Defamation: A Compendium

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COMMENTS

DEFAMATION: A COMPRENDSUM

An examination of Louisiana's law of defamation must include the historical development of the English common law torts of libel and slander, for against this background is afforded the best comparison of the Louisiana position with the attitude prevailing in the remainder of the United States. The significance of particular Louisiana problems and the general impact on defamation of recent United States Supreme Court decisions can then be understood.

Defamation is an invasion of the plaintiff's interest in reputation and good name. Professor Prosser defines defamation as:

"[T]hat which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which plaintiff is held, or to excite adverse, derogatory or unpleasant feelings against him."1

THE COMMON LAW

Before modern-day telecommunications and travel, defamation was necessarily localized in its effect. During the thirteenth and fourteenth centuries defamed persons found redress in the seignorial courts,2 where their reputations could be cleared in the presence of those who heard them attacked.

Even before the complete demise of manorial courts in the Middle Ages, the ecclesiastical courts exercised general jurisdiction over the sin of defamation, imposing a penance which also cleared the victim's reputation.3 The decay of the local courts enabled the Church to acquire the exclusive right to

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1. PROSSER, TORTS § 106 (3d ed. 1964). See also SALMOND, TORTS 398 (6th ed. 1934); BOWER, ACTIONABLE DEFAMATION 4 (2d ed. 1923); RESTATEMENT, TORTS § 559 (1938). BLACK, LAW DICTIONARY (4th ed. 1957), defines defamatory [words] as those which "produce any perceptible injury to the reputation of another."

A colorful characterization of reputation is found in Dale System, Inc. v. Time, Inc., 116 F. Supp. 527, 530 (D. Conn. 1953): "[A] plaintiff's repute is his character and personality in the eyes of others. It thus comprises myriad relationships in all of which the plaintiff's individuality is the focus."


3. Id. at 549-51. The primary purpose of the Church's treatment was for correction of the slanderer for his soul's health; but an apology to the person defamed was a part of the ritual.

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deal with defamation, but this situation did not last in an era of rising common law courts.

Van Vechten Veeder suggests that the manner in which the royal courts usurped jurisdiction in defamation was through a fiction—a distinction between defamation causing only spiritual harm and defamation causing temporal damage. Temporal, or special, defamation is the actual loss of some material advantage which is pecuniary or capable of estimation in money.

Of certain classes of defamation—imputations of crime; imputations of loathsome disease; imputations affecting the business, trade, profession or calling of the person defamed; and, later by statute, imputations of unchastity of a woman— it was said that temporal damage resulted from the very fact of communication of information of that nature, and proof of the defamation itself was considered to establish the temporal loss which the jury was permitted to estimate without other evidence. Beyond these categories where temporal dam-

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5. Prosser, Torts § 106 (3d ed. 1964). Things relating to money or business were temporal. See also Van Vechten Veeder, The History and Theory of the Law of Defamation, 3 Colum. L. Rev. 546, 561 n.1 (1903); Holdsworth, Defamation in the Sixteenth and Seventeenth Centuries, 40 L.Q. Rev. 302, 397, 398-901 (1924). The distinction amounted to the line of division between cases that could be brought in the king's courts and those that would remain in the ecclesiastical courts. See McCornick, Damages § 113 n.5 (1935).
6. Gatley, Libel and Slander 72 (5th ed. 1960), citing the following cases to establish this definition: “actual temporal loss”—Ratcliffe v. Evans, 2 Q.B. 532 (1892); “temporal advantage”—Chamberlain v. Boyd, 11 Q.B.D. 412, 415 (1883); “capable of being estimated in money”—Roberts v. Roberts, 5 B. & S. 389 (1864); Chamberlain v. Boyd, 11 Q.B.D. 412 (1883); Hayward v. Pulliger [1950], 1 All E.R. 581. Accord. Restatement, Torts § 575, comment b (1938), which states that special harm is harm of a material and generally of a pecuniary nature.
9. See Lawson, The Slander of a Person in His Calling, 15 Am. L. Rev. 573 (1881) (fear that if a man’s means of livelihood were impaired he would become a ward of the state).
10. Slander of Women Act, 54 & 55 Vict., C. 51 (1891) (originally considered only a sin or a purely spiritual matter; this Act created the legal presumption of injury).
11. Carpenter, Libel Per Se in California and Some Other States, 17 So. Calif. L. Rev. 347, 348-49 (1944). “These classes are where the slanderous words impute (a) a crime of magnitude, variously defined, (b) the present possession of a loathsome disease, or (c) conduct or characteristics that would tend to injure or prejudice plaintiff’s reputation in relation to his office, profession or trade.”

It seems that the justification for the theory of temporal damage as
Prior to the invention of printing, defamation was almost without exception oral, and was usually referred to at common law as slander. Printing and increasing literacy in the seventeenth century necessitated the working out of a separate body of doctrine for written defamation—libel—by the Star Chamber. With oral defamation being subdivided on the point of special damage as to the possibility of remedy in the king's courts, the same considerations had to be viewed for printed defamation. Under the theory that the written or printed word was more onerous, deliberately malignant, lasting, widespread and temporal in effect, stricter rules of liability were ordained. To avoid resort to self-help and consequent breaches of the peace, no showing of special damage was required as a condition for a libel action, and in the 1812 decision of Thorley v. Lord Kerry, the English common law was expressly settled that in an action for libel (as opposed to slander) damages could be recovered without pleading or proving that any special damage attached.

**Defamation Today**

Today most American courts require no showing of special damages in cases of libel, and subdivide slander into two categories—one including the original classes of slander in which whole and the above classes specifically is that a person who is so damaged is in danger of becoming a ward of the state because he can no longer earn a living. Thus to protect itself from this burden, the state must provide a redress to the aggrieved through its courts. See Newell, Slander and Libel § 20 (4th ed. 1924); Plucknett, A Concise History of the Common Law 427-45 (5th ed. 1956).

12. McCormick, Damages § 113 n.5 (1935); Bower, Actionable Defamation 282 (2d ed. 1923).

13. Such stricter rules were first reported in De Libellis Famosis, 5 Co. Rep. 125a, 77 Eng. Rep. 250 (1605), emphasizing that libels deserved punishment as inciting to revenge and leading to quarrels and general breaches of the peace. See also Brant, The Bill of Rights 502 (1965).


16. Restatement, Torts § 569 (1938): "One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom."

This is the position reached in 1909 by the Supreme Court of the United States, rejecting the necessity of pecuniary damage in the law of libel. Peck v. Tribune Co., 214 U.S. 185 (1909).
The position of the current Restatement on the question of libel is the subject of much controversy. Professor Prosser is urging a change in the Restatement Second, claiming that the majority position has shifted. He points to a trend in some American jurisdictions to require proof of special damage in certain alleged libelous situations, labeled "libel per quod." Prosser considers this an indication that our courts are inching toward fusion of the common law torts of libel and slander.19

This suggestion has spawned an excellent and well-documented protest to Prosser's conclusions in the Harvard Law Review,20 where the writer discusses some of the general problems that perplex the courts in this area, and then argues that section 569 of the Restatement, which declares all libel claims actionable without proof of special damage, represents the prevailing view of United States courts, which should not be altered. In an equally well-supported answer by Prosser in the same issue,21 he adheres to the notion that the trend of American cases is to treat libel like slander—a plaintiff being unable to recover for libel without proof of special damages in any case where he would not recover if the utterance were slander.

