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# A Civil Law Approach to the Reparation of Emotional Disturbances by Abusive Language

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where the necessity for action was sufficiently compelling to induce the court to issue the order.[50] In any event, the party enjoined should find adequate protection in the bond[51] required of the plaintiff and in his right to seek dissolution of the injunction.[52]

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## A CIVIL LAW APPROACH TO THE REPARATION OF EMOTIONAL DISTURBANCES BY ABUSIVE LANGUAGE

The interest in peace of mind, in the protection of personal dignity and in freedom from mental disquietude has been accorded only scant legal protection in the United States. Invasions of this interest have not been recognized as a distinct and independent tort. In those cases where it has been felt that recovery should be allowed, compensation has been granted only in the form of parasitic damages for the commission of a recognized tort. Damages have been "tacked on" in actions for assault and battery,[1] false imprisonment,[2] libel, and slander.[3] Reluctance to give forth-

50. Such a situation might be presented where a mandatory injunction is sought to compel the defendant to restore a situation which he has changed in violation of a prohibitory order. See Levy v. New Orleans Waterworks Co., 38 La. Ann. 25 (1886), for an example of such a situation. In this case the mandatory injunction to compel restoration of the status quo prior to violation of the prohibitory injunction was issued ex parte. Anglo-American equity courts recognize such a case as a proper one for the issuance of an interlocutory mandatory order. Keys v. Alligood, 178 N.C. 16, 100 S.E. 113 (1919). See Texas Pipe Line Co. v. Burton Drilling Co., 54 S.W. (2d) 190 (Tex. Civ. App. 1932), noted in (1934) 12 Tex. L. Rev. 235, for a discussion of the American equity cases on the subject.

51. See La. Act 29 of 1924, § 2 [Dart's Stats. (1939) § 2079]; Art. 304, La. Code of Practice of 1870. But a defendant may, by injunction, be compelled to restore property wrongfully taken. Petit v. Cormier, 1 McGloin 370 (La. App. 1881).

52. See La. Act 29 of 1924, § 2 [Dart's Stats. (1939) § 2079]; Art. 307, La. Code of Practice of 1870.

1. Warner v. Talbot, 112 La. 817, 36 So. 743 (1903); Christmas v. Lofaso, 13 Orl. App. 443 (La. App. 1916); Fontenelle v. Waguespack, 150 La. 316, 90 So. 662 (1922); Derouen v. Fontenot, 8 La. App. 652 (1928); Davis v. Rondall, 17 La. App. 291, 135 So. 727 (1931); Davis v. Lindsay Furniture Co., 19 La. App. 169, 138 So. 439 (1931); Noguin v. Belliot, 155 So. 261 (La. App. 1934); Lorenz v. Hunt, 89 Cal. App. 6, 264 Pac. 336 (1928); Ransom v. McDermott, 215 Iowa 594, 246 N.W. 266 (1933); Kline v. Kline, 158 Ind. 602, 64 N.E. 9 (1902); Trogden v. Terry, 172 N.C. 540, 90 S.E. 583 (1916).

2. Block v. McGuire, 18 La. Ann. 417 (1866); Healy v. Playland Amusements, Inc., 199 So. 682 (La. App. 1940); Gadsden General Hospital v. Hamilton, 212 Ala. 531, 103 So. 553 (1925); Fisher v. Rumler, 239 Mich. 224, 214 N.W. 310 (1927); Jones v. Hebdo, 88 W.Va. 386, 106 S.E. 898 (1921). Compare Talcott v. National Exhibition Co., 144 App. Div. 337, 128 N.Y. Supp. 1059 (1911).

3. Dufort v. Abadie, 23 La. Ann. 280 (1871); Tuyes v. Chambers, 144 La.

right recognition to this interest in peace of mind is not due to an unsympathetic attitude toward the plaintiff. It is founded upon apparent administrative difficulties, such as the difficulty of proof and the accurate measurement of damages.[4] In the English case of *Lynch v. Knight*[5] the court said: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act causes that alone." The possibility of a docket crowded with trivial and trumped-up claims, along with the concomitant loss of judicial dignity, should not be overlooked.[6]

French law forthrightly recognizes mental injury *(le préjudice moral)*.[7] French writers consider mental injury just as real as material injury and equally deserving of legal recognition in an action for damages. It is under authority of Article 1382 of the French Civil Code,[8] the counterpart of Article 2315 of the Louisiana Civil Code, that such a position finds its justification. Such injury, although admittedly composed of elements more difficult to estimate in pecuniary terms than tangible material damage, is yet a basis for a money judgment.[9] Moreover, injuries to feelings and to honor[10] are protected even though not accompanied by more

