



CSU
College of Law Library

Cleveland State Law Review

Volume 15
Issue 1 *Mental Injury Damages Symposium*

Article

1966

Mental Suffering as an Element of Damages in Defamation Cases

Jack G. Day

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Legal Remedies Commons](#), and the [Torts Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Jack G. Day, Mental Suffering as an Element of Damages in Defamation Cases, 15 Clev.-Marshall L. Rev. 26 (1966)

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

Mental Suffering as an Element of Damages in Defamation Cases

Jack G. Day*

TO INSURE THE FOCUS of theme it is assumed for present purposes that the hurdles of proof and proximate cause in an actionable defamation have been cleared and that there is no concern with any other issues that may arise, offensively or defensively, in a defamation action beyond the propriety, or impropriety, of proving mental suffering as an element of compensable damage. Stated another way, the crux of the matter is whether mental anguish is, can, or ought to be classified as special damage in defamation actions.¹ Punitive damages are, of course, an element of no relevance here except in the unlikely event some court should find that mental anguish provides the

* Of Cleveland, Ohio; Member of the Bar of Ohio.

¹ It has been said mental pain and suffering caused by publication is not special damage, even accompanied by physical hurt also caused by the utterance. *Clark v. Morrison*, 80 Or. 240, 156 P. 429, 430 (1916); *Allsop v. Allsop*, 5 H&H 534, 157 Eng. Rep. 1292, 1293-1294 (1860). But see *Baker v. Winslow*, 184 N. C. 1, 113 S. E. 570, 572 (1922) where it was said that when "the facts and nature of the action so warrant, actual damages include pecuniary loss, physical pain, and mental suffering." Nevertheless this does not mean the Baker court would have considered mental suffering alone as special damage in a defamation case. Baker involved language actionable per se. One may wonder whether the damages presumed when the libel or slander falls in a per se category does not implicitly include mental anguish. Is it not always the case that a "bad" word among contemporaries involves some mental suffering by its object? Cf. *Garrison v. Sun Printing & Publishing Ass'n*, 207 N. Y. 1, 100 N. E. 430, 431 (1912):

In the case of such a wrong as that of libel and slander . . . the natural and immediate effect in the line of results . . . must be on the mind and not on the body, and therefore such mental disturbance and its consequences even in the shape of resulting sickness are fairly to be apprehended.

See also: *Curley v. Curtis Publishing Co.*, 48 F. Supp. 27 (D. Mass. 1942); *Hall v. Edwards*, 138 Me. 231, 23 A. 2d 889 (1942). Cf. *Langworthy v. Pulitzer Publishing Co.*, 368 S. W. 2d 385, 390 (Mo. 1963) where it was said, the right of privacy protects only ordinary sensibilities and not supersensitiveness. Inaccurate reporting of non-libelous newsworthy incident was involved. On its facts *Langworthy* may very well have reached the right conclusion. But does its "supersensitiveness" concept echo in the mental suffering area the repudiated "thin skull" doctrine? See *Dulieu v. White & Sons*, 2 K. B. 669, 679 (1901). For approval of an instruction that a susceptibility to fright has the effect of making damage all the greater see *Kenney v. Wong Len*, 81 N. H. 427, 128 A. 343 (1925).

special damage under the usual defamation rule requiring some special damage² before punitive damages are allowable.

Physical Impact and Mental Suffering

Except in a distinct minority of jurisdictions,³ the long-time rule in negligence law was that no recovery could be had for

² Cf. *Pecyk v. Semoncheck*, 61 Ohio L. Abs. 465, 105 N. E. 2d 61 (1952); *Gurtler v. Union Parts Mfg.*, 1 N. Y. 2d 5, 132 N. E. 2d 889 (1956); *Ward v. Forest Preserve Dist.*, 13 Ill. App. 2d 257, 141 N. E. 2d 753, 755 (1957). Is bodily sickness resulting from mental stress brought on by defamation per se compensable as punitive damage? See *Butler v. Hoboken Printing & Publishing Co.*, 73 N. J. L. 45, 62 Atl. 272, 275 (1905), where the issue was discussed but was not necessary to decision and compare *Poleski v. Polish American Publishing Co.*, 254 Mich. 15, 235 N. W. 841, 843 (1931), where the trial court intimated in its charge to the jury that "exemplary or punitive damages had to do with 'injury to feelings'."

³ In *Hambrook v. Stokes Brothers*, 1 K.B. 141 (1925), a landmark of minority view, a husband, whose wife died from the shock induced by the sight of a negligently attended motor lorry rushing by her toward a bend in the street where she had left her children, had a cause of action. The fear which induced the consequences was not for the wife's safety but for her children's. Cf. *Yates v. South Kirby etc.*, 2 K.B. 538, 539 (1910). See also *Kenney v. Wong Len*, *supra* note 1, where the plaintiff's shock, accompanied by nausea, at finding a dead mouse in food was held compensable upon proof of negligence and proximate cause. The case report, p. 346, indicates that plaintiff's distress was immediate upon her finding "the mouse in her mouth." The Court refused to "discriminate" between these facts and those involving an external "blow, cut, break, or wrench" on the ground that it "would be a legal refinement, wholly arbitrary and unjust." pp. 346-347. See *Sahuc v. United States Fidelity & Guarantee Co.*, 320 F. 2d 18, 20-21 (5th Cir. 1963) (Although the law of Louisiana would allow recovery for nervous fright and shock unaccompanied by physical injury evidenced by objective symptoms and recovery may also be had for mental suffering arising "from the breach of a contract having as its object the gratification of some intellectual enjoyments" it will not go so far as to support a recovery for the owner's psychic trauma upon learning of the burning of his house nor (dictum) would recovery be allowed if part of the fire was actually witnessed by the owner. [The opinion discusses a number of Louisiana negligence cases allowing recovery for fright or nervous shock without proof of physical injury.] A number of recent cases have taken the view that mental suffering caused by shock alone is compensable:

Robb v. Pennsylvania R.R. Co., 210 A. 2d 709, 714-715 (Del. 1965). ("We hold . . . that where negligence proximately caused fright, in one within the immediate area of physical danger from that negligence, which in turn produced physical consequences such as would be elements of damage if a bodily injury had been suffered, the injured party is entitled to recover under an application of the prevailing principles of law as to negligence and proximate causation.")