Defamation which does not require allegation or proof of special damages is referred to as "actionable per se,"22 while that for which the allegation and proof is necessary is called "actionable per quod."23

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17. See text at n.7 supra. This is exemplified in Restatement, Torts § 570 (1938): "One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a slander is liable to the other although no special harm or loss of reputation results if the publication imputes to the other (a) a criminal offense ... or (b) a presently existing venereal or other loathsome and communicable disease ... or (c) conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business, trade, profession, or office ... or (d) the other being a woman, acts of unchastity. . . ." 18. Restatement, Torts § 575 (1938): "One who falsely and without a privilege to do so publishes a slander which, although not actionable per se, is the legal cause of special harm to the person defamed, is liable to him."

22. Restatement, Torts § 569 comment b (1938).
23. See Eldredge, The Spurious Rule of Libel Per Quod, 79 Harv. L. Rev. 733, 736 (1966): "At common law, an action on the case was an action to recover the actual damages caused by the defendant's conduct. The Latin expression 'per quod,' meaning 'whereby,' traditionally introduced the
The "actionable per se" terminology leads to confusion when a distinction is also made between words which convey a defamatory meaning on their face, and words which may appear innocent on their face, but when considered in light of all other surrounding facts and circumstances are clearly offensive. The former are often labeled "defamatory per se" or "slanderous per se." The latter must have an accompanying innuendo or explanation to be properly pleaded, and if labeled at all should be referred to as "slanderous per quod." However, this requirement is unrelated to whether certain slander is actionable without a showing of special damages. It is understandable how the use of the phrase per se in both connections has engendered confusion and distortion.

In common law pleading, the extrinsic facts referred to, set forth in the "inducement" and the "innuendo" segment of the pleadings, explained the defamatory meaning of the communication in light of the extrinsic facts. The innuendo also served to demonstrate that a defamatory meaning was the one conveyed and understood when the words used were capable of either a defamatory or a non-defamatory construction, and to indicate the application to the plaintiff if the connection was not prima facie clear.

The determination of whether statements were slander per se (clear in their meaning) or whether extrinsic facts had to be examined should precede or coincide with a characterization of the words as actionable per se at common law or only actionable with a showing of special damages. A statement specification of damages incurred—a necessary element for an action on the case. Actions that required this 'per quod' allegation of damages came to be known as 'actionable per quod.' Actions that did not require it, for example, trespass quare clausum fregit, were called 'actionable per se.'"  


25. Restatement, Torts § 575 (1938), is careful to use the terminology "actionable per se"—not "slander per se." "One who falsely and without a privilege to do so publishes a slander which, although not actionable per se, is the legal cause of special harm to the person defamed, is liable to him."


28. A detailed analysis of this phase of common law pleading may be found in Gatley, Libel and Slander 451-52 (5th ed. 1960). See also Encyclopedia of Pleading and Practice 57 (McKinney ed. 1898).
might appear innocent on its face; but, when additional facts were revealed, not only would the statement be slanderous, but if the innuendo made the whole circumstances fit into one of the designated categories (crimes, loathsome disease, conduct incompatible with trade or business, unchastity of women) it would be actionable per se. 29

If implicit or covert defamation is not in the actionable per se classes, special damages would have to be shown, as in the case of a statement defamatory on its face. 30

Whether the defamatory character appears on the face of the statement or is covert and requires extrinsic explanation,

29. Suppose A, knowing his statement to be false, deliberately states that Mrs. B, a prominent socialite, gave birth to twins. This is apparently innocent on its face, but when the innuendo explained the communication in the light of the extrinsic fact that Mrs. B has only been married three months, the defamatory character is shown in the suggestion of improper conduct or pre-marital involvement of Mrs. B. Though the statement was not slander per se, the extrinsic explanation shows that it was "covert" defamation, that is, the defamatory nature did not appear on the face of the words, but was revealed only to those who knew certain circumstances. Then to apply the category test, we see that the statements imputed unchastity to a woman, a category that is actionable per se. Thus, correct separation of the two uses of the per se terminology demonstrates how words innocent on their face (1) become slanderous upon reflection on the whole of the facts and (2) would then be placed in the common law category of words actionable per se. See Carpenter, Label Per Se in California and Some Other States, 17 So. Calif. L. Rev. 347, 353-54, 370 (1944). See also Towne v. Eisner, 245 U.S. 418, 425 (1918), where Mr. Justice Holmes speaking for the Court said: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." The same idea was conveyed by Judge Learned Hand in NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941): "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used of which the relation between the speaker and the hearer is perhaps the most important part."

30. If A, knowing his statement to be false, deliberately states that B is a playboy bachelor, this again seems innocent enough, but when it is shown that some of those who heard the remark know that B is in fact living with a woman who purports to be his wife, and has three children, the picture changes. These persons draw the defamatory conclusion that B is not married and is guilty of immoral conduct. Again, through extrinsic facts, slander is shown. But B cannot then place the situation in any of the special common law classes that would be actionable per se, and must therefore plead and prove special damages for his action to succeed. Of course if concubinage is a crime in the given jurisdiction, B could place the uncovered defamation under the heading of imputation of crime and thus put it into the common law category of words actionable per se. This type of reasoning has been effectively applied in cases where the defendant has called plaintiff a "communist"; the charge being held synonymous with the imputation of the crime of violating the Smith Act. On this latter point see Lightfoot v. Jennings, 363 Mo. 678 (1953). See generally Note, 33 So. Calif. L. Rev. 104 (1969).
the question of special damages still must be considered unless the statement with explanation falls into one of the special classes.31

THE LOUISIANA DEFAMATION ACTION

Unlike most common law jurisdictions Louisiana, because of its civilian heritage, makes no libel-slander distinction based on the oral or written form of defamation; all defamation is treated alike.32 Perhaps it was the recognition that the common law of defamation, with its technical and barren distinctions, contained some questionable doctrines foreign both to notions of justice33 and to the civilian tradition, that led the Louisiana courts to take a somewhat different stand on the tort of defamation.

From the outset Louisiana refused to be hampered in this area by mere technicalities obstructing just results. In the landmark decision of Miller v. Holstein34 plaintiff sought recovery for the defendant's having accused him of swearing falsely. The defendant contended that the mere accusation of swearing falsely was not actionable because it did not amount to an accusation of perjury—following the common law rule that to recover without establishing damages, the charge complained of must be a crime and not merely an unsavory deed. To refute this, Justice Bullard, speaking for the court, said:

"I am by no means prepared to adopt from the common

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31. Certain text writers even suggest that should the meaning of covert slander as extrinsically explained come under one of the headings actionable per se, the words themselves are not actionable per se. See GREEN, MALONE, PEDRICK & RAHL, INJURIES TO RELATIONS 397 (1st ed. 1959). It is submitted that while this is technically correct, it tends to blur the distinctions and amounts to an unrewarding complication.


