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Damages

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The result is the same: "aid" imputes no knowledge; "aiding," unmodified, is not criminal, regardless of what the statute says; to be criminal, "aid" must include knowledge of the wrongful purpose of the perpetrator.

A third solution, the simplest and the most direct, is to refuse to be influenced by the dictum in the *Hinkley* case.

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DAMAGES

Damages for Mental Suffering Resulting from Breach of Contract. In *Carpenter v. Moore*[1] an unusual aspect of the law of contract damages was re-examined by the Washington Supreme Court. Since the emergence of *Hadley v. Baxendale*,[2] the rule has been that damages are allowed for only those injuries that the defendant had reason to foresee as a probable result of his breach at the time the contract was made. One of the postulates to evolve from the *Hadley* rule was that in breach of contract actions, damages for mental suffering are not allowable.[3] The issue raised in the *Carpenter* case was whether this aforementioned postulate ought to be followed strictly, or whether to allow exceptions in certain cases involving contracts of such nature that it was foreseeable at the time the contract was made that mental anguish would result from a breach of such contract.

The controversy in the *Carpenter* case arose in the following manner: The defendant, a dentist, agreed to make partial plates for the plaintiff, and he expressly guaranteed that all of the work would be done to her satisfaction. The agreed price for the plates was four hundred dollars. The plates did not fit the plaintiff's mouth properly, causing her pain and discomfort. They also caused growths to appear that had to be removed by a surgeon. The plaintiff sued on grounds of malpractice but failed to prove negligence on the part of the dentist. The trial court allowed the pleadings to be amended to an action for breach of contract. Judgment for the plaintiff included four hundred dollars as the price paid for the partial plates and seven hundred and fifty dollars for plain and suffering. On appeal the judgment was modified, deleting the damages for pain and suffering.

It may first be observed that the *Carpenter* case did not present the

[1] 51 Wn.2d 795, 322 P.2d 125 (1958).
[2] 9 Exch. 341 (1854).
[3] Robinson v. Western Union Tel. Co., 24 Ky.L.Rep. 452, 68 S.W. 656 (1902); Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955).

usual obstacle to recovering damages for mental suffering in tort cases, namely the lack of an accompanying physical injury.[4] There was such physical injury in the case at hand, as evidenced by the growths in plaintiff's mouth.[5] Hence, the precise issue to be decided was whether damages should be allowed for mental suffering resulting from a breach of contract which also caused physical injury to the plaintiff.

The Washington Supreme Court, sitting en banc, delivered the *Carpenter* case opinion through Chief Justice Hill. After discussing the requirement of foreseeability, the court said that damages for pain and suffering are ordinarily predicated on negligence and are not within the contemplation of the parties for the breach of a promise to do work to the satisfaction of a patient. As authority for the latter statement, a New York case, *Frankel v. Wolper*,[6] was cited. The *Frankel* case is questionable authority for the view expressed by the court. In the first place, it may be distinguished from the case at hand because it involved a physician who was negligent. The only reason the plaintiff failed to sue for malpractice was the bar of the statute of limitations. Judge Hill himself admitted, "Had the breach of contract involved . . . negligence . . . it might well be argued that the pain and suffering resulting therefrom were within the contemplation of the parties." Moreover, thirteen years later, in a decision the facts of which much more closely correspond with the *Carpenter* case, this same New York court granted damages for pain and disfigurement solely on the theory of breach of contract. This decision, which appears to have emasculated the *Frankel* case to the point that it is merely authority for determining whether a cause of action sounds in tort or contract, stated that the *Frankel* case should be restricted to controversies concerning the "classification of a particular pleading so as to determine which statute of limitations was technically applicable."[7]

[4] Where the defendant's negligence in a tort action inflicts an immediate physical injury, the courts will generally allow compensation for purely mental elements of damage accompanying it. Redick v. Peterson, 99 Wash. 368, 169 Pac. 804 (1918). This requirement of physical injury is not sensible and has received criticism. PROSSER, TORTS § 177 (2nd ed. 1955).

[5] It would be expected that this evidence of physical injury would be helpful to the plaintiff for two reasons: First, to prevent the court from denying damages as a result of confusing this action for breach of contract with the aforementioned tort requirement of simultaneous physical injury; second, that mental suffering has been regarded by the courts as the usual accompaniment of physical pain. Hargis v. Knoxville Power Co., 175 N.C. 31, 94 S.E. 702 (1917). Hence, the difficulty of distinguishing between the two has been deemed a reason in itself for allowing damages for mental suffering. Bonelli v. Branciere, 127 Miss. 556, 90 So. 245 (1922).