Cf. *Georgia Southern & Florida Ry. Co. v. Perry*, 326 F. 2d 921, 925-926 (5th Cir. 1964). (Applying Florida law the court found that the measure of damages for loss of service in an action for the wrongful death of a minor child was restricted to the value of the service that a parent is entitled to between the time of death and majority of the child but "There is no such restriction in the measure of damage for mental pain and suffering . . . the amount . . . is left to the discretion of the jury unless clearly arbitrary or so great as to be shocking to the judicial conscience or indicate

(Continued on next page)

mental suffering unaccompanied by physical impact.⁴ The rationale varied. The injury has been held lacking in that direct and proximate quality required by proof of causation.⁵ The damages are too remote and speculative.⁶ The courts would be inundated with specious claims.⁷ The injury is lacking substance, could be simulated more easily than others, was hard to rebut and standards were not available to gauge the proper compensation.⁸ Recovery in such cases was said to be against public policy.⁹ And even courts which concede the causal relationship between the injury and the fear generated by the defendant's negligence will deny recovery.¹⁰

(Continued from preceding page)

that the jury was influenced by prejudice or passion The mental condition of a parent resulting from the wrongful death of a child is a proper matter for consideration in fixing damages for mental pain and suffering.");

Haight v. McEwen, 215 N.Y.S. 2d 839, 845 (S. Ct. 1964) held a cause of action was stated when parents alleged emotional shock to the mother at witnessing alleged negligent killing of a child. To pass upon the motion to dismiss a complete analysis of the evidence at trial was essential;

Hopper v. United States, ___ F. Supp. ___ (D. Colo. 1965, Civil Action No. 9084) Vol. 8 ATL News Letter No. 8, p. 249 (Oct. 1965) where a 6 year olds' complaint for mental and physical injury following from the witnessing of the killing of her 4 year old sister by a government vehicle was upheld against a motion to dismiss as to the merits. (Motion granted with right to amend for failure to allege that plaintiff was within the ambit of physical danger.)

⁴ *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354 (1896)—overruled by *Battala v. State*, 10 N. Y. 2d 237, 176 N. E. 2d 729 (1961). *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657 (1898); *Reed v. Ford*, 129 Ky. 471, 112 S. W. 600 (1908); *Chesapeake & Ohio Ry. v. Robinett*, 151 Ky. 778, 152 S. W. 976 (1913); *Spade v. Lynn & Boston R.R. Co.*, 168 Mass. 285, 47 N. E. 88 (1897); *Weissman v. Wells*, 306 Mo. 82, 276 S. W. 400 (1924); *Pettett v. Thompson*, 33 Ga. App. 240, 125 S. E. 779 (1924). *Becker v. Borough of Schuylkill Haven*, 200 Pa. Super. 305, 189 A. 2d 764 (1963). (Action for trespass in wrongful cutting off water supply. Claimed aggravation of heart condition from hauling water. Testimony as to worry, lack of ability to eat or sleep. ". . . damages for mental and psychic suffering are not ordinarily recoverable in absence of physical impact or injury causing such suffering.") *State Farm Mutual Auto Ins. Co. v. Village of Isle*, 265 Minn. 360, 122 N. W. 2d 36, 41 (1963). (Worry and nervousness over husband's condition would not sustain a verdict for the wife where she had suffered no physical injuries or disabilities because of accident which injured husband.)

⁵ *Victorian Railway Comm. v. Coultas*, 13 A. C. 222, 226 (1888); *Reed v. Ford*, *supra* n. 4.

⁶ *Reed v. Ford*, *supra* n. 4 at 475.

⁷ *Mitchell v. The Rochester Ry. Co.*, *supra* n. 4.

⁸ *Reed v. Ford*, *supra* n. 4; *Smith v. Gowdy*, *supra* n. 4; cf. *Spade v. Lynn & Boston R.R. Co.*, *supra* n. 4 at 288.

⁹ *Mitchell v. The Rochester Ry. Co.*, *supra* n. 4.

¹⁰ See *Weissman v. Wells*, *supra* n. 4; *Spade v. Lynn & Boston R.R. Co.*, *supra* n. 4 at 288, 290.

One may speculate that the harshness and unfairness of the rule contributed to the development of a line of cases evading its effectiveness by the simple device of holding that even minimal physical injury would suffice to allow recovery for the accompanying mental suffering. Thus, impacts leaving no external signs of injury¹¹ or surface bruises¹² and the impact from jumping or a slight blow¹³ or a jolting ride over tracks and impact with a seat,¹⁴ muscle strain caused by evasive action to avoid fire¹⁵ and the shaking of box car living quarters¹⁶ was held enough. There is also evidence of considerable judicial willingness to find reasons for compensating mental suffering when consequential upon an action which is willful, wanton, malicious, humiliating or simply wrongful in connection with an absolute duty.¹⁷ Moreover, intentional torts may occasion the allowance

¹¹ *McGee v. Vanover*, 148 Ky. 737, 739, 744, 147 S. W. 742 (1912); *Berard v. Boston & Albany R.R. Co.*, 177 Mass. 179, 180, 58 N. E. 586 (1900).

