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# THE LOSS OF PUBLICITY AS AN ELEMENT OF DAMAGES FOR BREACH OF CONTRACT TO EMPLOY AN ENTERTAINER

NEIL A. SHANZER\*

## I. INTRODUCTION

The question whether to allow damages for loss of publicity to an entertainer, whose contract to perform has been wrongfully breached, presents a situation in which various well defined rules of law meet head on in what appears to be a hopeless quandry. That the wrongful deprivation of an opportunity to appear before the public causes damage to one whose success is dependent upon such exposure seems too obvious to warrant substantiation.<sup>1</sup> However, American courts, for reasons which shall be discussed later, have yet to accept this "obvious fact," at least to the extent of recognizing a remedy for such a loss.

Analytically, the problem has a dual aspect—first, whether the failure of an employer to allow an entertainer to appear constitutes a breach of the employment contract, and, second, whether, under existing rules relating to damages in contract, substantial pecuniary relief for such a breach can be granted. Determination of the former is dependent upon the existence of a duty to allow such persons to appear, while resolution of the latter encompasses questions of foreseeability and certainty of damage.

For various policy reasons the American and English decisions which have dealt with this question have emphasized different aspects of the problem. In England the established rule is that one who employs an entertainer is duty bound to furnish him with an opportunity to perform. A breach of the employment agreement gives rise to an action on the contract for damages.<sup>2</sup> However, such a rule has yet to emerge from an American court. The apparent reason for this difference is the comparative lack of confidence of American judges in the discretion of juries.<sup>3</sup> Thus, this country requires a more strict showing of certainty of damages than do the English courts.<sup>4</sup> The English judges deal mainly with the "duty to provide work" and "foreseeability of damage" aspects, and discuss problems of certainty of amount under the vague rubric of "remoteness."<sup>5</sup> They further subordinate the question of certainty by treating the measurement of damages as a matter for the jury's discretion and by advising

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1. See *Fechter v. Montgomery*, 55 Eng. Rep. 274 (Rolls Ct. 1863).

2. *Id.* See *Bunning v. Lyric Theatre, Ltd.*, 71 L.T.R. (n.s.) 396 (Ch. 1894); *Marbe v. George Edwardes (Daly's Theatre), Ltd.*, [1928] 1 K.B. 269 (C.A. 1927).

3. C. McCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 26 (1935) [hereinafter cited as *McCORMICK*].

4. *Id.* § 25.

5. See *McCORMICK*, *supra* note 3, at § 25.

rather than directing the jury as to traditional doctrines and standards of damages.<sup>6</sup> Conversely, the few American decisions, for the most part address themselves to the issue of certainty of amount, and completely ignore the other aspects of the situation.

## II. THE PURPOSE OF DAMAGES IN CONTRACT AND THE DUTY TO PROVIDE WORK

The primary aim in measuring damages is compensation.<sup>7</sup> In breach of contract cases, the goal of compensation is not the mere restoration to a former position, as in tort, but the awarding of a sum which is, as nearly as possible, the equivalent of performance of the bargain.<sup>8</sup> Such an award attempts to place the plaintiff in the position he would have been had his contract been fulfilled.<sup>9</sup>

The general measure of damages recoverable by a wrongfully discharged employee—wages due for the unexpired part of the term, plus any unpaid balance due under the contract at the time of the breach, less what the employee could have earned by reasonable effort in similar employment<sup>10</sup>—provides adequate compensation in the normal employment situation. In such cases the anticipated benefits that accrue to the employee are generally limited to the wages stipulated, and the performance of work by the employee is usually regarded as solely for the benefit of the employer.<sup>11</sup> This being the case, the employer can elect to forego the benefit he would derive from the employee's services, decline to provide work, and completely fulfill his obligations by giving the employee the wages due.<sup>12</sup> There being no apparent reason to imply a promise by the employer to provide work and, therefore, no duty to do so, the above mentioned measure of damage parallels performance of the bargain and places the employee in his post-contract position. The employee's rights under the contract are, therefore, adequately protected.

However, there are situations where a wrongfully discharged employee is not adequately compensated by an award of damages measured by the above mentioned general rule—situations where the discharge causes the employee injury over and above the mere loss of money wages. For example, the discharge may cause the employee to lose an opportunity to acquire a valuable reputation. According to Professor Williston,

if in view of usage and the natural understanding of the parties to the agreement, any advantage might be derived by the em-

6. *Id.*

7. *Id.* § 137.

8. *Id.*

9. *Id.*

10. A. CORBIN, *CONTRACTS* § 958 (1951). For an interesting discussion on what constitutes similar employment in cases dealing with public performers, see *Parker v. Twentieth Century-Fox Film Corp.*, 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970), involving the well-known actress Shirley MacLaine.