Likewise, all defamation, oral or written, receives the same treatment in Scotland (NORMAN, THE LAW OF DEFAMATION IN SCOTLAND, 6 CAMB. L. J. 227 (1958)), and presumably Washington (see dictum in Grein v. LaPoma, 54 Wash.2d 844 (1959)). This view has also been adopted by statute in New South Wales, N.S.W. DEFAMATION ACT § 4 (1912), and retained in the new DEFAMATION ACT OF 1958, No. 39 N.S.W.; QUEENSLAND, DEFAMATION LAW OF 1859, 53 Vict. No. 12 § 6 (Queensland); WESTERN AUSTRALIA, WESTERN AUSTRALIAN CRIMINAL CODE ACT §§ 348-49 (1913); NEW ZEALAND, DEFAMATION ACT OF 1954, N.Z. Stat. No. 46 § 4; and through the CANADIAN UNIFORM DEFAMATION ACT in MANITOBA, R.S.M. c. 11, §§ 2-3 (1948), and ALBERTA, ALTA. REV. STAT. c. 14, §§ 2-3 (1947).

33. The law of defamation "contains anomalies and absurdities for which no legal writer ever has had a kind word..." PROSSER, TORTS § 106 (3d ed. 1964).

34. 16 La. 389 (1840).
law the distinction between words which are actionable in themselves and words which are not; and to say that a plaintiff is not entitled to recover in an action for slander, unless charged with an indictable offense without proof of special damages."

Relying on the authority of the Civil Code that every act which caused damage to another must be repaired by the person perpetrating the act, the court said: "If injurious words are uttered, they fall within the terms of this provision." Louisiana courts have since then rejected any distinction both between written and oral defamation, and between defamation carrying with it a conclusive presumption of pecuniary damage and defamation requiring proof of special damages before recovery will be allowed. What is at common law two separate torts has received in Louisiana treatment as a single quasi offense—defamation. Thus all defamation, written or oral, is actionable without proof of pecuniary damages, because the interest protected is a person's reputation and his reputation is his property. Therefore, "in Louisiana, when the defendant has defamed the social, business, or moral interests or character of another, he is liable to the injured party without further proof of damage." This rule has been specifically expressed by the courts whether the defamation was written or oral.

35. Id. at 404. On this point see generally Tullis, Louisiana Legal Systems Reappraised, 12 Tul. L. Rev. 113 (1957), and Stone, Tort Doctrine in Louisiana: From What Sources Does it Derive?, 16 Tul. L. Rev. 489, 496 (1942).
37. 16 La. 289, 394 (1840).
40. Since defamation is a quasi offense, the prescriptive period for such action would be one year. Interestingly, in article 3536 of the Civil Code, a one-year prescriptive period is expressly established for "injurious words, whether verbal or written." This supplies some grounds for the argument that the legislative intent was always to treat oral and written words alike.
41. See text at note 1 supra. See also Simms v. Clark, 194 So. 123 (La. App. 1st Cir. 1940).
45. Covington v. Roberson, 111 La. 326, 342, 35 So. 598, 593 (1903).
In Louisiana, the elements necessary to make defamatory words actionable are: (1) publication, that is, communication to some person other than the one defamed; (2) falsity; (3) malice, actual or implied; and (4) resulting injury.

The last stated element, resultant injury to plaintiff's reputation, is the very essence of the tort. Words are only defamatory when they "produce . . . perceptible injury to the reputation of another." The three elements discussed in the following paragraphs all depend on the words first being found defamatory.

Since the interest protected is one's reputation, it is essential to liability that the defamation be communicated to one other than the person defamed. This transmission of the defamatory information is called publication, but this does not mean that it must be printed or written. Since it is the defamatory meaning. .

46. It is sufficient that plaintiff prove the substance of the words charged; he need not prove every exact word. See Trimble v. Moore, 2 La. 577 (1851); Freeland v. Lanfear, 2 Mart.(N.S.) 257 (La. 1824).

47. The mere fact that defendant only repeated another's charges (orally or in print) and did not himself originate the scandal is no defense. See Sanders v. Times-Picayune Pub. Co., 168 La. 1125, 123 So. 804 (1929); Harris v. Minvielle, 48 La. Ann. 908, 19 So. 925 (1896).

"Every repetition of a slander originated by a third person is a willful publication of it, rendering the person so repeating it liable to an action." Newell, Slander and Libel 350 (4th ed. 1924).

The often-stated Louisiana position as to this is, "Talebearers are as bad as talemakers." Harris v. Minvielle, 48 La. Ann. 908, 915, 19 So. 925, 928 (1896).

The general rule also is that the original author of a libelous publication will not be held liable for the republication or repetition by others; however, an exception to this rule exists where the later publication is a natural and probable consequence of the originator's initial deed. Cormier v. Blake, 198 So.2d 139 (La. App. 3d Cir. 1967); Giordano v. Tuiller, 139 So.2d 15 (La. App. 4th Cir. 1962).

48. See the "New York Times Rule" discussed infra at nn. 154-175 which resulted in the elimination of presumed malice in defamation cases involving public officials. The burden of proving actual malice is expressly placed on plaintiff.

This writer feels that this expanding concept will find its way into all defamation cases and not be limited to the public official situations.

49. See Derivas v. Gaspard, 1 La. App. 420, 423 (2d Cir. 1929).

50. The foundation of an action for defamation is the injury done to the reputation. See Simms v. Clark, 194 So. 123 (La. App. 1st Cir. 1940).


52. Communication of non-privileged defamatory statement to only one person constitutes actionable publication. Toomer v. Breaux, 146 So.2d 723, 726 (La. App. 3d Cir. 1962). See also Vicknair v. Daily States Pub. Co., 153 La. 677, 96 So. 529 (1923); Jozsa v. Moroney, 125 La. 513, 51 So. 908 (1910); Simms v. Clark, 194 So. 123 (La. App. 1st Cir. 1940). But see Buggs v. Harrison, 152 La. 724, 94 So. 369 (1922), where size of audience being only one person acted in mitigation of damages (defendant communicated only to plaintiff's employer). Accord Fitzpatrick v. Zedaird Realty Co., 10 La. App. 306, 121 So. 660 (Orl. Cir. 1929) (publication limited to grandchild and wife whose hearing was impaired).

of the words that must be communicated, it must be shown that the language was understood in that sense. Only when it is shown that a harmful meaning was conveyed is there redressable injury.

To support an action for defamation, the charges made by the defendant must be false. Truth is an absolute defense, even though the words that cause injury to the plaintiff are defamatory. The plaintiff need only show that the language was defamatory, however; the defendant must then rebut a presumption of falsity. Thus, the mere establishment of the words themselves as defamatory or as conveying a defamatory meaning is not always sufficient for the plaintiff to recover.

