Compensating Distress With A Stiff Upper Lip

Author : John C.P. Goldberg

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Eric Descheemaeker, *Rationalising Recovery for Emotional Harm in Tort Law*, 134 **L.Q. Rev.** 602 (2018).

Tort compensation is often said to be governed by the make-whole principle – damages should compensate the successful plaintiff for all the losses she suffered as a result of the tort. Even if there is such a principle, it seems to have exceptions. In *Rationalising Recovery for Emotional Harm in Tort Law*, Eric Descheemaeker focuses on an apparent exception that applies to suits for interferences with possessory rights. For example, in standard cases of conversion, the plaintiff is not entitled to recover compensation for emotional distress caused by the wrongful interference with her property rights. Examining English authorities, Descheemaeker offers a surprising result. Although courts *purport* to disallow distress damages in these cases, they actually do allow them. English tort law is more principled in hewing to the make-whole ideal than it appears to be.

Rationalising Recovery is *not* in the first instance concerned with the question of when emotional distress serves as a "predicate injury" – i.e., the injury that the defendant was duty-bound to avoid causing.[1] Nor is it concerned with cases in which the plaintiff sues for having been made to suffer the sort of psychiatric injury that, under English law, is treated as a personal injury on par with a broken leg. Rather, it focuses on the availability of "parasitic" emotional distress damages – compensation for fear, horror, grief, anger, frustration, worry, or other negative emotions arising out of a distinct injury that grounds the victim's tort claim.

No one disputes that such damages are *sometimes* available. A plaintiff who suffers bodily harm in a car accident proximately caused by the defendant's negligence is entitled to recover compensation for anxiety or misery over her injury. So too are successful battery and libel claimants. However, many courts and commentators deny that emotional distress damages are always available to tort victims.

For example, courts in the U.S. maintain that, absent special circumstances, victims of conversion are not entitled to recover emotional distress damages.[2] Imagine that Jasper returns home to discover that the young dogwood tree in his front yard has vanished. He investigates and determines that it was uprooted by the landscaping company that he had hired to maintain his yard – a company employee somehow misunderstood Jasper's instruction to prune a different tree as an instruction to remove the dogwood. For the landscaper's mistaken but intentional taking of his property, Jasper stands to prevail on a conversion claim. However, Jasper is not entitled to compensation for his distress over the loss of the tree.

Descheemaeker's thesis is that, even though English jurists, like their American counterparts, tend to insist that property torts such as these don't give rise to claims for emotional distress damages, such damages are recoverable under other guises. Thus, courts sometimes permit "aggravated damages" for conduct that is not merely tortious but insulting, humiliating, or malicious.[3] Aggravated damages, Descheemaeker claims, compensate for the psychic wounds generated by particularly nasty torts. Courts also award compensation for certain abstractly defined losses, including the "loss of use" of a damaged item of personal property, even if the plaintiff had not previously used the item to earn revenue. Here, he says, compensation is actually being paid for the annoyance that comes with not having access to one's stuff. Finally, judges sometimes permit claimants to recover more than would be

awarded under a diminution-in-value measure. Suppose some trees in Jennifer's backyard are trampled by her neighbor's trespassing cattle. Even if their destruction barely affects the value of her land, if the evidence shows that she took great pleasure in viewing the trees from her living room, a judge might order the defendant to pay higher, replacement-value damages. By these subterfuges, Descheemaeker argues, English judges have helped see to it that the make-whole measure is realized even in areas of tort law supposedly not faithful to it.

Others better qualified than I can speak to Descheemaeker's reading of the relevant English decisions. I will instead approach his very interesting article from a more theoretical perspective. There is real ingenuity to his analysis. My question is whether and why such ingenuity is required. The reasoning of the courts in the relevant cases does not cry out for second-guessing – while hardly unassailable, these decisions are by no means exemplars of "transcendental nonsense." Moreover, they seem to reach perfectly palatable results. Rulings that provides the Jennifers of the world with a bit more compensation strike me as unlikely to generate outcry from the bar or the public. Why, then, should we suppose, with Descheemaeker, that there is a hidden logic to these cases? Why not just take them at face value?

Descheemaeker has an explanation of sorts. English judges, he claims, have long been discomfited by the thought of treating emotional distress as a compensable setback. Stiff upper lip and all that. Thus, when we see property tort cases in which English courts award damages under headings such as aggravated damages, we can surmise that they are surreptitiously compensating emotional distress.

