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Mental or Emotional Distress: Pigeonhole Recovery or Independent Tort?

Petitioner was awarded compensation for mental suffering and punitive damages¹ for the willful and malicious killing of her pet dog.² The District Court of Appeal reversed, holding that the trial judge should not have instructed the jury to consider petitioner's mental suffering as an element of compensatory damages.³ That court assumed that the compensation for mental suffering actually represented an improper recovery of the dog's sentimental value.⁴ The Florida Supreme Court granted certiorari, reversed, and *held* that although there may be some affinity between sentimental value and mental suffering, the emotional disturbance caused by the destruction of one's dog is compensable. *La Porte v. Associated Independents, Inc.*, 163 So. 2d 267 (Fla. 1964).

The *La Porte* case may seem to permit recovery of a dog's sentimental value, contrary to the general rule, particularly since it does not discuss the relationship between sentimental value and mental suffering.⁵ However, *La Porte* is distinguishable from the cases establishing the rule. Persons are injured in two ways by the destruction of their chattels — their emotional tranquility is disturbed and the amount of their personal property is reduced. Damages for the property loss could be measured by market value, special value ascertainable by reference to the usefulness or services of the dog, or sentimental value.⁶ The latter term is

1. The plaintiff was awarded \$2,000 compensatory damages and \$1,000 punitive damages. The dog was purchased for \$75 two years prior to its death. See *Associated Independents, Inc. v. La Porte*, 158 So. 2d 557 (Fla. Dist. Ct. App. 1963).

2. Petitioner observed defendant's employee throw a garbage can in the direction of her dog. When she rushed outside to protest, the garbage collector laughed and departed. *Ibid.*

3. *Ibid.* The District Court of Appeal held that only the market value of the dog and punitive damages could be recovered.

4. Generally a dog's sentimental value to its owner is not recoverable upon its destruction. *Kling v. United States Fire Ins. Co.*, 146 S.2d 635 (La. App. 1962); *Klein v. St. Louis Transit Co.*, 117 Mo. App. 691, 93 S.W. 281 (1906); *Wilcox v. Butt's Drug Stores*, 38 N.M. 502, 35 P.2d 978 (1934); *Smith v. Palace Transp. Co.*, 142 Misc. 93, 253 N.Y.S. 87 (N.Y. Munic. Ct. 1931); 4 *AM. JUR. 2d Animals* § 147 (1962); 3 *C.J.S. Animals* § 234 (1936).

5. 163 So. 2d at 269.

6. Generally, damages for the injury or destruction of a dog are measured by the dog's market value. *Wilcox v. Butt's Drug Stores*, 38 N.M. 502, 35 P.2d 978 (1934); *Blauvelt v. Cleveland*, 198 App. Div. 229, 190 N.Y.S. 881

used to describe the value that a person attaches to his dog because of past experiences producing a tender feeling or susceptibility — presumably greater than the dog's market value.⁷ This measure has been rejected by the courts because it is entirely subjective, is easily inflated, and is approximated by the other measures. The cases establishing the rule only involved the choice of measures for property damages — compensation of the owner for his mental suffering or disturbance of mental tranquility was not in issue.⁸ Plaintiff's hysteria required medical treatment;⁹ the *La Porte* court cited mental suffering cases¹⁰ and used language indicating that the award was for mental suffering¹¹ and not sentimental value.

Until recently, a mental or emotional disturbance, no matter how serious, was not regarded as sufficient injury to make culpable conduct actionable if it was the only legal consequence of such conduct.¹² Early American cases permitted recovery of damages

(1921). Value measured by its usefulness to the owner may be recovered only if the dog has no market value. *Kling v. United States Fire Ins. Co.*, 146 So. 2d 635 (La. App. 1962); *Klein v. St. Louis Transit Co.*, 117 Mo. App. 691, 93 S.W. 281 (1906); *Young's Bus Lines v. Redmon*, 43 S.W.2d 266 (Tex. Civ. App. 1931). *But see* *Wertman v. Tipping*, 166 So. 2d 666 (Fla. Dist. Ct. App. 1964).