¹² *Conley v. United Drug Co.*, 218 Mass. 238, 240, 105 N. E. 975 (1914); *Kiesel v. Holyoke Street Ry. Co.*, 240 Mass. 29, 31-32, 34-35, 132 N. E. 622 (1921).

¹³ *Berard v. Boston & Albany R.R. Co.*, *supra* n. 11 at 181; *Homans v. Boston Elevated Ry. Co.*, 180 Mass. 456, 62 N. E. 737 (1902). See *Davidson v. Lee*, 139 S. W. 904, 907 (Tex. Civ. App. 1911) Verdict for plaintiff affirmed. Damages awarded for mental suffering brought on by humiliation and fear, assault and unlawful restraint, but only technical battery involved.

¹⁴ *Wood v. New York Central & Hudson River R.R. Co.*, 83 App. Div. 604, 607, 82 N. Y. Supp. 160 (1903).

¹⁵ *Steverman v. Boston Elevated Ry. Co.*, 205 Mass. 508, 511-513, 91 N. E. 919 (1910).

¹⁶ *Louisville & Nashville R.R. Co. v. Roberts*, 207 Ky. 310, 313-316, 269 S. W. 333 (1925).

¹⁷ See *Nordgren v. Lawrence*, 74 Wash. 305, 133 Pac. 436 (1913), where the pretty nearly maniacal conduct of the landlord in connection with a wrongful forced entry on his tenant's premises frightened an already ill female. The court said at pp. 437-438: "Whether or not an action will lie for mental distress alone, when unaccompanied by injury to person or property, need not here be discussed. Such a question is not present in this case. In this state mental suffering may be taken into consideration in assessing damages, where the same is a result of a wrongful act, even though there is no physical injury." See also *Davis v. Tacoma Ry. & Power Co.*, 33 Wash. 203, 77 Pac. 209, 210-212 (1904). (Recovery approved for mental suffering in consequence of being mistaken for a scarlet woman, treated in a rude and insolent manner and told to leave the grounds of an amusement park, but reversed because the damages reflected the jury's passion and prejudice); *Haile v. New Orleans Ry. & Light Co.*, 135 La. 229, 65 So. 225, 226 (1914) (Recovery for humiliation and mortification to fat woman stemming from conductor's comments on her size); and *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 239-240 (1891) (where it was held appropriate to allow recovery for mental suffering proximately caused by an invasion of a wife's legal right to her dead husband's body unmutated and not dissected). *Floyd v. Stevens-Davenport Funeral Home*, 110 Ga. App. 271, 138 S. E. 2d 333, 334-

(Continued on next page)

of compensation for fright or shock resulting in bodily harm even though the intentional acts are not directed toward the injured person.¹⁸ And a crude practical joke has been held to justify compensation when only the consequences from shock and humiliation were involved.¹⁹

Defamation Damage Principles: Analogies to the Law of Damages in Negligence Cases

No doubt in thrall to the rules of negligence law, the courts have analogized and attempted to rationalize rulings in terms which fit the familiar physical impact principles when considering mental suffering flowing from defamation.

Accordingly, mental anguish has been held compensable when consequent upon words actionable per se.²⁰ The presum-

(Continued from preceding page)

335 (1964) (Action for willful, wanton, and gross negligence in disturbing grave of mother while preparing grave for father not supported by allegations of petition—Demurrer sustained. "It is well settled that recovery for damages for mental pain and anguish and wounded feelings, unattended by damage to person or purse, must be predicated upon an intentional tort or the legal equivalent . . . and cannot be based upon mere negligence"). *Tenn. Central R. Co. v. Brasher's Guardian*, 29 Ky. L. Rep. 1277, 97 S. W. 349, 350 (1906). (Recovery for mental suffering consequent upon discharge at the wrong station. The railroad's duty was "absolute, . . . not excused for honest errors" and the court approved the submission to the jury of questions of mental pain and suffering. "Mortification and humiliation are always . . . elements of damage in such cases," p. 351). Cf. *Antelope v. George*, 211 F. Supp. 657, 660 (D. Idaho N. D. 1962) ("Nor is it necessary . . . to show a tort against plaintiff's person before she can recover for mental suffering . . ."). Illegal arrest without warrant, delay in being taken before magistrate without jurisdiction in violation of federal civil rights act, 42 U. S. C. §1983. Proper case for punitive or exemplary damage). And see *Olan Mills, Inc. of Texas v. Dodd*, 234 Ark. 495, 353 S. W. 2d 22, 24 (1962). (The right of privacy was involved and the court recognized that there may be recovery for humiliation and mental suffering in the absence of any physical injury "just as in cases of willful and wanton wrong.")

¹⁸ See *Jeppsen v. Jensen*, 47 Utah 536, 155 Pac. 429, 430-431 (1916). Intruder's threat to kill plaintiff's husband "frightened and terrified" plaintiff causing her confinement to bed with nervous prostration. "Prima facie, the acts complained of and testified to constitute an unlawful assault."

¹⁹ *Nickerson v. Hodges*, 146 La. 735, 84 So. 37, 39, 9 A. L. R. 361 (1920). The practical joke was in front of others and caused the plaintiff, formerly an inmate of an insane asylum, extreme mental anguish. Plaintiff died while the case was pending, but the cause of action passed to others by statute and relief was granted. The court indicated that had plaintiff survived it would have awarded her substantial damages. And see text at note 38, *infra*, respecting a new tort for intentional infliction of mental suffering.