This explanation strikes me as wanting. The article acknowledges all the different torts for which English courts have long allowed parasitic distress damages – everything from negligence to false imprisonment to defamation. Where's the discomfiture? Even Victorian-era jurists (Pollock, CB, we're looking at you) deemed the award of distress damages appropriate in physical injury cases. Given that these jurists also tended to embrace robust notions of property rights, why would *they* have felt sheepish about compensating owners for miseries associated with dispossession? It is one thing to argue – as, famously, has Martha Chamallas – that common law judges' sexism led them to reject claims for 'pure' emotional distress that struck them as unmanly. It is quite another to suggest that the Pollocks of the world would be put out by a rule that provides compensation for the anguish of men deprived of their land or things. (Note that, on this side of the Atlantic, even the Anglophilic and hard-headed Holmes paused his cynical musings in The Path of the Law to wax poetic about how a long-held possession "takes root in your being, and cannot be torn away without your resenting the act . . . .")[4]

I am led to wonder if Descheemaeker's analysis ultimately belies an implicit acceptance of a brand of empiricism that arbitrarily limits the class of compensable setbacks to those with a physical and hence potentially observable dimension.[5] Some such thinking seems to fuel his otherwise under-motivated effort to recast aggravated damages as emotional distress damages. My casebook co-author Anthony Sebok expertly exposed the fallacy underlying a comparable effort by the U.S. Supreme Court to treat punitive damages as "compensatory" of distress over having been treated in a high-handed manner.[6] In fact, there seems little reason not to take aggravated damages at face value. They are redress for having been insulted, humiliated, or otherwise trashed, independent of one's emotional reaction to the trashing, just as damages for loss of reputation or privacy compensate in the first instance for being held in lower esteem by others or because others know things about one's private life they shouldn't know, not for one's anxiety or fear over such things. If one supposes – as one should – that there is nothing philosophically problematic about the idea of a wrongdoer compensating a victim for the very fact of having subjected her to gross maltreatment, there is no pressure to recast aggravated damages for malicious property torts as a sneaky way of compensating a 'real' setback such as distress.

Finally, to return to where I started, it is worth highlighting the teleological (Whiggish?) flavor of Descheemaeker's doctrinal exposition. He seems to assert that "make whole" – by virtue of being a

basic principle of tort justice – exercises a gravitational force that has been pulling courts unwillingly and perhaps unwittingly toward its full realization in case law. One might question whether "make whole" really is a principle of this sort. I have argued that it is instead a default rule for tort cases fashioned by modern judges in an effort to render more predictable the application of a deeper but also more indeterminate principle of "fair compensation." On this view, a practice of denying parasitic emotional distress damages in plain-vanilla conversion cases need not constitute a departure from principle. It could be instead that courts have simply decided, quite reasonably, that compensation for the value of the damaged or destroyed property just is fair compensation in cases of this sort.

Assuming, however, make-whole is the core principle of tort damages, one wants to hear more about how it influences judicial decisionmaking. When, in property tort cases, courts have awarded aggravated damages, or use- or replacement-value damages, have they done so out of a sense that it would be unjust to deprive the plaintiff of full compensation for his losses? How would we know that this particular sentiment is driving their decisions?

Jotwell Torts contributor Sandy Steel previously published a Jot *reviewing Professor Descheemaeker's article. I hope it will prove interesting for Jotwell readers to see a second take on the same piece.*

1. For example, an undertaker's liability for carelessly inflicting distress on family members by mishandling their decedent's body rests on the duty to take care against causing distress to such persons; their distress is the injury that 'completes' the tort.
2. So says Section 73 of the reliable Dobbs, Hayden, and Bublick Torts treatise.
3. Imagine that Jasper planted the tree in memory of his deceased spouse, and Jasper's neighbor, knowing this, dug it up out of sheer malice.
4. Of course other grounds might be invoked to explain judicial reluctance to allow for the award of emotional distress damages. For example, the late, great John Gardner seems to have been of the view that, as a conceptual matter, emotional distress is not something for which a person can actually be compensated. Yet he also thought that the payment of such awards could be understood (and hence presumably justified) as a quasi-apology – i.e., as an acknowledgement by the defendant to the plaintiff of the defendant's failure to comport with the reasons she had not to injure the plaintiff. *See* John Gardner, From Personal Life to Private Law (2018).
5. This class, I suppose, could include measurable physical sensations such as pain.
6. Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 **Chi.-Kent L. Rev.** 163 (2003).

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