Closely related to the requirement of falsity is the element of malice. "Malice expressed or implied is of essence of slander." Actual malice—personal ill will—may be found from the circumstances; or, similar to the presumption of falsity, if the words are of a defamatory nature with resulting injury, the law presumes malice. This doctrine of implied malice is closely

57. Under Louisiana law, truth is a defense to a suit for injury to public and private character; therefore, the words may be defamatory, yet not be actionable because of the element of truth. Jenkins v. D X Sunray Oil Co., 297 F.2d 244 (5th Cir. 1962); Deshotel v. Thistlethwaite, 240 La. 12, 121 So.2d 222 (1960).
60. Harris v. Minvielle, 48 La. Ann. 908, 914, 19 So. 925, 927 (1896). announces that, "[W]ords which ... are defamatory ... if false, are actionable." Accord, Wiel v. Israel, 42 La. Ann. 935, 8 So. 826 (1890). See also notes 55 and 58 supra and accompanying text.
61. See Harry v. Constantine, 14 La. Ann. 782 (1859); Church of St. Louis v. Blanc, 8 Rob. 51 (La. 1844).
62. Bocca v. Soulant, 6 La. App. 708, 711 (Orl. Cir. 1927). See also Gilbert v. Palmer, 8 La. Ann. 130 (1853), which states: "[W]ords uttered without malice, and under circumstances from which no malice is in law implied ... carry with them no pecuniary responsibility to the plaintiff."
63. See Kernan v. Chamberlin, 5 Rob. 116 (La. 1843); Cauchoix v. Dupuy, 3 La. 206 (1831). Legal malice is also inferred from the falsity of the accusation. Ford v. Jeane, 159 La. 1041, 1044, 106 So. 555, 559 (1925).
associated with willful and wanton conduct. As stated in Barnhill v. Times-Picayune Publishing Co.\(^6\)

"The malice imputed . . . is not personal ill will, but merely legal malice implied from willfully and wantonly doing an unlawful act which results in injury."\(^6\)

Implied malice therefore is a second presumption which the defendant has the burden of rebutting.\(^6\)

The presumption of malice where slanderous words are used\(^6\) should be applied only to words defamatory on their face rather than to those where the defamatory effect is only extrinsic.\(^6\) The words must be other\textit{wise actionable} for the presumption of malice to attach.\(^6\) As stated in Williams v. McManus,\(^7\) the law "implies malice" to the words used "where these are slanderous \textit{per se}."\(^7\) Or as in Wimbish v. Hamilton,\(^7\) "motive may be inferred from the nature of the charge made,"\(^7\) meaning that the charges must be clearly defamatory as opposed to only extrinsically defamatory.\(^7\)

The benefit of the above presumptions offers the plaintiff a moderate advantage even though the courts tell us that suits for libel and slander partake more or less of the nature of a criminal accusation and the preponderance of proof necessary for plaintiff's case is greater than in ordinary civil actions.\(^7\)

In defamation actions there are apparently only three

\(^{64}\) 171 La. 286, 131 So. 21 (1930).
\(^{67}\) Smith v. Lyons, 142 La. 975, 997, 77 So. 896, 904 (1918).
\(^{68}\) See text at notes 22-26 supra for a discussion of the distinction as well as text at notes 120-143 infra concerning Louisiana cases.
\(^{69}\) That is, they must be false, injurious and have been communicated to a third person. See Kernan v. Chamberlin, 5 Rob. 116 (La. 1843); Cauchoux v. Dupuy, 3 La. 206 (1831).
\(^{71}\) Id. at 163.
\(^{72}\) 47 La. Ann. 246, 16 So. 856 (1895).
\(^{73}\) Id. at 254, 16 So. 856, 860 (1895).
defenses—denial, truth, and justification. Denial needs no elaboration. However, it should be noted that since it is essential to tort liability that the defamation be communicated to some third person, defendant's denial would have to contradict the testimony of both the plaintiff and that third person or persons.

The defense of truth has been considered above.

The defense of justification includes the privileges recognized in Louisiana jurisprudence. Defendant may admit that the statement is defamatory, but claim a privilege. The recognized privileges are of two types—absolute and conditional. The absolute privilege is limited to judges, legislators, and certain executives, acting in their respective official capacity and no liability whatsoever will attach. A conditional privilege will also be a defense if the defendant's conduct under the privilege has not been excessive. The conditional privilege extends to:

1. Defamatory remarks in protection of a substantial interest in one's own social or economic welfare;
2. Defamatory remarks when the publisher and the recipient have a common interest protected or furthered by the communication;
3. Defamatory remarks in protection of certain third persons;
4. Those made to protect an interest of the person to whom the remark is addressed;
5. Those classified as "fair comment" or in the "protection of public interest" concerning public affairs, but only if the words in question are comment or opinion and not a false assertion of fact;
6. Those made by a public official in discharge of a public duty, including a false assertion of

77. See n. 52 supra.
78. The defendant cannot avoid liability simply by denying the exact words in plaintiff's pleadings, for it is sufficient to prove the substance of the words charged. See note 46 supra.
79. See text at notes 56-60 supra.
80. An excellent discussion of the privileges in Louisiana defamation law may be found in a two part Comment in 6 LA. L. Rev. 281 and 417 (1945).
81. Comment, 6 LA. L. Rev. 281 (1945).
82. Id. at 282. See generally Levy v. McCan, 44 La. Ann. 528, 10 So. 794 (1892); Lynch v. Febiger, 39 La. Ann. 336, 1 So. 690 (1887).
84. Comment, 6 LA. L. Rev. 281, 284 (1945). See also Bulsson v. Huard, 106 La. 768, 31 So. 293 (1901).
86. See Comment, 6 LA. L. Rev. 417, 417-20 (1945).
fact, and (7) defamatory remarks made during a legislative or judicial proceeding and reported by news media.

Although not defenses to liability, notwithstanding loose characterization as such, there are situations which mitigate an award of damages. Included are such things as defendant's making the statement in good faith, upon reasonable grounds, supported by acts of the plaintiff, the utterances being made in a state of great excitement and so understood by those who heard them, or the utterances being made during an exchange of mutual opprobrious epithets. Also, retractions or apologies may be considered in awarding damages.

