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Mental Distress as an Independent Basis for Recovery

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MENTAL DISTRESS AS AN INDEPENDENT BASIS FOR RECOVERY*

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The principal recognition accorded by the common law to the interest in freedom from mental and emotional distress has been in regarding it universally as a basis for the recovery of parasitic damages. In many jurisdictions, unintentional conduct which is recognizably likely to cause nothing more than such a disturbance is not actionable even though it later results in physical harm.[1] In these states, recovery for such material harm is allowed if, but only if, the actor should have realized not only that his conduct was likely to cause distress, but also that the other was so lacking in ordinary physical resistance to emotional strain that the disturbance involved an appreciable risk of harmful consequences.

The fact that mental distress is intentionally inflicted may dispense with the necessity of showing that the actor knew or should have known that the other's subnormal power of resistance thereto gave the actor's misconduct a potency to cause serious bodily harm which would otherwise be unlikely.[2] Obviously, when one intentionally causes a mental disturbance, he has more opportunity to reflect upon and to calculate the possible effect of his conduct than in cases of negligent conduct where the actor should, but may not, visualize that he is subjecting another to a mental condition which may in turn result in physical injury. Therefore, an intentional infliction of mental distress may entail broader liability than a negligent one, insofar as in the former case, the actor in effect takes the risk that the other belongs to a subnormal

*This article does not deal with slander and libel or other actions for loss of reputation, even though the damages are obviously based upon the offensive and thus distressing character of the imputations.

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[1]Mitchell v. Rochester Ry., 151 N. Y. 107 (1896).

[2]Wilkinson v. Downton, 2 Q. B. 57 (1897).

class, whereas in the latter, it may be necessary to recovery that the actor should have realized the other's subnormality.

However, apart from cases involving material harm, and unsupported by some independent cause of action to which it may be parasitic, the interest in freedom from emotional disturbance has been given by the common law, a very limited and indeed peculiar protection even as against intentional invasions.[3] Only two cases[4] appear definitely to allow recovery and these reveal not only an intention by the defendant to cause mental distress, but a persistent course of conduct aimed to aggravate the effect.

Nevertheless, there are a number of highly specialized situations which within their limited sphere, do seem to recognize mere mental distress as a basis for recovery of damages. These situations appear with sufficient recurrence as to merit separate consideration. To these various situations, we now turn our attention.

DUTY OF CARRIERS TO PROTECT PASSENGERS FROM EMOTIONAL DISTURBANCES

Foremost among the cases appearing to protect the interest in freedom from mental distress are the actions brought by passengers against carriers. The cases fall principally into two groups; first, those in which mental distress or humiliation is alleged to have been intentionally inflicted by servants of the carrier; second, those in which passengers sue a carrier for the failure of its servants to protect them from mental distress caused by fellow-passengers.

A substantial number of jurisdictions have allowed recovery in these

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[3]It is true that conduct causing the mere apprehension of a harmful or offensive contact has always been held actionable and that such an apprehension does in a broad sense constitute a mental disturbance. But the actor's liability for an "assault" is predicated upon the other's mere *realization* of the intentionally threatened contact; and recovery is allowed quite irrespectively of whether such realization results in fear or mental distress, or whether, on the other hand, such realization fails altogether to alarm the other, as where his superior strength makes him confident of his ability to avoid the threatened contact. Thus liability for an "assault" is not essentially for mental "suffering", "anguish" or "distress" and is perhaps more properly associated with that part of the law of torts dealing with liability for unprivileged bodily contacts.

[4]In Nickerson v. Hodges, 146 La. 735, (1920), plaintiff suffered humiliation as the result of a "practical joke" perpetrated by defendants who led plaintiff to search for, find and deposit in a bank, a "pot of gold" which they had previously filled with dirt and stones, which they "planted" for her to find. Defendants induced plaintiff to refrain from examining the contents of the pot until a formal gathering of notables had been arranged before whom she finally discovered, to her chagrin, that the whole affair had been a deliberated hoax. The other case allowing recovery was Barnett v. Collection Service Co., 242 N.W. 25 (Iowa 1932), where defendants in attempting to collect a small debt owed by plaintiff, persisted in writing a stream of annoying and insulting letters, making numerous threats to vex plaintiff by lawsuits, to cause her discharge by her employer and generally to "tie her up tighter than a drum." See also the dictum in Gadbury v. Bleitz, 133 Wash. 134 (1925), that recovery would be allowed in cases of intentional misconduct.

cases for mere humiliation to which servants of carriers have subjected passengers. In most of these cases, the insulting treatment occurred in the course of an altercation over the payment of fare, the passenger generally being openly accused of dishonesty and of attempting to "steal rides" by nonpayment or by tender of alleged counterfeit money or irregular tickets.[5] In many southern states, recovery has been allowed for mental distress resulting from open charges by the servant of the carrier that the passenger, although in fact of the white race, was colored, and from the servant's insistence that the passenger seat himself in the section reserved for negroes.[6]

