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John E. Duda

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Damages for Mental Suffering in Discrimination Cases

*John E. Duda**

ANTI-DISCRIMINATION LEGISLATION enacted by Congress and by legislatures of various states reflects a general recognition of the idea that discrimination by reason of race is a wrong for which there should be both a prohibition and a remedy. Save for those former slave states in which complete separation of the races remains preserved by custom and law, most state legislatures have enacted statutes attacking various forms of racial discrimination.¹ While recent legislative action by a few states has provided effective remedies, statutory prohibitions against racial discrimination have been available since the latter 1800's. These early state pronouncements were a result of the failure of the first post-Civil War federal civil rights act² to withstand constitutional scrutiny by the United States Supreme Court.³ Some of the earliest state legislation prohibits racial discrimination in public accommodations, hospitals, recreational facilities, jury venire selection, voting, and by insurance companies. For the most part, the first public accommodations laws have been attacked as being ineffective for want of an adequate remedy. These statutes provided for criminal penalties or limited punitive damage awards, both of which often operated as a license for the violator to continue discriminating.⁴ Some state laws enacted within the last decade have expanded the prohibition to housing, education, and employment, and have strengthened the effect of pre-existing prohibitions against discrimination in places of public accommodations.⁵ A fresh approach has been to create a government agency authorized to order a discriminator to cease and

* Of the Cleveland Bar; formerly Asst. Atty. Genl. of Ohio, and Counsel to the Ohio Civil Rights Commission.

¹ For citations to laws of all jurisdictions see Greenberg, *Race Relations and American Law*, 275-79 (1959); also, *State Laws and Agencies for Civil Rights*, Gov. Comm. on Human Rights (Wis., 1960).

² Civil Rights Act of 1875, 18 Stats. 335, Vol. 3 (1875).

³ Civil Rights Cases, 109 U. S. 3 (1883).

⁴ See Van Alstyne, *A Critique of the Ohio Public Accommodations Law*, 22 Ohio St. L. J. 201 (1961); also see, Note, 12 Cinc. L. Rev. 60 (1938); and See, Goostree, *The Iowa Civil Rights Statute—A Problem of Enforcement*, 37 Iowa L. Rev. 242 (1952).

⁵ See n. 1, *supra*.

desist from his unlawful discriminatory practice.⁶ These agencies seem to be effective in eliminating discrimination in those cases where valid complaints are filed.⁷

Federal legislation attacks racial discrimination in employment, public accommodations, voting, and transportation.⁸ In addition, the equal protection clause of the Fourteenth Amendment to the United States Constitution is a traditional basis for a cause of action for injunctive relief against discriminatory state agencies.⁹ Its effect on individual discrimination has not yet been settled by the courts.¹⁰

The earlier state laws contemplate punitive remedies. The more recent statutory schemes, as well as the federal constitutional pronouncements, are designed to provide injunctive relief. Generally, they do not anticipate, as the thrust of their remedy, compensating the victim of unlawful discrimination for his injury. There are two notable exceptions: (1) The authority granted to some state civil rights agencies to order dollar awards for back pay in addition to an order to hire, reinstate, or upgrade an employee in employment discrimination cases;¹¹ and (2) California's (Unruh) Civil Rights Act which creates liability for ". . . actual damages, and two hundred fifty dollars in addition thereto. . ." ¹²

This article explores the legal basis for an award of damages for mental suffering caused by unlawful racial discrimination. It necessarily includes religious and nationality discrimination, since these three areas are intertwined in the law. For the most part, the legal principles are applicable alike to all three forms of discrimination. Mental suffering is treated as an element of compensatory damages on the theory that the purpose of such an award is to compensate the claimant for his loss and not neces-

⁶ E.g.; Ohio Civil Rights Act, Secs. 4112.01 to 4112.99, Ohio Rev. Code (as amended 1965).

⁷ See Annual Reports of the Ohio Civil Rights Commission for the years 1960, 1961, 1962, 1963, 1964.