**Defamation Damages in Louisiana**

Injury to reputation is at best a nebulous concept; circumstances virtually control and great discretion must be exercised by the courts in each situation. Louisiana apparently breaks with the common law at this point. Injury to the reputation is compensable in Louisiana upon establishment of the injury, without the necessity of proof of damage in pecuniary

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87. Id.
92. The fact that defendant made his remarks in a state of drunkenness may be a matter of mitigation also. Williams v. McManus, 38 La. Ann. 161, 163 (1886).
94. Defamatory words are "words which produce any perceptible injury to the reputation of another." Harris v. Minvielle, 48 La. Ann. 908, 914, 19 So. 925, 927 (1896). When read in connection with the cases finding no distinction between written and oral words, the definition would evidently be the same for both.
95. The Louisiana courts classify it as a property interest. See Kennedy v. Item Co., 213 La. 347, 372, 34 So.2d 886, 895 (1948); Simpson v. Robinson, 104 La. 150, 28 So. 908 (1900).
form. Louisiana recognizes that injury to reputation can result simply from the character of the defamatory words and the circumstances of their use, though proof of pecuniary damage is impossible. This is the underlying premise that motivated the Louisiana Supreme Court in Miller v. Holstein to shun the common law limitations and submit all defamatory words to the same treatment. "Injury to reputation" was thought sufficiently elusive to deserve equal treatment in all corners. A break with the common law over the "actionable per se" category and the special damage rule left all defamation in Louisiana judged by the four elements of publication, resulting injury, falsity, and malice. Once classified as defamation, the only remaining question is the amount of damages to be awarded. Predication of liability on injury without requiring proof of monetary damage creates no problem as article 1934(3) of the Civil Code allows awards without strict adherence to the concept of demonstrable pecuniary form. Only after liability is established does a pecuniary scale enter the picture, and then merely as an expression of value of the award, not as an element of proof of liability. This is clearly a separation of the concept of damage leading to liability and damages as a dollar amount at which that liability is taxed. It is a separation of the concept of damage, that is, injury, and damages, the amount of the monetary award to the plaintiff. Since Louisiana predicates liability upon and awards damages for injury or damage, it is essential for conceptual clarity that a clear distinction be maintained between damage and damages. Conceptual clarity, however, has not


Many well-written opinions by other United States courts today voice discontent over the restrictive nature of the requirement for proving special damages. See Afto-American Publishing Co. v. Jaffe, 366 F.2d 649, 660 (D.C. Cir. 1966): "[A] special damage requirement would thwart the function of the law in providing compensation for damage that does not take a demonstrable pecuniary form."

97. 16 La. 368 (1840).

98. La. Civil Code art. 1934(3) (1870): "Although the general rule is, that damages are the amount of the loss... sustained, or of the gain... deprived, yet 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... ."

99. BLACK, LAW DICTIONARY (4th ed. 1957): "Damage. Loss, injury or deterioration, caused by... one person to another... . The word is to be distinguished from its plural—'damages'—which means a compensation in money for a loss or damage. "Damages. A pecuniary compensation or indemnity which may be recovered in the courts by any person who has suffered loss, detriment, or injury... ."
survived the daily language interchange by the courts and attorneys.100

In Louisiana, the only proof of injury required is the establishment of the words as defamatory to the plaintiff. From this the trier of fact will be allowed to formulate an award. This award may certainly be based upon proof of distinct and readily provable dollar losses, such as the loss of a $5000 commission because a customer refused to renew his contract with plaintiff as a result of the defendant's remarks. It may be based upon less specific items which nonetheless may be ascertained in money. For example, while a defamed motel manager may not be able to show a loss of specific customers who would have rented rooms at his now empty motel, he can show a general loss of business. A value may be ascertained by looking to previous business conditions there with allowance for an average rate of increase and business conditions in similar motels in the area at the time. Finally the award may be based upon general circumstances which may not be ascertained in money but of which, with a view to all aspects of the situation, it will be said that some dollar figure seems reasonable. If, due to circulated statements, plaintiff's fiancee refused to marry him or his wife leaves him, there could certainly be no precise value established for marriage with a given fiancee or wife, yet a dollar award should be made to ameliorate all that plaintiff has endured. The setting of the amount of damages should be dealt with only in determining the amount of reparation, not the need for reparation. Louisiana's approach is able to do this while the common law requirements create a burdensome overlapping of the damages concept since specific monetary damage is used both in the question of establishing liability and in determining a just award.

Perhaps the results could be better explained by illustration. If A makes certain statements concerning B's moral character which cause B immense humiliation, promote scandalous talk, and lower B's standing in the community, certainly B has been injured. Assuming that the precise statements by A were not in the specially treated actionable per se category, a common

100. See Smith v. Lyons, 142 La. 975, 77 So. 896 (1918), and Derivas v. Gaspard, 1 La. App. 420 (2d Cir. 1925), for good illustrations of the two ideas used correctly and separately. But see Acme Stores v. Better Business Bureaus of Baton Rouge, 225 La. 824, 74 So.2d 43 (1954), for an illustration of interchange of the two terms.
law jurisdiction would predicate relief on the showing of special monetary damages. If B were to plead no more than his humiliation, the community gossip, and his lessening of esteem in the eyes of the community, he could not support his action because there was no showing of special damages. However, had B shown that his credit rating had been injured and credit subsequently denied, or even that specific persons had denied him gratuitous entertainment, then B would have met the requirement of showing special damages and liability would attach.

Were the same facts to arise in Louisiana, B should not be denied a remedy, because there is demonstrable injury proved. The question of monetary damage has not yet arisen—only after proof of liability for causing injury will a court attempt to decide upon an equitable award, and the absence of a showing of special damages will not prevent granting recovery. Instead, the size of the award will depend on an evaluation of the circumstances.

If there is no injury, there can be no recovery because there is no liability. But even if the words are injurious with liability attaching, there may yet be only a small recovery or none at all if the circumstances so dictate. While the likelihood of this happening may be greater when the only claim is damage to reputation through humiliation, etc., it is not reserved to such situations. Quite possible are cases of specifically provable pecuniary losses when no award may be forthcoming, or apparently insignificant awards made because of other considerations in the estimation process. Once the aspect of quantum is taken under consideration, however, any special damage that has been sustained will certainly be an element in determining the amount of the award.

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104. An excellent example may be found in Derivas v. Gaspard, 1 La. App. 420 (2d Cir. 1925).
105. In Buggs v. Harrison, 152 La. 724, 94 So. 389 (1922), there was liability for a clearly libelous letter to plaintiff's employer, but there was only an award of $1 because the letter did not affect plaintiff's standing with his employer and was easily explainable.
106. Tate v. Nicholson Pub. Co., 122 La. 472, 47 So. 774 (1908), holds that to determine the question of defamation, the court is under a duty to take into consideration all the circumstances, weigh each fact of legal significance and consider the occasion on which it was made.
107. Louisiana allows the expense of maintaining a suit for defamation as an element of special damage. Guice v. Harvey, 14 La. 198 (1839).
As indicated by the preceding discussion, the lack of a "proof of pecuniary damage" requirement in Louisiana makes the measure of damages to be awarded an object of special interest in those cases where no monetary damage is established. Because of article 1934(3) actual monetary loss does not have to be the sole measure of recovery,108 but even more noteworthy, "the jury have no fixed rule in assessing the sum for which they are to give a verdict,"109 but must find a guide in their own consciences for the damages.110 Such leeway afforded the trier of fact is essential in carrying out the provisions of article 1934(3), especially when the injury inflicted by defamation is not readily capable of monetary approximation.

