Refining the Traditional Theories of Recovery for Consumer Mental Anguish

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COMMENTS

Refining the Traditional Theories of Recovery for Consumer Mental Anguish

Emotional distress naturally results from offensive, abusive, or otherwise dissatisfactory consumer transactions, yet the law has been reluctant to redress emotional injuries caused by offensive business practices. In almost all cases a finding of extreme and outrageous conduct is required before recovery is granted. Only in cases involving common carriers, innkeepers, and other public utilities, which have become uniquely liable for the insults and indignities of their employees, does the law grant recovery for offensive conduct short of extreme outrage. If the words or conduct of a private business are not extreme and outrageous, some legal scholars have queried whether a cause of action should nevertheless be recognized based on an extension of the liability imposed on public utilities.

This Comment will discuss briefly the roles of tort and contract in consumer mental anguish recovery, and then examine in greater detail the historical and economic rationale for imposing liability on public utilities for the insults and indignities of their employees. The Comment will then examine recent decisions that allow consumer recovery for emotional distress on the basis of traditional common law notions of liability. Finally, a proposal for a new framework of consumer recovery will be made.

1. Stavnezer v. Sage-Allen & Co., 146 Conn. 460, 152 A.2d 312 (1969); Slocum v. Food Fair Stores, 100 So. 2d 396 (Fla. 1958); Nance v. Mayflower Tavern, Inc., 106 Utah 517, 150 P.2d 773 (1944). See Borda, One's Right to Enjoy Mental Peace and Tranquility, 28 Geo. L.J. 55 (1939). In recent times the judiciary has shown a greater willingness to recognize emotional interests as legally protectable, but recovery is still limited by strict review of the facts in each case, taking into consideration the foreseeability of harm to the emotions, the unreasonableness of the actor's conduct, and the gravity of distress. Id. at 56-57.

2. Restatement (Second) of Torts § 46, Comment d (1965).

3. See Prosser, Insult and Outrage, 44 Calif. L. Rev. 40, 59-63 (1956). Recovery is limited to cases where the conduct of the defendant, "although falling short of extreme outrage, still rises above the level of petty and trivial offensiveness." Id. at 63.

I. THE TORT-CONTRACT CONFUSION

Historically, two theoretical foundations permit a purchaser to recover damages for emotional distress arising from a consumer transaction. The purchaser can base his recovery for mental suffering on either breach of contract or traditional tort theory.

When relying on contract remedies, a purchaser-plaintiff must overcome the general rule denying damages for mental anguish resulting from breach of contract by successfully applying one of the following exceptions. First, sufficient proof that the defendant’s conduct in breaching the contract was reckless, willful, or malicious permits compensatory damages that may serve a punitive purpose. Alternatively, if the contract implies or expresses a duty on the part of the seller to tender the goods or services in a civil and decent manner, a showing of willful and reckless behavior establishes a breach of contract that would warrant recovery of compensatory damages. The plaintiff need only prove that the resulting mental anguish was within the contemplation of both parties at the inception of the contract. The most recognized exception is applied upon a determination that the basis of the contract is emotional rather than pecuniary. "Where other than pecuniary benefits are contracted for, damages have been allowed for injury to the feelings."

Some courts have adhered to the general rule denying recovery for mental anguish for breach of contract but have nevertheless allowed recovery by finding a tortious breach of a legal duty stemming from the contractual relationship. Although tort and

5. Both contract and tort theories apply naturally to the factual circumstances surrounding a consumer transaction. The consumer expends resources in exchange for goods or services and expects a commitment from the business to act honestly and fairly. A breach of the seller’s duty to avoid outrageous conduct constitutes an actionable tort, while a breach of a similar duty contemplated by buyer and seller as a substantial element of the contract results in an actionable breach of contract. Hirst v. Elgin Metal Casket Co., 438 F. Supp. 906 (D. Mont. 1977). See, e.g., Seidenbach’s, Inc. v. Williams, 361 P.2d 185, 191 (Okla. 1961) (Berry, J., dissenting).
7. E.g., World Ins. Co. v. Wright, 308 So. 2d 612 (Fla. 1975).
9. WILLISTON ON CONTRACTS § 1341, at 221 (3d ed. 1968).
11. WILLISTON ON CONTRACTS § 1341, at 214 (3d ed. 1968).
contract actions are distinct and independent,\(^{13}\) most courts fail to identify the source of the duty breached, blurring the line between tort and contract.\(^{14}\) One critic has argued that the distinction between tort and contract is a nonissue, since a plaintiff should be allowed “to have the issues of fact determined in his favor, if the evidence is there, irrespective of the question whether a breach of contract or a tort has occurred.”\(^{15}\) This notion accurately reflects the recent trend that allows more frequent recovery for nervous shock. Between tort and contract, a “gradual equalising, or fusing process . . . is taking place.”\(^{16}\) This simplified approach depends on an implicit legal duty to exercise civility and decency in contractual as well as noncontractual business transactions.\(^{17}\)