⁸ Civil Rights Act of 1964, 42 U.S.C.A. Secs. 1981-2000a (1964).

⁹ Civil Rights Cases, 109 U.S. 3 (1883); also see, *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836 (1948).

¹⁰ See Justice Douglas' concurring opinion in *Lumbard v. State of Louisiana*, 83 S. Ct. 1122 (1963); followed in *Gegner v. Graham*, 1 Ohio App. 2d 442 (1964), 205 N.E. 69 (1964); dismissed for mootness: 1 Ohio St. 2d. 108, 205 N.E. 2d 72 (1965).

¹¹ Ohio Rev. Code, Sec. 4112.05 (G).

¹² Cal. Civil Code, Sec. 51 (as amended 1961).

sarily to penalize the discriminator. Punishment enters the analysis only to the extent that the prevailing legal rules governing damage awards for mental suffering are different in cases involving intentional conduct from those applicable to negligence.

First let us examine the idea of compensation for loss in civil rights cases generally. Compensatory damage awards in discrimination cases are relatively rare. The law has given little attention to the idea that a person should be compensated for his injury or loss caused by a discriminator's unlawful conduct. There are perhaps several reasons for the thin precedent to support compensatory awards in civil rights cases. First, there are other available statutory remedies.¹³ The extent to which these remedies are or have been inadequate reflects the degree of the white majority's willingness both to recognize the actuality of racial discrimination, and the extent of the white majority's desire to eliminate it. Second, until the recent press for equality by organized civil rights groups and equally recent publications by Negro writers, there has been little public attention given to the injury to the individual caused by racial discrimination. Third, racial discrimination was accepted as a matter of course—as a custom of the community—the results of which either did not occur to the white man, did not outrage him, or actually pleased him. Fourth, and perhaps most significant, Negroes simply have not made claims for compensation. They are aware, after all, that the merit of their claims invariably is decided by a white judge and a white jury. Undoubtedly, there are other factors which contribute to the absence of litigation. For our purposes, it is sufficient to recognize that claims for, and awards of, compensatory damages are not common.

Whether anti-discrimination legislation can be the basis of a cause of action for compensatory damages has become a matter of recent interest for the courts. In *Bachrach v. 1001 Tenants Corporation*,¹⁴ a recent case, a Jewish claimant sued a cooperative apartment corporation for compensatory damages. He claimed that the defendant refused to allow him to acquire an interest in an apartment solely because of his religion. Bachrach relied on a New York City ordinance¹⁵ which provides for an administrative and judicial remedy upon the initiative of the named admin-

¹³ *Supra*, n. 1.

¹⁴ 41 Misc. 2d 512, 245 N.Y.S. 2d 912 (1963).

¹⁵ New York City Administrative Code, Secs. D1-1.0 to D1-4.0.

istrative agency. The ordinance prohibits the denial of accommodations to any person because of his race, color, religion, national origin or ancestry. The defendant moved to dismiss on the ground that the ordinance provides for no private or individual remedy in the form of an action for damages. The trial court denied the motion and held that the defendant's willful denial of consent to the plaintiff's purchase of an apartment was actionable at law for damages, that the available administrative remedy is not exclusive, and that the action sounds in prima facie tort. The court said that while the claim was novel, that alone did not warrant dismissal. The trial court viewed the cause as one of prima facie tort for injury due to the infliction of intentional harm, resulting in damages, without excuse or justification. On appeal, the appellate division reversed the trial court and dismissed the complaint.¹⁶ It held that the administrative remedy is exclusive and that Bachrach had no private action for damages. The highest appeals court affirmed the appellate division's decision without opinion.¹⁷