In only one state has recovery been denied against a carrier for insulting treatment of passengers by the carrier's servants, in the absence of physical injury.[7] On the other hand, even the courts allowing recovery attach various limitations upon the carrier's liability. Thus, a number of states otherwise imposing liability for abusive conduct of a servant, deny recovery if the servant was not acting in the "scope of his employment" at the time of the offensive conduct.[8] So too, some cases deny recovery against the carrier where the insulting remarks, though they concerned the passenger and were overheard by him, were intended to be heard only by others.[9] Occasionally but

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[5]Lafitte v. N. Orleans City Ry Co., 43 La. Ann. 34 (1891); Gulf Ry. Co. v. Sullivan, 119 So. 501 (Mo., 1928); Philips v. Atl. Coast Line Ry., 160 S.C. 323 (1931); Bonner v. Pullman Co., 160 S. C. 531 (1931); Texas Ry. v. Tarkington, 27 Tex. Civ. App. 353 (1931); C.N.O. and T.P. Ry. v. Harris, 115 Tenn. 501 (1905); Gillespie v. Brooklyn H. Ry. Co., 178 N.Y. 347 (1904); Ga. Ry and Elec. Co. v. Baker, 125 Ga. 474 (1897); McGinnis v. Mo. Pac. Ry. Co., 21 Mo. App. 399 (1886); Bleecker v. C. and L. Ry., 108 S.C. 151 (1917); Austro-Amer. S.S. Co. v. Thomas, 248 Fed. 231 (N.Y. 1917); Yazoo Ry. Co. v. Fitzgerald, 50 So. 631 (Miss. 1909); Ga., S. and F. Ry. v. Ransom, 8 Ga. App. 277 (1910); Huffman v. So. Ry. Co., 163 N.C. 171 (1913); So. Ry. Co. v. Carrole, 14 Ala. App. 374 (1915); Humphrey v. Mich. United Ry., 166 Mich. 645 (1911); Cook v. Lusk, 186 Mo. App. 288 (1914); Tudor v. Quebec Ry., 41 Quebec C. S. 19 (1911). See also Knoxville Traction Co. v. Lane, 103 Tenn. 376 (1899) where a drunken motorman called plaintiff a prostitute.

[6]St. Louis, Ark., and T. Ry. v. Mackie, 71 Tex. 491 (1888); May v. Shreveport Traction Co., 126 La. 419 (1910); Wolfe v. Ga. Ry. and Elec. Co., 2 Ga. App. 499 (1907). In Haile v. N. Orleans Ry. Co., 135 La. 229 (1914), plaintiff, a corpulent woman fell off her seat in a street car while it was going around a bend. She recovered for humiliation when the conductor told her, as she was getting off the car, that "a fat woman like you had no business sitting in the front of the car".

[7]St. Louis, I. M. and S. Ry. v. Taylor, 84 Ark. 42 (1907); Chicago, R. I. and P. Ry. v. Moss, 89 Ark. 187 (1909); Dobbins v. Little Rock Ry., 79 Ark. 85 (1906); Little Rock Ry. v. Putsche, 104 S. W. 554 (Ark. 1909), where the conductor mistook plaintiff for a negress and ordered her to sit in the negro section.

[8]Parker v. Erie Ry., 5 Hun. (N. Y.) 57 (1875); Southern Ry. v. Thurman, 121 Ky. 716 (1906); Mo., K., and T. Ry. v. Pope, 149 S. W. 1185 (Tex. C. A. 1912). But apparently *contra*, Knoxville Traction Co. v. Lane, *supra* note 5; Chesapeake Ry. v. Francisco, 149 Ky. 307 (1912); and Haile v. N. Orleans Ry. Co., *supra* note 6.

[9]Ga. Ry. v. Baker, 1 Ga. App. 382 (1907); Louisville, N. R. Ry. v. Scott, 141 Ky. 538 (1911); Pitts., C. and S. L. Ry. v. Dervin, 86 Ill. 296 (1887). Compare Birmingham Ry. v. Glenn, 179 Ala. 263 (1912).

not always, recovery has been denied because, although the servant had admittedly accused the passenger of attempting to "steal" a ride or had called him a negro, the servant had done so "in good faith" believing what he said to be true, and had not done so "maliciously".[10] In addition, recovery has been denied where the passenger's own conduct had "provoked" the abusive treatment.[11]

The cases imposing liability upon carriers for mere mental distress suffered by a passenger because of conduct of fellow-passengers are comparatively few.[12] On the other hand, there appears to be little contrary authority.[13] The curious fact is that in no case is the plaintiff a male passenger. Indeed there seems to be no reported case in which a male passenger brought such an action. These cases in effect require the carrier to exercise, through its crew, reasonable care to protect women from distress caused by conduct which is offensive to what the courts regard as a reasonable sense of female modesty and decency. In all of these cases, the fellow-passenger whom the crew failed to restrain engaged in scurrilous, blasphemous and obscene language or sang vulgar songs. The imposition of liability in these cases, most of which are southern, reflect a highly chivalrous instinct on the part of the courts which regard the interest in safeguarding feminine modesty and purity from moral contamination as of sufficient social significance to justify them in ignoring the usual objections to recovery for mere mental distress.[14] This protection has been accorded to colored as well as white women.[15]

Even in Arkansas, which denies recovery for the abusive conduct of servants of the carrier, recovery to female passengers for mental distress resulting from boisterous, blasphemous language of drunken fellow-passengers has been denied only because the conduct of such fellow-passengers was

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[10]Southern Ry. v. Thurman, 121 Ky. 716 (1906); McGinnis v. Mo. Pac. Ry., 21 Mo. App. 399 (1886). Contra, May v. Shreveport Traction Co.; Wolfe v. Ga. Ry., both *supra* note 6.