II. Differing Standards for Public Utilities and Private Businesses

A. Origins of the Distinction

In earlier centuries, all persons engaged in particular trades or common callings were held to a duty of care in rendering their services, while others who rendered the same services on an occasional basis were held to no such duty.\(^{18}\) This early distinction was justified because those persons engaged in the occupation of performing specific services, by holding themselves out as “common” businessmen such as “common carriers,” “common farriers,” and “common innkeepers,” assumed the risk of compensating those who relied on their public representations of competence in practicing their particular trades.\(^{19}\) “Common” busi-

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15. Fridman, supra note 14, at 432.
16. Id. at 436.
17. Id. at 440.
19. “[A]nyone who held himself out to serve all who might apply was conceived of as assuming a public or common calling, and by force of this assumpsit was held to
nesses had a duty to practice their trades on demand and to exercise skill in performance. Those who performed services on a casual, one-time basis did so at the risk of the hirer, and any injury suffered by the hirer as a result of the worker's negligence, lack of skill, or impropriety was suffered without remedy.

It would seem that the origin and basis of the liability of the person engaged in a common calling for failure to serve, or for lack of care in the performance of the service, is to be found in this early developed branch of the action on the case. It was because a person held himself out to serve the public generally, making that his business, and in doing so assumed to serve all members of the public who should apply, and to serve them with care, that he was liable . . . for lack of care in the performance of the service.

The devastating destruction of human capital resulting from the Black Death in the fourteenth century left England with a serious shortage of laborers. As a result, tradesmen charged any price they pleased and often refused to serve in order to increase the price of their services. The Statutes of Laborers were passed to cope with this problem by forcing tradesmen to accept all requests for services and preventing them from charging unreasonable rates. The public's demand for laborers generated a public interest in regulating "common" callings, and correlative legislative activity brought stringent regulations and tighter policy controls.

Fourteenth-century England also saw its population clustered in small communities separated from each other by treacherous, unimproved highways. Travel was dangerous for the ill-equipped or inexperienced. Outlaws roamed the countryside and night travel was avoided. Consequently, common carriers and innkeepers occupied positions as virtual monopolies.

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20. Arterburn, supra note 18, at 413.
21. Id. at 416.
22. Burdick, supra note 19, at 515-16.
24. 1 B. WYMAN, PUBLIC SERVICE CORPORATIONS § 201 (1911);
26. Id. Private businesses, on the other hand, competed for customers in the marketplace and were regulated by the economic forces of free enterprise. A customer in town
mon carriers represented the only safe means of travel, and the inn was the only safe place to stay. Because society was particularly interested in having suitable accommodations available for the traveling public, the public's role in regulating common carriers and innkeepers was established.

The unique liabilities imposed on common carriers, innkeepers, and other public utilities can therefore be traced to two factors present in the fourteenth century: (1) the development of a general public policy requiring common callings to serve their customers with care and (2) the existence of monopolistic characteristics among particular businesses, which necessitated public control through legislative and judicial action. In the centuries that followed, economic conditions improved and the majority of trades known as common callings were dropped from that classification. However, because of their monopoly position in the market, common carriers, innkeepers, and other inherently public businesses continued to be regulated by public interests and remained the only businesses subject to the peculiar duty to serve all who sought their services. These public service businesses have since become subject to other unique liabilities, such as for emotional suffering caused by the gross insults and indignities of their employees, while private businesses have been left to the

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27. 1 B. WYMAN, supra note 19, §§ 12, 13.
28. "The essential thing in all this is the recognition of the common calling as a thing apart from the private calling, presenting different conditions, involving the necessity therefore of further law than that which suffices to regulate ordinary businesses." Wyman, supra note 25, at 160-61.
29. "This extreme form of the police power over public employment remained in the legislative branch notwithstanding the general guaranties of individual liberty contained in the American constitutions." 1 B. WYMAN, supra note 19, § 19. See Arterburn, supra note 18, at 423. The courts regularly enforced the common law duty to serve all who applied for services and to exercise skill and care in performance. Wyman, supra note 25, at 158-59.
30. Arterburn, supra note 18, at 427.
31. "Barber, surgeon, smith and tailor are no longer in common calling because the situation in the modern times does not require it; but innkeeper, carrier, ferryman and wharfinger are still in that classification." 1 B. WYMAN, supra note 19, § 20.