11. See 9 S. WILLISTON, *CONTRACTS* § 1013 (3rd ed. 1967).

12. 9 S. WILLISTON, *CONTRACTS* § 1013 (3rd ed. 1967).

ployee from the opportunity to exercise his trade or profession, and thereby to increase his skill or improve his acquaintance and connections, and *bring himself to the attention of the public*, the employer is bound to give reasonable opportunity for the performance of the work for which the employee was engaged.<sup>13</sup>

The *Restatement (Second) of Agency* is apparently in accord. Section 433 provides:

A principal does not, by contracting to employ an agent, thereby promise to provide him with an opportunity for work, but the *circumstances* under which the agreement for employment is made or the *nature of the employment* may warrant an inference of such a promise.<sup>14</sup>

By way of further explanation, comment c thereunder provides:

If the agent's compensation is not dependent upon the amount of work done, as where he is to receive a fixed salary, a *promise by the principal to furnish him with work is inferred from a promise to employ* only if it is found that the anticipated benefit to the agent from doing the work is a *material part* of the advantage to be received by him from the employment. This anticipated benefit may be the acquisition of skill or reputation by the employee or the acquisition of *subsidiary pecuniary advantages*, as in the case of the employment of public performers whose reputation will be enhanced by their appearance or diminished by their failure to appear . . . .<sup>15</sup>

This recognition of a duty to provide work on the part of one who employs an entertainer came from a survey of the English cases discussed below.<sup>16</sup>

### III. THE ENGLISH CASES

The duty to furnish an entertainer with an opportunity to perform was established in England in the case of *Fechter v. Montgomery*.<sup>17</sup> The plaintiff-manager of a London theatre brought suit to restrain the defendant-actor from performing other than at his theatre. Although the contract between the parties was silent on the subject, the court, taking cognizance of the position and situation of the parties and the custom in the profession, inferred

13. *Id.* at 42 (emphasis added). Professor Williston continues by noting that this principle has been chiefly applied for the benefit of stage performers.

14. RESTATEMENT (SECOND) OF AGENCY § 433 (1957) (emphasis added). See also *Turner v. Sawdon & Co.* [1901] 2 K.B. 653 (C.A.), where the Court of Appeal held that there was no duty to give work to one employed as a representative salesman.

15. RESTATEMENT (SECOND) OF AGENCY, Explanatory Notes § 433, comment c at 313 (1957) (emphasis added).

16. See 9 S. WILLISTON, CONTRACTS § 1013 nn.3-5 (3rd ed. 1967). See also 5 A. CORBIN, CONTRACTS § 1095 n.53 (1963); 53 AM. JUR. 2d *Master and Servant* § 133 nn.1-2 (1970).

17. 55 Eng. Rep. 274 (Rolls Ct. 1863).

that there was a mutuality in the agreement entered into on both sides, on the one side that he [the defendant-actor] should have an opportunity of displaying what his abilities and talents were before a London audience, and on the other side, that he should not act elsewhere, unless with the permission of the plaintiff.<sup>18</sup>

Noting that the acting profession is peculiar in that an actor's success depends entirely on his pleasing and constantly being before the public, the court recognized the obvious verity that the employment of an actor cannot be compared to that of a clerk or other person similarly situated.<sup>19</sup> Since the plaintiff had failed to allow the defendant to appear on stage for some five months,<sup>20</sup> he was held to have materially breached the contract and was therefore not entitled to the injunction.

The first case in which damages were awarded to an entertainer, whose employer had failed to allow his appearance in public, was *Bunning v. Lyric Theatre Ltd.*<sup>21</sup> The plaintiff had been engaged by the defendants to be the musical director for their theatre. By the terms of the written contract, the plaintiff was to be employed for three years at a weekly salary. The contract further provided that the plaintiff's name was to be advertised in certain daily newspapers and on the bills and programs. After the plaintiff had conducted three compositions at the theatre with complete success, another conductor was brought in to compose and conduct music. Subsequently, although he continued to receive his stipulated salary, the plaintiff was not called upon to perform any of his duties as musical director, including the conducting of the orchestra. In bringing suit, the plaintiff alleged that the contract had been breached in two ways: first, by the failure to advertise his name; and second, by reason of his non-employment as conductor. The court found that the express provision to advertise was clearly breached. And, although there was no express stipulation in the contract to the effect that the plaintiff was to be employed as conductor, the court inferred one from the express provision to advertise the plaintiff's name and held that the defendants had breached the contract in this respect also. Although he was unable to show any direct pecuniary loss, as he had continued to receive his salary, the court was of the opinion that the plaintiff's non-employment was not due to any incapacity or fault on his part, and it held that the plaintiff had a "substantial grievance"<sup>22</sup> and was entitled to more than mere nominal damages.

Unlike the contract in the *Bunning* case, in *Turpin v. Victoria Palace, Ltd.*,<sup>23</sup> the contract between the plaintiff, a music-hall artist, and the defendants, proprietors of the Victoria Palace in London, did not contain

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18. *Id.* at 276.

19. *Id.*

20. The court was of the opinion that five months was a reasonable time for the defendant to have waited before seeking other employment in his profession.

21. 71 L.T.R. (n.s.) 396 (Ch. 1894).

22. *Id.* at 398.

23. [1918] 2 K.B. 539.

a promise on the defendants' part to advertise the plaintiff's name. The plaintiff had been engaged, at a fixed weekly salary, to perform at the Victoria Palace for specified periods during the following four years. Shortly thereafter, the plaintiff, alleging that the defendants had wrongfully repudiated the bargain, brought suit. She sought damages for both loss of salary and for the loss of publicity and advertisement suffered from the defendants' refusal to allow her to appear. Having found no express obligation on the part of the defendants to allow her to perform, the court, being of the opinion that all employment contracts should be treated alike,<sup>24</sup> refused to infer one. Although the court noted that damages for loss of publicity might be allowed in an appropriate case, it said that under the circumstances of this case, and in view of the written contract, such damages were too remote, were outside the business contemplation of the parties and, therefore, were not within the rules laid down in *Hadley v. Baxendale*.<sup>25</sup> Thus, the plaintiff's claim for loss of publicity damages failed.