On the other hand, in *Amos v. Prom, Inc.*¹⁸ the United States District Court for the Northern District of Iowa assumed that an action for damages is available to a victim of discriminatory conduct which violates the Iowa Civil Rights Act.¹⁹ A Negro citizen of Iowa brought an action in the federal court for \$3,000.00 compensatory and \$7,000.00 punitive damages against a Delaware corporation engaged in operating a dance hall in Clear Lake, Iowa. She claimed that the defendant willfully and maliciously refused to admit her to its ballroom solely because of her race. The Iowa statute is clearly criminal in character. It prohibits racial discrimination in places of public accommodation, makes violation a misdemeanor, and imposes a fine. No other remedy is provided for by the Act. *Prom, Inc.* moved to dismiss on the ground that under the Iowa law regarding compensatory and exemplary damages, it would be legally impossible for Miss Amos to recover damages in excess of \$3,000.00; therefore, the amount of the damage claim could not meet the federal court's jurisdictional minimum then in effect.²⁰ The court overruled defendant's

¹⁶ 21 A.D. 2d 622, 249 N.Y.S. 2d 855 (1964).

¹⁷ 15 N.Y. 2d 718, 256 N.Y.S. 2d 929 (1965).

¹⁸ 115 F. Supp. 127 (D.C. Iowa, 1953).

¹⁹ Iowa Civil Rights Act, Sec. 735.1; Code of Iowa 1950, Vol. 55, I.C.A.

²⁰ 28 U.S.C. Sec. 1332 (1953).

motion to dismiss after coming to the conclusion that it was not a legal certainty that Miss Amos could not receive an award in excess of the jurisdictional requirement. After taking as true the allegation that defendant's action was malicious, willful, illegal, and based solely on her race with no other justification, the court held that the defendant, without justification, intentionally committed an illegal act to plaintiff's injury. Even though the court did not explicitly label the action as one in "prima facie tort," it recognized that the claim was for an intentional wrong which caused an injury, an analysis not far from that of the trial court in the *Bachrach* case.

We must take notice, however, that the Iowa statute was criminal in character. The New York City ordinance was administrative. It did not declare racial discrimination a crime. While this distinction might be a reason for attaching an action at law for damages to one and not the other, it appears that it is a distinction without merit. Both acts prohibit a wrong; both declare discrimination evil; both recognize the harm done by discrimination; yet both fail to provide for compensation to an injured victim. Only the statutory schemes for solution differ. New York City's administrative mechanism is designed to eliminate the evil by injunction rather than merely to punish the wrongdoer. The Iowa Public Accommodation Act seeks only punishment. But forced compliance or punishment do not make a victim whole. Injunctive and punitive anti-discrimination legislation should not infringe upon the law's traditional objective of attempting to make whole a victim of intentionally inflicted injury. An action for damages should be available to any person injured by the conduct of an intentional wrongdoer who acts without justification. Where there is a statute that provides a means either to end the harm or to punish the wrongdoer, its remedy should not be exclusive. If Mr. Bachrach was caused to purchase an apartment at a price higher than the price of the one that he was denied by 1001 Tenants because of his religion, the defendant should be liable for this loss. This injury is no less real than similar injuries in other tort and contract actions. Furthermore, once the injury is inflicted, the discriminator's compliance with the statute does not compensate his victim for past harm. In the *Bachrach* case, for example, the sale of the apartment to Mr. Bachrach after administrative or court order cannot compensate him for loss due to a difference in rent during litigation. Nor will it make him financially whole should he be un-

able to dispose of the alternative apartment that he was caused to buy due to defendant's conduct.

As claimants begin to file actions for damages due to discrimination, the courts will be required to look more realistically at the basis for this cause of action. Where statutes explicitly state that their remedies are exclusive, the courts will have little alternative but to deny a remedy at law. Such an exclusionary clause operates to take away a cause of action at law for damages and ought to be carefully scrutinized as to its effect when offered to legislatures for enactment. In the absence of such a legislative declaration, courts should be attentive to the law's traditional purpose of attempting to make the victim whole. In some cases the conduct of a discriminator might be so outrageous to society and injurious to the claimant that the latter's action will stand apart from a statutory prohibition, on traditional tort law alone. Principles applicable to prima facie tort, the intentional infliction of harm resulting in damage without excuse or justification,²¹ should be explored by the courts as civil rights damage cases come before them.

