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Mental Distress: Damages Allowed for Malicious Killing of Plaintiff's Dog

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degree of interference with free exercise of religion. The baccalaureate programs in Dade County generally consisted of invocations, Bible readings, prayers, hymns, sermons, and benedictions.[23] The programs were conducted by a religious leader; however, rabbis and Catholic priests have generally declined to appear at such services.[24] These facts seem to indicate that the Dade County programs might have a sufficient affect on religion to constitute a violation of the establishment clause. The question remains unsettled; the ultimate decision will depend upon the precise facts of each case as presented.

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MENTAL DISTRESS: DAMAGES ALLOWED FOR MALICIOUS KILLING OF PLAINTIFF'S DOG

La Porte v. Associated Independents, Inc., 163 So. 2d 267 (Fla. 1964)

Plaintiff brought action against a garbage collecting corporation for the malicious killing of her dog by its employee. Plaintiff had tied her miniature dachshund in her yard out of reach of her garbage can, and when the defendant's employee entered the yard to pick up the garbage the dog began barking. Looking out the window, plaintiff saw the garbage collector hurl an empty garbage can toward her pet. She heard the dog yelp and upon going outside to investigate found her pet had been struck and killed by the can. The collector, who did not know the plaintiff or of her presence at the time of his act, laughed and departed. On the afternoon of the day in question plaintiff, who had been under medical care for a nervous condition for the preceeding two years, visited her doctor in a state of marked hysteria.

23. Brief for the Appellant, p. 6 (citing the record), Chamberlin v. Dade County Bd. of Pub. Instruction, 160 So. 2d 97 (Fla. 1964).
24. *Ibid.*

Basing her suit on these facts plaintiff sought punitive damages on the allegation that defendant's acts were malicious and intentional, and compensatory damages for mental suffering caused by the loss of her dog and for the dog's actual value. The trial court rendered a verdict of $2,000 compensatory damages and $1,000 punitive damages. The Second District Court of Appeal reversed that judgment and remanded the case on the issue of damages.[1] The district court found that the trial judge had incorrectly instructed the jury that it could consider the plaintiff's mental suffering in assessing compensatory damages. This reversal was grounded on the rule that the plaintiff was not entitled to recover for the "sentimental value" of her dog. On certiorari the Supreme Court of Florida reinstated the trial court's judgment and HELD, plaintiff could properly recover damages for mental suffering as an element of an award of compensatory damages for the killing of her dog.

Under Florida law, in cases involving no contemporaneous physical impact to the plaintiff, damages for mental distress are recoverable only when the acts of the defendant display a disregard for the rights of others sufficient to justify the imposition of punitive damages.[2] Thus, although damages for mental distress are allowable only as an element of compensatory damages,[3] the test employed in their assessment is the same as the test for the assessment of punitive damages. This test appears to be whether the acts of the defendant were intentional, wanton, or malicious.[4] In applying this test, however, it is not necessary that punitive damages actually be awarded; it is sufficient if they *could be* awarded.

The *La Porte* case has three important aspects. Initially, it is a reaffirmation of the limitation placed on the Florida "impact rule" by the case of *Kirksey v. Jernigan*.[5] Prior to that case, Florida courts adhered to the much criticized[6] "impact rule," which required an actual physical impact to the plaintiff's person as a prerequisite to a recovery of damages for mental distress.[7] In *Kirksey*, the Florida Supreme Court limited this impact rule to cases involving simple negligence by upholding an award of damages for mental distress resulting from an undertaker's intentional withholding of the body of

1. Associated Independents, Inc. v. La Porte, 158 So. 2d 557 (2d D.C.A. Fla. 1963).

2. Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950).

3. Carraway v. Revell, 116 So. 2d 71 (Fla. 1959).

4. Ross v. Gore, 48 So. 2d 412 (Fla. 1950).

5. 45 So. 2d 188 (Fla. 1950).

6. See Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) *overruling* Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958) (Musmanno, J., dissenting); PROSSER, TORTS §11 (3d ed. 1964).

7. Mees v. Western Union Tel. Co., 55 F.2d 691 (S.D. Fla. 1932).

the plaintiff's child. The court expressly eliminated the impact requirement if it could be shown that the acts of a defendant were of a nature sufficient to sustain the assessment of punitive damages. As the defendant in *La Porte* did not contest the imposition of punitive damages, the case clearly presented a fact situation permitting the application of the *Kirksey* impact limitation. The court chose to reaffirm this limitation and allowed mental distress damages without impact to the plaintiff. Although *Kirksey*, and its reaffirmation by *La Porte*, constitutes a partial abrogation of the "impact rule," many other jurisdictions have eliminated the impact requirement even in cases involving simple negligence.[8] Florida has not yet done so and is thus behind the current trend in the area.