Several years later, the *Turpin* decision was seriously questioned in *Marbe v. George Edwardes (Daly's Theatre), Ltd.*<sup>26</sup> The defendant company, which was producing a musical play in London, engaged the plaintiff, an American actress of considerable repute in the United States, to play one of the parts. The written contract provided that the plaintiff was "to rehearse and *play* the part of Lolotte in the play called "Yvonne" . . . at such times and at such theatres . . . as the manager [defendants] shall from time to time direct . . ." <sup>27</sup> It also contained a negative covenant whereby the plaintiff was deemed exclusively engaged by the defendants.<sup>28</sup> In consideration for signing this contract, the plaintiff, who came to England seeking to acquire a reputation in London, obtained a promise from the defendants to advertise her name at the head of the cast. The plaintiff's name appeared as promised up to the date of dress rehearsal. Thereafter, the defendants refused to allow her to appear in the play. The plaintiff brought suit claiming that her reputation had been damaged since her name had not appeared as advertised. She also contended that she had suffered serious loss by reason of the defendants' refusal to allow her to appear in the play.<sup>29</sup> Unlike *Bunning v. Lyric Theatre Ltd.*,<sup>30</sup> where the

24. *Id.* at 549.

25. 156 Eng. Rep. 145 (Ex. 1854). This case established the rule that the damages recoverable for a breach of contract are those that may fairly and reasonably be considered as arising naturally (*i.e.*, according to the usual course of things) from the breach of the contract itself, or those as may be reasonably supposed to have been in the contemplation of both parties at the time they entered into the contract as the probable result of its breach. This rule has received widespread acceptance and is adopted by the RESTATEMENT OF CONTRACTS. See RESTATEMENT OF CONTRACTS § 330 (1932).

26. [1928] 1 K.B. 269 (C.A. 1927).

27. *Id.* at 270 (emphasis added).

28. *Id.* at 271.

29. She also claimed damages for a libel contained in a letter. However, since this is beyond the scope of this article, it will not be discussed.

30. 71 L.T.R. (n.s.) 396 (Ch. 1894).

court found it necessary to imply a duty to provide work from a provision in the contract to advertise the plaintiff's name, this court held<sup>31</sup> that such an obligation was express<sup>32</sup> since the contract provided that the plaintiff had been engaged "to rehearse and *play* the part of Lolotte. . . ."<sup>33</sup> As to the clause giving the defendants the right to direct the times and theatres at which the plaintiff was to perform, both Bankes, L.J., and Lawrence, L.J., reasoned that this did not give the defendants the right to say that the plaintiff should not act at all.<sup>34</sup>

The judges were not in unanimity concerning the effect of the collateral agreement to advertise the plaintiff's name. Bankes, L.J., treated it as one of the "special circumstances, well known to the defendants, attending the making of this contract . . . ."<sup>35</sup> In so doing it appears as though he was bringing his holding, *i.e.*, that the plaintiff was entitled to damages for her loss of publicity, within the foreseeability rule regarding contract damages laid down in *Hadley v. Baxendale*.<sup>36</sup> In comparison Atkin, L.J., held that there had been two breaches,<sup>37</sup> one of the primary contract and one of the collateral agreement. He then spoke of the collateral agreement as evidence, under the authority of *Bunning v. Lyric Theatre, Ltd.*,<sup>38</sup> supporting his holding that under the principal contract the parties intended that the plaintiff should in fact *play* the part.<sup>39</sup> Lawrence, L.J., merely stated that there was also "a breach of the collateral agreement; but whether that be so or not, the jury were entitled to award

31. There is no one opinion representing the opinion of the court per se, however, all three justices agreed on this point.

32. *Marbe v. George Edwardes (Daly's Theatre), Ltd.*, [1928] 1 K.B. 269, 279, 287, 290 (C.A. 1927). In so holding, Bankes, L.J., drew the following comparison.

Much has been said about implied terms in theatrical contracts. It seems to me that contracts of employment or engagement—it matters not which word is used—fall into two classes which must be distinguished. There are well known occupations in which when a person is employed or engaged there is no implied agreement that he shall be actually given work to do. A contract of domestic service contains no implied term that the master shall give the servant work to do, or that the servant shall have a cause of action if he is not given enough work. Similarly a doctor or a solicitor may be employed or engaged for a year, but the person who employs is not bound to be ill or to become involved in litigation in order that the other party may have something to do. A retainer, or call upon the services of another, is also an example; it does not imply an undertaking to utilize the services but merely a right to utilize them when necessary or convenient. But there is another class of contracts which is quite different and in which it is not necessary to introduce any implied term; these are contracts of employment to do a particular specified thing. For example, a man may be engaged to come and clean windows on a certain day. If when he comes he is told he is not to do the work, there is a breach of contract. *The engagement of an actress to play a particular part is an instance of this latter class. In my view no question of implied obligation arises here; the obligation is express. The manager who engages an actress to play a particular part and then refuses to allow her to play it commits a breach of contract.*

*Id.* at 278, 279 (emphasis added).

33. *Id.* at 279, 287 (emphasis added).