After once having decided that persons discriminated against because of their race have a cause of action for damages, courts will face an equally challenging problem of delineating those injuries suffered by the claimants which are compensable. Mental suffering as an item of compensatory damages will be among the first to be scrutinized. In public accommodations cases, it will probably be the only injury complained of. The singular Negro mother and child turned away at a midtown restaurant, the Negro gentleman refused a haircut by a local barber, the Negro boy and girl refused admission to a movie theatre, will have little compensable injury beyond their insult, humiliation, and mental anguish. In employment, housing, and education cases, other elements can be anticipated. Loss of income due to an inability to obtain a job, back pay, differences in purchase price of real estate due to a refusal to sell the originally desired property, loss of income due to inadequate education or refusal to educate, are some other possibilities. Here, too, mental suffering will be contemplated as an added element of damages. In most cases, claims for emotional distress, mental anguish, insult, outrage, and injury to pride or reputation, as kinds of mental suffering, are considerations in determining a Negro's injury. In order to answer whether or not courts will allow compensation for mental suffer-

²¹ *Ruza v. Ruza*, 286 App. Div. 767, 146 N.Y.S. 2d 808 (1955).

ing in civil rights cases, we must first direct our attention to the current status of the law as it relates to compensation for mental suffering.

A sharp distinction between mental suffering inflicted by intentional misconduct and that caused by negligence is necessary. In negligence cases, the courts agree that mental disturbance accompanied by physical impact is compensable. At present there is a dispute among the authorities as to whether or not recovery for mental suffering in the absence of physical impact will be compensated. The so-called impact rule has been repudiated by the majority view in favor of the rule allowing mental suffering resulting in physical harm even where there is no contemporaneous impact. However, some courts jealously hold on to the old "impact rule." Where there is mental disturbance as the only result of negligence, the courts generally agree that there is no recovery. Emotional fright in the absence of resultant physical harm is believed to be easily feigned and usually so trivial that the law will not protect against mere negligence. But in a 1964 case New York said that the mental suffering caused to a mother by seeing her child struck by a car is actionable.^{21a} Where the mental suffering is intentionally inflicted, the law is more liberal.²²

Extreme and intentionally inflicted mental suffering is compensable in the absence of resultant physical harm. There are several requirements. First, the act must be intentional or willful. Second, the mental suffering must be extreme. With only a few exceptions, insult and indignity is not enough.²³ Third, the conduct must exceed that which is considered decent by the community. It must be "outrageous."²⁴ While these tests are not easily met, there is a growing list of incidents that have come within the scope of recovery. Recovery was allowed for mental suffering in a case where two school officials attempted to extract a confession of unchastity from a school girl by threatening to send her to a reformatory;²⁵ where a grocery boy delivered

^{21a} *Haight v. McEwen*, 251 N.Y.S. 2d 839 (1964). Actionable if injury is foreseeable: *Slaughter v. Slaughter*, 143 S.E. 2d 683 (N.C. 1965). Actionable if physical illness results: *Falzone v. Busch*, N. J. Supr. Ct., Oct. 25, 1965; reported in *N. Y. Times*, p. 47 (Oct. 26, 1965). Actionable if wilful: *Barry v. Baugh*, 143 S.E. 2d 849 (Ga. 1965).

²² Prosser, *Law of Torts*, 38-47 (2d ed. 1955).

²³ For a brief analysis of the current law, see Editor's Note, 25 *NACCA L. J.* 116-129 (1960); Prosser, *op. cit. supra*, n. 22.

²⁴ Restatement (Second), *Law of Torts*, Sec. 46 (G) (1948).