[11]Burden v. Ga. Ry. and Elec. Co., 13 Ga. App. 381 (1913); Pullman Palace Car Co. v. Ehrman, 65 Miss. 383 (1888). But compare Mo., K., and T. Ry. v. Morgan 138 S. W. 216 (Tex. C. A. 1911).

[12]St. Louis, S. W. Ry. v. Wright, 84 S. W. 270 (Tex. C. A. 1904); Lucy v. Chicago etc. Ry., 64 Minn. 7 (1896); Louisville and N. Ry. v. Bell, 166 Ky. 400 (1915); Southern Ry. v. Lee, 167 Ala. 268 (1910). Compare Texas P. Ry. v. Jones, 39 S. W. 124 (Tex. C. A. 1897).

[13]Norris v. So. Ry., 84 S. C. 15 (1909). See also Taylor v. Atlantic C. L. Ry., 59 S. E. 641 (S. C. 1909).

[14]These cases present an analogy to those few cases in which courts have extended themselves to find a physical contact necessary to support an action of trespass for battery where men have by false pretences, induced women to expose their persons to view. In such cases, the battery is exceedingly technical and constitutes merely a "formula" by which female decency is protected.

[15]Louisville and N. Ry. v. Bell; Southern Ry. v. Lee, *supra* note 12.

shown "not to have been directed at the plaintiff".[16] On the other hand, recovery appears properly to be limited to cases of conduct which is reasonably offensive to female decency and does not extend to cases of mere "gruffness", "impatience", or "roughness of tone".[17] Moreover, of course, the carrier's duty is not absolute and is imposed only if its servants knew or should have known of the plaintiff's predicament and, in the exercise of reasonable care, could have restrained the misconduct of the fellow-passengers.[18]

The protection of the interest in freedom from mental distress has already been characterized as peculiar. It is indeed curious that a carrier should be held vicariously liable for failing to prevent conduct of its servants or its passengers which results in mental distress under circumstances that would not sustain recovery were the suit brought directly against the wrongdoer.[19] Justification for these cases, if any, lies in the fact that the imposition of such liability upon carriers is perhaps the most effective way in which the traveling public may be assured not only safe, but decent transportation.

It is interesting to note that such liability has been imposed upon carriers, not only for mental distress caused during the course of a journey, but also for distress caused on the station premises,[20] and even though the plaintiff had not yet procured a ticket and was not yet strictly a passenger.[21] This fact negatives the suggestion that the basis of the carrier's duty is that the passengers by going upon a train entrust their safety and comfort exclusively to the carrier. If protection from mental distress is given by the law to passengers while in stations, depots, and baggage rooms, there would seem to be no logical reason why it should be restricted to carrier cases, and not be extended to cases of all public utilities since the public is equally privileged to be on the premises of any public utility for purposes connected with its services. The extent of the liability imposed in other than carrier cases will be considered below.

16Texarkana and S. F. Ry. v. Anderson, 67 Ark. 123 (1899).

17Louisville and N. Ry. v. Ballard, 85 Ky. 307 (1887); Taylor v. Atlantic Ry., 59 S.E. 641 (S.C. 1907).

18Hale v. Chesapeake and O. Ry., 142 Ky. 835 (1911); Norris v. Southern Ry., 84 S. C. 15 (1909).

19See the following cases not involving a carrier-passenger or other special relation and denying recovery for mere mental anguish although intentionally inflicted. Brooker v. Silverthorne, 111 S. C. 553 (1919); Trawick v. Martin Brown Co., 79 Tex. 460 (1890); Barnes v. Bickle, 111 Wash. 113 (1920); Alexander v. Pacholek, 222 Mich. 159 (1923); Texas Power and Light Co., 201 S. W. 205 (Tex. 1918) and Reed v. Maley, 115 Ky. 816 (1903). Only the cases cited *supra* in note 4 appear *contra*.

20Gulf Ry. v. Luther, 90 S. W. 44 (Tex C. A. 1905); Richberger v. Amer. Express Co., 73 Miss. 161 (1895).

21Texas P. Ry. v. Jones, 39 S. W. 124 (Tex. C.A. 1897). But compare Huston and T. C. Ry. v. Phillio, 96 Tex. 18 (1902).

One other group of cases in which carriers figure may be considered in passing, namely, those in which a carrier is sued for mental anguish alleged to have been caused because of negligent instead of intentional conduct. A large number of cases can be found in which a carrier is alleged negligently to have caused mental distress to a passenger by delaying his transportation,[22] or by carrying him beyond his destination.[23] So too, recovery has been sought for mental anguish resulting from a carrier's negligent delay in delivering a corpse thereby retarding funeral services and burial.[24] With few exceptions,[25] liability has been denied in all these cases, and this in spite of the fact that a breach of contract is involved which might serve as a basis for parasitic damages.