[A]s a result of the rapidly changing economic conditions it soon became more and more usual for persons to hold themselves out to serve the public generally in all lines of commercial activity, . . . and the assumpsit, so important in earlier actions on the case, and implied in the case of one engaged in a common calling from the holding-out, was no longer recognized as a necessary element.

Burdick, supra note 19, at 522-23. See Wyman, supra note 25, at 158-61.
32. RESTATEMENT (SECOND) OF TORTS § 48 (1965).
operative restraints of the competitive market system.33

B. Common Carriers, Innkeepers, and Other Public Utilities: A Higher Standard of Conduct

Section 48 of the Restatement of Torts summarizes the legal duty imposed on common carriers, innkeepers, and other public utilities to protect a customer's interest in freedom from insulting or abusive conduct.34 The law requires a higher duty of care of these businesses in dealing with patrons, and consequently, offensive words or conduct short of extreme outrage are actionable.35

Common carriers were the first to feel the sting of money judgments awarded to patrons suffering from the emotional abuse of careless or reckless employees. Recovery was initially based on an implied contract to carry passengers both safely and in a decent and civil manner.36 From this notion evolved the current legal duty imposed upon all public utilities to serve the public with politeness and respect.37

For example, in Brown v. Fifth Avenue Coach Lines, Inc.38 the plaintiff successfully recovered damages for the "indignity, humiliation and nervous strain caused by the insulting and abusive language" of a bus driver who refused to stop at the plaintiff's request.39 The court reasoned that "in an age when psychiatry has shown the profound and disastrous effects of mental anguish,

33. "The processes of competition may be trusted in the case of the shop, they do not act with any certainty in the case of the inn." Wyman, supra note 25, at 159 (footnote omitted).

34. Restatement (Second) of Torts § 48 (1965).

35. "It is only where there is a special relation between the parties, as stated in § 48, that there may be recovery for insults not amounting to extreme outrage." Restatement (Second) of Torts § 46, Comment d (1965).


37. The action is now "essentially one in tort." Restatement (Second) of Torts § 48, Comment a (1965).


39. Id. at 694, 185 N.Y.S.2d at 926.
even in the absence of apparent physical injury," a refusal to allow recovery for mental anguish would be untenable.\textsuperscript{40}

The court reasoned that enforcement of the carrier's obligation to exercise a high degree of responsibility requires the carrier to choose its employees with care.\textsuperscript{41} It argued that the economic pressure resulting from penalties imposed by the court would encourage the replacement of reckless and offensive employees. The common carrier is "entrusted [with] the lives and limbs and comfort and convenience of the whole traveling public, and it is certainly as important that these servants should be trustworthy as it is that they should be competent."\textsuperscript{42}

This higher duty has also been imposed on those offering lodging to the public.\textsuperscript{43} Innkeepers occupy a position analogous to common carriers and are subject to the same high standard of care in dealing with their customers.\textsuperscript{44} In Boyce v. Greeley Square Hotel Co.\textsuperscript{45} an employee of the defendant-hotel forcibly entered the plaintiff's room and charged her and her husband with immoral conduct. In allowing recovery for the plaintiff's mental suffering, the court held that the general rule denying such recovery does not apply in cases involving innkeepers since they must treat guests civilly and avoid words or conduct that might cause emotional distress.\textsuperscript{46}

The failure of telegraph companies to deliver messages promptly or accurately has often injured the emotions of senders and receivers. Recovery for emotional distress has been based on the commonsense conclusion that persons patronizing telegraph companies attach great importance to instant communication with others.\textsuperscript{47} This is especially true in the transmission of messages concerning illness or death.\textsuperscript{48} To recover, the plaintiff must prove that the defendant was aware of a blood relationship between the communicating parties or some other special circumstance making mental anguish a probable result of failure to

\textsuperscript{40} Id.
\textsuperscript{41} Id. at 695, 185 N.Y.S.2d at 927.
\textsuperscript{42} 1 F. Harper & F. James, The Law of Torts § 9.3 (1965) (quoting Goddard v. Grand Trunk Ry., 57 Me. 202, 213 (1869)).
\textsuperscript{43} Restatement (Second) of Torts § 48, Comment a (1965).
\textsuperscript{44} Emmke v. De Silva, 293 F. 17 (8th Cir. 1923); Prosser, supra note 36, at 60. See 1 B. Wyman, supra note 19, § 12.
\textsuperscript{45} 228 N.Y. 106, 126 N.E. 647 (1920).
\textsuperscript{46} Id. at 190, 126 N.E. at 649.
\textsuperscript{47} 29 Neb. L. Rev. 481, 483 (1952). See also 22 Tex. L. Rev. 106, 106 (1943).
\textsuperscript{48} 29 Neb. L. Rev. 481, 482 (1952).
promptly deliver the message. In many circumstances the nature of services performed by telegraph companies necessarily heightens a customer's interest in mental security.50 Stuart v. Western Union Telegraph Co.51 is a leading case allowing damages for mental anguish resulting from a delayed telegraph message. Because of the defendant's negligence, the plaintiff received word of his brother's illness too late to comfort him, see him before his death, or even attend his funeral. The court awarded the plaintiff compensatory damages. Defending the award against a motion for rehearing, the court declared that "physical pain is no more real than is mental anguish."52