723, 81 So. 265 (1919); Gernon v. Maulhes, 150 La. 927, 91 So. 300 (1922); Ford v. Jeane, 159 La. 1041, 106 So. 558 (1925); Lasseigne v. Tolmas, 164 La. 529, 114 So. 122 (1927); Johnson v. Crow, 158 So. 857 (La. App. 1935); Sclar v. Resnick, 192 Iowa 669, 185 N.W. 273 (1921); Pion v. Caron, 237 Mass. 107, 129 N.E. 369 (1921); Hibdon v. Moyer, 197 S.W. 1117 (Tex. Civ. App. 1917).

4. But see Graham v. Western Union Telegraph Co., 109 La. 1069, 1074, 34 So. 91, 93 (1903), where the court points out that awarding damages for the physical pain that results from a bodily wound is no more speculative than awarding damages for pain and suffering caused by mental and emotional disturbance.

5. 9 H. L. Cas. 577, 598, 11 Eng. Reprint 854 (1861).

6. It must be remembered also that truth is a good defense to an action for slander. But the very essence of truth may be as emotionally distressing as falsehood. Often truth "hurts" more for the very reason that it *is* true.

7. Under Article 1382 of the French Civil Code in Dalloz and Vergé, cited in Graham v. Western Union Telegraph Co., 109 La. 1069, 34 So. 91 (1903), authorities are found to the following effect:

"No. 46. *Un dommage matériel n'est pas le seule qui donne ouverture à l'action en reparation il suffit d'un intérêt moral.*"

(Translation) "A material damage is not the only one which gives rise to the action in reparation; mental interest is sufficient."

"No. 290. *Que le préjudice causé sort matériel ou moral la responsabilité est encourrue.*"

(Translation) "Whether the damage caused be material or mental, responsibility is incurred."

For an elaborate treatment of *le préjudice moral* see Bosc, Essai sur les Eléments Constitutifs du Délit Civil (1901) 206-239.

8. *"Toute fait quelsonque de l'homme, qui cause à autri un dommage, oblige celui par le faute duquel il est arrivé a le réparer."*

(Translation) "Every act whatever of man obliges him by whose fault it happened to repair it."

9. 6 Planiol et Ripert, Traité Pratique de Droit Civil Français (1930) 751, nº 546; Bosc, op. cit. supra note 7, at 209.

10. Id. at 754, nº 548.

tangible elements of damage. For example, the emotional disturbance occasioned by receipt of a letter seen by no one save the recipient is compensable.[11] The French commentator Capitant says that "the jurisprudence has always accorded damages for mental injury resulting . . . from injurious or defamatory words."[12] It thus appears that the infliction of mental and emotional disturbance is an actionable wrong in itself and there need not necessarily be present any *préjudice materiel* in order to sustain recovery.

The French view should even more readily find acceptance in Louisiana where the Civil Code expressly recognizes that "there are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party."[13] Cases are to be found in Louisiana where recovery was allowed for mental suffering; but in these cases recognized grounds of tort liability, other than the independent and distinct tort of injury to the sensibilities, were present. On one occasion the Louisiana Supreme Court declared that the infliction of mental suffering was an independent tort. In so doing it emphasized the civilian source of Louisiana tort law as expressed in Article 2315. The language of the court is interesting:

> "The weight of common law authority seems to be against a recovery for mental suffering or injury to feelings (when unaccompanied by any physical injury), such as shock, fright, etc., or for worry over damages to any personal or property right; but our law of torts is found principally in the Civil Code, particularly Article 2315, taken from the civil law, and which does recognize a right of action for such injuries. . . ."[14]

The case of *Tuyes v. Chambers,* in which this statement occurs, however, was one involving defamatory utterances made as a part of collection tactics and fell under well accepted concepts of libel and slander obtaining in this jurisdiction. It is doubtful

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11. Bosc, op. cit. supra note 7, at 214; Trib. de paix de Lille, 25 octobre 1897, Gas. Pal., 1898.1.579.

12. Les Grands arrêts de la Jurisprudence Civil (1934) 217: *"La jurisprudence a toujours accordé des dommages—intérêts pour le préjudice d'ordre moral résultant . . . de propos . . . injurieux on diffamatories. . . ."*

13. The article continues: "Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach. . . ." Art. 1934(3), La. Civil Code of 1870.