²⁰ *McMullen v. Corkum*, 143 Me. 47, 54 A. 2d 753, 756-757 (1947) (statements charging larceny); *Wilson v. Goit*, 17 N. Y. 442, 444 (1858) (lack of chastity not slander per se and no proof of special damage; recovery for mental distress denied). *Shafer v. Ahalt*, 48 Md. 171-173, 30 Am. Rep. 456

(Continued on next page)

tion of damage supplies the equivalent of actual damage and enables a parallel to the physical impact cases. Extending the negligence analogy, the minimal impact cases²¹ suggest another possible rationale for the allowance of damages for mental anguish in defamation. Even if the words are not per se actionable and the emotional element is not considered special damage (as distinguished from general damage), no particular theoretical stress is imposed in treating the words as sufficiently damaging a minimum (following the jostling cases, for example) to support an allowance for emotional stress.²²

When words are not actionable per se but a cause of action made out with some showing of temporal or special damage, a variety of damages have been held permissibly subsidiary in-

(Continued from preceding page)

(1877) (charge of adultery not actionable per se and wife's sickness not a natural consequence of such words); *Beach v. Ranney*, 2 Hill 309, 312-314, (N. Y. 1842) (female spoken of as lacking continence not actionable per se; wrongful acts of third persons, e.g. children throwing stones and calling names, is too remote); but see *Barnett v. Ward*, 36 Ohio St. 107, 110-111, 38 Am. Rep. 561 (1880). (The imputation of lack of chastity is actionable per se); and *Zeliff v. Jennings*, 61 Tex. 458, 466-467 (1884) (fornication and adultery imputations are actionable per se; mental anguish a factor in damages. Verdict for plaintiff reversed on other grounds); cf. Restatement, Torts, § 623; See *Clark v. Morrison*, *supra* n. 1, *Walker v. Tucker*, 220 Ky. 363, 295 S. W. 138-139, 53 A. L. R. 547 (1927) (oral words charging bastardy are not actionable per se, humiliation and mental strain are insufficient to supply special damage); *Pion v. Caron*, 237 Mass. 107, 129 N. E. 369, 370-371 (1921) (charge of theft. This would be actionable per se, but query whether Massachusetts requires per se defamation for recovery for mental suffering, see *Curley v. Curtis Publishing Co.*, *supra* n. 1). *Viss v. Calligan*, 91 Wash. 673, 158 Pac. 1012, 1014 (1916) (Non-responsive answer on trial of lawsuit which answer charged thievery is actionable per se and not privileged. Damages for such injured feelings and mental suffering and humiliation as naturally result are proper). See also *Kelly v. Loew's, Inc.*, 76 F. Supp. 473, 486-489 (D. Mass. 1948). It is not clear that the finding in *Kelly* was that a movie version of plaintiff's character was defamatory per se. Yet a libel was involved and the claim of "ridicule" was apparently successful. These circumstances meet the requirements of libel per se—"ridicule" being one of the alternative triad of conditions ("hatred, ridicule or contempt," see *Pecyk v. Semoncheck*, *supra* n. 2 at 63) which will not support slander per se when spoken, but will found libel per se when written or expressed in other forms more or less permanent.

²¹ *Supra* n. 11 through 16.

²² But see *Clark v. Morrison*, *supra* n. 1. An even greater hurdle for this theory resides in those cases which require the loss prerequisite to damages for mental suffering to be pecuniary. *Roberts v. Roberts*, 5 B&S 384, 122 Eng. Rep. 874, 876 (1864) (Loss of membership in a religious society and consortium vicinorum is not sufficiently substantial or material loss); *Beach v. Ranney*, *supra* n. 20 (being in pain and enfeebled in mind and body and assailed with missiles and epithets is not sufficiently pecuniary); *Williams v. Riddle*, 145 Ky. 459, 140 S. W. 661, 664-665 (1911) Loss of the companionship of a young lady of good family with whom the plaintiff was keeping company was not a loss of "material temporal advantage."

(Continued on next page)

cluding compensation for wounded feelings and humiliation.²³ The intentional act cases resulting in some bodily harm also provide a ready analogy from which theoretical support may be derived for allowing damages for mental stress in defamation cases when the latter also involve bodily harm coupled with or resulting from emotional stress. Although, again, the requirement in defamation cases (not involving per se libel or slander) that there be some pecuniary temporal (i.e. special) damage precedent to the allowance of damages for emotional stress is a theoretical impediment.²⁴ The same difficulty would impede an attempt to use the "pure" shock or emotional stress cases (i.e. no physical or bodily damage) as an analogue in damages for defamation²⁵ although the logic of these cases comes close to rendering shock and mental suffering "special damage."

(Continued from preceding page)

On the point of pecuniary loss, *Clark v. Morrison*, *supra* n. 1 at 430 includes the following quotation from 25 Cyc. 525:

"The special damage must flow from impaired reputation. It must be a loss of a pecuniary character, or the loss of some substantial or material advantage."

²³ Cf. *Beach v. Ranney*, *supra* n. 20 at 312, 315-316 (although recovery was denied on the loss shown, the court indicated that the loss of "something of value" would have satisfied the necessity for special pecuniary loss). See *Poleski v. Polish American Publishing Co.*, *supra* n. 2 (special damage to property, plus damages for injury to feelings. Was the latter punitive?) See n. 27, *infra*. In a "per se" situation a prerequisite to the introduction of specific evidence of special damage may be an allegation of such special damage, see *Butler v. Hoboken Printing & Publishing Co.*, *supra* n. 2 at 274.

