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## **LIBEL AND SLANDER - MENTAL SUFFERING ALONE AS SUSTAINING LIBEL ACTION**

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**LIBEL AND SLANDER — MENTAL SUFFERING ALONE AS SUSTAINING LIBEL ACTION** — In a libel action, the plaintiff proved that the defendant had published a news item in its newspaper falsely imputing to the plaintiff, a Puerto Rican student at Louisiana State University, the authorship of an article written in the student paper deploring the pacifistic attitude of the American youth. The lower court dismissed the plaintiff's bill. *Held*, the publication by the defendant was not a libel actionable without proof of special damages, and that, while mental suffering alone would constitute special damages, the defendant's publication was not the proximate cause of the plaintiff's suffering. *Santana v. Item Co., Ltd.*, 192 La. 819, 189 So. 442 (1939).

Libels may be conveniently divided into two main categories: (1) those which are defamatory upon their face; (2) those which become defamatory only when extrinsic facts and circumstances are considered. The Louisiana

court, in the instant case, enunciates a proposition, which, while straying away from what is generally recognized as the common-law rule of libel, has found support in other jurisdictions. This proposition is that in the second category of libel, those which are defamatory only upon a consideration of extrinsic factors, a plaintiff must allege and prove special damages in order to recover.<sup>1</sup> In the case at bar, however, the position seems particularly strained and unnecessary in view of the fact that Louisiana is a civil law state and is not bound by any common-law distinctions between defamation which is actionable without proof of special damage and that which is not so actionable.<sup>2</sup> But recognizing that this position of the court is sustained by some authority, although condemned by text-writers,<sup>3</sup> the question still remains whether mental suffering of the defamed alone will constitute special damage. It seems to be authoritatively settled that where a defamatory statement is actionable without proof of special damage, whether it be libel or slander, the mental suffering of the person defamed is an element which the jury may take into consideration, along with the other elements of damages, in estimating the general damages.<sup>4</sup> This rule is apparently based upon the theory that when the reputation has been injured, mental suffering presumptively follows. However, even in cases where the defamation is actionable without proof of special damages, a great many courts hold that mental suffering alone, without some injury to the reputation, will not be compensable,<sup>5</sup> although there is authority to the contrary.<sup>6</sup> The courts which refuse to allow the jury to consider the mental suffering of the

<sup>1</sup> *Rowan v. Gazette Printing Co.*, 74 Mont. 326, 239 P. 1035 (1925); *Wiley v. Oklahoma Press Pub. Co.*, 106 Okla. 52, 233 P. 224 (1924).

<sup>2</sup> *Carlin v. Steward*, 2 La. 73 (1830); *Miller v. Holstein*, 16 La. 389 (1840); *Feray v. Foote*, 12 La. Ann. 894 (1857); *Spotorno v. Fourichon*, 40 La. Ann. 423, 4 So. 71 (1888).

<sup>3</sup> HARPER, *TORTS*, § 243 (1933); 3 *TORTS RESTATEMENT*, § 569 (1938); 35 *MICH. L. REV.* 500 (1937); ODGERS, *LIBEL AND SLANDER*, 6th ed., 309 (1929).

<sup>4</sup> *Cyrowski v. Polish-American Pub. Co.*, 196 Mich. 648, 163 N. W. 58 (1917); *Thorson v. Albert Lea Pub. Co.*, 190 Minn. 200 at 204, 251 N. W. 177 (1933), where it was said: "Mental suffering is an element of general damage. Such suffering is presumed to have naturally resulted from the publication of a libelous article." Accord: *Newby v. Times-Mirror Co.*, 46 Cal. App. 110, 188 P. 1008 (1920); *Vail v. Pennsylvania Ry.*, 103 N. J. L. 213, 136 A. 425 (1927); *Sandora v. Times Co.*, 113 Conn. 574, 155 A. 819 (1931); *Garrison v. Sun Printing & Pub. Assn.*, 207 N. Y. 1, 100 N. E. 430 (1912); 37 C. J. 117 (1925); 90 A. L. R. 1175 (1934); NEWELL, *SLANDER AND LIBEL*, 4th ed., § 725 (1924).

