

# **Defamation is no longer a "rich man's tort,"— but neither has it become the poor person's surefire lottery ticket.**

*By Nicholas Carroll, April 30, 2019.*

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Twenty years ago, emotional distress was not a primary component of damages in defamation cases. Emotional distress damages were usually awarded as a bonus to quantifiable damages claims, such as lost wages or business revenue. Jury verdicts from the early 2000s appear to reflect few punitive damages awards – and in those awards, the defendants engaged in malicious behavior, such as workplace vendettas against plaintiffs, sexual harassment and vulgarity toward plaintiffs, false reports made to plaintiffs’ employers, and public humiliation of plaintiffs by falsely arresting them.

Today, in the era of the Me Too movement and widespread impact of social media trolling and cyberbullying, emotional distress can be a primary component of damages. This surfaced in a case reported in the *Washington Post* in 2015 about an anesthesiologist whom the jury determined had defamed a patient while he was sedated in the process of a colonoscopy. Damages totaled \$500,000, including \$200,000 in punitive damages. According to the [Post’s interviews with jurors](#), one juror initially voted for zero damages. However, as another member of the jury told the reporter, “We finally came to a conclusion that we have to give him something, just to make sure that this doesn’t happen again.”

This article highlights two parts of proving emotional distress damages in defamation cases: (1) how to establish the existence of such damages and (2) how to tie them into additional economic damages. In addition, this article addresses defenses that can be raised.

## **Establishing the Existence of Emotional Distress Damages**

Some common sources of evidence to establish emotional distress in defamation cases include psychiatrists’ or psychologists’ reports, medications, emergency room (ER) visits and/or hospitalizations, plaintiff-side testimony, and the defamation itself.

A psychiatrist’s or psychologist’s report is the anchor for an emotional distress claim if the report clearly states that the plaintiff’s emotional distress stems from defamation. Many defamation victims become agitated, rambling, repetitive, or even obsessed with the attacks on their reputation. Unfortunately, many victims refuse to seek mental help, preferring to tough it out.

In addition, medication prescriptions (e.g., Xanax, Valium) by psychiatrists, as opposed to other medical doctors or urgent-care doctors, are strong evidence of emotional distress.

ER visits or hospitalizations for panic attacks, strokes, or temporary amnesia are also helpful in establishing emotional distress; this evidence is not uncommon in defamation cases.

Another type of evidence for an emotional distress claim is plaintiff-side testimony. Testimony by the defamation plaintiff may be questioned because the exact symptoms that indicate emotional distress – abnormal and irrational behavior – can also make the plaintiff look like a “kook.” It takes time to appreciate how unhinged people can become when they are defamed, and a jury is not likely to have the time or insight to understand that the plaintiff may have been a calm, normal human before the defamation began. Testimony from family, friends, coworkers, and business partners, on the other hand, can be more effective. They may credibly describe the before-and-after mental state and behavior of the plaintiff.

Finally, the defamation itself can be powerful evidence for an emotional distress claim. Some allegations are so heinous that any reasonable person would accept that they are inherently distressful. “Child molester,” “sexual predator,” and “racist” are hot-button accusations. Perhaps little more is needed to demonstrate the emotional distress caused by this kind of defamation.

## **Rebutting the Existence of Emotional Distress Damages**

The reports and opinions of mental health professionals may be difficult to rebut. Even if they have no experience in testifying, these professionals are used to writing accurate reports and may even memorize them before testifying. And psychiatrists will surely stand behind any drug prescriptions they have made; their medical licenses depend on it. However, defamation cases often require expertise and credentials specific to emotional distress beyond generalized mental health. Moreover, the expert must credibly connect the emotional distress to the defamation without gaps in the chain of causation. Emergency room and hospital admittance reports can be inconclusive. Was defamation the triggering event? Perhaps a panic attack arose from family stresses. Perhaps a heart attack followed years of arterial plaque buildup. Perhaps a post-traumatic stress disorder event stemmed from pre-defamation incidents of violence or physical threats.

Testimony by the plaintiff, family, and friends should be subjected to typical cross-examination into areas of bias and credibility.

## **Tying Emotional Distress to Economic Damages**

It may not be readily apparent, but emotional distress from defamation can actually cause economic damages.

Consider, for example, the brain surgeon needing to take a sabbatical because of emotional distress caused by defamation. Nobody would want a distressed surgeon wielding a scalpel inside his or her skull. Consider the performance impact in other jobs: the contract attorney who starts making mistakes in writing contracts, a symphony conductor slipping up on the podium, a baseball player going into a slump, an airplane pilot misjudging a landing. These are all measurable damages.

Aside from direct performance impact, mental health treatment and medications taken in response to defamation can lead to economic damages. Lost workdays, unproductive workdays,

and termination – say, due to testing positive for drug use – are also measurable damages. When medications create a conflict between job performance and outright job loss – notably for people with security clearances – one might argue that the defamation plaintiffs are “damned if they do and damned if they don’t.”

## **Disconnecting Emotional Distress from Economic Damages**

The best way to refute any link between emotional distress and economic damages is to disconnect the defamation from the damages altogether. Regardless of the type of damages, defamation must cause, or be a substantial factor in causing, damages. For some “libel-proof” plaintiffs with already damaged reputations, the defamation may be largely irrelevant. A jury may end up awarding \$1 in damages, simply on principle.

Even if emotional damages exist and the defamation caused them, secondary economic damages can be challenged on their merits. A defamation plaintiff may have no record of earnings, such as the owner of a brand-new restaurant or a first-time chef with no previous history of success. In these instances, the burden may fall back onto the plaintiff, under the aging “new business rule,” the “modern new business rule,” or other theories.

## **Conclusion**

It is hard to predict whether we will see a growth in defamation cases with emotional distress damages. So far, there are not enough cases to shout “TRENDING!” with confidence, much less in capital letters. However, lawsuits over emotional distress caused by online defamation, cyberbullying, and sexual harassment and assault could change that situation fast. Likewise, with advances in medical science (think neurobiology) and technology, we might be able to more easily show the connection between defamation and emotional distress.

At some point, emotional distress due to defamation may no longer be something that “happens to other people.” It may be something that can happen to anyone who becomes the target of a vengeful spouse, disgruntled customer, jealous boss, unhinged competitor, or a social media feeding frenzy. In other words, it may eventually be a common primary component of damages in defamation-of-character cases.

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