²⁴ See *supra* n. 22. A further "third party" limitation has been attacked:

"It is a mistake to assume as is done by Wigmore, Evidence, Rev. Ed. 1940 Vol. I § 209, p. 704 that 'the injury to feelings which the law of defamation recognizes is not the suffering from the making of the charge, but is that suffering which is caused by other people's conduct toward him in consequence of it.' Recovery for such mental suffering can be had although no loss of reputation is involved" *Curley v. Curtis Publishing Co.*, *supra* n. 1 at 28, citing *Marble v. Chapin*, 132 Mass. 225 (1882) (Chapin did in fact involve publication to a third person, but only one).

In a very short opinion in *Finger v. Pollack*, 188 Mass. 208, 74 N. E. 317 (1905), the Supreme Judicial Court of Massachusetts said flatly without indicating the nature of the slander "In an action for slander one of the elements of damage is mental suffering." The court further said it may be evidenced by appearance or actions. But see *Yavis v. Sullivan*, 137 Conn. 253, 76 A. 2d 99, 103-104 (1950) where it was held that the harassment of the defamed by the defamer was relevant only to the extent that "the effect of the slanders upon plaintiff's feelings was greater because of the defendant's great malice." Hurt feelings flowing from conduct not part of the slanders alleged were not "legitimate elements of damage for the specific slanders charged."

²⁵ See *supra* n. 19.

"Pure" Mental Suffering in Defamation Cases

If a parallel can be drawn between the defamation per se and the intentional wrong cases, there seems to be little theoretical justification for not allowing recovery for mental suffering in all defamation actions. For all conceivable slander and libel would qualify as intentional under a simplistic definition of that term. The cases have not adopted this position. Accordingly it is probable that most courts still will require special damage other than shock or mental or nervous distress as a prerequisite to recovery for the latter.²⁶ And the requirement that the special damage must be pecuniary²⁷ makes little sense but it will not be

²⁶ *Hoar v. Ward*, 47 Vt. 657, 666 (1875) (averment of special damage necessary to actionable slander for words imputing lack of chastity. The special damage must be pecuniary); *Paysse v. Paysse*, 84 Wash. 351, 146 Pac. 840, 841 (1915) (charging a person with bastardy is not slander per se and instruction to contrary is erroneous; also erroneous to charge on special damage without averment and proof); *Mishkin v. Roreck*, 202 Misc. 653, 115 N. Y. S. 2d 269, 270, 274, 277 (Sup. Ct. 1952) ("Crook," without innuendo, is not slanderous per se. Special damages were not pleaded; plaintiff proceeded on theory that the utterance was slanderous per se); *Friedlander v. Rapley*, 38 App. D. C. 208, 212-213 (1912) (Words not actionable in themselves cannot be made so by innuendo. Words not charging on indictable offense are not actionable per se and special damage must be specially alleged); *Hofstadter v. Bienstock*, 213 App. Div. 807, 208 N. Y. Supp. 453, 453-454 (1925) ("Crook" not slanderous per se); *Eggleston v. Whitlock*, 242 Ill. App. 379, 381 (1927) ("Crook" who "swindled" another not slander per se. Special damage necessary if words are to be actionable); *Gaare v. Melbostad*, 186 Minn. 96, 242 N. W. 466, 467 (1932) ("Crooked" spoken of bank officer not actionable per se. No allegation of special damage as a proximate result of statement made); *Ringgold v. Land*, 212 N. C. 369, 193 S. E. 267, 267-268 (1937) (Demurrer sustained to action for spoken words "damn son of a bitch" and "damn common and dishonest man" because complaint lacked allegation of special damage necessary where slanderous words are only actionable per quod); *Martin v. Sutter*, 60 Cal. App. 8, 212 Pac. 60, 62 (1922) ("Bitch" not slander per se); *Torres v. Huner*, 150 App. Div. 798, 135 N. Y. S. 332, 333-334 (1912) ("You are drunk" and "You are a God damn son of a bitch" are not slanderous per se and not actionable without proof of special damage); *Shipe v. Schenk*, 158 A. 2d 910, 911 (Mun. App. D. C. 1960) ("Damn liar" and "dead beat" are not slanderous per se and in the absence of a claim of special damage the complaint must be dismissed); *Urban v. Hartford Gas Co.*, 139 Conn. 301, 93 A. 2d 292, 293, 295-296 (1952) (Implication of "dead beat" or "delinquent debtor" not actionable per se. Injury to reputation must be alleged and linked to special damage of material or pecuniary nature and result from action of third person); *Patton v. Jacobs*, 118 Ind. App. 358, 78 N. E. 2d 789, 789-790 (1948) (Letters to employer describing plaintiff's failure to pay debts is not libel per se and does not state a cause of action in the absence of an allegation of special damages); *Hudson v. Pioneer Service Co., Inc.*, 218 Or. 561, 346 P. 2d 123, 124-125 (1959) (Printed report listing plaintiff as delinquent debtor not libel per se and in the absence of either allegation or proof of special damage a motion for directed verdict properly sustained).

²⁷ *Evans & Harries*, 1 H & N 250, 156 Eng. Rep. 1197, 1199 (1856) (Evidence of loss of trade sufficient to prove special damage).

(Continued on next page)

defeated even by severe mental distress with accompanying ill-

(Continued from preceding page)

Brooks v. Harrison, 91 N. Y. 83, 89-92 (1883) (Letter charging sale of impure milk. Slander to same effect. Imputation of crime defamatory per se if jury under the court's charge found as a fact that poisonous milk sold or created contrary to statute was a necessary consequence of plaintiff's acts. Absent defamation per se evidence of a loss of business was sufficient to require submission of special damage to jury).

Ross v. Fitch, 58 Tex. 148, 149 (1882) (No indictable offense imputed by charge of adultery. Not actionable per se but special damage must be alleged. "Any special damage, however slight, will suffice to sustain the action." Special damage alleged included loss of boarders at plaintiff's boarding house and pupils in her school).