DUTY OF TELEGRAPH COMPANIES TO PREVENT EMOTIONAL DISTRESS RESULTING FROM NEGLIGENT TRANSMISSION OF MESSAGES

In a number of southern and southwestern states, telegraph companies have been held liable for emotional distress caused by their negligence either in delaying delivery of the message or in failing to transmit it accurately. The great majority of cases involving delays in delivery concern messages announcing the death or serious illness of a relative of the sendee.[26] In

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[22]Walsh v. Chicago etc. Ry., 42 Wis. 23 (1877); Zabon v. Cunard Steamship Co., 151 Iowa 345 (1911); Chicago, R. I. and P. Ry. v. Kyle, 182 Fed. 613 (Ark. 1910); Wilcox v. Richmond and D. Ry., 52 Fed. 264 (S. C. 1892); Picklesimer v. Louisville and N. Ry., 194 N. C. 40 (1927). Compare Ill. C. Ry. v. Head, 119 Ky., 809 (1905).

[23]Trigg v. St. Louis etc. Ry.. 74 Mo. 147 (1881); Deming v. Chicago, R. I. Ry., 84 Mo. App. 152 (1899); Texarkana and Ft. Smith Ry. v. Anderson, 69 Ark. 123 (1899); Sappington v. Atlanta and W. P. Ry., 127 Ga. 178 (1906); Kans. etc. Ry. v. Dalton, 65 Kans. 661 (1902); Pullman Co. v. Kelly, 86 Miss. 87 (1905); Smith v. Wilmington and W. Ry., 130 N. C. 304 (1902); Black v. Charleston and W. Ry., 15 Wash. 213 (1896); Walsh v. Chicago etc. Ry., 42 Wis. 23 (1887); Muller v. B. and O. Ry., 85 N. Y. 883 (1903).

[24]Beaulieu v. Gt. Northern Ry., 103 Minn. 47 (1907); So. Express Co. v. Byers, 240 U. S. 612 (1915); Compare Miles v. Amer. Express Co., 150 Ark. 114 (1921); Gulf Ry. v. Beard, 129 Miss. 827 (1922).

[25]Nashville etc. Ry. v. Campbell, 212 Ala. 27 (1924); Ill. C. Ry. v. Hawkins, 114 Miss. 110 (1917); Burrus v. Nevada-Cal. Ry., 38 Nev. 156 (1914). The last two cases show evidence of wilfulness in delaying plaintiff's transportation. Denying recovery on facts almost identical to those in Ill. C. Ry. v. Hawkins, is Central of Ga. Ry. v. Wallace, 141 Ga. (1913). In Spaugh v. Atlantic Coast Line Ry., 155 S.E. 145 (S.C. 1930), plaintiff was allowed to recover for anxiety suffered for her children whom she was not able to reach by the time expected by them because of wrong information as to trains given her by a ticket agent. It appeared, however, that plaintiff had suffered physically as well from exposure to weather.

[26]Relle v. Western Union, 55 Tex. 308 (1881); Western Union v. Moore, 76 Tex. 66 (1890); Wadsworth v. Western Union, 86 Tenn. 695 (1888); Young v. Western Union, 107 N. C. 370 (1891); Chapman v. Western Union, 90 Ky. 265 (1890); Mentzer v. Western Union, 93 Iowa 752 (1895); Graham v. Western Union, 109 La. 1069 (1903); Western Union v. Stratemeier, 6 Ind. App. 125 (1892).

consequence of the delay, the sendee was deprived of the opportunity of reaching his relative's bedside before death or of attending the funeral. However, there are some cases allowing recovery for mental distress resulting from delayed delivery which do not involve "death" messages. In one case, plaintiff sent a message to a third person asking that the latter meet the plaintiff at a "flag-station" and delay in delivery in the message resulted in compelling plaintiff to walk a considerable distance alone at night.[27] In another case, mental distress was alleged to have resulted through the defendant's failure promptly to deliver to the county clerk a telegram, wherein plaintiff directed the clerk not to issue a marriage license to plaintiff's eloping daughter. Because of the delay, the clerk had already issued the license when the message arrived.[28] So too, recovery has been allowed for mental distress resulting from failure of a telegraph company promptly to remit money sent by relatives to plaintiff in an emergency,[29] or from failure promptly to deliver a message asking for medical aid.[30]

All the cases complaining of inaccuracies in transmission, rather than delay in delivery, involve messages concerning the health of a relative. Thus recovery has been allowed for transmitting the message, "Mary and baby doing better", as "Mary and baby dieing".[31] In another case the message, "Your sister better" was delivered as "Your sister dead".[32]

The majority of the states, especially in the north and east, in which telegraph companies have been sued for mental anguish alone, have refused to recognize the existence of any liability.[33] It is curious that the states

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[27]Western Union v. Norton, 62 S. W. 1081 (Tex. C. A. 1901).

[28]Western Union v. Proctor, 6 Tex. C. A. 300 (1894).

[29]Western Union v. Brooks, 221 S. W. 1024 (Tex. 1920).