Mental anguish suits arising from telegraphic communications have largely disappeared because of decreased use of telegraphy as the chief means of emergency communication. It is helpful, however, to understand the rationale for recovery in telegraph cases. Telegraph companies held themselves out as the chief and perhaps only means of communicating immediately with others. Consequently, they had a unique capacity to wound the emotions of those who relied on their representation of prompt and accurate service. Businesses maintaining a comparable position of power to wound patrons' feelings should arguably be subject to the same high standard of conscientious conduct.

C. Private Businesses

While common carriers, innkeepers, and other public utilities can be held liable for gross insults and indignities, a private business' conduct must be extreme and outrageous before recovery will be granted to an injured consumer.53 "It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice.'"54 The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable

49. Id. at 482.
50. Id.
51. 66 Tex. 580, 18 S.W. 351 (1885).
52. Id. at 587, 18 S.W. at 354.
53. "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." RESTATEMENT (SECOND) OF TORTS § 46 (1965).
54. Id. § 46, Comment d.
in a civilized community."

The "insults, indignities, threats, annoyances, petty oppressions, or other trivialities" confronted in everyday life are clearly not contemplated by the term "outrageous conduct." There is a need for freedom of expression "and some safety valve must be left through which irascible tempers may blow off relatively harmless steam." Only where there is a special relationship between the parties, as set forth in section 48 of the Restatement of Torts, is recovery allowed for insults or indignities not amounting to extreme outrage.

III. A RATIONAL FRAMEWORK FOR RECOVERY

A. An Economic Foundation

Economic conditions in earlier centuries may have had the strongest influence on the development of the public utility status and its accompanying unique liabilities. Monopoly thus emerges as the principal factor for assigning common carriers, innkeepers, and other public utilities a stricter liability for the emotional suffering caused by offensive employees. Unlike most private businesses, whose competitive success depends on satisfied customers, noncompetitive public utilities can afford to be largely indifferent to the emotional welfare of their patrons.

The public interest in regulating monopolies such as common carriers and innkeepers set the stage in the late nineteenth century for the imposition of liability for emotional abuse. In Chamberlain v. Chandlers Justice Story held that the captain of an oceangoing common carrier was not only responsible for the passengers' safety and quarters on the ship, but that he was also under a duty to provide comforts, necessities, and kindness.

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55. Id.
56. Id.
57. Id. "A common carrier or other public utility is subject to liability to patrons utilizing its facilities for gross insults which reasonably offend them, inflicted by the utility's servants while otherwise acting within the scope of their employment."
58. The difference between public and private callings has been described as a distinction in the law governing business relations which has always had and will always have most important consequences. . . . The causes of this division are, of course, rather economic than strictly legal; and the relative importance of these two classes at any given time, therefore, depends ultimately upon the industrial conditions which prevail at that period.
59. 5 F. Cas. 413 (C.C.D. Mass. 1823) (No. 2575).
60. Id. at 414.
captain of the ship was considered to have absolute and sovereign control over the obedient will of the passengers.\textsuperscript{61} Passengers could not avoid the crew’s abusive, insulting, immodest, or vulgar conduct. They were forced to endure whatever indecencies the captain in his arbitrary discretion allowed.\textsuperscript{62} From \textit{Chamberlain v. Chandlers} emerged the rule for holding common carriers and, later, innkeepers liable for uncivil treatment of their patrons.\textsuperscript{63}

It is "the unusual power and opportunity afforded the carrier [and other public utilities] to wound the feelings of those entrusted to [their] care; and the interest of the public in freedom from insult at the hands of those with whom it must come in contact, and on whom it must rely for essential help"\textsuperscript{64} that necessitates a special rule applicable to public utilities. The lack of competitive forces to regulate employee selection inspired the common law doctrine making common carriers and other public utilities "subject to liability to patrons utilizing [their] facilities for gross insults which reasonably offend them, inflicted by the [utilities'] servants while otherwise acting within the scope of their employment."\textsuperscript{65}

