

8.46 DEFAMATION DAMAGES (PRIVATE OR PUBLIC)
(06/2014)

NOTE TO JUDGE

Constitutional developments in the defamation area have had a considerable impact on the scope and availability of damages in a defamation action. Damages issues will ordinarily arise in two basic contexts: (1) when the speech is of public concern and the plaintiff is a public official, public figure, or a private person as these terms are defined in the case law; and (2) when the speech is of exclusively private concern and the plaintiff is a private figure. The attached instructions on damages have been drafted to reflect the current status of the law as it affects both categories. In the accompanying explanatory footnotes, the Committee sets out the modifications which should be made, in view of the still evolving constitutional dimensions of defamation, when cases fall within either of the two categories.

A. Damages — General Instructions

For the injury to reputation caused by [defendant's] alleged defamatory statement, [plaintiff] seeks to recover both compensatory and punitive damages. Compensatory damages are sought by [plaintiff] for recovery of the money value of his/her loss(es). Punitive damages are sought to punish [defendant] for the wrongful act by imposing a further award to [plaintiff] over and above the

amount of [his/her] loss.¹ I will first explain the law on compensatory damages and then the law on punitive damages.

If [plaintiff] has established the essential elements of his/her claim as explained in these instructions, he/she is entitled to compensatory damages for all the detrimental effects of a defamatory statement relating to [plaintiff's] reputation which were reasonably to be foreseen and which are the direct and natural result of the defamatory statement. Damages awarded for such purposes are compensatory.²

Cases:

King v. Patterson, 49 N.J.L. 417, 432 (E. & A. 1887); *Bock v. Plainfield Courier-News*, 45 N.J. Super. 302, 309 (App. Div. 1957); *Devitt, Blackmar and Wolff*, *Federal Jury Practice and Instructions* sec. 84.05 (4th ed. 1987).

¹ Where punitive damages are not being sought, the first paragraph should be appropriately modified to delete any references to punitive damages.

² Compensatory damages are further classified in defamation law as general damages and actual damages. The subcommittee feels that these should, wherever possible, be generally referred to as compensatory damages for ease of understanding by the jury. However it is critical for the judge to recognize that the Supreme Court in *Rocci v. Ecole Secondaire*, 165 N.J. 149 (2000), states that in defamation actions by a public or private citizen regarding a matter of public interest or concern the plaintiff must prove actual damages (general damages for slander *per se* or libel will not be presumed) The doctrine of whether presumed damages should apply to claims made by a private figure plaintiff where no public interest is implicated was answered in the affirmative by the Supreme Court in the case of *W.J.A. v. D.A.*, 210 N.J. 229 (2012)

B. Compensatory Damages (Actual Damages)³

[Plaintiff] seeks compensatory damages for particular material, economic or financial losses suffered directly by him/her as the proximate result of the injury to the his/her reputation caused by the defamation. These compensatory damages are sometimes referred to as special damages. These damages are never presumed; they must be specified by [plaintiff] and proved by the evidence. [Plaintiff] must show you what the special loss was and by what sequence of connected events it was produced by the defamation. [Plaintiff] can recover these damages only if you determine that [defendant's] conduct was a substantial factor in causing [plaintiff's] material, economic or financial losses. Evidence of embarrassment, mental suffering or physical sickness will not, without more, entitle [plaintiff] to these damages.

Here, [plaintiff] claims that he/she suffered certain specific damage as a result of the (publication) (making) of the defamatory statement. I shall now outline the specific damages claimed by [plaintiff].

³ These instructions should only be given when the plaintiff has properly asserted special damages.

[Here the trial judge should outline the claimed actual damage and discuss, if appropriate, the parties' respective contentions concerning the evidence.]

C. Compensatory Damages — Emotional Suffering (In conjunction with actual damages)

The foundation of an action for defamation is the injury to reputation. Hence, any award you choose to make as part of the compensation to plaintiff may only be to redress consequences which followed from injury to [plaintiff's] reputation. In connection with [plaintiff's] claimed emotional distress, I instruct you that he/she may be compensated by you for such ill effects only if you find that he/she experienced them because of the actual damage done to his/her reputation. If you find that his/her emotional suffering was caused only by his/her having (read the libel) (heard the slander), and not by the publication's impact upon his/her reputation, you may not consider such suffering in arriving at the amount of damages you choose to award [plaintiff].