34. *Id.* at 279, 290. Atkins, L.J., expressed no opinion on this point.

35. *Id.* at 279.

36. See note 25 *supra*.

37. *Marbe v. George Edwardes (Daly's Theatre), Ltd.*, [1928] 1 K.B. 269, 287-88 (C.A. 1927).

38. See note 21 *supra*.

39. *Marbe v. George Edwardes (Daly's Theatre), Ltd.*, [1928] 1 K.B. 269, 288 (C.A. 1927).

damages for the substantial breach of the principal contract."<sup>40</sup> The three justices also differed somewhat as to their exact holdings regarding the awarding of damages for loss of publicity. Bankes<sup>41</sup> placed more emphasis on the existence of the collateral agreement to advertise than did both Atkin<sup>42</sup> and Lawrence,<sup>43</sup> who relied mainly on the express terms of the principal contract. While all three justices expressed some concern over the size of the amount awarded to the plaintiff by the jury for her loss of publicity (£ 3000), none of them were of the opinion that the verdict was beyond what a jury of reasonable persons might award.<sup>44</sup> The problem of certainty of damages was never mentioned.

In *Herbert Clayton & Jack Waller, Ltd. v. Oliver*,<sup>45</sup> the House of Lords approved both *Marbe v. George Edwardes (Daly's Theatre), Ltd.*<sup>46</sup> and *Fechter v. Montgomery*<sup>47</sup> and overruled the *Turpin v. Victoria Palace, Ltd.*<sup>48</sup> decision.<sup>49</sup> By a contract contained in two letters,<sup>50</sup> the defendants engaged the plaintiff to *play* one of the three leading comedy parts in a new musical play which they were producing. Thereafter, the defendants cast the plaintiff in a part which he claimed was not one of the three leading parts. When the defendants refused to recast the plaintiff, he refused to appear in the production. He then brought suit for breach of contract seeking damages for loss of publicity.<sup>51</sup>

40. *Id.* at 290.

41. In my opinion it is sufficiently established that where there has been a breach of a contract to employ an actress, whose reputation depends on the continued and successful practice of her art, and where the engagement is accompanied by promises of widespread publicity and advertisement which will probably lead to future opportunities following on successful performance, the Court recognizes that the damages for that breach may properly include such a sum as a jury may award to compensate the plaintiff for the loss of the reputation which would have been acquired, or damage to reputation already acquired, or, to use another expression, for loss of publicity.

*Id.* at 281 (emphasis added). It will be seen further along in this article that the statement of Bankes, regarding recovery for damages to an existing reputation, has been dissented from.

42. Speaking solely of the principal contract, Atkin said that

[h]ere was a plain obligation to allow the plaintiff to play the part of Lolotte, and it was broken and there is no reason why for a breach of that contract in not allowing her to play that part she should not be entitled to substantial damages.

*Id.* at 287.

43. [T]he obligation to give employment is not merely an implied but an express obligation, and it follows that there are two separate engagements on the part of the employers, one to pay the agreed salary and the other to afford the plaintiff the opportunity of acting the part. There has been no breach of the agreement to pay the salary, but there has been a breach of the agreement to employ. In my opinion there has also been a breach of the collateral agreement; but whether that be so or not, the jury were entitled to award damages for the substantial breach of the principal contract.

*Id.* at 290.

44. *Id.* at 281-282, 288, 290.

45. [1930] A.C. 209, noted in 30 COLUM. L. REV. 889 (1930) [hereinafter referred to as *Clayton & Waller*].

46. [1928] 1 K.B. 269 (C.A. 1927).

47. 55 Eng. Rep. 274 (Rolls. Ct. 1863).

48. [1918] 2 K.B. 539.

49. *Herbert Clayton & Jack Waller, Ltd. v. Oliver*, [1930] A.C. 209, 217-18.

50. *Id.* at 213-14.

51. At trial the jury found for the plaintiff and assessed damages at £ 165 for loss of salary and £ 1000 for loss of publicity. The Court of Appeal modified the verdict by



Although there was some evidence of a verbal collateral agreement to advertise the plaintiff's name, the court was of the opinion that under the circumstances its existence or non-existence would be of little effect.<sup>52</sup> Thus, all that was in dispute was the construction given the principal contract and the jury's verdict awarding the plaintiff £ 1000 for his loss of publicity.<sup>53</sup>

In construing the contract, the court mentioned that the character of the employment involved was an essential factor in determining its meaning.<sup>54</sup> Lord Buckmaster, speaking for the court, said that

[a]n engagement . . . that the [plaintiff] is "to play one of the three leading comedy parts" is to my mind something more than a mere contract on the [plaintiff's] part to render service, opportunity for such service is contemplated and agreed to be furnished.<sup>55</sup>

It was held that the plaintiff be allowed to play one of the three parts. This conclusion, said Lord Buckmaster, was further supported by the negative covenant which was part of the contract.<sup>56</sup>

After noting that damages for injury to feelings or vanity are not recoverable in contract actions, Lord Buckmaster said that the rule of *Hadley v. Baxendale*<sup>57</sup> applied without qualification to the instant case.<sup>58</sup> Lord Buckmaster went on to say,

"[h]ere both parties knew that as flowing from the contract the plaintiff would be billed and advertised as appearing at the Hippodrome and in the theatrical profession this is a valuable right."<sup>59</sup>

Therefore, Lord Buckmaster continued,

[i]n assessing the damages . . . it was competent for the jury to consider that the plaintiff was entitled to compensation because he did not appear at the Hippodrome, as by his contract he was

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omitting the sum awarded for loss of salary, since the plaintiff had obtained employment elsewhere at an equivalent wage. The Court of Appeal confirmed the verdict in all other respects, and from that judgment this appeal was taken to the House of Lords. *Id.* at 214.

