

The Oldest Property: Why Statutory Caps on Damages for the Benefit of Government or of Third Parties Deserve Rigorous Analysis under the “Takings” Clause

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Scenario 1: A public school bus, driven by an intoxicated driver, strikes a pedestrian, a minor, and fractures her left leg. After a bench trial, a judge awards the pedestrian \$50,000 for all of her causes of action, as well as \$10,000 to each of her parents for their pain and suffering. The governmental defendant pays the entire judgment.

Scenario 2: Minutes after the incident narrated above, the bus falls off a steep cliff into the ocean. Thirty school children die, twenty are seriously hurt. After a bench trial, a judge determines that the actual damages of each of the surviving children amount to \$500,000, that the pain and suffering of each parent of those twenty survivors amounts to \$100,000 and that the pain and suffering of each parent of the thirty who did not survive amounts to \$200,000. The sum total of the awards is \$26 million. The judgment, following the law, orders the government to pay each of the surviving children \$2,884.60; \$576.91 to each of the survivors’ parents; and, \$1,153.85 to each parent of a deceased, for a grand total of \$150,000.00.¹ The governmental defendant pays that judgment, with a sense of relief.

What explains this obvious miscarriage of justice? In its infinite wisdom, the Legislative Assembly of that not so hypothetical jurisdiction has determined that in order to avoid serious inroads into that jurisdiction’s budget, it will only pay relatively small claims, but will refuse to pay above a certain limit in larger claims. The limits are \$75,000 per cause of action per “incident” up to a total of \$150,000 for all causes of action arising out of the same incident. The accident concerning the pedestrian is a separate incident from the second, much more tragic one.

This brand of “distributive justice”² is what nowadays often goes around under the euphemistic label of “tort reform.”³ The jurisdiction in the quite credible hypothetical example

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¹ The equation is: $[(500,000 / 26,000,000) \times 150,000] + [(100,000 / 26,000,000) \times 150,000] + [(200,000 / 26,000,000) \times 150,000]$.

² I am not here concerned with systems of compulsory insurance where different types of damages to various kinds of plaintiffs have been indexed in great detail, and judges must follow such index. The Spanish system of compensation for traffic accidents is an example. See Law No. 30 of November 8, 1995. See also Jesús Pintos Ager, *Baremos*, INDRET (no. 1, 2000). Whatever objections may be raised concerning such systems, inequality between types of plaintiffs is not usually among them. Caps on damages or outright prohibition of compensation of moral damages in some types of cases is an entirely different matter.

³ As a recent article aptly put it, paraphrasing Harold Lasswell: “Tort reform is about politics and ‘who gets what, when, and how’.” Stephen Daniels & Joanne Martin, *Texas Plaintiffs’ Practice in the Age of Tort Reform: Survival of the Fittest – It’s Even More True Now*, 51 N.Y.L. SCH. L. REV. 285, 291 (2006-2007). They add that “tort reform” proposals “all are the result of organized political activity on the part of well funded interest groups trying

is Puerto Rico,⁴ but there are comparable legislative schemes throughout the United States⁵ and around the world.⁶

Before a human being had anything of value which could be defined as “property” under the most traditional terms, it had itself: its body, its mobility, its physical and psychic health. One of the oldest and most basic tenets of liberal society has been that government cannot take for itself or transfer to others a human being’s “property” without paying just compensation.⁷ Yet, that promise usually has been kept more faithfully concerning interests in things that may be traded in the market, albeit the concept of such “things” has evolved.

When it comes to the most basic function of tort law, to compensate “A” for the damage that “B” intentionally or negligently caused the former, legislatures in the United States and elsewhere, quite often with judicial blessing, have found it proper to impose caps on damages, either to benefit government or certain categories of third parties whom government has looked upon with favor.⁸ Arguments against such schemes usually have failed, whether

to change the law in ways that benefit them to the detriment of their opponents.” *Id.*

⁴ See *P.R. Laws Annotated*, title 32, § 3077. This statute was patterned after the Federal Tort Claims Act, 28 U.S.C. § 2674, which, however, does not contain caps on recoverable damages. The Puerto Rican limits used to be even smaller (\$15,000 per cause of action; \$30,000 for all causes of action arising out of the same incident), but the Supreme Court of Puerto Rico struck these down in *Torres v. Castillo Alicea*, 111 DPR 792 (1981), under substantive due process analysis. When the legislature raised the limits to the current level, the Court, one Justice bitterly dissenting, found no constitutional problem, although it did not analyze it under the federal or Puerto Rican Constitutions’ just compensation clause. See *Defendini Collazo v. E.L.A.*, 134 DPR 28 (1993).