Cases:

Cole v. Richards, 108 N.J.L. 356, 357 (E. & A. 1932); *Arturi v. Tiebe*, 73 N.J. Super. 217, 222-23 (App. Div. 1962).

D. Compensatory Damages (Nominal Damages for Slander *Per Se* or Libel)⁴

In the event you find the Plaintiff is not entitled to actual damages, [plaintiff] claims was caused by [defendant's] wrongful act,⁵ [plaintiff] seeks recovery for nominal damages which the law presumes to follow naturally and necessarily from the (publication of a libel) (utterance of a slander *per se*) and which are recoverable by [plaintiff] without proof of causation and without proof of actual injury. The law recognizes that damage to reputation caused by defamation may not always lend itself to proof by objective evidence. An

⁴ Slander *per se* is defined as words that are slanderous in themselves without proof of actual damages. For example, if an utterance charges (a) the commission of a crime, (b) imputes some offensive or loathsome disease that would tend to deprive a person of society, (c) matters incompatible with business, trade, profession, or office, or (d) charges serious sexual misconduct. *Restatement (Second) of Torts*, Section 570 (1976). The continuing availability of general or presumed damages in *any* defamation case for injury to reputation has been called into question by *Rocci v. Ecole Secondaire, supra*.

The language in *Rocci* appears to refer only to cases involving matters of public concern or public interest, which was the situation in *Sisler*, rather than to private person/ private concern defamation cases. See *Sisler v. Gannett Co., supra* at 280 n. 5, where the New Jersey Supreme Court appears to adopt the plurality opinion in *Dunn and Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-62, 105 S.Ct. 2939, 2944-46, 86 L.Ed. 593, 604 (1985) (in private person/private concern defamation actions, presumed and punitive damages may be awarded without necessity to show “actual malice,” *i.e.*, knowledge of falsity or reckless disregard of truth). However, clarification of this issue must await further decisional law as stated in *Rocci v. Ecole Secondaire, supra*. “In situations where the actual malice standard applies, a defamation plaintiff cannot rely on the doctrine of presumed damages absent a finding that the defendant published a statement with knowledge that it was false and with reckless disregard of whether it was false or not,” quoting *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

⁵ Do not charge this portion of first sentence if special damages have not been claimed.

opportunity may be closed to the person without his/her knowledge. Damage to character or reputation could occur without the person knowing of the libel or slander. A person's business or professional career may be limited by the operation of forces which the person cannot identify but which, nevertheless, were set in motion by the defamatory statement. In fact, it has been said the damages which are presumed from the (publication) (statement) of defamatory material, while not capable of being accurately measured, are, in many ways, more substantial and real than those which can be proved and measured accurately by the dollar standard. For these reasons, you are permitted to award nominal damages to compensate [plaintiff] for injury to reputation which you reasonably believe he/she sustained. Nominal damages are a small amount of money damages that are not designed to compensate a plaintiff but are awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage.⁶

E. Punitive Damages (For Defamation Actions Filed On OR Before 10/26/95)⁷ (Approved 1/97)

⁶ W.J.A. v. D.A., 210 N.J. 229,240-41 (2012)

⁷ The *Punitive Damages Act*, N.J.S.A. 2A:15-5.1 *et seq.* applies to all causes of action filed on or after October 27, 1995. See 3.11C, Section 6 for punitive damages claims in defamation

If you find [defendant] has *[insert a description of the specific defamatory conduct giving rise to a claim for punitive damages]*, you must consider whether to award punitive damages to [plaintiff]. Punitive damages are awarded as a punishment of [defendant]. [Plaintiff] is not automatically entitled to punitive damages simply because you have found that [defendant] has *[insert a description of the specific defamatory conduct giving rise to a claim for punitive damages]* or because you have awarded actual damages to compensate [plaintiff] for his/her losses.⁸

The purposes of punitive damages are different from the purposes of compensatory damages. Compensatory damages are intended to compensate a plaintiff for the actual injury or loss that plaintiff suffered as a result of a

actions filed on or after October 27, 1995. On the effective date of the *Punitive Damages Act*, see **NOTE TO JUDGE** in Model Civil Charge 8.60 “Damages—Punitive.”