Although the Louisiana Supreme Court has stated that there are some harms that must unavoidably be inferred from the nature of the defamation such as estimated damage to reputation, credit or some injured feelings,111 the courts' discretion must yet take into consideration "the severity of the charges, the motives of the defamer, the 'position of influence' enjoyed by the defamer and the consequent extent and weight of the circulation of the defamation."112 The damages should then be commensurate with the character of the language used,113 but a judgment may also take into consideration the ability of the defendant to pay.114

Subjective as they may be, the respect, integrity, and reputation of the plaintiff, developed through the pleadings and the evidence, and accepted as commensurate with his station in life, are evaluated by the trier of fact with a view to balanc-

109. Guice v. Harvey, 14 La. 198, 202 (1839). This statement and those in the cases cited in note 110 infra make it difficult to understand how the author of Note, 32 Tul. L. Rev. 135 (1957), can adhere to the position that, "the injured party is entitled only to such damages as he can prove." Id. at 136.
114. Lorentz v. Thiesen, 140 La. 663, 668-69, 73 So. 717, 719 (1917).
ing the effect both present and future on the wronged party's life caused by the defamation. Though the courts find favor in such language as, "in view of all the circumstances, we find $XX to be a fair award," or "from our review of the record, we find no abuse of the trial judge's discretion in awarding $YY damages and affirm this as a just award," some additional insight into the reasoning of the court may be found.\textsuperscript{115} The tendency of the evidence to show that a person was highly respected in the community or that his general reputation was impeccable, or that he possessed unusual ability in his calling, or was a man of unquestioned integrity might lead one to suggest that the court's human and judicial experience as a "reasonable man" is the fire in which an award of damages is forged.

Undoubtedly the fact that the person is a professional man\textsuperscript{116} or a business personality\textsuperscript{117} carries great weight. Similarly the relative unreasonableness of the defamer must be noted—the concept of punishing the "bad man" cannot be overlooked.\textsuperscript{118} Even though communication to one other person is enough, the size of the audience and their individual or collective relationship to the person defamed must carry some weight.\textsuperscript{119}

Many reasonable criteria could be included in the catalog

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\textsuperscript{115} This writer makes no attempt to exhaust the many close factual situations that have influenced the courts' discretion in making defamation awards. It is hoped that no great injustice will be done this area simply by relying on the courts' sweeping statements as to discretion and announcements of general principles that have a bearing on the body of the law.

One of the most interesting cases that turns on a narrow factual point concerns a physician who was a member of a medical society which condemned advertising for physicians and who himself was opposed to advertising in any form. A newspaper published an article praising the physician's great skill after he had cured a young woman afflicted with a very serious disease. In a suit for libel, based on the policy of his medical society and his own personal convictions, though the statement was complimentary to plaintiff and though the words themselves were not actionable, the physician alleged that because of the feeling against advertising among regular physicians and the fact that doctors who resort to it are looked upon by the regular practitioners and the public with contempt, he was thereby lowered in the esteem of his friends and his business was injured. The Louisiana Supreme Court held that the physician's petition stated a good cause of action. Martin v. The Picayune, 115 La. 979, 40 So. 376 (1906).


\textsuperscript{117} Central Improvement & Contracting Co. v. Grasser Contracting Co., 119 La. 263, 44 So. 10 (1907) (contractor); Scortino v. Batt, 164 So. 136 (La. App. 4th Cir. 1936), writ refused, 245 La. 720, 167 So.2d 320 (1964) (real estate agent).


\textsuperscript{119} See cases cited in note 52 \textit{supra}.
and yet no absolute rules could be deduced. It can be said with reasonable certainty, however, that if the overall effect of the event—viewed as to parties, place and reasonableness—is such that would cause a reasonable, prudent man to believe that such effect tends to injure plaintiff's reputation, plaintiff will recover damages sufficient to soothe his suffering and impress upon the defendant that he stepped beyond the bounds of reason and decency. Though the key element of the tort is resultant injury, with a view to the discretion, reasonable experience and the absence of requiring proof of actual damages, it seems the real test is the tendency of the total event to injure the existing reputation of the plaintiff. This is borne out from a procedural standpoint in that plaintiff need not produce witnesses that will testify as to their degree of esteem for plaintiff prior to the remarks at issue and their consequent lessened esteem for him afterwards. Although as pointed out earlier, an introduction of evidence by defendant that no one took the remarks seriously or gave them any second thought will indeed act in mitigation of damages.

LOUISIANA'S BORROWED CONFUSION:
THE "PER SE" SUFFIX

The difficulties encountered by the common law in the use of the per se suffix in two separate connotations120 have not been without a Louisiana counterpart. An examination of the Louisiana cases will show a similar and equally respectable confusion. In Louisiana the terminology "slanderous per se" was originally used to designate words which carried their defamatory meaning on their face—the same as the term "slanderous per se" was correctly employed at common law.121 In such cases, actual malice did not have to be shown. This, however, was not in any way an adoption of the technical common law classifications. The cases as early as 1891122 correctly employed this

120. See text at notes 22-26 supra. See also McCormick, DAMAGES § 113 (1955); Eldredge, The Spurious Rule of Libel Per Quod, 79 Harv. L. Rev. 733 (1966); Prosser, More Libel Per Quod, 79 Harv. L. Rev. 1629 (1966); Prosser, Libel Per Quod, 46 Va. L. Rev. 339 (1960); Carpenter, Libel Per Se in California and Some Other States, 17 So. Calif. L. Rev. 347 (1944).
121. See text at notes 22-31 supra.
122. Savoie v. Scanlan, 43 La. Ann. 967, 9 So. 916 (1891). Much earlier in Kernan v. Chamberlin, 5 Rob. 116, 117 (La. 1843), the court simply used the term "actionable words" to mean words determined to be slanderous—meaning that if slanderous, they were actionable. It went no further and should not therefore be confused and construed to mean "actionable per se." Accord, Cauchoix v. Dupuy, 3 La. 206 (1831).
terminology by holding that malice might be inferred from the nature of the charge made; where words were clearly defamatory, malice would be presumed, whereas if they merely created extrinsic defamatory effects, the malice must not be presumed. This was later shortened to the holding that the law presumes malice where slanderous words are used. But slanderous as used in this latter sense evidently meant slanderous on their face because the same cases were cited to support the statement as had supported the term slanderous per se when it was explained to mean "on its face."

In most instances the Louisiana courts have adhered to this principle, but at times have interchanged the terms "slanderous per se" and "actionable per se," the latter meaning those words which the common law has traditionally said require no proof of damage, giving the misleading impression that Louisiana embraces the common law distinction between cases in which damage is presumed and those where special damage must be shown.

Another example of confusing terminology is found in Tuyes v. Chambers, in which the court found that plaintiff's demand fell into the class of cases requiring proof of special damage and that the language complained of would, "when made orally, give rise to special damages, which must be alleged and proven," but which if written, "become actionable per se."

In support of this the court cites six common law decisions, but none of the Louisiana jurisprudence which refuses to make the written-oral distinction.

