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## Torts - Damages - Florida Owner Entitled to Damages for Mental Anguish for Malicious Destruction of Her Dog

Frederic C. Jacobs

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case that a dismissal would not be justified. The diversity-in-outcome test can be defended quite readily by the argument that a state has every right to protect its citizens against a law which it considers to be opposed to its own policies. Since in some respects federal courts are considered merely state courts in that the law is identical, the federal court adopts the policy of the state where the action was first brought. Granted this partial solution for the present case, the decision certainly portends a multitude of forum shoppers in the future. It would seem that an attorney would be ill-advised in a *Barrack*-type case to bring his action in Massachusetts if a forum were available which has adopted the *Kilberg* decision. An adoption of the state forum non conveniens rule would appear to be a logical application of the *Erie* Doctrine to foster uniformity and to prevent shopping in certain cases. However, if forum non conveniens is not possible, the federal court would merely be accomplishing what the state court itself would have done.

It is quite apparent that the Supreme Court has given only a partial answer to the problems that plague the litigant in diversity cases. Quite consistently with this case, it may still be held in the future that a change of venue, requested by plaintiff, may or may not result in a change of law, contingent upon whether the change of law will be advantageous to the plaintiff.<sup>14</sup> Since the plaintiff originally had the opportunity to choose a forum favorable to himself, it hardly seems fair to the defendant to grant a change on plaintiff's motion and yet allow him to retain any benefits accrued. Such an outcome would seem to invite the argument against forum shopping since, in effect, it would mean that a plaintiff could dictate to the court what law was most favorable to him.

However, any solution to future problems in this area will be unsatisfactory so long as diversity jurisdiction exists and courts refuse to follow certain foreign law, or until the Supreme Court declares this refusal unconstitutional. In the instant case, a sensible answer was deduced for an extremely complex question. Nevertheless, it may be hoped that in future litigations, the Court may provide further guidelines for determining the extent of state power and the province of federal courts in this area.

*Michael A. Macchiaroli*

#### TORTS — DAMAGES — FLORIDA OWNER ENTITLED TO DAMAGES FOR MENTAL ANGUISH FOR MALICIOUS DESTRUCTION OF HER DOG.

*La Porte v. Associated Independents, Inc.* (Fla. 1964)

Defendant, a corporation engaged in the business of collecting garbage, sent its employee to collect the refuse of plaintiff, one of its customers. At the time of the collection plaintiff's dog was chained beyond reach of

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14. The Supreme Court also avoided this issue. *Van Dusen v. Barrack*, 376 U.S. 612, 640, 84 S.Ct. 805, 821.

the garbage can.<sup>1</sup> However, within sight of plaintiff, the garbage collector hurled the emptied can in the direction of the dog. Hearing the yelp of the animal, plaintiff rushed outside to find the pet injured and the collector laughing as he drove away. The dog died shortly thereafter as a result of the injuries.

At the trial plaintiff's doctor testified as to the adverse effect of the dog's demise on plaintiff's mental condition. The trial court charged that plaintiff could recover for alleged mental suffering as the result of the malicious destruction of her dog. The Florida District Court of Appeals, in reversing the judgment below on the issue of damages, ruled that it was improper to include the sentimental value of the dog to its owner as an element of damages. However, the Supreme Court of Florida reinstated the decision of the trial court, and *held* that the affection of a master for his dog is a very real thing and provides an element of damage upon the malicious destruction of the pet. *La Porte v. Associated Independents, Inc.*, 163 So.2d 267 (Fla. 1964).

The trend of modern jurisprudence is to regard dogs as tame domestic animals having value<sup>2</sup> and full and unqualified status as personal property.<sup>3</sup> As such, the owner is entitled to the usual civil remedies in order to protect his ownership.<sup>4</sup> It is not surprising therefore to find that the same rules which apply to the assessment of damages in cases involving the intentional destruction of inanimate personal property are applied to cases concerned with the intentional destruction of dogs.