Punitive damages may be awarded where the killing of the dog was willful and under aggravated circumstances. *Dreyer v. Cyriacks*, 112 Cal. App. 279, 297 Pac. 35 (Dist. Ct. App. 1931) (\$25,000 punitive damages set aside as excessive); *Mendenhall v. Struck*, 207 Iowa 1094, 224 N.W. 95 (1929); *Tenhopen v. Walker*, 96 Mich. 236, 55 N.W. 657 (1893).

7. 9 VILL. L. REV. 681, 684 (1964).

8. "Mental suffering" has been used by the courts to describe a variety of psychic disturbances. These may be classified into two main groups: (1) transient disturbances of mental tranquility without disability, and (2) severe disturbances of mental tranquility producing disability through physiological mechanisms. See Smith & Solomon, *Traumatic Neuroses in Court*, 30 VA. L. REV. 87, 92-95 (1943); RESTATEMENT, TORTS § 46, comment f (Supp. 1948). Mental suffering should be distinguished from physical injuries caused by psychic stimuli. See Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 212-26 (1944).

9. 163 So. 2d at 268.

10. *Slocum v. Food Fair Stores*, 100 So. 2d 396 (Fla. 1958); *Crane v. Loftin*, 70 So. 2d 574 (Fla. 1954); *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950).

11. In comparing the instant case with another, involving mental suffering, the court stated: "[T]he anguish resulting from the mishandling of the body of a child cannot be equated to the grief from the loss of a dog but that does not imply that *mental suffering* from the loss of a pet dog . . . is nothing at all." 163 So. 2d at 269. (Emphasis added.)

12. Assault is an exception to this rule. RESTATEMENT, TORTS § 47, comment a (1934). The *Restatement's* position has been altered, however. See

for mental suffering when they were the direct or natural result of either an intentional tort committed under circumstances of malice,¹³ or a negligent act which caused physical injury by impact.¹⁴ Subsequently, courts allowed recovery of damages for mental suffering where physical injury was caused by psychic stimuli.¹⁵ Some courts now permit recovery for mental suffering without physical injury, if the suffering is severe and brought

RESTATEMENT, TORTS § 24, comment *c* (Supp. 1948); note 16 *infra* and accompanying text.

Mental suffering inflicted on a patron by an employee of a public utility is another exception. Recovery is usually permitted on the ground that mental suffering was a foreseeable consequence of a breach of contract and that a utility occupies a special relationship to its patrons. *E.g.*, *Lipman v. Atlantic Coast Line R.R.*, 108 S.C. 151, 93 S.E. 714 (1917); *Graham v. Western Union Tel. Co.*, 109 La. 1069, 34 So. 91 (1903). *Contra, e.g.*, *Western Union Tel. Co. v. Speight*, 254 U.S. 17 (1920).

13. See *Phillips v. Hoyle*, 70 Mass. (4 Grey) 568 (1855) (seduction); *Stowe v. Heywood*, 89 Mass. (7 Allen) 118 (1863) (enticement of child away from home and performance of his services); *Meagher v. Driscoll*, 99 Mass. 281 (1868) (willful trespass to land); *Lombard v. Lennox*, 155 Mass. 70 (1891) (willful slander); 2 GREENLEAF, EVIDENCE § 267 (16th ed. 1899); RESTATEMENT, TORTS § 47(b) (1934).

14. *Seeger v. Town of Bakkhamsted*, 22 Conn. 289 (1853) (impact); *Masters v. Town of Warren*, 27 Conn. 293 (1858) (impact); *Canning v. Inhabitants of Williamstown*, 55 Mass. (1 Cush.) 451 (1848) (impact); *accord Wyman v. Leavitt*, 71 Me. 227 (1880) (dictum) (no impact); *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897) (dictum) (no impact).

Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896), is the leading case in this country for denying recovery for negligently inflicted mental distress unaccompanied by impact. This rule was followed by RESTATEMENT, TORTS § 47, comment *a* (1934): "[T]he interest in mental and emotional tranquility is not as a thing in itself regarded as of sufficient importance to make tortious conduct which is intended or recognizably likely to cause only a mental or emotional disturbance."

For a discussion of the creation and development of the impact rule, see Lambert, *Tort Liability for Psychic Injuries*, 41 B.U.L. REV. 584 (1961); 37 N.Y.U.L. REV. 331 (1962). For a complete study of the mechanical tests employed by the courts in determining whether mental injuries resulting from the negligence of defendant are compensable, see Brody, *Negligently Inflicted Psychic Injuries: A Return To Reason*, 7 VILL. L. REV. 232 (1961).

15. *Lewis v. Woodland*, 101 Ohio App. 442, 140 N.E.2d 322 (1955); *Colla v. Mandella*, 1 Wis. 2d 594, 85 N.W.2d 345 (1957). The physical harm provides the basis of liability although mental suffering may be included as part of the damages. RESTATEMENT, TORTS § 306, comment *b* (Supp. 1948).

Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), overruled *Mitchell v. Rochester Ry.*, *supra* note 14. The court discarded "impact" as a condition precedent to recovery and stated: "Although fraud, extra litigation and a measure of speculation, are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction." 10 N.Y.2d at 240-41, 176 N.E.2d at 731, 219 N.Y.S.2d at 37.

about by extreme and outrageous conduct.¹⁶

It is alleged that mental suffering is not susceptible to exact measurement, is frequently inflicted in minor degrees, and may be easily feigned.¹⁷ Hence, courts have been reluctant to permit recovery in the absence of other factors lessening these dangers and difficulties.¹⁸ Thus, the "impact rule" in negligence cases is intended to protect the courts against feigned cases, a flood of litigation, and recovery of remote and speculative damages.¹⁹ The existence of an intentional tort would seem to perform this same function, although courts allowing damages for mental distress caused by an intentional tort fail to articulate a rationale.²⁰ Certainly the existence of assault, seduction, or slander, for

16. *E.g.*, *Cohen v. Lion Prods. Co.*, 177 F. Supp. 486 (D. Mass. 1959); *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 232 (1952). See generally Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956). The RESTATEMENT (SECOND), TORTS § 46 (Tent. Draft No. 1, 1957), provides: "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 for bodily harm resulting from it." For many years legal writers have advocated recognition of intentional infliction of mental distress as a separate and distinct tort. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

The defendant need not have actually intended to cause the emotional disturbance. Knowledge on his part that severe emotional distress is substantially certain to be produced by his conduct is sufficient. *Mitran v. Williamson*, 21 Misc. 2d 106, 197 N.Y.S.2d 689 (Sup. Ct. 1960).

17. See, *e.g.*, *Perry v. Capital Traction Co.*, 32 F.2d 938 (D.C. Cir. 1929); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896).

It has been argued that "if knowledge of . . . [psychic injuries] is so imperfect that any evidence pertaining to it is speculative and conjectural, it may be as just, and more expedient, to refuse a remedy." Smith, *supra* note 8, at 198.

18. See PROSSER, TORTS §§ 11 & 55 (3d ed. 1964).

19. See, *e.g.*, *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896).

The courts, adhering to the physical damage rule, have found "impact" in minor contacts with the person which in themselves cause no real harm to the plaintiff. See *Christy Bros. Circus v. Turnage*, 38 Ga. App. 581, 144 S.E. 680 (1928) (defendant's horse emptied its bowels into plaintiff's lap); *Kentucky Traction & Terminal Co. v. Roman's Guardian*, 232 Ky. 235, 23 S.W. 2d 272 (1929) (slight burn from live wire); *Hess v. Philadelphia Transp. Co.*, 358 Pa. 144, 56 A.2d 89 (1948) (slight electric shock).