[6] 181 App. Div. 485, 169 N.Y.S. 15 (1918).

[7] Frank v. Maliniak, 232 App. Div. 278, 249 N.Y.S. 514 (1931).

The decision of the court in the *Carpenter* case was not unanimous. Judge Finley wrote a vigorous dissent, rebutting that portion of the opinion which refused compensation for pain and suffering with the contention that this was another example of the common-law forms of action "ruling us from their graves." He stated the general requirement of foreseeability with respect to damages for breach of contract, and then made the following distinction as to types of contracts:

> In the ordinary contract situation, only pecuniary benefits are contemplated by the parties; therefore, the damages resulting from the breach of the contract are measured by pecuniary standards. But when the parties contract for other than pecuniary benefits, other than pecuniary standards will be applied to ascertain the damages flowing from the breach.[8]

Applying this distinction to the facts in the principal case, Judge Finley reasoned that where a dentist has contracted to make and fit dentures to the satisfaction of a patient, pain and suffering ought to have been within the contemplation of the parties when the contract was made.

The dissenting opinion's distinction of pecuniary and non-pecuniary type contracts seems to have the approval of many writers[9] and has been employed in several recent decisions involving the issue of damages for mental suffering.[10] Logically it would seem that this distinction could not be denied. Moreover, since the majority in the case under examination did not expressly make such a denial, perhaps the real controversy between the majority and dissent is only whether the distinction can apply to this particular contract. Probably a good argument can be made that it should not. The contract in the *Carpenter* case would seem to fall midway between those contracts of a purely commercial character[11] and contracts whose breach obviously must result in mental anguish and pain.[12] If the defendant in this

[8] Carpenter v. Moore, 51 Wn.2d 795, 809, 322 P.2d 125, 133 (1958).

[9] 1 SUTHERLAND, DAMAGES § 328 (4th ed. 1916); MCCORMICK, DAMAGES § 592 (1935); RESTATEMENT, CONTRACTS § 341 (1932).

[10] Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957) (damages granted); Lamm v. Shingleton, 231 N.C. 10, 55 S.E.2d 810 (1949) (damages granted); Farmers Ins. Exch. v. Henderson, 82 Ariz. 335, 313 P.2d 404 (1957) (damages denied).

[11] Of course the breach of even a purely commercial contract may in fact cause considerable mental anguish. However, the courts state that such injury is a part of the ordinary business risk and *recovery* for such damages was not contemplated by the parties. Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957).

[12] The American Law Institute lists the following as the most common contracts of this kind: contracts to marry, contracts of carriers and innkeepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of death messages. RESTATEMENT, CONTRACTS § 341, comment a (1932).

case had been a "painless" dentist who promised he would extract teeth without discomfort to the patient, then it patently would have been foreseeable that the defendant's breach of promise would result in pain. Other examples of contracts whose breach did cause foreseeable mental anguish, and where in fact the court did grant damages for such anguish, are: An undertaker who contracted to bury the body in a decent, respectable manner;[13] an undertaker who contracted to furnish a completely watertight vault;[14] a physician who agreed to perform Caesarean section, his failure to so perform resulting in the child being stillborn;[15] and a plastic surgeon who promised not to make any external incisions.[16]

In the case at hand, it must be noted that the Washington court only modified the judgment, the amount for the price paid on the contract still being allowed as "damages." Since no negligence or incompetence by the defendant was found, the breach of contract had to be predicated upon the guarantee that all the work would be done to the plaintiff's satisfaction. To find a breach of contract on this condition of personal satisfaction, the court necessarily must have interpreted the contract as meaning the plaintiff's promise to pay was conditional on the plaintiff being *personally* satisfied with the dentist's performance.[17] This is in contrast to the more common interpretation that the performance need only be sufficient to satisfy a reasonable man in the promisor's position.[18] In other words the promisor's subjective state of mind was the standard, rather than the usual objective standard. Hence, in the *Carpenter* case it would seem that the contract gave the plaintiff grounds to sue on a breach for the mere reason that the dental plates did not personally satisfy or please her. Under this analysis, conduct of the defendant necessary to establish a breach of contract did not necessarily have to result in pain and suffering to the plaintiff. Thus, one can argue that the contract in the *Carpenter* case was not such an instrument that pain and suffering were a foreseeable consequence of its breach. Indeed upon considering the nature of

