

STIGMA DAMAGE TO PROPERTY

Toxic pollutants can harm property as well as people. When that happens under the common law, plaintiffs may employ multiple different legal theories to base their claims for damages, which include trespass, nuisance, negligence and strict liability.ⁱ In Louisiana, owners of property have relied upon Articles 667,ⁱⁱ 669 and 2315 of the Civil Code along with the above common law theories to recover damages for polluted property.ⁱⁱⁱ But what type of damages are available to those possessing an ownership interest in immovable property when they prove more likely than not that a toxic substance has interfered with their use of the land?

Louisiana courts have used a variety of methods to measure such damages. In some cases the courts have used the cost of restoration as the measure.^{iv} Courts have also used the difference between the value of the property before and after the damage as the measure.^v A combination of the methods has been employed.^{vi} A frequently cited case stated the following:

We think that the proper measure of damages must be determined from the circumstances of each case, considering such factors as the extent of the damage; the use to which the property may be put; extent of economic loss, both as to value and income; and the cost of and practicability of restoration.^{vii}

Damages awardable to one owning a real property interest can also be had for the “stigma” attached to the property as a result of the tortfeasor’s activities.^{viii} This may occur when property values drop after neighboring land is discovered to contain hazardous substances, or is designated a remedial superfund site, or is announced to be a public landfill. The resulting stigma can cause property to drop in value even though it is not contaminated. Typically, “marketplace” stigma may be attached by the public to property located near a site of toxic contamination or “incomplete repair” stigma may result after all practical remediation efforts to clean up property have taken place.^{ix}

Several recent cases illustrate the elements necessary for a court to allow the claim for stigma damages to be heard by a jury. In *Walker Drug Company, Inc. v. La Sal Oil Company*,^x plaintiffs alleged that since significant quantities of gasoline leaked from tanks at defendants’ service stations and contaminated the groundwater and soil of their properties, this had damaged the value of the properties and impinged upon their ability to use their properties as collateral for a loan. In reversing the trial court’s exclusion of evidence relating to stigma damages, the court wrote:

Stigma damages are a facet of permanent damages, and recovery for stigma damages is compensation for a property’s diminished market value in the absence of “permanent ‘physical’” harm. L. Neal Ellis, Jr. & Charles D. Case, *Toxic Tort and Hazardous Substance Litigation* § 6-5(a) (1995), at 156. This Court has not assessed the availability of stigma damages in any prior case.

A majority of courts from other jurisdictions, however, allows recovery when a defendant’s trespass or nuisance has caused some temporary physical injury to

the property but, despite the temporary injury's remediation, the property's market value remains depressed. *See Id.; In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 797-98 (3d Cir. 1994). Thus, stigma damages compensate for loss to the property's market value resulting from the long-term negative perception of the property in excess of any recovery obtained for the temporary injury itself. Were this residual loss due to stigma not compensated, the plaintiff's property would be permanently deprived of significant value without compensation.

We find the majority position convincing. Stigma damages are therefore recoverable in Utah when a plaintiff demonstrates that (1) defendants caused some temporary physical injury to plaintiff's land and (2) repair of this temporary injury will not return the value of the property to its prior level because of a lingering negative public perception.

In *Paoli II*^{xi}

[A]n award of stigma damages requires proof of the following elements: "(1) defendants have caused some (temporary) physical damage to plaintiffs' property; (2) plaintiffs demonstrate that repair of this damage will not restore the value of the property to its prior level; and (3) plaintiffs show that there is some ongoing risk to their land."

The plaintiffs in *Paoli*, long-standing litigation which generated other reported decisions,^{xii} lived for many years in the vicinity of the Paoli Railroad Yard, a railcar maintenance facility at which polychlorinated biphenyls ("PCBs") were used in great quantities for over twenty-five years. Plaintiffs sued those corporations responsible for premises maintenance and those who sold the PCBs, seeking to recover for a variety of physical ailments and for property damage. After an adverse jury verdict following a two week trial the plaintiffs appealed.^{xiii} Although the court affirmed the jury's verdict, it offered the following observations about the jury instructions given on property damage at trial:

The plaintiffs argue that the district court erred in instructing the jury to consider whether "actual" property damage occurred under the *Paoli II* standard. However, as we stated above, what the court instructed the jury was that the plaintiffs need only demonstrate *temporary* physical damage; the court never instructed the jury that the damage had to be permanent. The court's repeated use of the word "actual" did not convey a different legal standard to the jury. The dictionary defines "actual" as "existing in reality or fact." *Webster's New World Dictionary* 14 (3rd College ed. 1988). Thus, actual damage can be either temporary or permanent. As a result, the jury was not improperly restricted to a finding of permanent damage as a prerequisite to a finding for the plaintiffs. Moreover, the court's use of the word "actual" was appropriate because *Paoli II* specifically requires proof of some real physical damage to plaintiffs' land, some damage that "exists in fact," as opposed to damage caused by negative publicity alone.