20. See *Wiggins v. Moskins Credit Clothing Store*, 137 F. Supp. 764 (E.D.S.C. 1956); *Smith & Gaston Funeral Directors, Inc. v. Wilson*, 262 Ala. 401, 79 So. 2d. 48 (1955); *Dawsey v. Newton*, 244 Ala. 661, 15 So. 2d 271 (1943); *Acadia, California, Ltd. v. Herbert*, 54 Cal. 2d 323, 353 P.2d 294, 5 Cal. Rptr. 686 (1960); *Kuhr Bros., Inc. v. Spahos*, 89 Ga. App. 885, 81 S.E.2d 491 (1954); *Oglesby v. Town of Winnfield*, 27 So. 2d 137 (La. Ct. App. 1946);

example, provides some assurance that the mental suffering is genuine and the direct or natural result of the act.²¹ This is also true of some trespasses, for example, a trespass to the grave of a loved one.²² But neither "slight impacts"²³ nor "slight intentional torts"²⁴ guarantee that the resultant mental suffering is severe or genuine. In the instant case, for example, an intentional tort was committed, but evidence indicated that the mental suffering was of the most transitory nature and was aggravated by a preexisting nervous condition.²⁵ In addition, the requirement that the malicious act constitute an intentional tort may preclude recovery on facts not substantially different from those where recovery is granted. In the instant case, for example, had a neighbor of the plaintiff witnessed the malicious destruction of the dog, he would be denied recovery because he had no property interest in the dog.²⁶

Henderson v. Weidman, 88 Neb. 813, 130 N.W. 579 (1911); Michels v. Crouch, 122 S.W.2d 211 (Tex. Civ. App. 1938); Murphy v. City of Tacoma, 60 Wash. 2d 603, 374 P.2d 976 (1962).

Where property is only negligently destroyed, recovery for mental distress is not allowed. See cases cited *supra*.

21. See, e.g., McChristian v. Popkin, 75 Cal. App. 2d 249, 171 P.2d 85 (Dist. Ct. App. 1946) (assault); McMullen v. Corkum, 143 Me. 47, 54 A.2d 753 (1947) (slander imputing criminal charge); Dwire v. Stearns, 44 N.D. 199, 172 N.W. 69 (1919) (mental suffering of family resulting from seduction of daughter).

22. See Michels v. Crouch, 122 S.W.2d 211 (Tex. Civ. App. 1938).

23. Compare Porter v. Delaware, L. & W.R.R., 73 N.J.L. 405, 63 Atl. 860 (Sup. Ct. 1906) (mental distress recovered when train crash threw dust into eyes), with Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). In Mitchell, recovery for mental distress was denied to a pregnant woman suffering a miscarriage when runaway horses stopped inches short of impact.

One must grant that the requirement [of impact] has some relevancy, for if a dangerous force comes near enough to graze one's person, it is likely to cause more psychic reaction than if it remains at a distance.

But it is doubtful that a car which brushes against a person frightens him any more than one which misses him by an inch.

Smith, *supra* note 8, at 300 n.296. Impact should be treated merely as an evidentiary factor bearing upon the reasonableness of the plaintiff's psychic responses. See *ibid*.

24. A "slight intentional tort" occurs when the technical requirements of an intentional tort are present but the magnitude of the harm is slight, as when defendant intentionally walks over plaintiff's land.

25. Plaintiff's doctor, who had been treating her for a nervous condition for two years prior to the occurrence, stated that her nervous condition at the time of trial was the same as it would have been if the dog had not died. Associated Independents, Inc. v. La Porte, 158 So. 2d 557 (Fla. Dist. Ct. App. 1963).

26. No case has been found where the plaintiff did not have an interest in the property destroyed.

Courts requiring a high degree of culpability on the defendant's part in committing the intentional tort also seem to be attempting to lessen the supposed dangers and difficulties of compensating for mental suffering. If the conduct of the actor is malicious or wanton, it is arguably more likely that the mental suffering will be severe and the direct result of the act.²⁷ But this is not necessarily so. If in the instant case the dog had been negligently killed, the plaintiff's mental suffering probably would have been just as severe and immediate. The dog's death and not the actor's conduct would appear to be the primary cause of the mental suffering. Hence, neither the requirement of an intentional tort nor the requirement that defendant's conduct be wrongful²⁸ appreciably lessens the difficulties.

