*, Wolfe v. Georgia Ry. & Elec. Co., 2 Ga. App. 499, 58 S.E. 899 (1907); Haile v. New Orleans Ry. & Light Co., 135 La. 230, 65 So. 225 (1914); Gillespie v. Brooklyn Heights R.R., 178 N.Y. 347, 70 N.E. 857 (1904).

[35] 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970).

[36] *Id.* at —, 468 P.2d at 218-19, 86 Cal. Rptr. at 90-91.

[37] *Id.*

[38] *Id.* at —, 468 P.2d at 218, 86 Cal. Rptr. at 90.

individually to determine if the particular plaintiff is, in fact, peculiarly susceptible. The California court in *Alcorn* intimated that the peculiar susceptibility of a particular plaintiff is a determination to be entrusted to the trier of fact in the individual case.[39]

The doctrine of peculiar susceptibility serves two functions in cases involving intentional infliction of mental distress. In determining whether conduct is "outrageous," defendant's conscious disregard of uniquely vulnerable sensibilities of a class is one of the factors to be considered.[40] In this respect, the actual susceptibility of the individual plaintiff is not crucial. For example, subjecting a pregnant woman to a cruel practical joke is made more culpable because of the woman's condition, irregardless of the particular woman's actual vulnerability. If a class is generally susceptible to a certain type of emotional harm, conduct calculated to cause that harm is no less blameworthy because the individual plaintiff fortuitously does not share the general vulnerability.

On the other hand, the second purpose of the peculiar susceptibility doctrine does depend upon its applicability to the particular plaintiff. The unusual vulnerability of an individual to a certain type of emotional injury gives assurance of the truthfulness of an allegation of mental distress.[41] For the assurance to be meaningful the actual susceptibility of the plaintiff must be established. This may be accomplished in the racial discrimination context, for example, by offering evidence that the plaintiff has always been sensitive to racial insults. Such evidence is not essential, though, since the fact that the plaintiff is a Negro is itself evidence of the likelihood of his susceptibility. Still, the trier of fact must decide, based upon the class's vulnerability or specific evidence, whether the plaintiff was actually susceptible.

It is enlightening at this point to probe into the justifications for the stringent requirements for mental distress damages within the racial discrimination context. Strict criteria are necessary, for there is a real danger that mental distress litigation could degenerate into the realm of the trivial, involving the judicial process in attempts to redress petty annoyances.[42] Insistence upon "outrageousness" mitigates against this

[39] *Id.* at — n.4, 468 P.2d at 219 n.4, 86 Cal. Rptr. at 91 n.4.
[40] RESTATEMENT (SECOND) OF TORTS § 46, comment f (1965).
[41] *Id.*, comment j.
[42] "Adoption of the suggested principle would open up a wide vista of litigation in the field of bad manners, where relatively minor annoyances had better be dealt with by instruments of social control other than the law." Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

eventuality.[43] Conversely, racial discrimination in housing and public accommodations results in unreasonable denial of access to essential services. Legislatures, both state and federal, have responded to the critical nature of this denial by enacting a myriad of civil rights laws[44] reflecting society's belief that precluding a man, on the basis of his race, from obtaining housing for his family is a matter of grave concern. Likewise, the mental distress caused by this discrimination is not the product of a petty annoyance.

The alleged vagueness and the speculative nature of mental distress damages have caused courts considerable apprehension.[45] By setting up a very rigid standard, liability is limited to injurious behavior of exceptional gravity, thereby minimizing the danger of fictitious claims.[46] However, the intense statutory prohibition on discrimination can reasonably be interpreted as legislative recognition that acts of discrimination are harmful; since implicit in an act of discrimination is a connotation of inferiority, much of that harm must be emotional. The studies of social scientists have underscored the devastating effects of discrimination; exemplary is the statement:

> Self-hatred and feelings of inferiority are not, of course, rational or effective responses, but they are among the natural results of the pressures acting upon a minority group. The suffering which discrimination causes . . . "may be aggravated by consciousness of incurability and even blameworthiness, a self-reproaching which tends to leave the individual still more aware of his loneliness and unwantedness . . . . The dominant sociopsychological pressure of color prejudice seems to produce a collapsing effect upon the individual's self-respect—to render him ashamed of his existence."[47]

In fact, the United States Supreme Court in *Brown v. Board of Education*[48] recognized and articulated the emotional harm resulting from discrimination.[49] It is, then, incongruous to have broadly based recog-

[43] Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 44 (1956) [hereinafter cited as Prosser].

[44] *See* J. GREENBERG, RACE RELATIONS AND AMERICAN LAW, 372-400 (1959).

[45] "Such injuries are generally more sentimental than substantial." Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 721, 8 S.W. 574, 582 (1888) (dissenting opinion). *See also* Harned v. E-Z Finance Co., 151 Tex. 641, 649-50, 254 S.W.2d 81, 86-87.

[46] Prosser, *supra* note 43, at 44-45.

[47] G. SIMPSON & J. YINGER, RACIAL AND CULTURAL MINORITIES 217 (1958).

[48] 347 U.S. 483 (1954).

[49] Chief Justice Warren writing for the Court stated that segregation "generates

nition, including legislative and judicial notice, of the mental suffering caused by discrimination and still preclude recovery for fear that the alleged harm is fictitious.

The final concern that must be considered is the possibility of an unhealthy flood of litigation resulting from the recognition of a new interest.[50] A finding of fact that racial discrimination has been practiced is a condition precedent to recovery for mental distress. Special judicial machinery has already been established in many states to handle this litigation.[51] Furthermore, a recent federal case[52] indicates that damages in discrimination cases do not require a jury trial; mental distress damages could therefore be awarded by anti-discrimination commissions. Such procedure would place no additional burden upon the courts.

The tort of intentional infliction of mental distress has been carefully and perhaps prudently circumscribed by the courts. Within the context of racial discrimination in housing and public accommodations, however, the rationale behind the strict limitations does not retain validity. Given this invalidity, a new, more liberal standard should be applied in mental distress cases in this area. Further, given the appropriateness of the peculiar susceptibility theory established by *Alcorn*, recovery for mental distress may be available under the traditional criteria. Finally, *Franzaroli* provides a rationale for recovery for mental suffering based upon the independently actionable nature of racial discrimination. On at least one of these theories, the genuine emotional suffering engendered by discriminatory exclusion from essential services should be compensated.

COY E. BREWER, JR.

---

a feeling of inferiority as to [Negro school children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494.

[50] *E.g.*, Simone v. Rhode Island Co., 28 R.I. 186, 192, 66 A. 202, 204-05 (1907).

[51] For reference to states having commissions against discrimination see J. GREENBERG, RACE RELATIONS AND AMERICAN LAW 384-85 (1959).

[52] Rogers v. Loether, 312 F. Supp. 1008 (E.D. Wis. 1970); however, this case represents a significant break with substantial precedent. *See* Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). Consequently, the validity of the case as precedent may be questioned.