[30]Western Union v. Cooper, 71 Tex. 507 (1888).

[31]Lay v. Postal Teleg. Co., 171 Ala. 172 (1911).

[32]Western Union v. Odom, 21 Tex. C. A. 537 (1899). Compare Taylor v. Western Union, 31 Ky. L. R. 240 (1907); Gardner v. Cumberland Tel. and Western Union Teleg. Co., 207 Ky. 249 (1925).

[33]Chapman v. Western Union, 88 Ga. 763 (1892); Connell v. Western Union, 116 Mo. 34 (1893); Western Union v. Chauteau, 28 Okla. 664 (1911); Ey v. Western Union, 298 Fed. 357 (Cal. 1924); Russell v. Western Union, 3 Dak. 315 (1884); Internat'l Teleg. Co. v. Saunders, 32 Fla. 434 (1893); Western Union v. Halton, 71 Ill App. 63 (1897); Western Union v. Ferguson, 157 Ind. 64 (1901); West v. Western Union, 39 Kans. 93 (1888); Western Union v. Rogers, 68 Miss. 748 (1891); Curtin v. Western Union, 13 App. Div. (N. Y.) 253 (1897); Morton v. Western Union, 53 Ohio 431 (1895); Thomas v. Western Union, 50 Pitts. L. J. (Pa.) 211 (1903); Lewis v. Western Union, 46 W. Va. 48 (1899); Corcoran v. Postal Teleg. Co., 80 Wash. 570 (1914); Summerfield v. Western Union, 87 Wis. 1 (1894); Western Union v. Burris, 179 Fed. 92 (Ark. 1910). Compare Cook v. Grey, 70 Kans. 705 (1905), where recovery was denied against a postmaster who negligently delayed delivery of a postal card advising the addressee of his father's death. Texas, in at least one case has departed from its current of authority and denied recovery. See Western Union v. Edmondson, 91 Tex. 206 (1889).

which impose upon carriers the duty to use reasonable care to protect the modesty and purity of female passengers, are with one exception,[34] in accord in holding telegraph companies liable for mental distress caused by negligent delay or inaccuracy in the transmission of messages.

Apart from the fact that only a minority of states impose such liability, it is noteworthy that even among that minority, various and divergent "exceptions" and limitations are imposed upon the right to recover against telegraph companies. Thus in some jurisdictions, a right of action has been restricted to those in contractual privity with the telegraph company.[35] Other states[36] have permitted sendees to recover, preferring to consider the liability as tortious rather than contractual. In Texas the cases reveal an inner conflict on this point.[37]

Another limitation imposed by some of the minority prevents the imposition of liability unless it was apparent from the message itself that a relationship subsisted between the plaintiff and the deceased or sick person concerning whom the message was sent.[38] In other cases, the telegraph company has been held to be "charged with the notice of the relationship between the parties named whether disclosed by the terms of the message or not".[39] So too, a distinction has been made between "close relatives" and "more distant relatives such as brother-in-law or friends" requiring the court to "presume" that mental anguish resulted from the company's negligence, in cases of "close relatives" whereas proof of the fact of mental anguish must be adduced where the plaintiff is a "more distant relative".[40] A further distinction is made in some but not all Texas courts between cases where a delayed message was one intended to relieve the sendee of already existing mental anxiety and cases where the defendant's negligence gives rise to heretofore non-existing mental distress. The cases making this distinction

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[34]Minnesota denied recovery in Francis v. Western Union, 58 Minn. 252, (1894), although it had protected female modesty in Lucy v. Chicago etc. Ry., *supra* note 12.

[35]Gulf, C. and S. F. Co. v. Levy, 59 Tex. 563 (1883). Recovery has often been denied even where contractual privity between plaintiff and the telegraph company has been established. See West v. Western Union, and Corcoran v. Postal Teleg. Co., *supra* note 33.

[36]See Relle v. Western Union, 53 Tex. 308 (1881); Wadsworth v. Western Union, 86 Tenn. 695 (1888); Young v. Western Union, 107 N. C. 370 (1891); Chapman v. Western Union, 90 Ky. 265 (1890); Mentzer v. Western Uunion, 93 Iowa 752 (1895); Graham v. Western Union, 109 La. 1069 (1903). Compare Gulf, C. and S. F. Co. v. Levy, *supra* note 35, with Relle v. Western Union, *supra* note 26.

[37]See Relle v. Western Union, 53 Tex. 308 (1881).

[38]Western Union v. Luck, 91 Tex. 178 (1897); Western Union v. Moore, 76 Tex. 66 (1890); Western Union v. Brown, 71 Tex. 723 (1888).

[39]Western Union v. Coffin, 88 Tex. 94. Note that this case is intermediate among those cited *contra* in note 38.

[40]Cashion v. Western Union, 123 N. C. 267 (1898); Western Union v. Coffin, *supra* note 39.

allow recovery only in the latter situation.[41] Why the interest in freedom from continuing anxiety for one believed to be dangerously ill should be deemed less important and less deserving of protection than the interest in being promptly apprised of a relative's unexpected death is a question that may well puzzle even a casuist. The result of these limitations and distinctions is obviously to make ambiguous the ambit of liability of the telegraph companies.