The Committee notes that the Supreme Court of the United States has held that the common law method for assessing punitive damages is not *per se* unconstitutional. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed. 2d 1 (1991). See also, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (upholding the constitutionality of a punitive damage award 526 times as large as the actual damages). On bifurcation of the jury’s consideration of compensatory and punitive damages in a defamation action, see **NOTE TO JUDGE** in Model Civil Charge 8.60 “Damages — Punitive.”

⁸ The common law term “malice” applies to punitive damage proofs but it is confusing and potentially misleading in light of constitutional developments in the defamation area, *Dairy Stores, Inc. v. Sentinel Pub. Co.*, 104 N.J. 125, 150-51 (1986). Actual malice in defamation suits to prove actual compensatory damages is defined in *Pitts v. Newark Bd. of Educ.*, *supra*, as actual knowledge that the statement he is making is false or when he entertains serious doubts as to its truth (citing *Burke v. Deiner*, 97 N.J. 465, 481 (1984)).

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defendant's misconduct. In contrast, punitive damages are intended to punish a wrongdoer and to deter similar wrongful conduct in the future.⁹ Punitive damages are designed to require the wrongdoer to pay an amount of money that is sufficient to punish a defendant for particular conduct and to deter that defendant from misconduct in the future.¹⁰

I will now explain how you determine whether punitive damages should be awarded to [plaintiff] here.

[When the speech is of exclusively private concern and the plaintiff is a private figure, charge the following paragraph. In all other cases (e.g., where plaintiff is a public official or private figure and the speech at issue is of public concern), the following paragraph should be omitted.]

To support an award of punitive damages, you must find that [defendant] acted with ill-will or with a wrongful intent to injure [plaintiff].¹¹ In making this determination, consider whether [defendant] was motivated by an actual desire

⁹ *Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 48-49 (1984); *DiGiovanni v. Pessel*, 55 N.J. 188, 190-91 (1970).

¹⁰ The Appellate Division in the case of *Tarr v. Ciasulli*, 390 N.J. Super. 212, 224 (App. Div. 2007), *aff'd*, 194 N.J. 943 (2008) found that the *New Jersey Punitive Damages Act*, N.J.S.A. 2A:15-15-5.9, *et al.* does not permit counsel to urge the jury to increase a punitive damage award in order to enhance the general **deterrence of others**. Accordingly the language in the original charge which allowed punitive damages to be awarded as a “deterrence to others” was deleted.

¹¹ *Weir v. McEwan*, 94 N.J.L. 92, 109 A. 355 (1920); *Bock v. Plainfield Courier News*, 45 N.J. Super. 302 (App. Div. 1957).

to harm [plaintiff] or a calculated disregard of the consequences rather than from a desire to publish a statement that [defendant] honestly believed to be true. The mere act of (making) (publishing) the defamatory statement is not sufficient to justify an award of punitive damages. The evidence must establish ill feeling, personal hostility or spite, or an actual desire to hurt [plaintiff] without belief or without any reasonable grounds to believe in the truth of the defamatory statement.

[When plaintiff is a public official or private figure, and the speech at issue is of a public concern, the jury instructions on punitive damages should be modified at this point in two significant respects.

(1) The jury must be instructed that punitive damages can only be awarded if the plaintiff demonstrates that the defendant knew the statement to be false or acted in reckless disregard of its truth or falsity.¹²

(2) The jury must be instructed that plaintiff's burden of proof is "with convincing clarity" or by "clear and convincing evidence."¹³

These two modifications apply to non-media as well as to media defendants.]¹⁴

[TO BE INSTRUCTED IN ALL DEFAMATION CASES]

¹² *Burke v. Deiner*, supra at 477 n.2; *Vassallo v. Bell*, 221 N.J. Super. 347, 374 (App. Div. 1987); *Gertz v. Robert Welch, Inc.*, supra at 349-50.