Although this article is found in the section of the code dealing with conventional obligations, its relevancy might reasonably be argued.

14. 144 La. 723, 731, 81 So. 265, 267 (1919).

that the Louisiana court was any more liberal in this instance than the courts of other states have been in similar situations.[15]

In supporting the above quoted statement in *Tuyes v. Chambers,* the court referred to *Graham v. Western Union Telegraph Company,*[16] where the action was for damages for mental distress growing out of a delay in the transmission of a death message. In this case the court emphasized that the common law limitations on the right to recovery for emotional disturbance do not obtain in Louisiana. Here again, however, the action was one recognized in many common law jurisdictions and involved a breach of duty by a common carrier. The creation of an independent tort for emotional disturbance was unnecessary.

Only one case has been found in which the Louisiana Supreme Court definitely appears to have held that an intentionally inflicted emotional disturbance constitutes an independent tort. This is the well known "pot of gold" case.[17] The facts of this case involved a meticulously executed practical joke of some magnitude. The defendants, who were aware that the plaintiff, an old maid nearly forty-five years old, had been for three months searching for buried treasure, hid a pot of "gold" (rocks) under such circumstances that the plaintiff would discover it and its contents under extremely disappointing and humiliating circumstances. The court caused the joke to boomerang on the perpetrators to the tune of five hundred dollars.

Not insignificant among the sundry causes of mental disquietude is insulting and abusive language. Considerations of the existing legal means of dealing with this problem—what the courts have said in this connection and what they have actually done—comprise a body of material from which may be drawn evidence of the extent of the protection afforded the interest in mental tranquility.

The law of defamation was developed for the protection of the reputation. The law seeks to protect the right not to be cast down in the estimation of one's fellows. The social and economic importance of reputation must not be minimized. In business and in the professions it is of paramount importance that reputation be unimpaired.

There is a close connection between interest in reputation and the interest in peace of mind and personal dignity. Often these

15. See cases collected in Note (1932) 66 U. S. L. Rev. 349.
16. 109 La. 1069, 34 So. 91 (1902).
17. Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

interests are concomitant, and it is difficult to separate them. Courts have recognized this, and where injury to reputation is found, the damages will include compensation for mental suffering.[18] In the case of *Fitzpatrick v. Daily States Publishing Company*,[19] the plaintiff, the mayor of New Orleans, sued for damages for an alleged libel contained in an article in defendant's newspaper. In affirming a verdict for five hundred dollars the supreme court said: "But every publisher is therefore liable not only for the estimated damages to credit and reputation and such special damages as may appear, but also . . . damages on account of injured feelings. . . ."

What relief does the law of defamation offer where there is no injury to reputation, and no special damage can be shown, but where abusive, opprobrious and insulting oral language causes injury to feelings and mental disturbance?

The common law rule regarding slander is that defamatory words are not actionable unless they fall within certain categories of words actionable per se,[20] or unless the plaintiff alleges and proves "special damages," that is, that as a result of the spoken words he has suffered a pecuniary loss.[21] On the other hand, the test for libel is very liberal and broad. Any written words tending to expose a person to ridicule, disgrace, contempt, or hatred are libelous and actionable per se, that is, without proof of special damage. It is enough that the plaintiff has been made ridiculous. It need not be shown that people believe unpleasant things to be true of him. It will be seen, therefore, that only the law of *written* defamation is available to protect the sense of dignity standing alone.

Unfortunately for the law's development, most insult is extemporaneous and verbal. Insulting language is more frequently the product of a sudden flash of pique than the result of ill feeling

18. Dufort v. Abadie, 23 La. Ann. 280 (1871); Williams v. McManus, 38 La. Ann. 161 (1886); Fitzpatrick v. Daily States Publishing Co., Ltd., 48 La. Ann. 1116, 20 So. 173 (1896); Poissent v. Reuther, 51 La. Ann. 965, 25 So. 935 (1899).

19. 48 La. Ann. 1116, 20 So. 173 (1896).

20. (1) Words charging some crime of moral turpitude for which one may be indicted and punished; (2) words accusing one of having certain loathsome communicable diseases; (3) words which tend to harm a person in his trade, business, profession or office; (4) words imputing unchastity to a woman. Harper, A Treatise on the Law of Torts (1933) 285 et seq., § 239.

