

Torts - Trespass By Municipality - Punitive Effect of Damages for Mental Suffering

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the more tender sensibilities only as the likelihood of these sensibilities being offended decreases.

Kenneth D. McCoy, Jr.

TORTS — TRESPASS BY MUNICIPALITY — PUNITIVE EFFECT OF DAMAGES FOR MENTAL SUFFERING

Defendant municipality constructed streets on plaintiff's property without her consent and without expropriation proceedings for which plaintiff brought an action to recover the value of the land taken and additional compensation for mental anguish resulting from the illegal trespass. The trial court awarded damages for both the trespass and mental anguish. The Court of Appeal for the Third Circuit affirmed. *Held*, a municipality which takes property without expropriation proceedings is liable to the landowner for trespass damages which include damages for mental anguish as well as for the value of the land taken. *Belgarde v. City of Natchitoches*, 156 So.2d 132 (La. App. 3d Cir. 1963).

Indemnification for mental anguish and suffering has never presented the problem in the civil law that it has at common law. French jurisprudence has had no difficulty in making such awards for torts when the mental suffering has been real and serious.¹ The original position at common law was to disallow recovery unless accompanied by some established tort,² but there is a growing trend toward recognition of the infliction of mental suffering as a separate tort.³ Although Louisiana Civil Code articles 2315 and 1934⁴ correspond substantially to French Civil Code articles 1382 and 1149-1151, respectively, Louisiana's original position on damages for mental suffering did not adhere to the French interpretation; but it has since undergone a development similar to that of the common law. Mental anguish occa-

1. 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 252 (1959).

2. PROSSER, TORTS § 2, at 40 (2d ed. 1955); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 460, 470 (1960): "The treatment of any element of damages as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as an independent basis of liability. It is merely a question of social, economic and industrial needs as those needs are reflected in the organic law."

3. RESTATEMENT, TORTS § 46 (Tent. Draft No. 1, 1957).

4. LA. CIVIL CODE arts. 2315 and 1934 (1870).

sioned by a trespass was recognized early in a case in which defendant utility company stripped limbs from trees located on plaintiff's land.⁵ Later cases have affirmed this decision;⁶ and it is now well settled in Louisiana, as at common law, that damages for mental suffering are actual rather than punitive and, when occasioned by a trespass, are compensatory for the violation of a recognized property right.⁷

The civil law recognizes neither nominal⁸ nor punitive damages.⁹ On the other hand, the common law allows at least nominal damages for every trespass¹⁰ and punitive damages where it

5. *Tissot v. Great Southern Tel. & Tel. Co.*, 39 La. Ann. 996, 3 So. 261 (1887).

6. *Bright v. Bell*, 113 La. 1078, 37 So. 976 (1905); *Givens v. Town of Ruston*, 55 So. 2d 289 (La. App. 2d Cir. 1951); *Oglesby v. Town of Winnfield*, 27 So. 2d 137 (La. App. 2d Cir. 1946).

7. *McGee v. Yazoo & M.V. R.R.*, 206 La. 121, 131, 19 So. 2d 21, 24 (1944): "We see no reason why damages for mental anguish or suffering can not be recovered in addition to property damage. Mental anguish or suffering is a distinct element of damages and is not merely an incident to be taken into consideration in addition to a pecuniary loss suffered by reason of a wrongful or negligent injury to persons or property."

Mental suffering became more closely linked with trespass in *Hernandez v. Harson*, 237 La. 389, 401, 111 So. 2d 320, 324 (1958), when the court said: "It is true that there is no proof of malice nor was the seizure characterized by harshness and total disregard to the interests of plaintiff. Yet it was illegally and wrongfully executed . . . sufficient to have caused mortification, annoyance and physical discomfort."