[13] Wright v. Beardsley, 46 Wash. 16, 89 Pac. 172 (1907).
[14] Lamm v. Shingleton, 231 N.C. 10, 55 S.E.2d 810 (1949).
[15] Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957).
[16] Frank v. Maliniak, 232 App. Div. 278, 249 N.Y.S. 514 (1931).
[17] RESTATEMENT, CONTRACTS § 265 (1932); Aymar v. Bloomingdale, 157 N.Y.S. 837 (1916); McDougall v. O'Connell, 72 Wash. 349, 130 Pac. 362 (1913). The plaintiff in the Aymar case paid for certain dental work under a promise by the defendant to return his money if the plaintiff were "dissatisfied." The court held the mere fact that the plaintiff went to a second dentist to have the defendant's work removed was sufficient evidence of dissatisfaction.
[18] Gould v. McCormick, 75 Wash. 61, 134 Pac. 676 (1913); Yarno v. Hedlund Box & Lumber Co., 129 Wash. 457, 225 Pac. 659 (1924).

most dental advertising, with its emphasis on "appearance" and the "natural look," it seems at least possible that both dentist and patient did in fact consider the contract in the sense of the obligation it placed on the dentist to guarantee against mere personal disatisfaction, rather than pain and mental anguish. This is especially persuasive in the light of the highly successful and standardized techniques employed by dentists today.

If the preceding analysis is correct, then the *Carpenter* case facts did not really present a situation of foreseeable pain and suffering. And perhaps that is all that the opinion actually holds. If so, the opinion has not precluded damages for mental anguish resulting from the breach of a contract whose subject matter would in fact make an injury foreseeable.[19] However, the words of the opinion give little indication that the court considered such a possibility. It remains to be seen whether a sufficiently difficult fact situation will persuade the Washington court to narrow the *Carpenter* case to its own particular facts.

Although it was not referred to in either the majority or dissenting opinions, the *Carpenter* case may have overruled *Mullins v. Alveolar Dental Co.*[20] The facts of that case were almost identical with those of the *Carpenter* case, involving a dentist who contracted to make dental plates for the plaintiff and guaranteed the work to be satisfactory and to give satisfaction during the life of the patient. The dental plates became loose, causing pain and inflammation in the plaintiff's gums. The issue of negligence was not raised by either party, and the trial court made no such findings. The Washington Supreme Court affirmed the judgment of the trial court awarding $280.00 to the plaintiff for the contract price, plus $70.00 for pain and suffering. Neither the court's opinion nor the briefs of counsel in the *Mullins* case discusses the issue of whether the damages for pain and suffering were proper.

In conclusion, the *Carpenter* case appears to have established the "rule" that when a contract is breached without negligence or wantonness, resulting in physical injury and pain to the plaintiff, damages for mental suffering cannot be recovered.[21] However, as this Note has

[19] Such a fact pattern may occur where the contract is personal in nature and the contractual duty is so coupled with matters of mental concern or with the sensibilities of the party to whom the duty is owed. Lamm v. Shingleton, 231 N.C. 10, 55 S.E.2d 810 (1949); *cf.* Warner v. Benham, 126 Wash. 393, 218 Pac. 260 (1923).

[20] 97 Wash. 170, 166 Pac. 65 (1917).

[21] The position taken by the Washington court with respect to allowing damages for mental suffering for the breach of a contract of such nature that such an injury

attempted to show, the true reason for the denial of damages in this case may well have been simply that the mental suffering was not a foreseeable consequence of the breach of contract. Hence the possibility remains open that the above "rule" is actually conditioned on the absence of the *Hadley* foreseeability requirement. If this is correct, then the Washington court might be expected to allow damages for mental suffering under the proper facts.

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Expenses for Unsuccessful Attempt to Mitigate Damages. *Snowflake Laundry Co. v. MacDowell,* 152 Wash. Dec. 591, 328 P.2d 684 (1958). *P* and *Q* were Seattle laundries. *P* had a contract with *D,* whereby *D* was to pick up and deliver laundry on Bainbridge Island for *P.* D was bound to deliver all the laundry to *P,* except for certain customers of *Q* with whom *D* had an agreement to service as an agent of *Q. D* breached his contract with *P* and began diverting *P*'s customers to *Q.* Upon discovering this, *P* made efforts to establish his own laundry route on the island, spending considerable money in the effort. In *P*'s suit for breach of contract, the trial court gave judgment against *D,* including in the damages the expenses incurred by *P* in attempting to establish the new laundry route.