Schoen v. Washington Post, 246 F. 2d 670, 671-672 (D. C. Cir. 1957) (Special damages resulting from inaccurate news story adequately alleged by allegation of comparative revenues in succeeding years. On trial plaintiff would be required to show part of decrease which was natural and proximate from the inaccuracies in an otherwise accurate story); *Afro-American Pub. Co. Inc. v. Jaffe*, 33 LW 2635 (CADC, 1965). (Special damage is not shown by emotional distress and fear stemming from a plaintiff's having been characterized as bigot in a newspaper publication.)

Morasse v. Brochu, 151 Mass. 567, 25 N. E. 74, 76, 78 (1890) (Excoriation from pulpit of an excommunicated physician joined in a marriage ecclesiastically scandalous. Imputation that physician's church and marital status should bar him from medical employment. Requisite averment of special damage is made with allegations of loss of practice with consequent loss of income. Further, it was for the jury whether plaintiff was "touched" in his profession and thus the words spoken of him were defamatory per se).

Storey v. Challands, 8 Car. & P. 234, 173 Eng. Rep. 475, 476 (1837) (Calling a commission agent "a most unprincipled man" under unprivileged circumstances not compensable without proof of special damage but such damage may be sufficiently shown if it appears that the person to whom it was said would not deal with the agent even though the transaction might have been a losing one had it taken place).

Dixon v. Smith, 5 H & N 450, 157 Eng. Rep. 1257, 1258 (1860) (Imputing the fathering of a child by his maid to a physician will not support an action for a general loss of business but only such loss as is attributable to the actual loss flowing from the defendant's words not their repetition by others).

Hartley v. Herring, 8 Term. Rep. 130, 101 Eng. Rep. 1305, 1306-1307 (1799) (Sufficient pecuniary loss is alleged when the plaintiff states that "in consequence of the words spoken . . . he was removed from his office, and lost the emoluments of it").

Wilson v. Cotterman, 65 Md. 190, 3 Atl. 890, 891 (1886) (To say of a clerk that he caused the ruin of another may be actionable upon the showing of special damage. The loss of a situation would be a natural consequence of such words and constitute the requisite damage).

Lombard v. Lennox, 155 Mass. 70, 28 N. E. 1125, 1125-1126 (1891) (Plaintiff discharged when defendant advised plaintiff's employer that plaintiff was defendant's apprentice. Acts done willfully or with gross carelessness of the rights of plaintiff, damages may be recovered for mental suffering. Court could consider all natural consequences of wrongful acts even though there was no express reference to them in the declaration).

Matthew v. Crass, Cro. Jac. 323, 79 Eng. Rep. 276, 276-277 (1614) ("Thou art an whore-master etc." are actionable per quod where a loss of a marriage was caused by the defamation).

Moody v. Baker, 5 Cow. 351, 352, 355-356 (N. Y. 1826) (Loss of marriage through slander is special damage. Verdict for plaintiff sustained).

ness.²⁸ With more justification it has been held the expense incurred to rebut the alleged defamation will not supply the special damage necessary where the words are not actionable per se, even though the defamed might recover expenses reasonably expended in mitigation if his cause of action could be independently established²⁹ by the showing of a special damage apart from mitigation expense.

An important characteristic of defamation law, setting it apart from the rest of the tort area, is the widely followed rule that special damage must result from the conduct of a third person who is neither the "defamer or the defamed."³⁰ Obviously a subjective mental condition cannot survive this test unless a third person is involved. Nor is it met by the plaintiff's apprehensiveness about what third persons *might* do to alter relations to his disadvantage.³¹ The theoretical implication of defamation per se satisfies this rule by presuming special damage from the conduct of a third person but the intentional, wrongful act theory, applied in defamation, does not meet the standard of the rule unless the words happen to qualify as per se defamation. Apparently, libel "qualifies" as "per se" more easily than slander.³²

²⁸ *Allsop v. Allsop*, *supra* note 1 (Illness arising from excitement induced by slander is not the sort of damage which is ground for action); *Terwilliger v. Wands*, 17 N. Y. 54, 62, 72 Am. Dec. 420 (1858) ("In the present case the words were defamatory, and the illness and physical prostration . . . may be assumed, . . . to have been actually produced by the slander, but this consequence was not, in a legal view, a natural, ordinary one . . .").

Harrison v. Burger, 212 Ala. 670, 103 So. 842, 843-844 (1925) (Great mental pain and anguish insufficient allegation of special damage to sustain libel when words used were not libelous per se).

Scott v. Harrison, 215 N. C. 427, 2 S. E. 2d 1, 3 (1939) "Embarrassment, humiliation and mental suffering" are insufficient for special damage resulting from defamation. Recovery denied in absence of words actionable per se. The rationale against allowing recovery for physical damage allegedly consequent upon defamation is that the damage is too remote since it is dependent on mental damage and extends the causation one step further. See *Butler v. Hoboken Printing & Publishing Co.*, *supra* note 2 at 274-275.

²⁹ *Bigelow v. Brumley*, 138 Ohio St. 574, 37 N. E. 2d 584, 594 (1941) (But ". . . he may not pull himself up by his own bootstraps, and by such expenditures create a cause of action for himself where one did not otherwise exist").

³⁰ *Bigelow v. Brumley*, *ibid.*, 3 Restatement, Torts 185, § 575, comment b. But see the quote from the *Curley* case in note 24, *supra* n. 1.

³¹ *Bigelow v. Brumley*, *supra* n. 29 at 594.