The second and most important aspect of the *La Porte* decision is its allowance of mental distress damages for trespass to chattels. No jurisdiction has been found that allows such a recovery when the acts involved constitute only simple negligence;[9] the issue regarding a mental distress recovery for intentional or malicious trespass to mere chattels has been decided by few courts[10] and appears unsettled. The majority of these decisions is in accord with *La Porte* in allowing such damages if the acts directed at the plaintiff's chattel are intentional or malicious. Even though *La Porte* is the first case in which the Florida court has been presented with this question in the clear context of a trespass to mere chattels,[11] the court's discussion of the matter appears inadequate. The court merely stated that the affection of a master for his dog is such a "real thing"[12] that recovery should be allowed. The distinction between acts directed at a plaintiff and those directed at his chattels was not examined. Nevertheless, it would seem that *La Porte* can be used as direct authority for a recovery of damages for mental distress if the defandant's acts constitute an intentional or malicious trespass to plaintiff's chattel. Although the property status of the dog involved in *La Porte* was not defined, such animals are

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8. Brown v. Crocker, 139 So. 2d 779 (La. App. 1962); Brown v. Broome County, 10 App. Div. 2d 152, 197 N.Y.S.2d 679 (1960); Lanford v. West Oakland Cemetery Addition, Inc., 223 S.C. 350, 75 S.E.2d 865 (1953).

9. See Cremillion v. C. & L. Const. Co., 125 So. 2d 198 (Ala. 1960) and Davis v. Hall, 21 Ga. App. 265, 94 S.E. 274 (1917) where the issue is discussed.

10. Louisville & N.R.R. v. Fletcher, 194 Ala. 257, 69 So. 634 (1915); Wilson v. Kuykendall, 112 Miss. 486, 73 So. 344 (1916). *Contra*, White Sewing Mach. Co. v. Lindsay, 14 S.W.2d 311 (Tex. Civ. App. 1929).

11. See Kirksey v. Jernigan, *supra* note 2, in which it is unclear whether the court allowed a recovery for mental distress as a separate tort or as incident to trespass to a chattel, or based such recovery upon the dead body exception to the impact rule. This latter exception is recognized in the *Restatement of Torts* §868 (1939).

12. La Porte v. Associated Independents, Inc., 163 So. 2d 267, 269 (Fla. 1964).

chattels,[13] and the decision clearly appears to support the above proposition. In light of the fact that only a very few other jurisdictions have allowed such recoveries,[14] the Florida court has apparently placed itself on the advancing front in this area of tort law. As Florida has not yet eliminated the impact requirement in simple negligence cases and is thus behind the current trend, *La Porte* appears as a bold step by our court.

A third and certainly noteworthy facet of *La Porte* is that it may indicate a movement by the Florida court toward recognizing intentional infliction of mental distress as a separate and distinct tort. Although not clearly settled, the present Florida position seems to be that mental distress is an element of damages and not a separate tort.[15] If this case is used as authority for a recovery of damages for mental distress for acts directed at third persons rather than chattels, the effect will be to recognize mental distress as a separate tort in this state. When the acts of the defendant are directed at a third person rather than at the plaintiff or his property interest, there is no technical tort committed against the plaintiff other than the infliction of mental distress. Thus to allow a recovery in such a case is in effect permitting a recovery for mental distress as a separate tort rather than as an element of damages. Florida has not yet considered the question whether a plaintiff can recover for mental distress for acts directed at a third person, but a few jurisdictions have allowed such a recovery when the act of the defendant were malicious or intentional.[16] Even though *La Porte* involved chattels, a strong argument can be made that if mental distress damages are recoverable for acts directed at a dog, certainly they should be recoverable for acts directed at a person with whom the injured party enjoys a close relationship. This argument appears reasonable and is supported by the rationale of *La Porte*.

Recognition of mental distress as a separate tort would allow a recovery in many cases in which it has been previously denied.[17] These cases cover situations in which the defendant's acts result in mental anguish as the only injury or technical "tort" to the plaintiff and include acts directed at the plaintiff, his chattels, or a third person.

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13. Hamby v. Sampson, 105 Iowa 112, 74 N.W. 918 (1898).

14. See note 10 *supra*.

15. See note 11 *supra*.

16. Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890); Jeppsen v. Jensen, 47 Utah 536, 155 Pac. 429 (1916).

17. See, *e.g.*, Slocum v. Food Fair Stores, 100 So. 2d 396 (Fla. 1958); Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941). See also foreign jurisdictions, Holland v. Good Bros. Inc., 318 Mass. 300, 61 N.E.2d 544 (1945); Thompson v. Minnis, 202 P.2d 981 (Okla. 1949).