21. "Thus, to allege and prove 'special' damages sufficient to make spoken defamatory words actionable, the damage must be of a character such that the law will recognize it as pecuniary. Accordingly, mere emotional disturbance is insufficient when not accompanied by actual pecuniary loss legally caused by the slanderous words." Harper, op. cit. supra note 11, at 515 et seq., § 242.

deliberately reduced to writing. This being the case, most insults are not actionable as slander (1) because they do not include words in the limited group which are actionable per se, and (2) because it is extremely difficult to prove special damage. If the test for libel were applicable to oral defamation, slander would be expected to be brought into frequent use as a means of enforcing compensation for insulting language.

In Louisiana two novel concepts afford a different approach to the problem: (1) Our tort law purports to stem from Article 2315 of the Civil Code which reads, "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it. . . ."; (2) Louisiana, under the leading case of *Miller v. Holstein,*[22] does not observe the traditional common law distinction between libel and slander.[23] In the rehearing in the *Miller* case,[24] Mr. Justice Garland becomes quite vehement in his denunciation of the common law distinction. "The rule of the common law is in some respects absurd, in others positively unjust, and was established for the double purpose of repressing frivolous actions, and saving the judges the trouble of trying cases."[25]

It would seem to follow then, that in Louisiana, any spoken words, which would be libelous at common law if written, are actionable; that mental suffering, a disturbed peace of mind, a wounded pride and a damaged dignity, standing alone, are potentially capable of supporting an action for damages.

To what extent has recovery for mental anguish caused by offensive and insulting language actually been allowed under the Louisiana law of slander? What the Louisiana courts have actually done in such cases is more significant than what they have said, which through the years forms no coherent pattern.

There are examples of cases where, on first blush, it might appear that the Louisiana courts have been more willing to award damages for mental disquietude than have been the courts in other jurisdictions. A typical case is the insulting of a passenger

22. 16 La. 389 (1840).

23. Feray v. Foote, 12 La. Ann. 894 (1857); Spotorno v. Fourichon, 40 La. Ann. 423, 4 So. 71 (1888); Savoie v. Scanlan, 43 La. Ann. 967, 9 So. 916 (1891); Warner v. Clark, 45 La. Ann. 863, 869, 13 So. 203, 206 (1893); Tarleton v. Lagarde, 46 La. Ann. 1386, 1373, 16 So. 180, 181 (1894). But see Dunn v. Burat, 155 La. 376, 99 So. 296 (1924) (where the Louisiana Supreme Court quoted a classification of words actionable per se set forth by the United States Supreme Court); Santana v. Item Co., 192 La. 819, 189 So. 442 (1939).

24. Miller v. Holstein, 16 La. 389 (1840).

25. Id. at 407.

on a public carrier by the latter's servant.[26] In *May v. Shreveport Traction Company*[27] the defendant's servant implied that the plaintiff was a negro by pointing to the colored section on the car and saying: "Don't you belong over there?" The court awarded damages for the plaintiff's mental disturbance and humiliation. Another kind of case is represented by *Moody v. Kenney*[28] where the house detective in a large hotel went to the plaintiff's room and asked the plaintiff's husband what he was doing with a woman in his room. Recovery was allowed here for the plaintiff's outraged sense of dignity and the mental suffering which she endured. But an examination of the jurisprudence of other jurisdictions reveals that carriers[29] and innkeepers,[30] because of their peculiar relation toward the public, are under a special obligation not to wound the feelings of any patron. Recovery is allowed for mental anguish, apart from any physical injury, just as is done in Louisiana.

In Louisiana, apart from such cases, no recovery has generally been allowed solely for humiliation and mental disturbance caused by mere harsh and unpleasant language causing no concomitant injury to the reputation of the plaintiff except in cases where the words actually used would have been actionable per se

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26. In Lafitte v. New Orleans City & Lake R.R., 43 La. Ann. 34, 8 So. 701 (1891), the defendant's servant charged the plaintiff with having handed him a counterfeit dollar and threatened to have him arrested. Plaintiff recovered $400 damages. In Haile v. New Orleans Ry. and Light Co., 135 La. 229, 65 So. 225 (1914), where after the plaintiff fell down in the defendant's car through no fault of the defendant, the conductor said to the plaintiff: "a big fat woman like you had no business sitting in front of the car." Plaintiff was awarded $250 for humiliation and mortification. In Molczewski v. New Orleans Ry. & Light Co., 156 La. 830, 101 So. 213 (1924), the defendant, a public carrier, leased an amusement park and ran its cars to and from the park. Plaintiff, a woman, was excluded from defendant's auto parking lot by defendant's servant who spoke to her in an insulting tone saying: "Hey, hey, you stop; you can't come in here. . . . If you do I will have an affidavit made against you." The court awarded her $500 damages.