Money judgments serve the legitimate function of forcing noncompetitive businesses to suffer the same pecuniary losses competitive businesses suffer when they lose customers and profits as a result of abusive conduct. The courts in effect take the place of competitors by applying financial pressure on noncompetitive corporations to employ persons who will serve the public in a polite and civil manner.\textsuperscript{66} Competitive businesses, on the other hand, have traditionally not been subject to liability for their

\textsuperscript{61.} Id.
\textsuperscript{62.} Id.
\textsuperscript{63.} Prosser summarized the development of the rule applied to common carriers, innkeepers, and other businesses in the public service arena: "The basis of this special rule is obviously the responsibility undertaken by the carrier toward the public, which carries with it an obligation of courtesy that does not rest upon ordinary defendants." Prosser, \textit{supra} note 3, at 60.
\textsuperscript{64.} Id.
\textsuperscript{65.} \textsc{Restatement (Second) of Torts} § 48 (1965). \textit{See} \textit{id.} § 48, Comment a.
\textsuperscript{66.} "The chief value of the rule lies in the incentive which it provides for the selection of employees who will not be grossly discourteous to those who must come in contact with them, and for the making of proper rules and supervision to enforce them." \textsc{Restatement (Second) of Torts} § 48, Comment a (1965). In \textit{Slocum v. Food Fair Stores}, 100 So. 2d 396 (Fla. 1958), the Supreme Court of Florida emphasized the noncompetitive nature of businesses as the special relationship necessary to support a consumer's right to expect courtesy in business transactions. \textit{Id.} at 398. Enforcement of that right is achieved through exposure to tort litigation via the broader path of the common law liability summarized in § 48.
employees’ insults and abuses as long as the actions fall short of extreme and outrageous conduct.

The monopoly rationale for imposing liability no longer applies to all businesses expressly contemplated by section 48 of the Restatement of Torts. For example, public transportation today consists of many competing modes of transportation, i.e., motor vehicles, railroads, airlines, and ships, each of which consists of numerous companies competing for the traveling consumer. The lodging industry is also competitive, as evidenced by vigorous promotional campaigns designed to create impressions of hospitality, friendliness, and cordial service. Only in rare circumstances is one forced to patronize a particular carrier or stay in a particular inn. Arguably, the competitive forces of the market adequately deter uncivil and indecent treatment of consumers. Rather than expand the number of businesses subject to the higher standard of care under section 48 of the Restatement, the historical and economic rationale for initially imposing liability indicates that the classification should be narrowed.\textsuperscript{67}

\section*{B. Reducing the Scope of Liability Under Section 48}

Liability should be keyed to the actor’s conduct rather than a business’ status as common carrier, innkeeper, or public utility. The categorical liability imposed under section 48 should only be relied on when there is a legitimate necessity for regulation beyond that provided by the competitive market.\textsuperscript{68} Emphasis on

\textsuperscript{67} Justice Holmes criticized the uniform application of a categorical notion of liability among all common carriers in \textit{The Common Law}.

We do not get a new and single principle by simply giving a single name to all the cases to be accounted for. If there is a sound rule of public policy which ought to impose a special responsibility upon common carriers, as those words are now understood, and upon no others, it has never yet been stated. If, on the other hand, there are considerations which apply to a particular class among those so designated,—for instance, to railroads, who may have a private individual at their mercy, or exercise a power too vast for the common welfare,—we do not prove that the reasoning extends to a general ship or a public cab by calling all three common carriers.


Professor Burdick noted the irrational continuation of the historical imposition of unique liabilities on “common callings”: “[L]iability had been repeatedly imposed upon those classes, and so their liability for refusal to serve had become a familiar doctrine; as so often happens, the rule came to be stated constantly without the original reasons for it, and so the reasons were gradually forgotten.” Burdick, \textit{supra} note 19, at 523.

\textsuperscript{68} The law should demand a higher standard of conduct whenever a virtual monopoly exists, “otherwise in crucial instances of oppression, inconvenience, extortion and injustice there will be no legal remedies for these industrial wrongs.” Wyman, \textit{supra} note
conduct would limit recovery to those cases that involve severe and intolerable words or actions, consistent with the public policy of avoiding fictitious or trivial claims. 69 "No pressing social need requires that every abusive outburst be converted into a tort, 70 nor is it necessary "for the law to intervene in every case where someone's feelings are hurt." 71

Courts should examine the relative positions of consumer and business in each case involving public transportation, public lodging, or any other business contemplated under section 48 to determine whether the noncompetitive rationale underlying section 48 should apply. If the business is competitive, the court should ignore section 48 and rely on the traditional criterion of extreme and outrageous conduct. A fortiori, given the historical rationale for imposing section 48 liability exclusively on public utilities to counter their unchecked monopolistic ability to insult and offend customers, the coverage of section 48 should not be extended to other competitive private businesses. 72 Indeed, most of the current cases allowing consumers to recover for mental anguish caused by insults, harrassment, and offensive conduct of private businesses ignore section 48 and rely instead on section 46 by finding such conduct "extreme and outrageous." 73

25, at 166. "[T]he rule will generally hold true that the more the natural laws of competition regulate service and price, the less the State need interfere in these respects; but conversely when competition ceases to act efficiently State control becomes necessary." 1 B. Wyman, supra note 19, § 16 (emphasis added).