52. *Id.* at 214.

53. *Id.* at 214-15.

54. *Id.* at 215.

55. *Id.*

56. *Id.* Lord Buckmaster reasoned as follows:

Now if the [defendants] were merely accepting the [plaintiff's] service for the period of the contract and were not bound to give him work, the service obviously not occupying all of his time, this provision, which would on that hypothesis prevent him from profitably using time not owed to them, would have little or no purpose. On the hypothesis, however, that he was being provided with a part it [the negative covenant] becomes sensible even if it be severe. To my mind it helps to explain the provision as to engagement and shows that there was within the contemplation of the parties the dual obligation to which I have referred. . . .

*Id.* at 215.

57. 156 Eng. Rep. 145 (Ex. 1854). See note 25 *supra*.

58. *Herbert Clayton & Jack Waller, Ltd. v. Oliver*, [1930] A.C. 209, 220.

59. *Id.*

entitled to do, and in assessing these damages they may consider the loss he suffered (1) because the Hippodrome is an important place of public entertainment and (2) that in the ordinary course he would have been "billed" and otherwise advertised as appearing at the Hippodrome. The learned [trial court] judge put the matter as a loss of reputation, which I do not think is the exact expression, but he explained that as the equivalent of loss of publicity and that summarizes what I have stated as my view of the true situation.<sup>60</sup>

In *Withers v. General Theatre Corp.*,<sup>61</sup> the court considered the question of the basis upon which the assessment damages should lie. In construing the House of Lord's decision in *Clayton & Waller*, the court dissented from Bankes' statement in *Marbe v. George Edwardes (Daly's Theatre), Ltd.*<sup>62</sup> that a jury might award an entertainer compensation for "damage to reputation already acquired."<sup>63</sup> In so doing, Scrutton, L.J., said that Bankes' opinion in *Marbe* contemplated two classes of damages—first, where "the actress looks forward to a reputation which she will get by appearing in the play, and she claims that the defendants have deprived her of that opportunity of acquiring the reputation;"<sup>64</sup> and second, where "the actress already has a reputation which is damaged by the defendants saying that they will not allow her to perform in the play after having engaged her to do so."<sup>65</sup> According to Scrutton, the House of Lords in *Clayton & Waller*, approved only the first class of damages as being competent for the jury to consider in these cases. This he inferred from Lord Buckmaster's reference in *Clayton & Waller*, as to what was competent for a jury to consider in assessing damages and Buckmaster's statement that "loss of publicity" summarized his view of the situation set out above.<sup>66</sup>

In *Withers*, the court adopted this position as clearly stated by Greer, L.J.:

When a proprietor of a music-hall or theatre engages an artiste to perform, he is promising two things: he is giving a consideration which consists of two different elements; firstly, a salary which he promises the artiste for his services, and secondly, the opportunity to play in public some part which will attract attention. For the loss of his salary the artiste is entitled to damages if his contract is broken. For the loss of the opportunity of impressing the public with his artistic value and so enhancing

60. *Id.*

61. [1933] 2 K.B. 536 (C.A.); noted in 47 HARV. L. REV. 875 (1934) and 50 L.Q. REV. 11 (1934).

62. [1928] 1 K.B. 269 (C.A. 1927).

63. *Id.* at 281. See note 41 *supra*.

64. *Withers v. General Theatre Corp.*, [1933] 2 K.B. 536, 546 (C.A.).

65. *Id.*

66. *Herbert Clayton & Jack Waller, Ltd. v. Oliver*, [1930] A.C. 209, 220. See note 60 *supra* and accompanying text.

or maintaining his reputation, he is also to recover damages; but he is not entitled to recover damages [to an already existing reputation].<sup>67</sup>

It was therefore held in *Withers* that no damages were recoverable when the plaintiff's only loss was injury to his already existing reputation as an actor. And, since the trial judge had failed to draw this distinction in his charge to the jury, the defendants were granted a new trial, *inter alia*, on the issue of damages.

The decision in the *Withers* case has been criticized for having drawn a "tenuous distinction"<sup>68</sup> since both loss to the expected enhancement of an actor's reputation and for the injury to his already existing reputation seem equally within the ordinary contemplation of the parties to the contract.<sup>69</sup> However, the distinction, although perhaps difficult to explain to a jury, is quite sound in view of the earlier House of Lords decision in *Addis v. Gramophone Co.*,<sup>70</sup> which held that injury to one's reputation, whether causing pecuniary or non-pecuniary loss, is not recoverable in a contract action for wrongful dismissal.<sup>71</sup>

Damage from loss of enhancement of reputation from loss of publicity was extended to an author of a screen play entitled to a screen credit in *Tolney v. Criterion Film Productions, Ltd.*<sup>72</sup> Although the loss of publicity to an actor, whose worth to the public can only be estimated by seeing him perform, is more serious than in the case of an author,<sup>73</sup> Goddard, J., pointed out that

[a]ll persons who have to make a living by attracting the public to their works, be they artistes in the sense of painters or be they literary men who write books or who perform in other branches of the arts, such as pianists and musicians, must live by getting known to the public.<sup>74</sup>

On the other hand, in *Collier v. Sunday Referee Publishing Co.*,<sup>75</sup> it was held that a chief sub-editor of a newspaper could not recover for his loss of publicity, there having been no implied stipulation in the contract for

67. *Withers v. General Theatre Corp.*, [1933] 2 K.B. 536, 554 (C.A.).