In *Loeblich v. Garnier*, 113 So. 2d 95 (La. App. 1st Cir. 1959) the court recognized the punitive effect of damages awarded for mental suffering caused by the violation of a property right. "The often found general statement that only compensatory and not punitive damages are awardable in Louisiana is in apparent conflict with the awards often made for damages for mental anguish and embarrassment caused by an illegal and deliberate violation of property rights or for such violation itself irrespective of any pecuniary damage caused thereby The key to resolution of this conflict seems to be that in such circumstances such awards in Louisiana are regarded as compensatory for violation of a recognized property right, rather than punitive." *Id.* at 103. *Accord*, *Roge v. Kuhlman*, 136 So. 2d 819 (La. App. 3d Cir. 1962).

In the case of *Breaux v. Simon*, 112 So. 2d 121 (La. App. 1st Cir. 1959) the trial court allowed \$250 for an illegal trespass of the city on land owned by the plaintiff. On appeal to the Supreme Court it was pointed out that punitive damages were not recoverable in Louisiana. The case was remanded to the court of appeal, which deleted the \$250 punitive damages. On rehearing, however, the court decided that this award was not punitive but was compensatory "for this unauthorized expropriation of his private property to public use." *Id.* at 125.

8. *E.g.*, *Tan Te v. Bell*, 27 Philippine 354 (1914); *Algarra v. Sandejas*, 27 Philippine 284 (1914); *contra*, *Griner v. Stracner*, 172 La. 538, 134 So. 737 (1931); *Gumpert v. Werlein*, 149 La. 840, 90 So. 215 (1921); *Bourdette v. Sieward*, 107 La. 258, 31 So. 630 (1902); *Lamartiniere v. Rachal*, 131 So. 2d 340 (La. App. 3d Cir. 1961); *Walker v. J. J. Ellis Lake Providence Corp.*, 107 So. 2d 550 (La. App. 2d Cir. 1958).

9. *Gugert v. New Orleans Independent Laundries*, 181 So. 653 (La. App. OrL. Cir. 1938); 6 *PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* n° 681 (1930); 7 *id.* n° 855; *SEDGWICK, DAMAGES* § 355 (9th ed. 1912).

10. *E.g.*, *Fletcher v. Howard*, 226 Ky. 258, 10 S.W.2d 825 (1928); *Giddings v. Rogalewski*, 192 Mich. 319, 158 N.W. 951 (1918); *Forest City Cotton Co. v. Mills*, 218 N.C. 294, 10 S.E.2d 806 (1940); *PROSSER, TORTS* § 13 (2d ed. 1955).

is intentional, wilful, or wanton.¹¹ In 1830 punitive damages were awarded in a Louisiana case for trespass in the absence of any special damages,¹² and similar awards were made in other cases involving malice or bad faith.¹³ Punitive damages were justified as a deterrent to repetition of illegal conduct.¹⁴ In 1917 the Louisiana Supreme Court abrogated these decisions by interpreting Civil Code articles 2315 and 1934¹⁵ to restrict tort recovery to compensation for actual damage.¹⁶ Even the common law denied municipal liability for punitive damages.¹⁷

11. *Yazoo & M.V. R.R. v. Sanders*, 87 Miss. 607, 40 So. 163 (1906); *Schumacher v. Shawhan Distillery Co.*, 178 Mo. App. 361, 165 S.W. 1142 (1914); *Oden v. Russell*, 207 Okla. 570, 251 P.2d 184 (1952); *Huling v. Henderson*, 161 Pa. 553, 29 Atl. 276 (1894); *contra, e.g., Ellis v. Brockton Publishing Co.*, 198 Mass. 538, 84 N.E. 1018 (1908); *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713, 82 N.W. 28 (1900).

12. *Carlin v. Stewart*, 2 La. 73 (1830).

13. *Summers v. Baumgard*, 9 La. 151 (1836); *Ostrica Oyster Co. v. Barbier*, 8 Orl. App. 425 (La. App. Orl. Cir. 1911); *cf. Tiblier v. Alford*, 12 Fed. 262 (E.D. La. 1882); *Townsend v. Fontenot*, 42 La. Ann. 890, 8 So. 616 (1890); *Marin v. Scatterfield*, 41 La. Ann. 742, 6 So. 551 (1889); *Leen Kee v. Smith Bros.*, 35 La. Ann. 518 (1883); *Carter v. Tufts*, 15 La. Ann. 16 (1860).