"The existence of a special relationship, arising . . . from the inherent nature of a non-competitive public utility, supports a right and correlative duty of courtesy beyond that legally required in general mercantile or personal relationships." Slocum v. Food Fair Stores, 100 So. 2d 396, 398 (Fla. 1958). The emphasis on noncompetitiveness implies that those common carriers, innkeepers, and others who actually compete for customers should be liable for emotional distress only when caused by intolerable and outrageous conduct. 69. Unless liability is made to rest in each case upon the severity of the defendant's conduct, it would be difficult to formulate a rule permitting recovery without making the ordinary man liable for every display of inconsideration of the feelings of others. Wallace v. Shoreham Hotel Corp., 49 A.2d 81, 83 (D.C. 1946).

70. Magruder, supra note 4, at 1053.
71. Restatement (Second) of Torts § 46, Comment d (1965).
72. The economic concept of social costs, borne by society in the form of disamenities, is relevant here. The gross insults and indignities perpetrated by noncompetitive businesses are costs borne by society as a whole. When the law awards money damages the noncompetitive tortfeasor is forced to pay the social costs of its offensiveness. Competitive businesses, on the other hand, bear the immediate costs of their consumer abuse in lost patronage and profits. The liability summarized in § 48 should therefore be restricted to noncompetitive businesses. See 33 Va. L. Rev. 96, 97-98 (1947).
73. See Eckenrode v. Life of America Ins. Co., 470 F.2d 1, 4-5 (7th Cir. 1972) (defendant-insurer's coercion of plaintiff to settle "clearly rises to the level of 'outrageous conduct' to a person of 'ordinary sensibilities'"); Meyer v. Nottger, 241 N.W.2d 911, 918-
should be predicated on the intolerable conduct of a tortfeasor under the standard set forth in section 46 rather than by classifying the tortfeasor as a business subject to liability under section 48.

Justice Holmes criticized the continuation of a categorical imposition of liability.

If there is no common rule of policy, and common carriers [innkeepers and other public utilities] remain a merely empirical exception from general doctrine, courts may well hesitate to extend significance of those words. . . . Hence it may perhaps be concluded that, if any new case should arise, the degree of responsibility . . . should stand open to argument on general principles. 74

The general principles upon which recovery should be based are clearly those articulated in section 46 of the Restatement of Torts.

C. Section 46 as the Basis for Liability

Several recent cases strengthen the argument for avoiding an extension of liability under section 48 and instead relying on a simplified tort theory grounded on section 46. Courts have with increasing willingness awarded damages for mental anguish suffered by insured parties as the result of extreme settlement tactics of insurers. 75 Often courts couch grounds for recovery in terms of extreme and outrageous conduct, relying on two general factors identified by both Dean Prosser and the Restatement. 76

First, courts consider the position or relationship of the parties to evaluate the defendant's relative power to wound the plaintiff's feelings or emotions. 77 Second, courts examine the de-

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19 (Iowa 1976) (defendant-mortician's dishonest and uncivil treatment of a customer whose deceased father and stepmother were being prepared by defendant for burial was declared outrageous); Note, Jarchow v. Transamerica Title Insurance Company: A Trend Toward Strict Liability for Emotional Distress in the Insurance Industry, 12 CAL. W.L. REV. 591, 601-02 (1976).


75. See World Ins. Co. v. Wright, 308 So. 2d 612 (Fla. Dist. Ct. App. 1975); Note, Damages for Mental Suffering Caused by Insurers: Recent Developments In the Law of Torts and Contract, 48 Notre Dame Law. 1303, 1306 (1973) [hereinafter cited as Recent Developments].