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126. Madison v. Bolton, 234 La. 997, 102 So. 2d 433 (1958), affords an example of erroneous interchange of the elusive "per se" terms. The court stated, "Words not actionable per se are actionable only in consequence of extrinsic facts." Id. at 1011, rather than correctly stating "Words not slanderous per se."
127. 144 La. 723, 81 So. 265 (1919).
128. Id. at 729, 81 So. 265, 267 (1919).
129. In Santana v. Item Co., 192 La. 819, 831, 189 So. 442, 446 (1939), the court found the publication "did not inflict that species of injury which results from the very nature of the words or writing," from which 'the law presumes injury.' Plaintiff is therefore entitled to only such special damages as he alleged and proved.

But in Johnson v. Crow, 158 So. 857 (La. App. 2d Cir. 1935), when the
In *Fitzpatrick v. Zedaird Realty Co.*, 18 where calling a person a "dirty old man, a liar, and a thief" was deemed slander *per se*, it is hard to say in what way the court was using the term. The question was whether the words were slander; and the court answered it by saying they were slanderous *per se*. Apparently the court meant that the words themselves were patently slanderous. The question in no way dealt with classification of words already deemed slanderous as either "actionable *per se*" or, though "slanderous in tendency,"181 requiring proof of special damage. Since it was an initial determination of whether words were slander or not, and not an attempt to characterize them as to type of slander, it is submitted that the court used slanderous *per se* to denote that they carried their meaning on their face.182

A case demonstrating the confusion of the slanderous *per se* and actionable *per se* doctrines is *Martin v. Markley*, 183 where the Louisiana Supreme Court correctly stated:

"To ascertain whether the writing in the instant case is libelous *per se*,"184 examination must be made of the charges uttered by the defendant with a view to whether they may be regarded as defamatory without the aid of extrinsic proof—that is to say, whether the statements made are susceptible of but one meaning."185

The confusion is shown when the court also stated:

court talks about libelous *per se* it states, id. at 569, "it is not necessary to prove special or pecuniary damage," and does not restrict this to any special words, but states this as true of all defamation. The particular situation involved was a charge of theft, which was included at common law in its special classes of slander. This fact might suggest that the statement concerning an absence of necessity of proving special damages applied only to charges of theft; but upon careful reading, neither the opinion nor the civil law theory it deals with puts such a limitation on the theory.

130. 10 La. App. 306, 121 So. 680 (Orl. Cir. 1929).
132. In *James v. FDIC*, 231 F. Supp. 475 (W.D. La. 1964), the court said, id. at 479: "The necessary premise that the statements are defamatory *per se* is missing here." When this is read in context, the court was talking about whether the words themselves were defamatory at all, so as to attach the presumption of falsity and malice, but concluded that the statement could not be so classified because the "necessary premise" that the words are in fact defamatory was missing. However, the terminology employed was not the clearest possible.
133. 202 La. 291, 11 So.2d 593 (1942).
134. Since all libel in Louisiana is actionable without showing anything more than its publication, this must not mean libel "actionable *per se*." See *Upton v. Times-Democrat Publishing Co.*, 104 La. 141, 29 So. 970 (1900).
"If it is libelous per se, the law presumes it was false and malicious ... On the other hand, if the writing is actionable per quod. . . ." 186

Thus the court incorrectly compares the idea of being defamatory without aid of extrinsic proof with the characterization of actionability. These are clearly non-comparable. Perhaps the court was simply careless with its language, although in support of its statement on actionability it cites a common law authority. 187

An example at the appellate level is Giordano v. Tullier. 188 The opinion states: "Proof of actual malice is not necessary if the words are actionable per se." 189 To support this the Fourth Circuit cites Cadro v. Plaquemines Gazette 190 and Costonio v. Guglielmo. 191 In Cadro there is absolutely no mention of words being actionable per se. The second case cited is only authority for the fact that actual malice is not necessary to sustain an action for libel because the actionable per se / actionable per quod distinction does not apply to libel. 192 This was true at common law, but such fact adds nothing to Louisiana's position since our courts have already refused to distinguish between oral and written defamation. 193

This use of the same words to mean different things and different words to mean the same thing demands that the researcher in the area of the Louisiana law of defamation keep in mind the proper separation of the two uses of the per se suffix to avoid being misled into thinking that the common law technicalities are finding an inroad into our law. 194 Confusing phrases in briefs and opinions only hinder the ready understanding of our law; they do not change the law itself.

136. Id.
137. Cited was 33 Am. Jur. Libel and Slander §§ 242, 266 and 274. See also Wiel v. Israel, 42 La. Ann. 985, 8 So. 626 (1890), citing ODGERS, SLANDER AND LIBEL (1st Am. ed. 1881), an English common law hornbook.
138. 139 So.2d 15 (La. App. 4th Cir. 1962).
139. Id. at 20. But see text at note 121 supra.
140. 202 La. 1, 11 So.2d 10 (1942).
141. 176 La. 421, 146 So. 11 (1933).
142. See notes 12-15 supra and accompanying text.
143. See notes 38, 93 supra and accompanying text.
144. Undoubtedly the common law has influenced Louisiana in that our courts have no trouble finding injury and adopting the strong common law presumption in charges of crime, loathsome disease, and unchastity. The difference is that Louisiana's presumption of injury extends to other charges as well, and does not admit of rigid limitations.
Relative to defamation concerning radio and television, Louisiana has statutorily discarded one of the major concepts which distinguishes our defamation law from the traditional common law position.\textsuperscript{146} In this area there has been a new requirement placed on libel.\textsuperscript{146} Statutory surgery on the common law concept of libel as applied to radio and television has long been the goal of the National Association of Broadcasters. Since television programs, and, in some instances, radio programs, because of the use of a script, are treated as libel,\textsuperscript{147} they have been generally governed by the law of libel. The Association is seeking to change the law governing radio and television defamation from the common law position that no proof of actual damage is required in libel causes of action.\textsuperscript{148} Their reason for this is to make recovery against members of their interest group more difficult and limited to actual damage proven. Their chief argument is that such provision facilitates the work of the courts by eliminating the need to distinguish between libel and slander on radio and television, a problem which has given the courts and legal scholars a great deal of trouble.\textsuperscript{149} With their proposed uniform statute, radio or television defamation would become in reality a new tort. Whether it took the form of libel or slander, it would receive the same treatment and, even though most often called libel, would not partake of the normal libel rules on the damage issue.

Louisiana is one of sixteen\textsuperscript{150} states which have enacted the model statute or a similar statute embodying its provisions.\textsuperscript{151}

\textsuperscript{145} See LA. R.S. 45:1351-1354 (1950).
\textsuperscript{146} Radio and television defamation is most commonly classified as libel, although there is much controversy over this question.
\textsuperscript{147} See Harum, \textit{Remolding of Common Law Defamation}, 49 A.B.A.J. 149 (1963), for an excellent article on the present state of the law of defamation in its relationship to radio and television, and the National Association of Broadcasters' move for statutes and changes in the law.
\textsuperscript{148} See note 16 supra and accompanying text.
\textsuperscript{150} Alabama, Arizona, California, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Nebraska, Oklahoma, Oregon, Utah, and Wyoming.
\textsuperscript{151} LA. R.S. 45:1353 (1950): "In any action against any owner, licensee or operator, or the agents or employees of any owner, licensee or operator, of a visual or sound radio broadcasting station or network of stations for
The anomaly of this reasoning of the Association when applied to the existing jurisprudence of Louisiana is that the statute will not facilitate the Louisiana courts' task of distinguishing between libel and slander over the video or audio waves because such a distinction is not made in Louisiana. Since in Louisiana defamation is actionable without proof of special damages, there is no need for a distinction in the treatment of libel and slander. All defamation carries the same liability provisions. However, the new statute carves out a segment of the law of defamation and imposes the notion of actual damages on it.