DUTY OF TELEPHONE COMPANIES TO PREVENT MENTAL DISTRESS RESULTING FROM FAILURE TO RENDER REASONABLY EFFICIENT SERVICE

Very similar to the cases of delayed telegrams asking for medical aid,[42] are those asking for recovery against telephone companies for alleged mental distress resulting from negligent failure of the company's employees to respond to calls, or having responded, from failure promptly to attempt to put the plaintiff in contact with a doctor whom he sought to reach for medical aid. Such cases against telephone companies are few. The curious fact, however, is that of the five cases[43] which the writer has been able to find involving such suits, only one[44] allowed recovery although each of the five except one, were decided by courts that have allowed recovery in the telegraph cases. In *Lawson v. Haskell Telephone Company,*[45] recovery was denied because the plaintiff, who had used his father's telephone in the attempt to reach a doctor, had no contract with the defendant telephone company. The inference that an action might have been maintained had there been contractual privity, seems, however, to have been dispelled by an earlier holding in the same jurisdiction.[46] In *Cumberland Telephone Company v. Jackson,*[47] the court in denying recovery, stressed the fact that the defendant's misconduct had not been wilful, intimating that wilful failure to put through plaintiff's call might subject the telephone company for any resulting mental distress. In the only case allowing recovery,[48] it appeared

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[41] Akard v. Western Union, 44 S. W. 538 (Tex. C. A. 1897); Rowell v. Western Union, 75 Tex. 26 (1889). But apparently *contra,* see Womack v. Western Union, 225 S. W. 417 (Tex. 1893).

[42] See *supra* note 30.

[43] Lawson v. Haskell Telephone Co., 224 S. W. 390 (Tex. C. A. 1920); South Western Telephone Co. v. Solomon, 54 Tex. C. A. 306 (1909); Cumberland Telephone Co. v. Sutton, 156 Ky. 191 (1913); Cumberland Telephone Co. v. Jackson 95 Miss. 79 (1909); South Western Telephone Co. v. Harris, 214 S. W. 845 (Tex. C. A. 1919).

[44] South Western Telephone Co. v. Harris, *supra* note 43.

[45] *Supra* note 43

[46] South Western Telephone Co. v. Solomon, *supra* note 43.

[47] *Supra* note 43.

[48] *Supra* note 44.

that the defendant negligently failed to put through plaintiff's call for help although plaintiff had informed the telephone operator of the nature and importance of the call.

Here again, it is difficult to perceive any reasonable basis for distinguishing between negligent delay in delivering a telegram asking for medical aid and a negligent failure to put through promptly a telephone call for the same purpose. Yet if the few cases on point are to be taken as criteria, the courts are not disposed to allow recovery in telephone cases as freely as in the telegraph cases.

DUTY OF INNKEEPERS TO PROTECT GUESTS FROM EMOTIONAL DISTRESS

Theoretically, the relationship of innkeeper and guest might involve the same duties in respect to the interest in freedom from emotional disturbance as that of carrier and passenger. A duty might be imposed on innkeepers protecting guests from mental distress inflicted by the innkeeper or his servants. The further duty might exist requiring the innkeeper to exercise reasonable care to protect guests from mental distress inflicted by fellow-guests.

There appear to be no cases considering the extent, if any, of an innkeeper's duty to protect guests from emotional disturbances caused by fellow-guests. There are on the other hand, cases in at least eight jurisdictions[49] which have allowed recovery against an innkeeper for mental distress inflicted upon a guest by an innkeeper or his servants. In most of these cases,[50] alleged humiliation was inflicted upon guests by charges of immorality, when in fact the plaintiffs were husband and wife, or otherwise so related as to render their association, in mutual quarters at the hotel, above reproach. It must be noted, however that in all these cases, in addition to making open charges of immorality the innkeeper or his servants had made a forceful entry into the rooms of the plaintiffs and, in some cases,[51] had caused arrests. The fact of wrongful entry or arrest may well justify consideration of the damages allowed for mental distress as being merely parasitic in character, rather than constituting an independent basis for recovery. Indeed, in one New York decision,[52] recovery was denied

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[49]Kalb and Sullivan v. Wm. Penn Hotel Co., 86 Pa. Super. Ct. 359 (1926); Warren v. Penn Harris Hotel Co., 29 Dauphin 163 (Pa. 1926); Frewen v. Page, 238 Mass. 499 (1921); Emmke v. De Silva, 293 Fed. 17 (Mo. 1923); Boyce v. Greely Square Hotel Co., 169 N. Y. S. 191 (1917); Newcomb Hotel v. Corbett, 108 S. E. 309 (Ga. 1921); Florence Hotel Co. v. Bumpas, 194 Ala. 69 (1915); Moody v. Kenny, 153 La. 1007 (1923); McCarthy v. Niskern, 22 Minn. 90 (1875); De Wolf v. Ford, 193 N. Y. 397 (1908); Dalzell v. Dean Hotel Co., 193 Mo. App. 383 (1916).