Consequently, the owner's recovery is based upon the value of the animal. This may be measured by the market value of the dog,<sup>5</sup> the actual or intrinsic value of the animal to its owner,<sup>6</sup> or other less frequently used methods of computation such as the purchase price paid for the dog by the owner,<sup>7</sup> or estimates of its value based upon the opinions of qualified witnesses.<sup>8</sup>

In addition to an award which will merely compensate plaintiff for his property loss, he may also seek damages for his mental pain and suffering occasioned by the destruction of his dog.<sup>9</sup> The problem the courts

1. The dog was a miniature Dachshund.

2. *Meekins v. Simpson*, 176 N.C. 130, 96 S.E. 894 (1918).

3. *Roos v. Loeser*, 41 Cal. App. 782, 183 Pac. 204 (1919); *Gerhart v. City of St. Louis*, 307 Mo. 206, 270 S.W. 680 (1925).

4. *Meekins v. Simpson*, 176 N.C. 130, 96 S.E. 894 (1918).

5. *Columbus Ry. v. Woolfolk*, 128 Ga. 631, 58 S.E. 152 (1907).

6. *Wilcox v. Butt's Drug Stores, Inc.*, 38 N.M. 502, 35 P.2d 978 (1934); *Tenhopen v. Walker*, 96 Mich. 236, 55 N.W. 657 (1893). In estimating the value of the animal to its owner, any special services the dog provides are included in the computation. Examples of special services include those provided by seeing eye dogs and sheep dogs.

7. *Smith v. Palace Transp. Co.*, 142 Misc. 93, 253 N.Y.S. 87 (1931).

8. *Adams v. Cook*, 91 Vt. 281, 100 Atl. 42 (1917).

9. This casenote is concerned only with mental disturbance resulting from injury to personalty as opposed to realty; in addition, it will not consider those cases involving mental disturbance as the result of breach of contract or a distinct situation which is raised by cases dealing with such emotionally charged "property" as dead bodies and graves.

must face, therefore, is whether mental damages are recoverable in the absence of any injury or physical impact involving the person of plaintiff. As in other phases of the law, the issue is usually resolved by the application of a well known general rule to which there is an equally well known exception. Generally, damages based upon mental anguish, shock and fright, are not recoverable in an action for property damages not involving some claim of impact or physical injury to the owner.<sup>10</sup> However, where the injury to personalty is inflicted wilfully, maliciously, or in circumstances of insult, aggravation, or manifest disregard of plaintiff's rights, damages for mental suffering are recoverable provided the ordinary and natural consequences of the act complained of would cause injury to the feelings of plaintiff.<sup>11</sup> This same rule is applied to the so-called dog cases.<sup>12</sup> The character of defendant's act is the essential criterion used by courts in determining whether or not to award damages for mental anguish in cases involving the loss or destruction of a dog. Where the injury to the dog is due merely to the negligence of defendant, there can be no recovery for mental suffering.<sup>13</sup> Where, however, the animal was killed wilfully or maliciously, plaintiff will be compensated for his mental suffering.<sup>14</sup>

The question of allowing damages for mental disturbance in connection with injury to, or loss of, personalty (including animals) is also presented indirectly in a number of cases in which no separate claim is made for damages for mental disturbance as such. The contention is that allowance should be made for the sentimental value of the property in question. Although there are a few cases to the contrary,<sup>15</sup> the overwhelming majority hold that it is not proper to consider sentimental value as an element of damages for loss or destruction of personal property.<sup>16</sup> This

10. *B. F. Goodrich Co. v. Hughes*, 239 Ala. 373, 194 So. 842 (1940).

11. *Sager v. Sisters of Mercy*, 81 Colo. 498, 256 Pac. 8 (1927); *Brown v. Zorn*, 275 S.W. 572 (Mo. App. 1925); 25 C.J.S. *Damages* § 68 (1941); *AM. JUR. Damages* § 181 (1938).

12. *Mattingly v. Houston*, 167 Ala. 167, 52 So. 78 (1909); *Wright v. Husband*, 193 Ark. 347, 99 S.W.2d 583 (1936); *City of Garland v. White*, 368 S.W.2d 12 (Tex. Civ. App. 1963).