76. Recent Developments, supra note 75, at 1306.

77. "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests." Restatement (Second) of Torts § 46, Comment e (1965). See Eckenrode v. Life of America Ins. Co., 470 F.2d 1, 4 (7th Cir. 1972).
fendant's awareness of any mental or physical condition of the plaintiff that may make him susceptible to emotional distress. 78 Either abuse of the seller's position of authority or intentional and flagrant conduct in the face of known susceptibility to emotional distress constitutes outrageous conduct. In insurance cases, tort actions for emotional distress arising from the insurer's unfair or abusive settlement tactics is based on the insurer-beneficiary relationship, which places the insurer in an unequal position of power. 79 Furthermore, when an insurer realizes a beneficiary's peculiar susceptibility to emotional injury resulting from his reliance on insurance proceeds to ameliorate the loss of life or property, the insurer has an implied duty to treat the beneficiary with a higher degree of fairness and civility. 80

Several cases involving typical consumer transactions join the insurance cases as examples of this approach to recovery for emotional distress in consumer transactions. In Lemaldi v. De Tomaso of America, Inc. 81 the plaintiff purchased a new Pantera automobile, which turned out to be a "lemon." 82 The plaintiff attempted many times to have the defects rectified but was repeatedly evaded, misled, and dissatisfied by the defendant car dealer, 83 whose action and inaction ultimately left the car inoperable. 84 The New Jersey Court of Appeals held that under the

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78. According to the Restatement reporters:

Conduct may be characterized as extreme and outrageous when it arises from the actor's knowledge that the other is peculiarly susceptible to the emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know.


80. "[I]t is common knowledge that one of the most frequent considerations in procuring life insurance is to ensure the continued economic and mental welfare of the beneficiaries upon the death of the insured." Eckenrode v. Life of America Ins. Co., 470 F.2d 1, 5 (7th Cir. 1972).


82. Id. at 447, 383 A.2d at 1223. The car's air conditioner fell out on the street, the car constantly pulled to the right, the windshield leaked, and the bushings burned out. The clutch, radiator, windshield wipers, and transmission all malfunctioned, requiring the car to be continually in the shop during the first year of ownership. Id. at 446, 383 A.2d at 1222.

83. The car dealer and personnel "failed to take or advise him of corrective action or to honor his claims." Id. at 447, 383 A.2d at 1223.

84. The court summed up the pitiful ending to an exasperating experience: "The Pantera, beautiful but unusable, now rests in state in a carpeted garage which, plaintiff
already exasperating circumstances surrounding the defective car, the dealer’s conduct “would aggravate an ordinary man to the point of ‘mental anguish.’” The defendant’s duty toward the plaintiff was “largely grounded in the natural responsibilities of social living and human relations, such as have the recognition of reasonable men; fulfillment is had by a correlative standard of conduct.”

The court did not articulate its holding in terms of outrageous conduct under section 46. It referred instead to a “social duty” on the car dealer’s part to avoid offensive and abusive conduct in light of circumstances surrounding this particular transaction. The court did not rely on traditional justifications of implied contract or warranty, or on an assignment of a higher duty of care by analogy to public utility status. Thus, although this case characterizes a growing trend to grant relief for independent emotional distress suffered in private business transactions, the decision was not based on a concrete theory. The court could have achieved the same result based on either of the two factors in the comments to section 46, which would have facilitated a finding of outrageous conduct. The plaintiff in Lemaldi was arguably in a much weaker bargaining position than the car dealer since his car was a unique and expensive piece of machinery that only a competent and experienced dealership should attempt to repair. This unequal position of power elevates the dealer’s duty to avoid offensive treatment of the plaintiff, the breach of which could be characterized as outrageous. Alternatively, the car dealer may still have been liable if he had knowledge of some physical or mental condition that made the plaintiff particularly susceptible to emotional distress. The defendant’s knowledge of the plaintiff’s unusual emotional interest in the purchase of the new Pantera would have created circumstances under which defendant’s offensive conduct would justify a finding of outrageousness and permit recovery under section 46.

In Wilson v. Redken Laboratories, Inc., the plaintiff recovered a large money judgment from a hair products manufacturer whose chemical treatment for hair discoloration ultimately resulted in the plaintiff’s baldness. The court held that notwithstanding the absence of physical pain or injury, the plaintiff

85. Id.
86. Id.
87. The plaintiff purchased the car on his birthday and kept it in a carpeted garage.
88. 562 S.W.2d 633 (Ky. 1978).
should be compensated for the humiliation and embarrassment she experienced as a result of losing her hair.\textsuperscript{88} The court made no finding of extreme and outrageous conduct, although the result of the defendant’s negligence could indeed be characterized as outrageous. In Wilson the Supreme Court of Kentucky was apparently convinced that the emotional interest in the service purchased by the plaintiff was intimately associated with the defendant’s satisfactory performance of the services.\textsuperscript{90} Liability for emotional injury could easily have rested on the defendant’s abuse of its unique power to wound the plaintiff’s emotions or its negligent conduct in the face of the plaintiff’s known susceptibility to emotional distress in the event her hair were discolored or lost. Either of these findings would constitute outrageousness and provide a clearer, more manageable basis for imposing liability.