A recent Fifth Circuit decision also found this kind of damage compensable, referring to “market stigma” as “the public’s fear of contaminated property, which lingers even after contamination has been remediated.”^{xiv}

Louisiana has found this kind of stigma compensable. In *Acadian Heritage Realty, Inc. v. City of Lafayette*,^{xv} the City of Lafayette had purchased property for the purpose of establishing a sanitary landfill after a subdivision developer had purchased an adjacent tract to develop residential lots. After suit had been filed to enjoin the city from beginning any type of operations on the property, the subdivision developer amended its petition (after operation of the landfill had begun) to claim damages for the alleged negligent operation and placement of the landfill. The court commented:

Although we find that some of the decrease in value of the land was due to the negligent operation of the landfill, we find further that damages resulting from the “stigma” attached to the landfill may be recovered. . .

As stated frequently at the trial of this case, a landfill is a unique operation. Some of the obvious effects of even a well-run landfill are increased traffic, increased noise level from the required machinery, and a change in the general appearance of the area. As clearly demonstrated at trial, the public perceived these negative effects even before operation of the landfill had begun. this perception caused damage to Acadian for which they should recover.

Counsel representing landowners harmed by toxins should consider demanding stigma damages when seeking full compensation for clients’ harm.

- i *See, generally*, W. Page Keeton, et al. *Prosser and Keeton on The Law of Torts* §13 at 67 (5th ed. 1984).
- ii The “strict liability” of Article 667 was abolished in favor of a negligence standard as part of the Acts, 1996, 1st Ex. Sess., No. 1, §1, effective April 16, 1996.
- iii *See, e.g.*, *Gaspard v. St. Martin Parish Sewerage Dist., No. 1*, 569 So.2d 1083 (La.App. 3d Cir. 1990); *Ortego v. Sevarg Co., Inc.*, 550 So.2d 340 (La.App. 3d Cir. 1989) and Maraist and Galligan on Louisiana Tort Law, § 2 - 6 (g) at 39 - 41 (1996).
- iv *Wilson v. Scurlock Oil Co.*, 126 So.2d 429 (La.App. 2nd Cir. 1960); *Melancon v. Oilfield Lubricant Services, Inc.*, 292 So.2d 908 (La.App. 1st Cir. 1974).
- v *Womack v. Travelers Ins. Co.*, 258 So.2d 562 (La.App. 1st Cir. 1972); *Curole v. Acosta*, 303 So.2d 530 (La.App. 1st Cir. 1974).
- vi *Daspit v. State Department of Highways*, 325 So.2d 368 (La.App. 3d Cir. 1975); *Acadian Heritage Realty, Inc. v. City of Lafayette*, 446 So.2d 375 (La.App. 3d Cir. 1984).
- vii *Ewell, et al. v. Petro Processors of Louisiana, Inc., et al.*, 364 So.2d 604 (La.App. 1st Cir. 1978), writ refused, 366 So.2d 575 (La. 1979).
- viii *Acadian Heritage Realty, Inc. v. City of Lafayette*, 434 So.2d 182 (La.App. 3rd Cir. 1983), writs denied 440 So.2d 733 (La. 1983); *Acadian Heritage Realty, Inc. v. City of Lafayette*, 446 So.2d 375 (La.App. 3d Cir. 1984), writs denied, 452 So.2d 697 (La. 1984).
- ix *See* Stigma and Property Contamination - Damnum Absque Injuria, *Torts and Insurance Law Journal*, Vol. 33, No. 3, Spring 1998 at 836.
- x 972 P.2d 1238 (Utah 1998).
- xi *In re Paoli Railroad Yard PCB Litig.*, 35 F.3d 717 (3rd Cir. 1994), cert. denied, 115 S.Ct. 1253 (1995) (*Paoli II*).
- xii *In re Paoli Railroad Yard PCB Litig.*, 916 F.2d 829 (3rd Cir. 1990) (“*Paoli I*”); *In re Paoli Railroad Yard PCB Litig.*, No. 95-2098 (3rd Cir. 1997) (“*Paoli III*”).
- xiii *In re Paoli III*, No. 95-2098 (3rd Cir. 1997).
- xiv *Bradley v. Armstrong Rubber Co.*, 130 F3d 168, 174 (5th Cir. 1997).
- xv 446 So.2d 375 (La.App. 3d Cir. 1984) writ denied, 440 So.2d 733 (La. 1983).