²⁵ *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814 (1926).

a package containing a dead rat as a substitute for a loaf of bread;²⁶ when a California association of rubbish collectors threatened to beat a man, destroy his truck, and put him out of business unless he paid them off with proceeds from a territory assigned to one of its members;²⁷ where practical jokers humiliated an old lady who had been told to look for a pot of gold by her fortune teller, by planting a phony pot of gold in her yard, which she dug up and took to her bank where she opened it publicly to her humiliation;²⁸ for an unauthorized autopsy on a dead body;²⁹ when a private investigator attempted to coerce a servant into getting him letters in her mistress's possession by accusing her of being a spy and threatening to have her jailed;³⁰ and where there has been a threat of pecuniary injury.³¹ These cases generally involve mental distress which results in injury to the body, usually in the form of nervousness, stomach upset, or other demonstrable physical manifestations of mental anguish. They meet the test of severity. The courts were satisfied that the injuries were not feigned.

The rule that mental suffering must be extreme is not without its exceptions. There is a class of conduct considered by the society to be so outrageous as to warrant an award for humiliation, indignity, and mental suffering when it is not followed by physical injury. This class includes wrongful eviction,³² insult by public carriers³³ and innkeepers,³⁴ and abuse of dead bodies.³⁵ These cases are particularly interesting in a discussion of racial discrimination because rejection by reason of race seldom causes the kind of mental suffering that results in physical illness. In a study of discrimination in places of public accommodation, the Ohio Civil Rights Commission reports that out of 47

²⁶ *Great Atlantic & Pacific Tea Co. v. Roch*, 160 Md. 189, 153 A. 22 (1931).

²⁷ *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P. 2d 282 (1952).

²⁸ *Nickerson v. Hodges*, 146 La. 735, 84 So. 37 (1920).

²⁹ *Brown v. Broome County*, 10 A.D. 2d 152, 197 N.Y.S. 2d 679 (1960).

³⁰ *Janvier v. Sweeney*, 2 K. B. 316 (C.A. 1919).

³¹ *Chamberlain v. Chandler*, 5 Fed. Cas. 413 (No. 2,575) (C.C. Mass. 1823); *Bleecker v. Colo. & So. Ry. Co.*, 50 Colo. 140, 114 P. 481 (1911).

³² *Curnett v. Wolf*, 244 Ia. 683, 57 N.W. 2d 915 (1953).

³³ *Chamberlain v. Chandler*, *supra*, n. 31; *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S.W. 557 (1899).

³⁴ *Emmke v. DeSilva*, 293 F. 17 (8th Cir. 1923).

³⁵ *England v. Central Pocahontas Coal Co.*, 86 W.Va. 575, 104 S.E. 46 (1920).

types of accommodations investigated, only bars were found to be grossly antagonistic toward Negroes.³⁶ Conduct of personnel in other accommodations ranges from varying degrees of welcome through restrained acceptance to total denial. Denial is seldom accompanied by overt hostility or abusive language and conduct. Conduct of discriminators was discussed in *Holland v. Edwards* (also sub. nom. *State Commission Against Discrimination v. Holland*).³⁷ Judge Fuld of the New York Court of Appeals said:

One intent on violating the law against discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practice in ways that are devious, by methods subtle and elusive . . . for we deal with an area in which subtleties of conduct . . . play no small part.

The Court also said that:

Racial prejudice or discrimination is intangible and elusive and can be established only through inferences. . . . It is substantially subjective in character, with its roots and symptoms buried within the recesses of the heart and mind. One who indulges in discrimination does not shout it from house tops. In fact, he conceals his true feelings by publicly announcing contrary views. For this reason, in this type of proceedings, greater latitude is accorded the tribunal to draw inferences from words or deeds than in cases where overt acts need to be established.

The *Holland* case not only highlights the necessity for relying on circumstantial evidence to prove racial discrimination, it also recognizes that an act of discrimination is seldom committed in an environment of hostility. Rather, it is often subtle. Sometimes rejection is accompanied by an apology or excuse, and a disclaimer of prejudice. An owner will often say that if it were up to him, everyone would be served, but since he depends on white people for his livelihood, he has to discriminate against Negroes to please his trade. Other instances include the ignoring of a Negro patron by a waitress; a simple, "I'm sorry, we're not hiring today," or "I can't cut your hair. I don't know how."³⁸

³⁶ *Discrimination in Places of Public Accommodations in Ohio* (A Report of the Ohio Civil Rights Commission, Dec. 1960), pp. 21-26.