³² See *Pecyk v. Semoncheck*, *supra* n. 2 at 63, where the court, apparently willing to characterize the defamatory words in question as "the grossest and most scandalous," nevertheless would not find them slanderous per se although the words "if written" would have been actionable per se as tend-

(Continued on next page)

A persuasive reason for the per se rule is, of course, that defamation is an action for damage to reputation³³ which the rule establishes by presumption. Evidence of actual damage to reputation may prove what is presumed in the per se situations, but the "pecuniary" requirement for actual damage makes no sense. However, unless the action is to be transformed into one for extreme outrage, invasion of privacy, or intentionally or wantonly caused distress,³⁴ there is no occasion *in logic* to allow damages in defamation cases for the consequence of shock, mental suffering or anguish or derived physical harm even where special damage apart from mental suffering is presumed or proven. The presence of malice ought not to alter this conclusion.³⁵

This gives rise to the question whether under any circumstances defamation ought to found compensation for any consequence other than damage to reputation. A not entirely convincing answer is found in some of the cases couched in the verbiage of the law of proximate cause.³⁶ Recovery extends to damages reasonably foreseeable as the normal consequences of

(Continued from preceding page)

ing "to subject a person to public hatred, ridicule or contempt." Cf. *Ward v. League for Justice*, 93 N. E. 2d 723, 726 (Ohio App. 1950) appeal dismissed 154 Ohio St. 367, 95 N. E. 2d 769 (1950); *Burrell v. Moran*, 82 N. E. 2d 334, 336 (Ohio C. P. 1948).

³³ "A more careful examination . . . discloses that the real and full theory on which a recovery was refused was that an action for slander or libel is brought to recover fundamentally for injury to character, and that the special damages necessary to sustain such an action must flow from disparaging and injuring it; that illness 'was not, in a legal view, a natural, ordinary one (consequence), as it does not prove that the plaintiff's character was injured. The slander may not have been credited by or had the slightest influence upon anyone unfavorable to the plaintiff.'" *Garrison v. Sun Printing & Publishing Association*, *supra* n. 1. (Discussing *Terwilliger v. Wands*, *supra* n. 28 at 57, holding no recovery for mental distress and physical pain consequent upon defamatory words unless the words were actionable per se).

³⁴ Cf. *Restatement, Torts* 2d § 46 (ALI, 1965); IV *Restatement, Torts* § 867 (ALI, 1939); see *Brink v. Griffith*, 396 P. 2d 793, 796-797 (Wash. 1964).

³⁵ But see *Baer v. Rosenblatt*, 203 A. 2d 773, 781 (S. Ct. of N. H. 1964) (Evidence of special damage of a pecuniary nature but the court said ". . . there was evidence from which the jury could find actual malice . . . and could award damages for mental distress and vexation . . ."). The court also said that upon a finding of malice a more liberal rule of damages prevails and the jury "is to 'endeavor, according to their best judgment, to award such damages by way of compensation or indemnity as the plaintiff on the whole ought to receive and the defendant ought to pay'"; *Hall v. Edwards*, *supra* n. 1 at 890 (actual malice may be shown to enhance damages).

³⁶ *Lynch v. Knight*, IX HLC 576, 11 Eng. Rep. 854, 855 (1861) (Slander of wife resulted in husband's sending her back to her father. Recovery for loss of husband's consortium denied); *Georgia v. Kepford*, 45 Iowa 48, 49-50 (1876) (action for divorce on ground of inhuman treatment is not the

(Continued on next page)

the defamation. But apparently one may recover for mental anguish under such logic only if his character is defamed per se or the defamation results in special pecuniary or material damage. It is difficult to see why proximate cause invests mental anguish with compensable status in conjunction with presumed or proven special pecuniary damage³⁷ but not without it. Perhaps an effort at logical symmetry explains the view that:

"... 'the injury to feelings which the law of defamation recognizes is not the suffering from the making of the charge, but is that suffering which is caused by other people's conduct towards him in consequence of it.'" *Curley v. Curtis Pub. Co. supra*, at p. 28.

Recovery under this view can be had even though no loss of reputation is involved. And there is a new tort attaining more and more recognition. Apparently unwilling to blink those situations in which deliberate, willful and malicious words, directly or inferentially, support an intentional infliction of mental suffering, courts have allowed recoveries.³⁸

(Continued from preceding page)

proximate consequence of a defamation charging larceny or adultery); *Field v. Colson*, 93 Ky. 347, 20 S. W. 264, 265 (1892) (Defeat in election for public office charged to statement that plaintiff had abandoned a previous political race in return for money. Damage too remote); *Vicars v. Wilcocks*, 8 East 3, 103 Eng. Rep. 244 (1806) (Dismissal from position by employer not proximate consequence of defendant's telling employer plaintiff had unlawfully cut cordage of defendant); *German Savings Bank v. Fritz*, 135 Iowa 44, 109 N. W. 1008, 1009 (1906) (Failure to connect statements respecting a bank's unsound condition with a subsequent run on the bank. Judgment for defendant affirmed); *Briggs v. Brown*, 55 Fla. 417, 46 So. 325, 331 (1908) (Demurrer properly overruled in action for defamation when letter to bonding company charges delinquencies by plaintiff in his working office and special damage allegations show inability to secure any employment requiring surety bond); *Williams v. Riddle*, 145 Ky. 459, 36 LRA (NS) 974, Ann. Cas. 1913 B 1151, 140 S. W. 661, 665 (1911) (Loss of companionship not the natural and probable consequence of the words describing racial antecedents); See *Garrison v. Sun Printing and Publishing Ass'n*, *supra* n. 1 at 431-432, where it is said that:

"... in an action brought . . . for a wrong intentionally, willfully and maliciously committed, the wrongdoer will be . . . responsible for the injuries which he has directly caused, even though they lie beyond the limit of natural and apprehended results . . ."