While the Association achieved its lobby purpose, it seems that Louisiana's defamation law was not aided by adoption of the statute. In fact it can result in two different standards being applied to the same occurrence. Suppose A, not an employee of the station or network, defames B over the air. In an action by B against A for defamation, proof of actual damages would not be necessary as this would be an action based on articles 2315 and 1934(3) of the Civil Code. But if B were to sue the management of the radio station under the radio-television defamation provisions in the Revised Statutes, he would have to prove actual damages and would be able to recover only such damages as he did prove. This would affect the concept of joint tortfeasors and suggests additional problems for a wronged plaintiff in bringing his action.

Any problems envisioned concerning the actual operation of the statute in such a case, however, are purely speculative, as there is no record of any litigation invoking this statutory provision since its adoption in 1950.

**THE FUTURE: THE "NEW YORK TIMES RULE"**

The Supreme Court of the United States has virtually rewritten liability requirements pertaining to words affecting a person in public office—that is the new “public official”

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152. See note 93 supra.  

There may no longer be recovery of damages by a public official "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The application of the principle seems to be an expanding and not a restricting one, applying to appointed as well as elected officials, and to candidates for office as well as incumbents. Garrison further made it clear that the rule of New York Times "is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed." Further, in Pauling v. News Syndicate, Inc., the plaintiff, a private citizen, sued defendant for alleged libelous statements contained in a newspaper published by it. On appeal, the court, in affirming a jury verdict for the defendant, discussed (in dictum) the effect of the Times case:

"Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in the principle the [N.Y. Times] decision can be so limited."

The court suggested an extension to "the participant in public debate on an issue of grave public concern. This is the same extension doctrine that appears in Walker v. Courier-Journal & Louisville Times Co. Though the trend of extension seems

\[\begin{align*}
154. & \quad 376 \text{ U.S.} 254 (1964). \\
155. & \quad 379 \text{ U.S.} 64 (1964). \\
156. & \quad 376 \text{ U.S.} 254, 279-80 (1964). \quad \text{In the Garrison case the Court stated that the rule of the Times case "is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed." Id. at 77 (1964).}
\end{align*}\]
well established, some courts have shown alarm at the idea of the uninhibited debate on public issues guaranteed by the first amendment being "turned into an open season to shoot down the good name of any man who happens to be a public servant," even though "public men are, as it were, public property." Then the Supreme Court announced:

"We are treating here only the element of public position, since that is all that has been argued and briefed. We intimate no view whatever whether there are other bases for applying the New York Times standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern."

In its latest pronouncement the Supreme Court clearly stated that which could be inferred from the quotation above and which has been held by many lower courts.

"We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

Louisiana courts have recently done battle with the public official or public figure doctrine in Thompson v. St. Amant and Walker v. Associated Press. In Thompson the Louisiana Supreme Court finally found actual malice under the "New

168. 250 La. 405, 186 So.2d 255 (1967).
169. 191 So.2d 727 (La. App. 2d Cir. 1966), writ granted, 250 La. 102, 194 So.2d 99 (1967).
York Times Rule," overruled the court of appeal's decision and held for the plaintiff. However, the trial court, court of appeal, and Supreme Court agreed that the plaintiff, a deputy sheriff, was a public official. But the Louisiana Supreme Court pointed out that simply because a person is technically a "public official" under state law, it does not follow that the "New York Times Rule" applies.

"The real test is whether the official has, or appears to the public to have, 'substantial responsibility for or control over the conduct of governmental affairs.'" This was the same test announced by the United States Supreme Court in Rosenblatt v. Baer.

In the Walker case, retired general Edwin A. Walker was held to be a public figure within the "New York Times Rule" by both the trial court and the court of appeal, and actual malice was found, but the court of appeal reduced the damages awarded him from $2,250,000 to $75,000. After the Louisiana Supreme Court granted writs on the case, the United States Supreme Court, hearing an appeal from a judgment for Walker in the Texas courts based on the same occurrence, held that the New York Times standard for malice had not been met when applied to the actions of the Associated Press. The Associated Press petitioned the Supreme Court to summarily reverse the decision in the Louisiana case as being in direct conflict with this Supreme Court decision and the Supreme Court directed Louisiana courts to proceed in a manner not inconsistent with its decision in the Texas version of the case.

Apparently, the law of defamation will undergo a significant change if the indicated extensions are fully exploited.

170. 184 So.2d 314 (La. App. 1st Cir. 1966), holding that the remarks were not made with reckless disregard of whether they were false or not. See also The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Torts, 27 LA. L. REV. 479 (1967).

173. 250 La. 102, 194 So.2d 99 (1967).
CONCLUSION

Any segment of the law of defamation—the historical accident of its origin, the policy notions that have molded it, its infiltration by news media, or speculation as to its future—makes an interesting field of study to which many pages of exposition could alone be devoted. For this reason, it is impossible to offer in the preceding pages more than a compendium of this tort.

Although the United States Supreme Court has sown the seeds of change, beginning with malice and public officials, and now cultivated them with the general concept of public figure, the extent of the harvest is yet unclear. In other areas of the law of defamation, the common law states remain reluctant to do more than slip away but slightly from the older English rules, and no uniform proposals of reform can be agreed on. Louisiana continues to reject the necessity of proof of special damages as a condition of liability, believing that flexibility can be accommodated by so doing, and has rather successfully demonstrated this to be true over the years.

The debate over radio and television defamation will undoubtedly continue, but the National Association of Broadcasters is proving to be a powerful and effective lobby, even bringing an avenue for change into Louisiana's general position in this area. Similarly, other distinct torts are being carved from the once all-encompassing sphere of defamation—such torts as invasion of the right of privacy and injurious falsehood are more adequately handling many of the problems once forced under "defamation."

The future of defamation is indeed uncertain, as has been its past. But it is an area of immense importance, and will remain a fertile area of litigation.

John T. Cox, Jr.

176. See PROSSER, TORTS § 107 (3d ed. 1964), for a discussion of the major reform proposals and the factors impeding them.

177. PROSSER, TORTS § 112 (3d ed. 1964): "The privacy cases go considerably beyond the narrow limits of defamation and no doubt have succeeded in affording a needed remedy in a good many instances not covered by the other tort."

See also Wade, Defamation and the Right of Privacy, 15 VAND. L. REV. 1093 (1962).