13. The reasons given by the courts for their refusal to allow damages for mental anguish in cases involving the negligent destruction of personalty are varied. Some hold that mental damages would be too remote; others say that such damages could not be reasonably foreseen. Still others explain their reluctance to allow recovery for mental suffering on the grounds that it was not the natural and probable consequence of the act complained of. See, *e.g.*, *Blanchard v. Reliable Transfer Co.*, 71 Ga. App. 843, 32 S.E.2d 420 (1944); *Davis v. Hall*, 21 Ga. App. 265, 94 S.E. 274 (1917); *Aronoff v. Baltimore Transit Co.*, 197 Md. 528, 80 A.2d 13 (1951); *Henry v. Southern Ry. Co.*, 93 S.C. 125, 75 S.E. 1018 (1912).

14. *City of Garland v. White*, 368 S.W.2d 12 (Tex. Civ. App. 1963).

15. *Bateman v. Ryder*, 106 Tenn. 712, 64 S.W. 48 (1901); *Shewalter v. Wood*, 183 S.W. 1127 (Mo. App. 1916).

16. There are many thoroughly amusing decisions on the issue of whether an owner's sentiment may be included in computing the value of an animal which has been destroyed intentionally or maliciously. A good example is the case of *City of Canadian v. Guthrie*, 87 S.W.2d 316 (Tex. Civ. App. 1935). The court held:

While, as bearing upon her [referring to an old grey horse] sentimental value, it is saddening to know that the beautiful flower beds and onion patches of

rule applies (1) even though the property involved has little or no actual or intrinsic value but is highly prized by its owner for personal reasons, and (2) whether or not the loss resulted from an intentional, malicious or negligent act on the part of defendant.

It should be observed that courts have distinguished between allowing an additional recovery for mental anguish and allowing the element of sentiment to be included in computing the value of property. In the former, plaintiff's mental suffering is treated as a separate and distinct element of recovery directly resulting from the character of defendant's act. In the latter, plaintiff's sentimental attachment for the property is merely used to compute its value.

In discussing the element of mental suffering in connection with the intentional destruction of personalty by a defendant, one must also consider the element of punitive or exemplary damages. It is generally held that where a dog is killed wantonly or maliciously, plaintiff's award may be punitive as well as compensatory in nature.<sup>17</sup> An exemplary award is given when the wrong done to plaintiff was aggravated by circumstances of violence, oppression, malice and wanton or wicked conduct on the part of the defendant.<sup>18</sup> It is intended to punish defendant for his asocial behavior, to make an example of him as a warning to others and to compensate plaintiff for the shame, the degradation and the laceration of his feelings which occurred as a result of defendant's act.<sup>19</sup>

It should be noted that (1) an exemplary or punitive award will be given in the same circumstances as an award for mental pain and suffering; that is, in cases involving wanton or wilful conduct on the part of defendant, and (2) one of the purposes of a punitive award is to compensate plaintiff for the injury to his feelings. As in the case of mental damages, it is the character of defendant's act which determines whether or not a punitive award will be allowed. There are therefore, in addition to punitive damages (which may be considered at least in part as compensation for the

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Canadians, over which she [again referring to the horse] was wont to gambol in the moonlight between the hour when

'Curfew tolled the knell of parting day'

and some hours later

'when greyeyed morn

Stood tiptoe upon the misty mountain height

And flecked the eastern hills with rays of golden light,'

which would know her no more forever, nevertheless, in the cold unsympathetic eye of the law, sentimental value is not recognized as a basis for damages. *Id.* at 318.

In addition, this rule has been applied to cases involving engagement rings, *Rider v. Gellenbeck*, 21 Ohio Op. 437, 7 Ohio Supp. 126 (1941); hand painted chinaware, a rare photograph of plaintiff's deceased mother, *Furlan v. Rayan Photo Works, Inc.*, 171 Misc. 839, 12 N.Y.S.2d 921 (1939); and a dog that could act as a bird dog, fetch and carry its master's order and play the piano, *Klein v. St. Louis Transit Co.*, 117 Mo. App. 691, 93 S.W. 281 (1906).

17. *Mendenhall v. Struck*, 207 Iowa 1094, 224 N.W. 95 (1929); *Tenhopen v. Walker*, 96 Mich. 231, 55 N.W. 657 (1893).

18. *Sager v. Sisters of Mercy*, 81 Colo. 498, 256 Pac. 8 (1927); *Spellman v. Richmond and D.R. Co.*, 35 S.C. 475, 14 S.E. 947 (1892).

19. BLACK LAW DICTIONARY (4th ed. 1951).