Because the technical rules developed by the courts appear to be of little value in distinguishing between meritorious and feigned claims, a better approach might be to treat mental distress as a distinct cause of action. Instead of relying on such factors as "impact," "intentional tort," and "malice," recovery should be granted if the mental suffering is severe, genuine, and a direct consequence of proximately related conduct unreasonably exposing the plaintiff to risk of such injury.²⁹ Medical advances reduce the problem in determining the existence, severity, and causation of the mental suffering.³⁰ The remaining difficulties are not alleviated by the existence of a slight impact or intentional

27. See RESTATEMENT (SECOND), TORTS § 46, comment *j* (Tent. Draft No. 1, 1957).

28. When damages for mental suffering are recovered because the act was malicious, punitive damages will probably be awarded too. *But see Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961). This has the effect of punishing the defendant twice. "The trier of fact cannot possibly escape the psychological urge to make damages [for mental suffering] correspond to the actor's culpability, and this makes the award punitive even though in theory it is still compensatory." Smith, *supra* note 8, at 228-29 n.128.

Recovery of damages for mental distress also tends to become punitive when rules of causation and foreseeability are less strictly applied to the results of wanton behavior, see Bower, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586, 588 (1933), and when the impact requirement is waived for wanton or willful torts, see Smith, *supra* note 8, at 233. The justification may be that malicious wrongdoers simply are not worthy of social solicitude. See *id.* at 232-33.

29. This would be similar to the approach taken by the American Law Institute with respect to the intentional infliction of mental suffering. See note 16 *supra*.

30. See generally Goodrich, *supra* note 16; Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944); Smith & Solomon, *Traumatic Neuroses in Court*, 30 VA. L. REV. 87 (1943).

tort. A limitation can be placed on the defendant's responsibility for the consequences of his conduct by balancing policy considerations.³¹ The policy considerations should be based upon the social utility of the actor's conduct³² and the seriousness of the injured party's injury.³³ Thus, if the dog had been struck and killed by an ambulance on an emergency call, the social utility of defendant's act would outweigh plaintiff's right to mental security. On the other hand, since there is little social utility in a malicious act of destroying property, liability would be indicated. Such consideration of the competing interests would give both plaintiff and defendant more equitable treatment than can be had when reliance is placed upon the unreasoned historical pigeonholes allowing recovery of damages for mental suffering.

31. See PROSSER, TORTS § 49, at 282 (3d ed. 1964), where the author states this limitation in terms of "proximate cause."

32.

[W]hen the general social utility of an activity is deemed to outweigh the particular interests with which it may clash, important policy reasons dictate that some limits be set to liability for its consequences. . . . Thus, in cases where the defendant's conduct involved negligent driving of a motor vehicle the courts conclude that to extend liability to spectators who were not themselves in danger "would, in our opinion, place an unreasonable burden upon users of highways."

Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 314, 379 P.2d 513, 524-25, 29 Cal. Rptr. 33, 44-45 (1963); accord, *Resavage v. Davies*, 199 Md. 479, 86 A.2d 879 (1952); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935). *But cf.* *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958), in the same jurisdiction as *Amaya*, which applied a test of the moral blame attached to the defendant's conduct similar to the test used in *La Porte*. The *Amaya* court also concluded that our present insurance system could not bear the losses if a duty were recognized in this type of situation. 59 Cal. 2d at 314, 379 P.2d at 525, 29 Cal. Rptr. at 45.

33. See, *Magruder*, *supra* note 16, at 1035; *Smith*, *supra* note 30, at 228-29 n.128. See generally *Smith & Solomon*, *supra* note 30.