In Hanke v. Global Van Lines, Inc.\textsuperscript{91} the plaintiff suffered great anxiety and disappointment when the moving company repeatedly failed to deliver her personal belongings on promised dates.\textsuperscript{92} The Court of Appeals for the Eighth Circuit vacated the summary judgment ordered by the lower court for the defendant and held that the defendant’s practices in this case could amount to outrageous conduct.\textsuperscript{93} The defendant’s position of power, and ability to wound the feelings of the plaintiff by continually “stringing her along” with meaningless promises of delivery, could conceivably convert the unfair, unsettling, and irritating business practices into outrageous conduct.

These cases illustrate the trend of providing consumers relief from insulting and abusive practices. In order to prevent frivolous claims, the chief criterion for relief should be outrageous conduct gauged by considerations of the business’ relative power to wound the customer’s emotions and the customer’s known susceptibility to emotional injury. In transactions involving a violation of legitimate emotional concern that is sufficiently grievous to warrant judicial relief, the plaintiff should rely on these two factors for determining outrageous behavior.

\textsuperscript{88} Id. at 636-37.

\textsuperscript{90} “One of the greatest pains that any person can suffer is the pain of embarrassment. The sudden loss of Louise’s hair was a traumatic shock.” Id. at 636.

\textsuperscript{91} 533 F.2d 396 (8th Cir. 1976).

\textsuperscript{92} The plaintiff was repeatedly informed by telegram that she could expect delivery of her furniture on specific dates, which came and went without delivery. After complaining to the Interstate Commerce Commission, she was again assured that she would receive delivery on a given date. Again the shipment failed to arrive as promised. Id. at 396.

\textsuperscript{93} Id. at 400.
IV. Conclusion

As courts continue to expand their recognition of the individual's right of freedom from emotional and mental abuse, consumers are likely to occupy an increasing number of seats at plaintiff tables seeking recovery for emotional distress inflicted by businesses and their employees. Insults and abuses that are so atrocious and beyond the bounds of decency as to elicit the exclamation "Outrageous!" are clearly actionable under section 46 of the Restatement of Torts. Offensive speech or conduct of common carriers, innkeepers, or other public utilities is currently actionable absent outrageous conduct by virtue of the common law, summarized in section 48 of the Restatement. For consistency with the historical rationale underlying the common law expressed in section 48, courts should not impose liability for less than outrageous conduct unless a compelling public interest to regulate a noncompetitive business exists.

A difficult situation arises when a private business inflicts emotional distress by insulting a customer or engaging in harsh business practices that cannot be characterized as extreme and outrageous under the traditional meaning of section 46. Legal scholars have contemplated the possibility of imposing on private businesses the same duty now possessed by public utilities, to avoid insulting or undignified service. This proposition should be rejected in light of the historical and economic rationale for initially imposing liability exclusively on public utilities. The thrust of section 48 liability for inflicting emotional distress is consistent with the public need for general regulation of public utilities. Both the imposition of a higher standard of care under the common law and modern legislative regulation of public utilities respond to the noncompetitive nature of such businesses and the lack of effective consumer control through market forces. Because private businesses are subject to the forces of the competitive market system and are already sensitive to the loss of consumer support resulting from dissatisfaction conduct and services, they should not be subject to the same judicial supervision through tort litigation necessary in the case of noncompetitive public utilities.

94. "[C]on sidering the greater strain that has been placed on one's nervous system under modern conditions of high speed living, and in accordance with the current standards of propriety, good taste and decency," the judiciary is willing to find intrusions into the emotional aspects of life "actionable over a constantly widening area." Borda, supra note 1, at 58 (footnotes omitted).

95. Restatement (Second) of Torts § 46, Comment d (1965).
A logical method of redressing legitimate emotional injuries inflicted by private businesses on their customers is to expand the concept of outrageous conduct to encompass particularly offensive business practices. Under this theory, an abuse of a business' special position of power over the feelings of a customer, or the business' flagrant offensiveness toward a customer while fully aware of the customer's susceptibility to emotional distress, could be characterized as "outrageous" and actionable under the common law summarized in section 46. Only when a business has abused a unique position of power or has acted offensively in the face of a known susceptibility to emotional distress should the business' conduct be characterized as outrageous and intolerable. There are specific instances when customers suffer emotional distress as a result of offensive business practices. Recovery, however, should not become a function of extended public utility liability under section 48 of the Restatement of Torts but should be based in each case on conduct that, because of the particular business relationship of the parties, rises to an intolerable level of offensiveness.

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