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DAMAGES - CONTRACTS - RECOVERY FOR MENTAL SUFFERING

G. Randall Price
University of Michigan Law School

DAMAGES — CONTRACTS — RECOVERY FOR MENTAL SUFFERING — Plaintiff bought a loaf of bread at defendant's bakery. After she had eaten half of one of the slices, plaintiff discovered a dead cockroach near the upper crust of the bread whereupon she became ill and suffered serious emotional disturbances. *Held*, no recovery for mental suffering arising out of breach of an implied warranty of wholesomeness. *Wheeler v. Balestri*, (Mass. 1939) 23 N. E. (2d) 132.

As a general rule the law does not allow recovery for mental suffering resulting from breach of contract no matter how forseeable the mental suffering may have been at the time the parties entered into the contract.[1] The theory is that such damages are not to be considered as part of the loss in an ordinary commercial transaction in which the parties generally contemplate only financial losses. However, exceptions to this general rule are sometimes made when courts are confronted with appealing cases involving serious mental suffering. Unfortunately these exceptions do not fit into any well-defined categories nor do they present any clear theory of recovery. They appear to rest on the peculiar types of fact situations involved. For the sake of convenience they may be classified into three groups: (a) where there has been a wilful breach of contract and an element of tort is present; [2] (b) where other than financial benefits are contracted for and the parties should reasonably anticipate that mental suffering will be one of the chief elements of damage; [3] (c) where the contract is such that only nominal damages could otherwise be recovered and there are strong policy reasons for giving a substantial recovery for the breach.[4] The factors which weigh heavily are: (1) the public interest in obtaining wholesome foods; (2) the likelihood of serious mental suffering to the person of normal fortitude;

[1] McCORMICK, DAMAGES, § 145 (1935); 5 WILLISTON, CONTRACTS, § 1340A (1937); 1 SEDGWICK, DAMAGES, § 45 (1912); 1 CONTRACTS RESTATEMENT, § 341 (1932).

[2] 1 CONTRACTS RESTATEMENT, § 341 (1932); Great A. & P. Tea Co. v. Roch, 160 Md. 189, 153 A. 22 (1931), where plaintiff ordered a loaf of bread from defendant who put a dead rat in the package and sent it to plaintiff; Larson v. Chase, 47 Minn. 307, 50 N. W. 238 (1891), where a wife recovered for wilful mutilation of her dead husband's body.

[3] Thrush v. Fullhart, 144 C. C. A. (4th) 322, 230 F. 24 (1915), breach of contract to marry; Loy v. Reid, 11 Ala. App. 231, 65 So. 855 (1914), where defendant breached his contract to embalm properly the body of plaintiff's child; Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903), where defendant contracted to furnish the wedding dress for a bride and failed to do so on the wedding day. In an extreme case damages for mental suffering arising from a leaky roof were allowed. F. Becker Asphaltum Roofing Co. v. Murphy, 224 Ala. 655, 141 So. 630 (1932). Cf. Plummer v. Hollis, 213 Ind. 43, 11 N. E. (2d) 140 (1937), noted in 13 IND. L. J. 583 (1938), where defendant contracted to take a picture of plaintiff's deceased daughter before embalming. No recovery was allowed for mental suffering alone.

[4] So Relle v. Western Union Telegraph Co., 55 Tex. 308, 40 Am. Rep. 805 (1881). For the conflicting decisions in the telegraph cases, see 26 R. C. L. 606 (1920). The food cases similar to the principal case can also be thought of as coming under this classification. Recovery was allowed in Jackson Coca Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914); Kenney v. Wong Len, 81 N. H. 427, 128 A. 383 (1925); Carroll v. New York Pie Baking Co., 215 App. Div. 240, 213 N. Y. S. 553 (1926). Recovery was denied in Young v. Great A. & P. Tea Co., (D. C. Pa. 1936) 15 F. Supp. 1018; Legac v. Vietmeyer Bros. Inc., 7 N. J. Misc. 685, 147 A. 110 (1929); Martin v. Waycross Coca-Cola Bottling Co., 18 Ga. App. 226, 89 S. E. 495 (1916); Koplin v. Louis K. Liggett Co., 322 Pa. 333, 185 A. 744 (1936). For an excellent discussion of the New York cases, see Wilson, "The New York Rule as to Nervous Shock," 11 CORN. L. Q. 512 (1926). Also MELICK, THE SALE OF FOOD AND DRINK, c. 13 (1936).

(3) the necessity of imposing greater sanctions than that of nominal damages in the case of certain types of contracts so that the parties will carry out their contractual obligations. Countervailing factors are: (1) the difficulty of measuring damages for mental suffering; (2) the possibility that the jury will render an unreasonable verdict; (3) the possibility of fraudulent claims. In the principal case the court allowed recovery for nominal damages, but excluded recovery for mental suffering on the theory that there was no physical impact and since plaintiff could have had no recovery in tort the same policy reasons should operate to deny her a recovery in an action for breach of an implied warranty of wholesomeness. The physical impact rule in tort cases is generally considered to be out-moded and courts do not hesitate to disregard it.[5] Thus the slightest impact or a technical battery is sufficient to allow a recovery for mental suffering.[6] If the court feels the need of a peg on which to hang the recovery, it could be found in the principal case in the fact that there is a breach of warranty which at least gives an action for nominal damages. Other courts have held this to be a sufficient basis upon which to allow a recovery for mental suffering.[7] Thus there is no necessity of applying a rule requiring a physical impact.[8] However, perhaps the result which the court reached in the principal case is proper if we are justified in assuming that a person of ordinary fortitude would not have suffered the mental disturbances claimed to have been suffered by the plaintiff.

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[5] See Harper and McNeely, "A Re-Examination of the Basis for Liablity for Emotional Distress," 1938 WIS. L. REV. 426.

[6] McCORMICK, DAMAGES, § 89 (1935). It is interesting to note how far a New York court went to find a physical impact in one of the food cases. See Carroll v. New York Pie Baking Co., 215 App. Div. 240 at 241, 213 N.Y.S. 553 (1926), where the court adopted the following theory: "If she had eaten the foreign substance contained in the pie and had then become ill there could be no question but that she would have been entitled to recover. We may, I think, with equal certainty go a step further. If the article of food, when cut, had emitted an offensive odor which nauseated the plaintiff, her right to recover in this action would have been clear. Can her cause of action be any less clear because the repulsive character of the food was comprehended by sight rather than by taste or smell?" When a court has to go this far to find a physical impact, the only conclusion that can be drawn is that this theory is one of doubtful validity.

[7] Westesen v. Olathe State Bank, 78 Colo. 217, 240 P. 689 (1925); O'Meallie v. Moreau, 116 La. 1020, 41 So. 243 (1906).

[8] McCORMICK, DAMAGES, § 145 (1935).