[50]Frewen v. Page; Emmke v. De Silva; Boyce v. Greely Square Hotel Co.; Newcomb Hotel v. Corbett; De Wolf v. Ford; Moody v. Kenny, *supra* note 49.

[51]See Moody v. Kenny, *supra* note 49.

[52]Hurd v. Hotel Astor Co., 169 N. Y. S. 339 (1918).

where it appeared that the accusations of immorality were made in a hallway of the hotel and that there had been no forceful entry into the guests' room. The court said:

> "There is a marked difference between the conduct of the innkeeper complained of here and that complained of in the DeWolfe and Boyce cases cited. Here there was no intrusion in the privacy of plaintiff's room. The conversation took place in the hall."

At least three cases[53] have allowed recovery against an innkeeper who in the course of wrongfully depriving the guest of his room or ejecting him therefrom, used abusive and insulting language as where plaintiff was wrongfully accused of having tried to evade payment. It is apparent that in these cases too, there was an independent cause of action apart from mental distress, to which the latter might be considered parasitic. Curiously enough, Texas, which is usually liberal in allowing recovery for mere mental anguish, denied recovery[54] against an innkeeper in a case where on demurrer, it appeared that the innkeeper "intending to humiliate plaintiff and to injure his reputation and standing" wrongfully caused plaintiff to be locked out of his room, in the presence of others. The court in spite of the fact that an independent cause of action existed because of the wrongful deprivation of the room, held that "mental anguish resulting from humiliation cannot be . . . . (an) element of actual damage".

On the basis of these cases therefore, it cannot be said that any court has imposed liability upon an innkeeper for mental distress even intentionally inflicted by the innkeeper or its servants. In all cases allowing recovery, there has been an independent cause of action, apart from mental anguish. It seems wholly unlikely, therefore, that a duty will be imposed on innkeepers to protect even its female guests from mental anguish caused by fellow-guests.

DUTY OF OPERATORS OF THEATRES AND AMUSEMENT RESORTS TO PROTECT PATRONS FROM MENTAL ANGUISH

As in the cases of carriers and innkeepers, operators of theatres and amusement resorts might theoretically be under the two-fold duty of protecting patrons from mental distress inflicted by their own or their servants' conduct as well as by that of other patrons. Here, too, however, what little authority there is to be found is restricted to cases where the mental distress

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[53]Dalzell v. Dean Hotel Co.; Florence Hotel Co. v. Bumpas; McCarthy v. Niskern, *supra* note 49.

[54]Malin and Browder v. McCutcheon, 33 Tex. C. A. 387 (1903).

is charged to the operator's or his servants' misconduct and not to that of fellow-patrons.

Several cases[55] appear to have allowed recovery for humiliation suffered by a patron when he was ordered off the premises or ejected. Again it is evident that an eviction and, generally, a breach of contract existed and served as an independent basis of recovery apart from mental distress. In two cases,[56] recovery was denied for humiliation suffered when admission was refused to a ticket holder, and this despite defendant's breach of contract. In short, in these cases, too, no definite authority is afforded which indicates that recovery is allowed for mere mental anguish apart from other elements of recovery.

LIABILITY FOR MENTAL DISTRESS RESULTING FROM MUTILATION OF THE CORPSE OF A RELATIVE

A considerable number of cases can be found appearing to allow recovery for mental anguish resulting from the mutilation of the corpse of a relative of the plaintiff, and this whether the mutilation was intentional[57] or merely negligent.[58] In a few states, a distinction seems to be made between intentional and negligent mutilation, recovery being restricted to the former.[59]

Despite the dogma which may be found repeated by the early writers and in the earlier cases denying the existence of "rights of property in a dead body",[60] the results of the cases indicate that, for some purposes, at least, a

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[55]Weber-Stair Co. v. Fisher, 119 S. W. 195 (Ky. 1909); Aaron v. Ward, 203 N. Y. 351 (1911); Smith v. Leo, 92 Hun. (N. Y.) 242 (1895). And see Davis v. Tocoma Ry., 35 Wash. 203 (1904). Here there was an intimation of an offensive touching.

[56]Marrone v. Washington Jockey Club, 35 App. D. C. 82 (1910); Luxemberg v. Keith and Proctor Amusement Co., 117 N. Y. S. 979 (1909).

[57]Meagher v. Driscoll, 99 Mass. 281 (1868); Burney v. Children's Hospital, 169 Mass. 257 (1897); Larson v. Chase, 47 Minn. 307 (1891); Darey v. Presbyterian Hospital, 202 N. Y. 259 (1911); Jacobus v. Congregation of Children of Israel, 107 Ga. 518 (1899); Wright v. Beardsley, 46 Wash. 16 (1907); but this case was overruled by Kans. v. Cremation Society of Washington, 103 Wash. 521; See also Keyes v. Konkel, 119 Mich. 550 (1899). Most cases in which intentional misconduct is charged involve unauthorized autopsies. See intimation in Southern Life Insurance Co. v. Morgan, 21 Ala. App. 5 (1925), that recovery would be denied even where intentional misconduct was charged.