14. *Tiblier v. Alford*, 12 Fed. 262 (E.D. La. 1882); *Black v. Carrollton R.R.*, 10 La. Ann. 33, 40 (1855).

15. *Vincent v. Morgan's La. & T.R. & S.S. Co.*, 140 La. 1027, 74 So. 541 (1917).

LA. CIVIL CODE art. 2315 (1870): "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

Id. art. 1934: "Although the general rule is, that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party. Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification although these are not appreciated in money by the parties, yet damages are due for their breach; a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.

"In the assessment of damages under this rule, as well as in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages under the above rules as will fully indemnify the creditor, whenever the contract has been broken by the fault, negligence, fraud, or bad faith of the debtor."

16. *Bacharach v. F. W. Woolworth Co.*, 212 F. Supp. 83 (E. D. La. 1963); *Breaux v. Simon*, 235 La. 453, 104 So.2d 168 (1958), transferred to 112 So.2d 121 (La. App. 1st Cir. 1959); *Moore v. Blanchard*, 216 La. 253, 43 So.2d 599 (1949); *Holcombe v. Superior Oil Co.*, 213 La. 684, 35 So.2d 457 (1948); *Janssen Catering Co. v. Abadie*, 157 La. 357, 102 So. 428 (1924); *Trenchard v. Central Laundry Co.*, 154 La. 1003, 98 So. 558 (1923); *Hanna v. Otis*, 151 La. 851, 92 So. 360 (1922); *Douglas, Burt & Buchanan Co. v. Texas & P. Ry.*, 150 La. 1038, 91 So. 503 (1922); *Mente & Co. v. Kaplan*, 146 La. 678, 83 So. 895 (1920); *Howell v. Vicksburg, S. & P. Ry.*, 144 La. 427, 80 So. 613 (1919); *Burt v. Shreveport Ry.*, 142 La. 308, 76 So. 723 (1917); *Serio v. American Brewing Co.*, 141 La. 290, 74 So. 998 (1917); *cf. Marr, The Punitive Damages Hereby*, 2 TUL. L. REV. 1 (1917); *Note*, 1 LA. L. REV. 226 (1938).

17. *E.g., Larson v. Grand Forks*, 3 Dak. 307 (1884); *Fisher v. Miami*, 160 So. 2d 57 (Fla. App. 1964); *Chicago v. Langlass*, 52 Ill. 256 (1869); *Bennett v. Marion*, 102 Iowa 425, 71 N.W. 360 (1897); *Desforge v. West St. Paul*, 231 Minn. 205, 42 N.W.2d 633 (1950); *Lineberger v. Greenville*, 178 S.C. 47,

In the instant case the court equated compensatory damages for mental suffering with damages for the violation of a recognized property right.¹⁸ However, greater emphasis was placed on the property violation than on mental suffering. No doubt the trespass could have caused some mental anguish; but, since the property probably could have been expropriated in any event, the seriousness of such distress is subject to some question. It seems that compensation for mental anguish was perhaps a means used by the court to give a punitive effect to damages awarded for a trespass. The court reasoned that if no more damages were awarded than the value of the land, the expropriation proceedings would become useless formalities.

The instant case appears to be a judicial attempt to insure that municipalities use proper expropriation proceedings. The imposition of punitive damages, however, has been the subject of much controversy.¹⁹ Besides contradicting the established jurisprudence of Louisiana and the general common law rule, punitive damages in the instant case would probably not have the desired punitive effect.²⁰ To place damages as punishment

182 S.E. 101 (1935). Some jurisdictions have made municipalities liable for punitive damages by statute. *Coffee County v. Parrish*, 249 Ala. 226, 30 So. 2d 578 (1947); *Myers v. San Francisco*, 42 Cal. 215 (1871); *Earle v. Greenville County*, 215 S.C. 539, 56 S.E.2d 348 (1949); *Wright v. Butte*, 64 Mont. 362, 210 Pac. 78 (1922). Other jurisdictions have held a municipality liable for punitive damages if it had in some way ratified the illegal acts of its officers. *Cf. Lawton v. Johnstone*, 123 Okla. 145, 252 Pac. 393 (1926); *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72 (1897).