68. C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 163 (1935).

69. *Id.*

70. [1909] A.C. 488. Here, the plaintiff, manager of the defendant's business in Calcutta, was wrongfully and abruptly discharged without notice.

71. While the plaintiff was allowed to recover for his lost earnings, Lord Loreburn said quite emphatically that damages "cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment." *Id.* at 491.

72. [1936] 2 All E.R. 1625 (K.B.). For an American case dealing with the breach of a contract to give screen credit to an author see *Paramount Productions, Inc. v. Smith*, 91 F.2d 863 (9th Cir.), cert. denied 302 U.S. 749 (1937). Also see *Lloyd v. RKO Pictures, Inc.*, 136 Cal. App. 2d 638, 289 P.2d 295 (2d Dist. 1955) dealing with the breach of a contract to give "star" billing.

73. *Tolney v. Criterion Film Productions, Ltd.*, [1936] 2 All E.R. 1625, 1626 (K.B.).

74. *Id.* at 1626.

75. [1940] 2 K.B. 647.

publicity. In *Moss v. Chesham Urban Dist. Counsel*<sup>76</sup> a similar claim by a surveyor to a local community failed. The court of appeal in *Golomb v. W. Porter and Co.*<sup>77</sup> refused to give damages to a company director for the loss of publicity or prestige he would have acquired by being in the defendant's service, where the employment contract was wrongfully terminated before his service had commenced. The approach of the court in *Golomb* suggests that damages for loss of publicity are germane only to theatrical or closely analogous contracts. In fact, Greer, in his dissent, went so far as to say that

[v]ery special considerations apply to an agreement with an artist who is to perform in public, because it is a matter of common knowledge that in a large majority of the cases the consideration to the artist when he accepts the engagement is just as much, if not more, the opportunity, certainly in the early stage of the artist's career, to appear before the public and make his reputation, which is of much greater value than the mere money wages fixed for the period of his employment. It seems to me it is for that reason that it is regarded as the *essence* of the matter that the artist should have the opportunity for which he has bargained, and these considerations make *exceptional principles applicable to the case of artists who perform in public.*<sup>78</sup>

#### IV. THE AMERICAN CASES

The few American courts that have had the opportunity to deal with this question have, for the most part, failed to recognize that the ultimate financial interests of an entertainer suffer from his being excluded from the work he contracted to perform. However, much of the blame for this miscarriage lies with counsel's failure to precisely articulate the distinct factors involved in loss of publicity as damages compensable in a contract action.

In this country the leading case standing for the proposition that damages for the injury to one's reputation resulting from a wrongful discharge from employment are not recoverable is *Westwater v. Rector of Grace Church*.<sup>79</sup> In that case a singer in the defendant's choir brought suit for wrongful discharge in violation of a clause in her contract entitling her to six months' notice. The only damages claimed were for injury to her reputation, health, and feelings. There was no allegation that any

76. 172 L.T.R. (n.s.) 301 (K.B. 1945).

77. 144 L.T.R. (n.s.) 583 (C.A. 1931) [hereinafter referred to as *Golomb*].

78. *Id.* at 590 (emphasis added). In *Fielding v. Moiseiwitsch*, 174 L.T.R. (n.s.) 265 (K.B. 1946), an impresario was held not entitled to damages for loss of publicity caused by the failure of the plaintiff, a famous pianist, to fulfill his contractual obligations to appear in concert. While this was not a wrongful dismissal action—the employer was the plaintiff and not the defendant—the decision is interesting in that the court, in refusing damages for loss of the opportunity to enhance reputation, stressed the fact that an impresario promoting concerts is a businessman rather than a creative artist. *Id.* at 270.

79. 140 Cal. 339, 73 P. 1055 (1903) [hereinafter referred to as *Westwater*].

wages were due her when she was dismissed, nor was there an allegation that she could not get employment in some other choir. A demurrer was sustained on the ground that the damages sought were not "clearly ascertainable" as contract damages are required to be under *California Civil Code* sections 3300 and 3301.<sup>80</sup> However, in the court's opinion, injury to reputation is hardly distinguished from the other elements claimed. Thus, the court apparently failed to take cognizance of the fact that injury to one's reputation stands on a slightly different footing than damages to health or feelings. Insofar as an injury to reputation results in a non-pecuniary loss it is, and should be, as irrecoverable as the non-pecuniary loss from an injury to feelings. However, it is possible that an injury to one's reputation may cause a pecuniary loss if it causes the plaintiff to have more difficulty in obtaining new employment.<sup>81</sup>