[58]Reinhan v. Wright, 125 Ind. 536 (1890). *Contra*, Nail v. McCullough, 88 Okla. 243 (1923); Hall v. Jackson, 24 Colo. App. 225 (1913); Long v. Chicago etc. Ry., 15 Okla. 512 (1905). In this latter case, the court renounces the doctrine of Foley v. Phelps, 1 App. Div. (N. Y.) 551 (1896) which follows Larson v. Chase (*supra* note 57) in cases of intentional misconduct.

[59]See Hockenhammer v. Lexington and Eastern Ry., 24 Ky. L. R. 2383 (1903); Gadbury v. Bleitz, 133 Wash. 134 (1925). But compare the latter with Kansas v. Cremation Society of Washington, *supra* note 57.

[60]2 Bl. Com. 429; East P. C. 652; Rex. v. Sharpe, Dearsly and B. 160 (1857).

corpse has been recognized as the "subject of property". It is true that English courts have refused to recognize a testamentary bequest of the body of the testator as giving a property right to direct the disposal of the corpse to the legatee as against the members of the testator's family.[61] On the other hand, actions have been sustained for disturbances of burial places of relatives[62] and indictments have been upheld for grave robberies.[63] So, too, the courts have adjudicated disputes on the question as to which of a decedent's relatives has the primary right to dispose of the body.[64] Decrees have been granted in equity restraining the destruction of cemeteries and bodies therein.[65] These cases suggest a tendency to regard the corpse, for those purposes, at least, as the subject of property. Indeed in many cases, the courts speak of the interest in a corpse as "quasi-property".[66]

The cases allowing recovery for the mutilation of a corpse may thus be explained on the theory that a right of action has been established apart from mental distress to which the latter is parasitic. It is noteworthy in this connection, that in no case has the right of a wife to direct the burial of her husband been held to depend upon the degree of her affection or upon the extent of her sorrow. There is authority, moreover, which denies recovery for mental anguish resulting from what appears to be carelessness in the handling of a corpse, where in fact, the body had not been mutilated or lost.[67] In a word, what right there is to recover for mental anguish resulting from the mutilation of a relative's corpse, seems not to be allowed solely because of the distress, but is dependent upon the physical violation of the corpse.

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[61] Williams v. Williams, L.R. 20 Chan. Div. 659 (1882).

[62] Jacobus v Congregation of Children of Israel, 107 Ga. 518 (1899).

[63] Rex v. Sharpe, *supra* note 60.

[64] Pettigrew v. Pettigrew, 207 Pa. 313 (1904); Hackett v. Hackett, 18 R. I. 155 (1893); Weld v. Walker, 130 Mass. 422 (1881); Hadsell v. Hadsell & Ohio C. C. 196 (1900); Pierce v. Proprietors of Swan Point Cemetery, 10 R. I. 227 (1872). See also Bogert v. City of Indianapolis, 13 Ind. 134, 138.

[65] Trustees of 1st. Evangelical Church v. Walsh, 57 Ill. 363 (1870); In re Brick Presbyterian Church, 4 Bradf. (N. Y.) 503 (1857).

[66] Hackett v. Hackett, *supra* note 64; Griffith v. Charlotte C. and A. Ry., 23 S.C. 25 (1884); Anonymous Ohio case, reported in 4 Amer. L. Times 127.

[67] Thus in Stahl v. Necker, 171 N. Y. S. 728, defendant returned ashes to plaintiff purporting to be those of her husband, whose body defendant had cremated. The urn indicated April 31 as the date of cremation. On that date, deceased had been alive. Plaintiff sued for mental anguish resulting from the belief that the identity of her husband's ashes had been lost. Defendant assured her and the jury found that these were the ashes and that the mistake had been only clerical. Upon that finding, the court reversed a judgment for plaintiff, saying that if the body had actually been mutilated or the ashes really lost, plaintiff might have recovered for mental suffering, but that there could be no recovery in the absence of actual mistreatment of the remains by defendant.

CONCLUSION

The interest in freedom from mere emotional distress has been accorded a very limited recognition by the courts. Most cases which appear to extend legal protection thereto, in fact reveal independent causes of action and are merely applications of the rule that if a right of action is established apart from mental distress, the latter may be taken into consideration in assessing the damages. The cases imposing liability for mere mental distress are principally the cases against carriers and telegraph companies. Even within this limited sphere, the courts allowing recovery have been uncertain of their ground, and the cases reveal inner conflicts, anomalies and diversities of view within the same jurisdiction, which defy rationalization and which are persuasive against increased recognition of the interest in freedom from mental distress.

The fundamental objection to recovery in these cases centers, of course, around the administrative difficulty of detecting false claims of emotional disturbances. If courts are to recognize this interest as deserving of protection, and if administrative problems of proof are to be ignored in suits against carriers and telegraph companies, it is submitted that similar protection should be accorded to this interest in other cases against any form of mental distress which is recognizable as equally serious as that in the carrier and telegraph cases. There appears to be no justification for confining such protection to such exceptional forms of distress as result through offenses to female modesty or through delay in transmission of death messages. Obvious it is at any rate, that if the protection of this interest is to find increased favor in the future, the boundaries of protection must be realigned on the basis of sounder social and economic considerations than those which now appear determinative.

Carlisle, Pa. D. J. Farage