18. 156 So. 2d at 134: "The plaintiff had prayed for damages for the humiliation, worry and mental anguish arising from the illegal trespass upon her property. This type of damages resulting from an illegal trespass onto a landowner's property is regarded under Louisiana jurisprudence as compensatory damages to which the landowner is entitled for the violation of a recognized property right through the trespass."

19. The advocates of the theory of punitive damages point out that they serve constructive purposes in redressing petty cases of outrage or oppression which would otherwise go unpunished and in compensating for actual expenses of litigation, such as counsel fees. *McCORMICK, DAMAGES* § 7 (1935); *PROSSER, TORTS* § 2 (2d ed. 1955); *SEDGWICK, DAMAGES* § 354 (9th ed. 1912); *Morris, Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931). See also *Morris, Rough Justice and Some Utopian Ideas*, 24 ILL. L. REV. 730 (1930).

PROSSER, TORTS § 2, at 10: "It has been condemned as undue compensation of the plaintiff beyond his just desserts in the form of a criminal fine which should be paid to the state, if anyone, with the amount fixed only by the caprice of the jury and imposed without the usual safeguards thrown about criminal procedure, such as proof of guilt beyond a reasonable doubt, the privilege against self-incrimination, and even the rule against double jeopardy — since the defendant may still be prosecuted for the crime after he has been mulcted in the tort action." *McCORMICK, DAMAGES* § 77; *SEDGWICK, DAMAGES* § 353; *Willis, Measure of Damages When Property Is Wrongfully Taken by a Private Individual*, 22 HARV. L. REV. 419, 420 (1909); *contra, Aldrige, The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 IND. L.J. 123 (1945).

20. It has been suggested that punitive damages against a municipality would tend to better training and control of its servants. If such damages became fre-

on a municipality is to place it on the taxpayers who are the very ones to benefit from the admonishment of the wrongdoer.²¹ Also, if punitive damages are designed to punish outrage, malice, or evil motive, there is serious doubt that a municipal corporation, as such, can act maliciously or wilfully.²² It is also recognized that defendant's ability to pay is a proper element in determining punitive damages since what may be severe punishment to one of small means would be insignificant punishment to one of great wealth.²³ What verdict would constitute a punishment on the body politic with its enormous ability to tax?

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quently assessed against a city, public sentiment and the pressure of political campaigns could possibly force its officials to heed their warning.

21. See Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1204 (1931); Annot., 19 A.L.R.2d 903, 910 (1951).

22. *Montgomery v. Gilmer*, 33 Ala. 116 (1858); *Wilson v. Granby*, 47 Conn. 59 (1879); *Doyle v. Sandpoint*, 18 Idaho 654, 112 Pac. 204 (1910); *Newton v. Wilson*, 128 Miss. 726, 91 So. 419 (1922); *Woodman v. Nottingham*, 49 N.H. 387 (1870).

23. *Jackson v. Briede*, 156 La. 573, 100 So. 722 (1924); *Perez-Sandi v. Berges*, 12 La. App. 191, 125 So. 185 (1929); *Gallman v. Young*, 6 La. App. 137 (1927). See SUTHERLAND, DAMAGES 745 (1883): "But when exemplary damages are claimed a different question is presented. The defendant's pecuniary ability is then a matter for the consideration of the jury, on the ground that a given sum would be much greater punishment to a man of small means than to one of larger." In Louisiana this point has twice received comment. *Janvier, Punitive Damages in Louisiana*, 10 LOYOLA L. REV. 26 (1929); *McMahon, Damages Based Upon What the Traffic Will Bear*, 11 LOYOLA L. REV. 115 (1930).