³⁷ The rule that pecuniary special damage is necessary (absent words per se defamatory) has not always been strictly followed. An injury to reputation may be enough without more to base a claim for mental suffering, cf. *Brink v. Griffith*, *supra* n. 34 at 796-797, where the court said damage for wounded feelings could be recovered on either a theory of defamation or invasion of privacy although only general damage was proven. The decision did not discuss the imputation of criminality as defamation per se; *Curley v. Curtis Pub. Co.*, *supra* n. 1 at 28.

³⁸ *Mitran v. Williamson*, 197 N. Y. S. 2d 689 (N. Y. Sup. Ct. 1960). There is an accelerating willingness to protect against tortiously induced emotional

(Continued on next page)

Summary and Conclusion

Paralleling negligence developments in the physical contact cases, mental suffering as an element in damages in defamation cases may be compensable when defamation per se is involved. Apart from the objective in defamation cases, i.e. reparations for impaired reputation, there seems no logical reason why an element for mental suffering should not be considered where the action is per se—or the proof of at least some per quod defamation damage³⁹ is accompanied by consequential mental suffering. Such a result has a theoretical kinship with the negligence cases conditioning damage for mental suffering upon minimum contact.

A number of arguments have been advanced against allowing compensation for shock, mental anguish, and mental suffering and comparable categories of damage in the negligence area unless accompanied by physical damage. Public policy (e.g., a concern for sham claims), difficulty of proof, the lack of directness necessary to meet standards of proximate cause, remoteness and speculative character of the damage, difficulty of defending, and the problem in fashioning a ready gauge for the quantum of damage⁴⁰ are included among the reasons for denying recovery. The same infirmities could be charged to mental damage or anguish flowing from defamation.

However, the rebuttal to most of the charges laid against allowing the mental element applies with approximate force, at

(Continued from preceding page)

disturbances. No case has been found forthrightly granting legal protection to peace of mind but a number of decisions have fastened recoveries for mental distress and outrage upon traditional torts. Some of the latter have involved defamation. Others have not and are outside the scope of this paper. Cf. *Nickerson v. Hodges*, *supra* n. 19, Restatement, Torts 2d § 46 (ALI, 1965). *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 150 So. 2d 154, 158 (1963) ("In general, damages for mental anguish or suffering are recoverable when they are the natural or proximate result of an act committed maliciously, intentionally, or with such gross carelessness or recklessness as to show an utter indifference to the consequences when they must have been in the actor's mind." Shock and hysteria with physical and emotional consequences after zealous bill collector shouted insults over telephone after mother disclaimed knowledge of debtor son's whereabouts); *Digsby v. Carroll Baking Co.*, 76 Ga. App. 656, 47 S. E. 2d 203, 205, 207-208 (1948) (Recovery proper for mental anguish suffered as result of profane, abusive, and suggestive language by defendant's servant attempting to collect a debt from pregnant plaintiff's husband).

³⁹ In any event there is considerable authority for the proposition that the special damage necessary as a pre-condition to allowances for mental suffering must be pecuniary in nature. See *supra* n. 22.

⁴⁰ See *supra* n. 5 through 10.

least, in both the negligence and defamation areas. Without attempting an elaborate refutation, there is no reason to assume that a jury is not as capable of assessing the existence, proximate cause and amount of damage in a mental anguish or mental suffering case as it is in other situations involving non-objective⁴¹ damage such as subjective pain and suffering. Both categories can be submitted under proper instructions and it is as probable in a mental suffering case as any other (perhaps more so) that the jury will reject fancy, speculation and far fetched causation concatenations. In addition, there is the fact that medical science has advanced enough that more is known about damages that are mental or otherwise subjective than may be generally realized. But assuming that mental conditions do pose greater problems of analysis, assessment and prognosis, they do not become less so when coupled with a physical injury, even a slight one,⁴² or a defamation severe enough to be classified as "per se" or one with supporting proof "per quod." The medical problem is identical. One suspects an element of sub-silentio corroboration in the mere presence of physical injury and the presumably aggravated nature of the hurt in per se cases. But what of the minimal impact decisions?

A more persuasive case can be made for disallowance of compensation for mental damage in defamation cases because the prime objective in defamation actions is compensation for injury to reputation—a goal which does not encompass mental suffering. One solution to the dilemma posed by a demand for recovery for mental suffering in such cases (although short on logic) lies with the rule that the tortfeasor is charged with the foreseeable consequences of his actions among which are the effect upon mind and emotions of the defamed even though reputation is actually affected only through the intervention of a third party who is neither defamer nor defamed.

A developing tort, so far nameless, would allow recovery for mental suffering inflicted intentionally by the spoken word.

⁴¹ No precise definition of objective damage is implied by this reference. No more is intended than such damage as depends upon the victim's testimony, supplemented or not by the testimony of an expert medical witness, regarding subjective complaints.

⁴² "My experience gives me no reason to suppose that a jury would really have more difficulty in weighing the medical evidence as to the effects of nervous shock through fright, than in weighing the like evidence as to the effects of nervous shock through a railway collision or a carriage accident, where, as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time." *Dulieu v. White & Sons*, *supra* n. 1 at 681.

Under this theory a foreseeable consequence (mental anguish) proximately caused by spoken words will posit liability without regard to effect on reputation.⁴³ With this development a defamed person may reach his tormenter with an adequate remedy (and may couple it with a conjunctive or alternative action in defamation⁴⁴) where existing rules of defamation will not allow compensation for verbally induced ravages of the mind.

⁴³ See *supra* n. 38.

⁴⁴ For an example of a pleading coupling the right of privacy with defamation, see *Brink v. Griffith*, *supra* n. 34.