³⁷ *Holland v. Edwards*, also sub. nomine, *State Commission Against Discrimination v. Holland*, 307 N.Y. 38, 119 N.E. 2d 581 (1954).

³⁸ The excuse given by a barber found to be discriminatory, in *Gegner v. Graham*, 1 Ohio App. 2d 442, 205 N.E. 2d 69 (1964); dismissed as moot, 1 Ohio St. 2d 108, 205 N.E. 2d 72 (1965).

Usually it is conduct that does not arouse the spirit to the extent of a headache, upset stomach, fainting spell or other physical result of either momentary or lasting duration. This is not to say that hostile confrontations between civil rights workers and Negroes on the one hand and segregationists and discriminatory proprietors on the other do not cause emotional distress which results in physical harm. There are many such instances reported in the news media, but they are not the daily experience of most Negroes. For the most part, these confrontations are planned by civil rights organizations. Resistance is expected and prepared for. They cannot be considered typical. Nor does it deny that a sign which reads "Colored Not Served" arouses anger in some black and white men alike. It merely suggests that a singular act of racial discrimination does not usually cause the extreme mental suffering anticipated by the general rules regarding damages.

Racial discrimination cases best fit within the exception allowed for those cases where malice or complete disregard for the sensibilities of the victim support an award for mental anguish.³⁹

A striking similarity exists between the wrongful eviction and the public accommodations cases. Landlords have been held liable for damages when they wrongfully evict a tenant causing mental anguish and humiliation without physical harm.⁴⁰ Malice or a reckless disregard for the sensibilities of the tenant appear to be necessary to support an award. On this basis, a Utah court⁴¹ has allowed recovery where a plaintiff was wrongfully evicted from her leased premises. The plaintiff went away for a holiday. When she returned, she found strangers occupying her apartment. The court held that in assessing damages for wrongful eviction, mental anguish and suffering, injury to pride and social position, and a sense of shame and humiliation caused by the landlord's conduct are elements to be considered, and that a tenant may recover damages for injury to her dignity, and insult caused by being turned out of her home with her family.

The kind of mental suffering experienced by the evicted tenant in the Utah case seems no less difficult to assess than that

³⁹ For a complete discussion of the legal basis for awards for mental suffering in the absence of physical injury see Prosser, *Insult and Outrage*, 44 Cal. L. Rev. 40 (1956).

⁴⁰ See Annotation, *Eviction-Injury to Tenant*, 17 A.L.R. 2d 936.

⁴¹ *Hargrave v. Leigh*, 73 Utah 178, 273 P. 298 (1928).

experienced by a Negro who is evicted from or refused admission to a place of public accommodations. Similarly, injury to a Negro's sensibilities, pride, and self-esteem is as likely to result from his publicly being turned away from a restaurant, theatre, hotel, or other accommodation as that experienced by one who is wrongfully evicted. Both wrongful eviction and unlawful discrimination are intentional acts which inflict harm. The basis for an award of compensatory damages is the same for one as for the other. As a practical matter, the difference between the two rests primarily with possible difference in the degree of outrage attached to each by the community in which the act occurred.

In the absence of a legislative statement of public policy which forbids or condemns discrimination, community outrage appears to be the test of whether an act of racial discrimination falls within that class of cases for which damages for insult, humiliation, or mental anguish apart from resultant physical harm will be allowed. Undoubtedly, whether a discrimination claim meets this test will vary from one community to another. Certainly where discrimination is customary and traditional, it is not likely to shock either the white majority or the Negro minority, irrespective of the harm it does to the individual. But where the legislature recognizes the outrage by statute, the courts need not go further than that statute to determine whether an action can be maintained. Actual community outrage, then, will be reflected in the values the juries place on the injury and the amount of the awards. If courts rely on federal anti-discrimination pronouncements to support such actions in states where there are no local statutes, and the attitudes of the people are contrary to the federal law, these attitudes will be reflected in low dollar awards or no awards at all. The adequacy of the compensation, as in all law suits, depends upon community attitudes toward the cause of action, and the value of injuries.