On appeal the supreme court observed that the doctrine of avoidable consequences places the prospective plaintiff under a disability to recover for loss which he could have avoided by taking reasonable steps to minimize the injury caused by the defendant. This doctrine is most commonly applied to instances where the plaintiff fails to perform these reasonable steps, thus resulting in a *reduction* of "damages." The Washington court then stated that in the converse situation, where the injured party makes reasonable but unsuccessful efforts to minimize his loss, he will be allowed to *increase* his "damages" by an amount equal to the expense he incurred in the attempt to mitigate damages. Apparently this is the first time this rule, sometimes termed the "affirmative branch" of the doctrine of avoidable consequences, has been recognized by the court. This rule is a logical and desirable corollary to the mitigation of damages concept, and appears to have been uniformly accepted by other American courts whenever the issue was presented. *Vining v. Smith,* 213 Miss. 850, 58 So.2d 34 (1952); 25 C.J.S., *Damages,* § 49; RESTATEMENT, TORTS § 919 (1939).

However, the Washington court held that in order for the rule to apply, the expenditure must have been incurred in an effort to accomplish a result that would actually mitigate. Hence in the case at hand, *P*'s conduct did not meet this test and therefore

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was a foreseeable consequence of the breach, with respect to fact patterns different from the Carpenter case, is as follows:

Where the defendant willfully and wantonly breaches the contract, resulting in mental anguish though no physical injury to the plaintiff, damages for mental suffering can be recovered. Wright v. Beardsley, 46 Wash. 16, 89 Pac. 172 (1907). However in a later case the Washington court indicated its reluctance to grant such damages in this situation unless the requirements of willfulness and wantonness were clearly established. Corcoran v. Postal Telegraph-Cable Co., 80 Wash. 570, 142 Pac. 29 (1914).

Where the defendant is merely negligent in breaching the contract, resulting in mental anguish though no physical injury to the plaintiff, damages for mental suffering cannot be recovered. Kneass v. Cremation Soc. of Washington, 103 Wash. 521, 175 Pac. 172 (1918).

Where the defendant negligently breaches the contract, resulting in physical injury and pain to the plaintiff, damages for mental suffering can be recovered. Reeves v. Wilson, 105 Wash. 318, 177 Pac. 825 (1919).

the court modified the judgment to reduce damages. This decision was predicated on the reasoning that *D* was an independent contractor, and therefore *P* had no customers on the island, but only a contract with *D* to have laundry delivered to *P*. Hence, *P*'s attempt to establish his own laundry route was not an attempt to mitigate damages by an act designed to prevent the loss of his existing customers. On the contrary, *P*'s acts were designed to gain customers of his own, something he did not have in the first place. Thus *P*'s expenses were not incurred in the attempt to mitigate damages caused by *D*'s breach.

In conclusion, while the rule allowing damages for expenses incurred in an unsuccessful attempt to mitigate injury could not be applied in the *Snowflake* case, the case does provide dictum that the Washington court will employ this rule if the facts are appropriate.

DOMESTIC RELATIONS

Property Settlement Agreements—Contempt—Imprisonment for Debt. In *Decker v. Decker*[1] the Washington court held that an order in a divorce decree directing the husband to pay a debt secured by a mortgage on real property awarded to the wife was enforceable by contempt proceedings. The husband had promised to pay the debt in a property settlement agreement entered into between himself and his wife, and this provision of the agreement was incorporated in the divorce decree. Upon the husband's failure to perform as ordered, the wife instituted contempt proceedings to enforce the decree. The trial court quashed the contempt proceedings upon the ground that property settlement agreements may not be enforced in such a manner.

On appeal the respondent husband contended that enforcement of a property settlement agreement by a contempt citation would violate the constitutional prohibition against imprisonment for debt.[2] The supreme court held that this constitutional prohibition applies only to "run-of-the-mill debtor-creditor relationships arising, to some extent, out of tort claims, but principally, out of matters basically contractual in nature," in which cases "the judgment of the court is merely a declaration of an amount owing and is not an order to pay."[3] In contradistinction, the court declared that orders to pay alimony, support, or property settlement agreements incorporated in a divorce decree are enforceable by contempt poceedings, since the duty enforced is created by order of the court, and not by a debtor-creditor relationship.

The respondent further contended that, even if a court constitu-

[1] 52 Wn.2d 456, 326 P.2d 332 (1958).
[2] WASH. CONST. Art. I, § 17.
[3] Decker v. Decker, 52 Wn.2d 456, 458, 326 P.2d 332, 333 (1958).