*Pollock v. Shubert Theatrical Co.*<sup>82</sup> was somewhat similar to the English case of *Marbe v. George Edwardes (Daly's Theatre), Ltd.*<sup>83</sup> discussed above. The complaint in *Pollock* alleged that the defendant had engaged the plaintiff "to appear"<sup>84</sup> in musical plays for the theatrical season, agreeing to pay him "\$250.00 weekly for each and every week that the plaintiff publicly appeared and performed."<sup>85</sup> It was further alleged that the plaintiff performed under the contract as required until a certain date; that thereafter he held himself ready, willing and able to appear publicly, and that without cause, the defendant failed to furnish musical plays in which the plaintiff might publicly appear. The plaintiff thus claimed that he was entitled to recover the stipulated wages for the period in which he was not allowed to publicly appear. In summarily holding that the complaint failed to state a cause of action, the court said that there was no allegation or any facts pleaded from which it could be inferred that the defendant had a duty to give the plaintiff employment or to permit him to perform in public. The court construed the pleaded contract as making actual employment entirely optional with the defendant, but if employment was supplied, the plaintiff was to receive \$250.00 per week. The court could just as easily have concluded that the contract as pleaded imposed a duty on the defendant to allow the plaintiff to appear

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80. For the breach of an obligation arising from contract, the measure of damages, except when otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.

*Id.* at 342, 73 P. at 1056, citing CAL. CIVIL CODE §§ 3300, 3301.

81. However, damages for injury to one's existing reputation were specifically held irrecoverable in *Addis v. Gramophone Co.*, [1909] A.C. 488.

82. 146 App. Div. 628, 131 N.Y.S. 386 (1911).

83. [1928] 1 K.B. 269 (C.A. 1927).

84. *Pollock v. Shubert Theatrical Co.*, 146 App. Div. 628, 629, 131 N.Y.S. 386, 387 (1911) (emphasis added).

85. *Id.*

and that the phrase in which the wages were stipulated precluded the defendants from saying that the plaintiff was not to appear at all.<sup>86</sup>

The only American case in which the duty to provide an entertainer with work has been recognized is *Colvig v. RKO General, Inc.*<sup>87</sup> While this duty was recognized by the court, the plaintiff's complaint was in tort and thus the case is not squarely on point.<sup>88</sup> An employee of a radio station brought an action against the station, its owner, and certain other defendants for tortiously failing and refusing to broadcast the plaintiff's voice. The complaint alleged that the plaintiff, pursuant to an arbitration award, was restored to his position as a staff announcer; that said award recognized that plaintiff had a right to practice his profession at the station; and that while defendants paid plaintiff the salary due under said award, they intentionally and tortiously refused to permit him to practice his profession over the radio waves, thus causing damages in loss of popularity as a radio announcer in the sum of \$250,000.00. In reversing the lower court, which sustained the defendants' demurrer, the court, citing both comment c of section 433 of the *Restatement (Second) of Agency*<sup>89</sup> and the English case, *Clayton & Waller*,<sup>90</sup> held, *inter alia*, that the facts pleaded brought this case within the exception to the general rule that an employer does not have a duty to provide work for his employee.<sup>91</sup> The court stated that

[f]rom the facts pleaded . . . it can be gleaned that under his contract of employment, plaintiff, as a highly paid professional man, was to be given the opportunity to exercise his abilities, an anticipated benefit of which was the acquisition of a reputation in the public eye which would be enhanced by his appearance through the media of the radio waves and diminished by his failure to make such appearance.<sup>92</sup>

Because this action sounded in tort, the problem as to certainty of damages is never discussed because in tort actions, the jury is allowed more discretion in ascertaining the amount of damages incurred. Therefore, this case is significant only for the court's recognition of the duty to provide work in these entertainment situations.

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86. Compare *Marbe v. George Edwardes (Daly's Theatre), Ltd.*, [1928] 1 K.B. 269 (C.A. 1927).

87. 232 Cal. App. 2d 56, 42 Cal. Rptr. 473 (1st Dist. 1965).

88. See also *Grayson v. Irvmar Realty Corp.*, 7 App. Div. 2d 436, 184 N.Y.S.2d 33 (1959), a personal injury action in which an opera singer about to make her debut who had received leg injuries and had her hearing impaired in an accident was held entitled to recover damages for the tortious injury to the development of her talents based upon impairment of her future earning capacity.

89. See note 14 *supra*.

90. *Herbert Clayton & Jack Waller, Ltd. v. Oliver*, [1930] A.C. 209.

91. *Colvig v. RKO General, Inc.*, 232 Cal. App. 2d 56, 42 Cal. Rptr. 473, 481 (1st Dist. 1965).

92. *Id.*

In *Amaducci v. Metropolitan Opera Association, Inc.*,<sup>93</sup> a case similar to the English case, *Bunning v. Lyric Theatre, Ltd.*,<sup>94</sup> the court reached a contrary result to its English counterpart. Here the plaintiff sought damages for the breach of his employment contract by which he had been engaged as a conductor of the orchestra of the Metropolitan Opera for a period of twelve weeks at a salary of \$700.00 per week. The plaintiff alleged that the defendant's breach caused him "mental anguish, humiliation, grief and distress"<sup>95</sup> and caused, and would in the future result in, "great and irreparable harm and damage to his name, career and reputation as an orchestra conductor."<sup>96</sup> The court modified the lower court's order denying the defendant's motion to dismiss by granting a motion to strike the above allegations. The court then reiterated the well settled rule as to the measure of damages in wrongful discharge cases<sup>97</sup> and summarily held that damages to the good name, character and reputation of the plaintiff are not recoverable in contract actions for wrongful discharge. It is submitted that this case should not be interpreted as holding that damages for loss of publicity are not recoverable in such cases. The plaintiff in this case, as in the *Westwater* case,<sup>98</sup> sought damages which were essentially designed to compensate him for the injury to his already existing reputation. Such damages do not contemplate the pecuniary value of an appearance before the public as do damages for loss of opportunity to enhance reputation due to loss of publicity. This distinction was made in the *Withers* case<sup>99</sup> in which the English court held that only the damages for loss of publicity were recoverable.