Certain discriminatory acts will be considered more outrageous than others. Discrimination by ambulance services, hospitals, and the medical profession could arouse a deep sense of outrage in the public. Take an example. A California medical doctor refused to treat a Negro child solely because of her race. The child's father brought an action for damages on behalf of himself and the child under the Unruh Act. He contended that the doctor breached an agreement with him to treat his daughter. He further alleged that a doctor comes within the proscription of the law prohibiting racial discrimination. California's highest

court rejected the doctor's argument that his services are personal in nature and that he cannot be held liable for refusing to serve someone because of race.⁴² For our purposes, this case is of interest for two reasons. First, because of the traditional attitudes of the public toward health, life, and the medical profession's commitment to help the sick, one might well shout, "Outrageous!"⁴³ upon hearing of a doctor's refusal to treat the child. And second, mental anguish could be an element of damages itself or in addition to any physical harm suffered by the child as a result of the doctor's refusal to treat her.

Courts have allowed damages for mishandling of dead bodies. Mutilation,⁴⁴ disinterment,⁴⁵ interference with burial,⁴⁶ and other intentional disturbances have been the basis for an award. While a property right of the next of kin in the dead body has been discussed in the decisions, it is obvious that the personal feelings of the survivors are the object of the courts' protection.⁴⁷ An analogous civil rights case involved an Akron, Ohio, Negro who sought to bury her deceased grandmother in a local cemetery.⁴⁸ Mrs. Smith received a solicitation letter from Rose Hill Burial Park suggesting that she contemplate the time when her husband or other relative might be in need of its services. Not long after she received the letter, her grandmother died. Mrs. Smith asked the undertaker to make arrangements for burial at Rose Hill. When the undertaker called the cemetery's business office, apparently the manager recognized his name as being that of a Negro funeral director. He was told that Rose Hill did not accept Negroes for burial. Mrs. Smith filed a complaint with the Ohio Civil Rights Commission claiming that Rose Hill was a place of public accommodation and that she had been refused the equal enjoyment, services and privileges thereof by reason of race, contrary to the Ohio Civil Rights Act. Counsel for the Commission advised the complainant temporarily to deposit her

⁴² *Washington v. A. Blampin*, 38 Cal. Rptr. 235 (Dist. Ct. App., 1964).

⁴³ See n. 24, *supra*.

⁴⁴ *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891); *Cremouese v. City of N.Y.*, 259 N. Y. S. 2d 235 (1965).

⁴⁵ *Gostkowski v. Roman Catholic Church of Sacred Heart*, 262 N.Y. 320, 186 N.E. 798 (1933).

⁴⁶ *Speigel v. Evergreen Cemetery Co.*, 117 N.J.L. 90, 186 A. 585 (1936).

⁴⁷ *Prosser, Law of Torts*, 50, 349 (3rd ed. 1964).

⁴⁸ *In re: Rose Hill Securities Co., d.b.a. Rose Hill Burial Park* (Ohio Civil Rights Com., 1963), 8 Race Rel. L. Rep. 749 (1964).

grandmother's body in a mausoleum crypt pending the outcome of litigation so as to prevent mootness. The cemetery defended itself before the Commission on the ground that it was not a place of public accommodation, restrictive covenants with other plot owners prevented it from receiving Negroes for burial, and that it was not discriminatory because a section of the cemetery was set aside for Jewish dead under an agreement with a Jewish congregation. The Commission's Hearing Examiner decided the case on an agreed set of facts and on arguments of law. On his recommendation, the Commission ordered Rose Hill to bury the body and pay Mrs. Smith the tomb rental fee. The cemetery complied without court contest, and buried the body. No compensation was awarded for Mrs. Smith's humiliation, grief, or anxiety. Indeed, the statute makes no mention of compensation for such injuries.