27. 127 La. 420, 53 So. 671 (1910).

28. 153 La. 1007, 97 So. 21 (1923).

29. Bleecker v. Colorado & S. Ry., 50 Colo. 140, 114 Pac. 481 (1911); Humphrey v. Michigan United Rys., 166 Mich. 645, 132 N.W. 447 (1911); Lamson v. Great Northern Ry., 114 Minn. 132, 130 N.W. 945 (1911); Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557 (1899). The law has been extended to include theaters [Planchard v. Klaw & Erlanger New Orleans Theatres Co., 166 La. 235, 117 So. 132 (1928); Weber-Stair Co. v. Fisher, 119 S.W. 19 (Ky. App. 1909); Laenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938)] amusement parks [Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 77 Pac. 209 (1904)], and even a circus [Boswell v. Barnum & Bailey, 135 Tenn. 35, 185 S.W. 692 (1916)].

30. Emmke v. De Silva, 293 Fed. 17 (C.C.A. 8th, 1923); Dixon v. Hotel Tutwiler Operating Co., 214 Ala. 396, 108 So. 26 (1926); De Wolf v. Ford, 193 N.Y. 397, 86 N.E. 527 (1908).

at common law. For example, merely applying vile curse words to a person has been held not to constitute actionable slander.[31]

Louisiana nominally rejects the common law classification of words actionable per se. Yet in the cases where recovery has been allowed for slander alone, aside from any special damage, the words would have been actionable of themselves at common law. Words which "charge some crime of moral turpitude [such as larceny] for which one may be indicted or punished" furnish by their very use a cause of action at common law.[32] With consonant reasoning calling a person a "thief" has been expressly held actionable per se in Louisiana.[33] In other cases damages have been awarded to one called a "thief" without mention of the epithet being actionable per se and at the same time without any finding of special damage to the plaintiff.[34] Similar results have been attained where the words imputed unchastity to a woman[35] or were such as tended to harm the plaintiff in his profession.[36]

The requirement that the slanderous words reach the ear of

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31. Dunn v. Burat, 155 La. 376, 99 So. 296 (1924), where the defendant called the plaintiff a G— d— s— o- b—. The court dismissed the words as "merely disgusting and senseless abuse." In McKoin v. McKoin, 168 La. 32, 121 So. 182 (1929), a divorce suit in which plaintiff claimed that he was publicly defamed by defendant when she called him a s-- o- b—. The court followed the *Dunn* case.

32. See note 8, supra.

33. Mallerich v. Mertz, 19 La. Ann. 194 (1867); Fitzpatrick v. Zedaird Realty Co., Inc., 121 So. 680 (La. App. 1929); Edwards v. Derrick, 193 La. 331, 190 So. 671 (1939).

34. Poissenot v. Reuther, 51 La. Ann. 965, 25 So. 935 (1899); Simpson v. Robinson, 104 La. 180, 28 So. 908 (1900); Fatjo v. Seidel, 109 La. 699, 33 So. 737 (1903); Lasseigne v. Tolmas, 164 La. 529, 114 So. 122 (1927). However, in Mihojevich v. Bodechtel, 48 La. Ann. 618, 19 So. 672 (1896), where the defendant, an old maid of over eighty years, called the plaintiff, her male tenant, a "dirty rat," a "thief," and "swindler." The jury's verdict for the defendant was affirmed, the court saying in the syllabus that "slanderous epithets are not always actionable." The court dismissed the words as "the irate and impulsive utterances of an old woman, whose only means of defense against a fancied or real wrong . . . was an unruly and mischievous tongue."

35. Jackson v. Briede, 156 La. 573, 100 So. 722 (1924), where the defendant, the superintendent of a mortuary establishment, accused the plaintiff, a stenographer, in the presence of another stenographer and the general manager, of living with the general manager and referred to her as "that damned woman." In Gernon v. Mailhes, 150 La. 927, 91 So. 300 (1922), defendant called the plaintiff a "big fat pig" and accused her of intimacy with their father. Other cases include William v. McManus, 38 La. Ann. 161 (1886); Von Eye v. Byrnes, 124 La. 769, 50 So. 708 (1909); Bache v. Stoltz, 134 So. 112 (La. App. 1931).