There are several other similar schemes under Puerto Rican law. For instance, a physician who works for the government of Puerto Rico is absolutely immune from malpractice lawsuits. The government is the only proper party, subject, of course, to the above limits. See *P.R. Laws Annotated*, title 26, § 4105. Other schemes protect physicians who work in the private sector. See *id.* §§ 4101-4111.

A somewhat typical civil law jurisdiction in this area of the law, Puerto Rico does not provide for trial by jury in civil cases. The argument for “tort reform” to constrain “runaway” juries, so prevalent in the United States, is therefore not applicable to Puerto Rico.

⁵ According to a recent article, there are forty-two states in the United States which limit the amount of damages recoverable for governmental torts, and only one –Washington– which explicitly refuses to do so. See Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 804 n. 27, 811 n. 49 (2007). After considering arguments for and against governmental liability in general, this author tends to endorse caps on damages without considering the relevance of the just compensation clause, which he discusses only as pertains to traditional property.

⁶ See, e.g., Organisation for Economic Cooperation and Development, *Medical Malpractice: Prevention, Insurance and Coverage Options* 38-39 (No. 11, 2006) (concerning medical malpractice). In 1978, the Canadian Supreme Court handed down a trilogy of cases where it held that, save for exceptional circumstances, noneconomic damages in all cases should be capped at \$100,000, with an allowance for inflation. See Theresa M. Hottenroth, *Lessons from Canada: a Prescription for Medical Liability Reform*, 13 WIS. INT’L L.J. 285, 298 (1994).

⁷ As recognized in John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 563 (2005), Chief Justice Marshall invoked Blackstone when he argued that “the very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives injury,” and that “[o]ne of the first duties of government is to afford that protection.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

⁸ For a review of such schemes and of litigation concerning them, which for the most part has not been

viewed under due process, equal protection, access to courts, or right to jury provisions. But analysis under the takings clause⁹ has been infrequent, or perfunctory, when undertaken. The U.S. Supreme Court's avoidance of that issue in *Duke Power Co. v. Carolina Env. Study Group, Inc.*,¹⁰ surprisingly, does not seem to have provided a lead to many litigants and courts. But there are important exceptions.¹¹

I submit that caps on economic damages, either for the benefit of third parties or of government, should be treated under the takings clause of a liberal constitution with as strict a standard as that used for "traditional" takings of immovable or movable property. In the context of government takings, I propose that any theory of sovereign immunity contradicts the promise of the takings clause. But I go further. I submit that caps or outright prohibitions of awards for "noneconomic" damages are also questionable and should undergo similar analysis. To argue that courts may be instructed not to grant compensation—or not to grant it above a certain level—in cases where those courts would otherwise grant such compensation, is a denial of the promise of the takings clause.¹²

If a human being has a constitutional right to be paid when government forces her to keep a tract of land completely barren,¹³ or to "dedicate" a tract of land for government use,¹⁴ or takes for itself interest on a court-deposited fund,¹⁵ or grants a free easement for the use of

successful, especially in more recent times, see Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How To Restore the Right Balance*, 32 RUTGERS L.J. 907, 939-76 (2001). Some more recent explorations of the subject include Michael P. Murphy, *Tort Reform: Would a Noneconomic Damages Cap Be Constitutional, and Is One Necessary in Iowa?* 53 DRAKE L. REV. 813 (2005); Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501 (2009).

⁹ U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation").

¹⁰ 438 U.S. 59, 94 n. 39 (1978) (leaving for another day the question of whether a taking could occur if, in the event of a nuclear disaster, damages exceeded the \$500 million cap established by the Price-Anderson Act of 1957, 71 Stat. 576, 42 U.S.C. § 2210).