The *Amaducci* case was recently relied on in *Quinn v. Straus Broadcasting Group, Inc.*,<sup>100</sup> a diversity action brought by the moderator of a radio "talk show" against the broadcasting corporation for its wrongful termination of his employment contract. In holding that, under New York law, the damages recoverable by a wrongfully discharged employee are limited to his unpaid salary under the contract, the court, operating under the *Erie* doctrine,<sup>101</sup> quite properly said that the *Colvig*<sup>102</sup> and *Clayton & Waller*<sup>103</sup> decisions relied on by the plaintiff could not be said to be the precursor of an exception to the New York rule stated in *Amaducci*. The

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93. 33 App. Div. 2d 542, 304 N.Y.S.2d 322 (1969) [hereinafter referred to as *Amaducci*].

94. 71 L.T.R. (n.s.) 396 (Ch. 1894).

95. *Id.* at 542, 304 N.Y.S.2d at 323.

96. *Id.*

97. See note 10 *supra* and accompanying text.

98. *Westwater v. Rector of Grace Church*, 140 Cal. 339, 73 P. 1055 (1903). See note 80 *supra*.

99. *Withers v. General Theatre Corp., Ltd.*, [1933] 2 K.B. 536 (C.A.).

100. 309 F. Supp. 1208 (S.D.N.Y. 1970).

101. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Briefly stated this case and the doctrine that has emerged from it, holds that while federal courts sitting in diversity cases are free to apply their own rules of procedure, any issue of substantive law must be determined according to the laws of the state in which the federal court is located.

102. *Colvig v. RKO General, Inc.*, 1232 Cal. App. 2d 56, 42 Cal. Rptr. 473 (1st Dist. 1965).

103. *Herbert Clayton & Jack Waller, Ltd. v. Oliver*, [1930] A.C. 209.

court further noted that no authority (presumably New York authority) had been suggested for the proposition that the loss of the opportunity to perform entitled an employee to a separate cause of action. Had this case been tried in a New York state court it is possible that an exception to the "settled" New York rule may have been found in favor of allowing the plaintiff damages for the loss of his opportunity to perform.

## V. CONCLUSION

It is submitted that the English courts have devised the better rule. As modified, the standard of certainty of damages from loss of publicity is not so stringent as to prevent such cases from being submitted to juries.<sup>104</sup> Besides, difficulty in ascertaining the pecuniary value of a public appearance to one whose profession is dependent thereon should not be a bar to compensation, since it is more desirable to give a rough approximation of the damages incurred than to award none at all.<sup>105</sup> In arriving at a monetary award designed to approximate the pecuniary value of a public appearance it is suggested that a jury consider the following:

- (1) The type of performance or appearance contemplated by the contract, *e.g.*, television, theatre, nightclub, etc.;
- (2) Whether the plaintiff was to appear alone, as in a nightclub act, or with a group of other performers, as in a play or movie;
- (3) Whether the plaintiff's appearance would have provided an opportunity to display his or her talents in such a way as to serve as an adequate basis for the audience to judge the plaintiff's abilities;
- (4) Where the performance or appearance was to take place, *i.e.*, what city, what theatre or nightclub, or if on television, what was the potential audience;
- (5) The potential size of the audience which would have seen the plaintiff's performance or appearance;
- (6) Whether, taking all of the above into consideration, it was more probable than not that the plaintiff would have secured subsequent oppor-

104. See C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 25 (1935). Section 27 provides:

There are various modifications of the rule of certainty. They enable the courts, while holding up a high standard of certainty as an ideal, to avoid harsh application of it. Among them are:

- (a) If the fact of damage is proved with certainty, the extent or amount may be left to reasonable inference.
- (b) Where the defendant's wrong has caused the difficulty of proof of damage, he cannot complain of the resulting uncertainty.
- (c) Mere difficulty in ascertaining the amount of damage is not fatal.
- (d) Mathematical precision in fixing the exact amount is not required.
- (e) If the best evidence of the damages of which the situation admits is furnished, this is sufficient . . . .

See also *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251; *Hartley & Parker, Inc. v. Florida Bev. Corp.*, 307 F.2d 916 (5th Cir. 1962); *ABC-Paramount Records, Inc. v. Topps Record Distrib. Co.*, 374 F.2d 455 (5th Cir. 1967); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *McCall v. Sherbill*, 68 So.2d 362 (Fla. 1953); *Saporito v. Bone*, 195 So.2d 244 (Fla. 2d Dist. 1967).

105. See T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 192 (8th ed. 1891).



tunities to perform or appear had it not been for the defendant's breach? If the answer to this question is in the negative, only nominal damages<sup>106</sup> should be awarded since no substantial damage would have been shown.

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106. Nominal damages are awarded for the infraction of a legal right where the extent of loss is not shown. Such an award is a judicial recognition of the breach of a duty owed by the defendant to the plaintiff. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 20 (1935).