36. Ford v. Jeane, 159 La. 1041, 106 So. 558 (1929), where the defendant, before a session of the school board, accused the plaintiff, a young teacher, of being drunk at a public dinner; Searcy v. Interurban Transp. Co., Inc., 189 La. 183, 179 So. 75 (1938), where the plaintiff, a minister of the gospel suffered a stroke of apoplexy. Defendant's agent negligently thought he was drunk and accused him of being in that condition.

a third person,[37] together with the mutual abuse doctrine,[38] would preclude a recovery in many cases where the plaintiff experienced appreciable mental suffering because of a shocked dignity and extreme humiliation.

But there are cases allowing recovery in which the slanderous words were heard by only a few people who could not have believed the truth of the assertions. Aside from the carrier and innkeeper cases, they represent the courts' nearest approach to awarding damages solely on the basis of wounded feelings and humiliation. A typical case is *Von Eye v. Byrnes*[39] in which, in the presence of only a few neighbors, defendant called plaintiff, a widow over seventy years old, a "whore" and another vile name. The judgment for defendant was reversed and plaintiff was awarded two hundred and fifty dollars damages. Here there is little question of compensation for reputational injury. It is extremely unlikely that the neighbors believed the charge or that the plaintiff was lowered in their estimation. In *Fitzpatrick v. Zedaird Realty Company, Incorporated,*[40] a female real estate agent of defendant called the plaintiff, an old man, "a dirty old man, a liar and a thief." The only third person hearing the words was the plaintiff's thirteen-year-old grandson.[41]

It is obvious in such cases that the court is not awarding damages because plaintiff's reputation has been impaired. Recovery

37. Gilliland v. Feibleman's Incorporated, 161 La. 24, 108 So. 112 (1928).
38. See Von Eye v. Byrnes, 124 La. 769, 773, 50 So. 708, 709 (1909).
39. 124 La. 769, 50 So. 708 (1909).
40. 121 So. 680 (La. App. 1929).
41. Other cases in which the plaintiff's reputation was not injured or only slightly impaired, and in which the court appeared to be awarding damages solely as a balm for the plaintiff's injured feelings follows: Fatjo v. Seidel, 109 La. 699, 33 So. 737 (1903) where the defendant charged the plaintiff in the presence of her sixteen year old son and her sister with being a "thief," a "God-damned thief" and with having "robbed me of $5000." The court says: "To charge a mother, in the presence of her 16 year old son with being a thief, has about it something shocking and revolting that does not accompany the same act in the presence of mere strangers." (109 La. at 703, 33 So. at 738.) In Searcy v. Interurban Transp. Co., Inc., 184 La. 183, 179 So. 75 (1938), the defendant accused a minister of the gospel with being drunk while in fact he was suffering a stroke of apoplexy. In Edwards v. Derrick, 193 La. 331, 190 So. 571 (1939), it was shown that the plaintiff, a candidate for sheriff, lost but one vote by reason of the slander. He recovered $500 for damaged feelings. In Gernon v. Mailkes, 150 La. 927, 91 So. 300 (1922), the defendant called the plaintiff a "big fat pig" and accused her of undue intimacy with the defendant's father. Only two outsiders heard the charge. The court found that "there is not the slightest evidence that the witnesses were in the least interested in the father or gave the matter any further thought." The court found an award of $300 sufficient, for "the damage suffered by the plaintiff was, under the circumstances, negligible and a nominal award as a solace for her wounded feelings will suffice." In Bache v. Stoltz, 134 So. 112 (La. App. 1931), the defendant, in the presence of the plaintiff's mother and a friend, called the plaintiff a "crooked thing" and imputed loose morals to her.

is in fact allowed because the court feels that anyone who is exposed to language which shocks his sensibilities and interferes with his peace of mind and sense of dignity to such a degree that it produces genuine mental anguish should recover damages notwithstanding he has not suffered "actual" or special damages. Admittedly the language used in some cases would be actionable per se at common law. Yet if Louisiana does not recognize a separate class of words actionable per se, at least the door is left open for the recognition of a general cause of action for wounded feelings, humiliation and injured dignity. Judicial utterances in support of such a position may be found in cases where the court was probably convinced that the defamatory words had produced a degree of emotional disturbance worthy of being soothed by a money judgment.