¹¹ See, e.g., Goldberg, *supra* note 7. Professor Goldberg's proposal is much more complex and does not rely alone on the just compensation clause. However, my core reasoning in this short, schematic piece has much in common with his.

For an argument against governmental liability for "constitutional torts" that would seem to reach the same result for "common law torts", see Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

¹² The takings clause figured prominently in judicial invalidations of similar schemes in the nineteenth century. See Goldberg, *supra* note 7, at 563, citing Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57 (1999). One need not be an avowed originalist in order to accept that not every early interpretation of a constitutional text should be considered *passé*. And this one has much more in its favor, besides the constitutional text and its original understanding. It must be remembered, moreover, that in recent decades the U.S. Supreme Court has reinvigorated takings clause analysis, at least as concerns traditional conceptions of property.

¹³ *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992).

¹⁴ *Dolan v. City of Tigard*, 512 US 374 (1994).

¹⁵ *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 US 155 (1980).

a private cable-TV firm,¹⁶ why can government order courts to refuse to grant reasonable compensation for the deprivation of life, limbs, or physical or psychic well-being?

It is not enough to answer, as the Puerto Rico Supreme Court did,¹⁷ parroting other courts, that there is no constitutional right to a civil action. There *is* a constitutional right to sue government when it takes private property for public purposes. Can it be seriously claimed that physical and psychic well-being is not “property” or has no value? Is it not precisely because of its worth that its wrongful deprivation is compensated? It would most probably be invalid for a statute to limit the value of just compensation in cases where government takes tangible immovable or movable property. Why should government be permitted to refuse to justly compensate or authorize others not to justly compensate other valuable goods that have been tortiously destroyed or seriously damaged by it or by others?¹⁸

If, as it has been cogently argued, the basic question that an affected individual asks and that government must answer under the takings clause is “Why me?,”¹⁹ caps on damages –of every type– provide no answer. They do not even try. And their typically perverse impact on disadvantaged groups and individuals is well-documented.²⁰

The oldest property is at least as valuable –if not more– than the old, the new or the newest. Not to recognize this, turns takings clause analysis into an incoherent play on labels.

¹⁶ Loretto v. Teleprompter Manhattan C.A.T.V. Corp., 458 US 419 (1982).

¹⁷ Defendini Collazo v. E.L.A., 134 DPR 28, 68-69 (1993).

¹⁸ I am not here concerned either with the common law concept of punitive damages. As a matter of fact, Puerto Rican law, just as civilian tort law in general, does not accept that remedy except in exceptional, statutorily-authorized instances. Carrasquillo v. Lippitt & Simonpietri, Inc., 98 DPR 659, 669 (1970).

For an analysis which tends to be at odds with mine, since it prefers to focus on the consequences for non-victims of paying full compensation to victims and argues that it would make valuable goods, such as medicine, more expensive for non-victims, see Lucas Grosman, *El cuerpo humano como propiedad y el problema de los daños*, in DERECHO Y PROPIEDAD – SEMINARIO EN LATINOAMÉRICA DE TEORÍA CONSTITUCIONAL Y POLÍTICA 106 (2008) (Paola Bergallo, ed.). That argument, however, would seem to run counter to the core message of the takings clause: an individual should not have her property destroyed, for free, in order to benefit the rest of society.

¹⁹ LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-6, at 606 (2d ed. 1988).

²⁰ See Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004). See also Goldberg, *supra* note 7, at 622. Although Professor Goldberg’s stance on caps on damages is somewhat less adverse than mine, he ends up agreeing with my core arguments, when he states:

[I]t is conceivable that a court should strike down even this more modest form of cap as applied to classes of plaintiffs whose claims will effectively be wiped out by it. These might include, for example, plaintiffs who will not have the sort of significant economic losses that render them eligible to obtain meaningful redress, such as homemakers and the elderly.

Id., citing Finley, *supra*, and David M. Studdert *et al.*, *Are Damage Caps Regressive? A Study of Malpractice Jury Verdicts in California*, 23 HEALTH AFF. 54, 60-62 (2004).