If one accepts Commissioner Hersberg's concurring statement attached to the 1960 Report to the President by the United States Civil Rights Commission,⁴⁹ in which he said that he does not care if we ever get to the moon so long as even at death, Negro Americans cannot rest side by side with other Americans, as representative of a sense of outrage experienced by many Americans because of the "cradle to grave" discrimination suffered by Negroes, it is not difficult to conclude that facts similar to the *Rose Hill* case can support an action for damages due to mental anguish. A similar Iowa case so aroused public sentiment that the legislature amended the statute to include cemeteries before the case was reached for final decision by the United States Supreme Court.⁵⁰ There is no substantial distinction between the discriminatory burial cases and a case where cremation was refused because of previous unpaid funeral bills, and a damage award was allowed for mental anguish suffered by a relative.⁵¹

Common carriers have been held liable for insulting passengers. Cases have held that the carrier is liable for language which is merely profane, indecent, or insulting to people of ordinary sensibilities even though the insult or other mental disturb-

⁴⁹ 50 States Report, a Report to the President by the United States Civil Rights Commission (1960).

⁵⁰ *Rice vs. Sioux City Memorial Park Cemetery*, 60 N.W. 2d 110 (Iowa, 1953) aff'd; 348 U.S. 880 (1954), pet. for rehearing gntd, jmt. and cert. dis'd, 349 U.S. 70 (1955).

⁵¹ *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299 (1925).

ance was not accompanied by physical illness.⁵² Some decisions rest on the theory that the carrier has a special obligation to the public to be decent.⁵³ Similar liability has been imposed on innkeepers,⁵⁴ owners of theaters,⁵⁵ amusement parks,⁵⁶ and other places of amusement. There is no reason why the same result might not be reached in a case where the complainant has been denied access to a place of public accommodation because of his race in violation of a statute.

In discussing the possible amount of recovery, the court in the *Amos* case⁵⁷ recognized the injury we are considering here:

If the defendant's description of the cause of plaintiff's emotional distress, deprivation of an evening's dancing, were accepted this contention might have merit. . . . The plaintiff complains not merely of the deprivation of an evening's pleasure on the dance floor but of the emotional distress caused by defendant's public and illegal act of discrimination against her on account of her race.⁵⁸

And further:

When the act is intentional or willful, however, compensatory damages may be recovered for emotional distress unaccompanied by any physical injury.⁵⁹

Judicial recognition of the idea that damages are recoverable for mental suffering caused by the intentional conduct of one who acts with malice or complete disregard for the sensibilities of another, provides a firm basis for similar recovery by persons who are victims of unlawful discrimination. Expansion of the scope of existing liability to include those who violate anti-discrimination statutes will serve to recognize a like injury suffered by members of minority races and religions which is the result of unlawful conduct. Mental suffering caused by those who unlawfully discriminate against others by reason of race or religion is an injury similar to that declared compensable in other cases. Modern courts should not ignore this injury.

⁵² *Texas & Pacific Ry. Co. v. Jones*, 39 S.W. 124 (Tex. Civ. App. 1897).

⁵³ *Birmingham Ry. L. & P. Co. v. Glenn*, 179 Ala. 263; 60 So. 111 (1912); *Cole v. Atlantic & W. P. Ry. Co.*, 102 Ga. 474, 31 S.E. 107 (1897).

⁵⁴ *Boyce v. Greeley Square Hotel*, 228 N.Y. 106, 126 N.E. 647 (1920).

⁵⁵ *Saenger Theaters Corp. v. Herndon*, 180 Miss. 791; 178 So. 86 (1938).

⁵⁶ *Davis v. Tacoma Ry. & Power Co.*, 35 Wash. 203, 77 P. 209 (1904).

⁵⁷ See n. 18, *supra*.

⁵⁸ Citing, *To Secure These Rights*, a Report to the President by the United States Civil Rights Commission (1947), pp. 76, 77, 82, et seq.

⁵⁹ *Ibid.*