What are the chances of recovery for injured feelings where the plaintiff has engaged in a mutual exchange of defamatory statements?[42] Since the early case of *Fulda v. Caldwell*,[43] it has been frequently held that the defendant owes no damages where there has been an interchange of opprobrious epithets, mutual vituperation, and abuse.[44]

Mutual abuse seems to be a defense for written defamation as well.[45] In the recent case of *Kenner v. Milner*[46] two members of the bar each published defamatory letters concerning the other. In holding for defendant the court said:

> "In our opinion, there was sufficient provocation for retaliation, and under the circumstances even though the retaliation was of a nature which would not be justifiable in law, plaintiff himself being at fault, cannot recover. The principle seems to be well imbedded in our jurisprudence that in suits of this kind where the parties have engaged in mutual vituperation and abuse at each other, they are both wrong, and neither can recover from the other."[47]

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42. See Malone, Insult in Retaliation (1939) 11 Miss. L.J. 333.

43. Fulda v. Caldwell, 9 La. Ann. 358 (1854); Johnston v. Barrett, 36 La. Ann. 320 (1884); Goldberg v. Dobberton, 46 La. Ann. 1303, 16 So. 192 (1894); Bloom v. Crescioni, 109 La. 667, 33 So. 724 (1903); Gilardino v. Patorno, 127 La. 255, 53 So. 556 (1910). The case of Mihojevich v. Bodechtel, 48 La. Ann. 618, 19 So. 672 (1896) has often been cited in support of this proposition, but an examination of this case discloses no mutual abuse.

44. 9 La. Ann. 358 (1854).

45. Bigney v. Van Benthuysen, 36 La. Ann. 38 (1884); C. S. Burt Co., Ltd. v. Casey & Hedges Mfg. Co., 107 La. 231, 31 So. 667 (1902); Kenner v. Milner, 196 So. 535 (La. App. 1940).

46. 196 So. 535 (La. App. 1940).

47. Id. at 537.

## CONCLUSION

Although Article 2315 unequivocally declares that "*every* act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it," it is manifest that there are many wrongs which cannot come within its contemplation. The law runs the whole gamut of human relations; nevertheless there are wrongs which, for reasons of judicial expediency, can only be tried before the bar of conscience. It is impossible to determine at just what point the Louisiana courts will extend the protection of the law to persons emotionally injured by abusive language. Situations involving such injury are not satisfactorily susceptible to general classification and rules of thumb. Words which might shock the sensibilities of a refined and sheltered lady would have no such effect upon her hardened sister of the streets. In cases where it occurs, however, emotional damages, although highly intangible, is none the less very real. Why should there not be legal protection of such an interest when the facts are such that judicial intervention is desirable?

The common law jurisdictions flatly refuse to recognize an independent cause of action for mental suffering and humiliation caused by insulting language. The Louisiana courts achieve substantially similar results, although their actual decisions are often obscured by a smoke screen of dicta. It is significant, however, that Louisiana is not bound by the rigid common law rules.[48] There is much to be found in Louisiana jurisprudence to support a liberal attitude, and much which may be relied upon should Louisiana decide to lead the way in the forthright recognition of an independent cause of action for mental and emotional disturbance resulting from vile and insulting language.[49]

OLIVER P. SCHULINGKAMP

48. In Martin v. The Picayune, 115 La. 979, 986, 40 So. 376, 378 (1906) the court said: "The common-law system has not gone as far as the civil law in upholding actions for injurious words spoken or written."

49. An interesting dictum in the case of Graham v. Western Union Telegraph Co., 109 La. 1069, 1074, 34 So. 91, 93 (1903) speaks of such an action as though it were well recognized in Louisiana jurisprudence. The court said: "If a contracting party, by reason of a breach of contract, can be made legally responsible for damages on his part for the 'mortification' or the loss of anticipated pleasure and enjoyment which his default has occasioned the other contracting party, *or if a man who has used harsh and insulting language to another, short of defamation, can be held legally to respond in money for the humiliation which he has caused the latter to suffer,* no good reason can be assigned why mental pain and suffering could not and should not furnish equally the basis for a judgment for damages."

In Covington v. Robertson, 11 La. 326, 342, 35 So. 586, 593 (1903), the court declared that under Article 2315 of the Civil Code all that is necessary for a person judicially claiming damages to himself from a slander is to allege