<sup>5</sup> *Samuels v. Evening Mail Assn.*, 6 Hun (13 N. Y. S. Ct.) 5 at 10 (1875), where the court said: "The action for libel can only be maintained upon the ground of injury to character or reputation of the plaintiff; and where no such injury has been sustained, it is not enough that the jury shall be able to find that the feelings of the plaintiff have been injured." Accord: *Hamilton v. Eno*, 16 Hun (23 N. Y. S. Ct.) 599 (1879); *Greenlee v. Coffman*, 185 Iowa 1092, 171 N. W. 580 (1919) (a case of slander per se); *Waite v. Stockgrowers' Credit Corp.*, 63 N. D. 763, 249 N. W. 910 (1933).

<sup>6</sup> *Stark v. Comer*, 190 Ala. 245, 67 So. 440 (1914); *Jozsa v. Moroney*, 125 La. 813, 51 So. 908 (1908); *Brown v. Knapp & Co.*, 213 Mo. 655, 112 S. W. 474 (1908).

defamed in such cases do so upon the theory that a defamation action is to compensate for injury to the reputation, and that allowing the jury to consider mental suffering, when there is no injury to the reputation, would not be within the scope of this theory. Moreover, where the defamation is actionable only with proof of special damages, as in the instant case, the courts seem substantially agreed that mental suffering alone will not constitute special damages.<sup>7</sup> The theory behind such decisions is analogous to that found in the field of mental suffering resulting from fright—that mental suffering, unattached to other damages, is too difficult to estimate to be compensable in damages.<sup>8</sup> It has been suggested, however, that such recovery should be allowed.<sup>9</sup> Thus, the instant case, on the basis of authority, would seem to be unjustified in its position. However, this apparent deviation from precedent may be explained by the fact that the Louisiana civil code allows a recovery for mental suffering alone.<sup>10</sup> Yet, it is questionable whether such a recovery should be allowed in a defamation action, which is primarily an action designed to protect one's interest in his reputation.

<sup>7</sup> In *Lynch v. Knight*, 9 H. L. C. 577 at 598, 11 Eng. Rep. 854 (1861), Lord Wensleydale said: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though, where a material damage occurs and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested." This case cites and approves *Allsop v. Allsop*, 5 Hurl. & Nor. 534, 157 Eng. Rep. 1292 (1860). In *Terwilliger v. Wands*, 17 N. Y. 54 at 60 (1858), the court, in a case of slander not actionable without proof of special damages, said: "It would be highly impolitic to hold all language, wounding the feelings and affecting unfavorably the health and ability to labor, of another, a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him and his physical strength and ability to bear them." Accord: *Harrison v. Burger*, 212 Ala. 670, 103 So. 842 (1925); *Walker v. Tucker*, 220 Ky. 363, 295 S. W. 138 (1927); *Hirshfield v. Ft. Worth Nat. Bk.*, 83 Tex. 452, 18 S. W. 743 (1892); 25 Cyc. 525 (1907); 90 A. L. R. 1175 at 1200 (1934); *ODGERS, LIBEL AND SLANDER*, 6th ed., 310 (1929).

<sup>8</sup> *Spade v. Lynn & Boston Ry.*, 168 Mass. 285, 47 N. E. 88 (1897).

<sup>9</sup> 15 VA. L. REV. 575 (1929).

<sup>10</sup> La. Civ. Code (1932), § 2315: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it. . . ." See *Tuyes v. Chambers*, 144 La. 723, 81 So. 265 (1919). The Louisiana law of torts, found principally in this section, recognizes a right of action for mental suffering or injury to the feelings, unaccompanied by any physical injury, and damages are therefore recoverable in libel and slander cases, under the doctrine of the foregoing case.