¹³ *Lawrence v. Bauer Pub. & Print., Ltd.*, supra at 466, 468; *Burke v. Deiner*, supra at 481. See also *Dairy Stores, Inc. v. Sentinel Pub. Co.*, supra at 155.

¹⁴ *Dairy Stores, Inc. v. Sentinel Pub. Co.*, supra at 153. See also, *Turf Lawnmowers Repair v. Bergen Record Corp.*, 139 N.J. 392, 402-403 (1995).

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If you decide that [defendant] has engaged in the type of wrongdoing that justifies punitive damages, you must then decide the amount of punitive damages to be awarded. In determining that amount, you must consider all of the circumstances in this case, including (1) the nature of the wrongdoing; (2) the extent of the injury or harm inflicted by the wrongdoing; (3) the intent of the party committing the wrongdoing; (4) the financial condition or wealth of the [defendant] and [defendant's] ability to pay any award of punitive damages; and (5) the effect the judgment will have on [defendant].¹⁵ You may also consider any mitigating circumstances that you find may justify reduction of the amount of damages including any punishment [defendant] has received or will receive, from other sources for the same misconduct.¹⁶

Finally, there must be is a reasonable relationship between the actual injury and the punitive damages.¹⁷ Punitive damages may, however, be higher than, equal to, or lower than compensatory damages. Punitive damages may

¹⁵ *Leimgruber v. Claridge Associates, Ltd.*, 73 N.J. 450, 456 (1977). See also, *Herman v. Sunshine Chemical Specialities, Inc.*, *supra* at 345.

¹⁶ *Leimgruber v. Claridge Associates, Ltd.*, *supra* at 456.

¹⁷ *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 673 (1986).

also be awarded for wrongful conduct even if you do not award compensatory damages.¹⁸

After considering these factors, exercise your judgment and determine (1) whether punitive damages should be awarded and (2) if so, what the proper amount should be.

¹⁸ *Nappe v. Anshelewitz, Barr, Ansell & Bonella, supra* at 50.

F. Punitive Damages (For Defamation Actions Filed On OR After 10/27/95)¹⁹ (Approved 1/97)

NOTE TO JUDGE

This charge incorporates the statutory changes in *P. L. 1995, c. 142, N.J.S.A. 2A:15-5.9 et seq.*, the *Punitive Damages Act*, and should *only* be used for causes of action filed on or after October 27, 1995.²⁰ The *Punitive Damages Act* includes the following procedural requirements:

- (a) Punitive Damages must be specifically prayed for in the complaint.
- (b) Actions involving punitive damages shall, if requested by any defendant be conducted in a bifurcated trial. However, in light of *Herman v. Sunshine Chemical Specialties*, 133 N.J. 329, 342 (1993), the trial court should conduct a bifurcated trial on punitive damages even if the defendant has not made such a request. The statute also requires a bifurcated trial with the liability and damages phase of a punitive damage's action tried separately at the second stage of the bifurcated trial. Evidence relevant only to punitive damages shall not be admissible in the liability and compensatory damages phase. This differs from the manner in which punitive damages actions arising before the effective date of the Punitive Damages Act are tried. (See ***NOTE TO JUDGE*** in Model Civil Charge 8.60.)
- (c) Punitive damages may be awarded only if compensatory damages have been awarded. Nominal damages cannot support an award of punitive damages.

¹⁹ The Committee believes that the trial judge has discretion to decide whether to explain at the outset of a trial that there is a request for punitive damages. In any event, the trial judge should take into account the possible length of the bifurcated procedures in a punitive damage's action when discussing the trial days it will take to complete the case.

²⁰ On the effective date of the *Punitive Damages Act*, see ***NOTE TO JUDGE*** in Model Civil Charge 8.60 "Damages—Punitive."

- (d) When there are two or more defendants, an award of punitive damages must be specific as to each defendant and each defendant is liable only for the award made against him or her.
- (e) There is a cap on punitive damages — five times the amount of compensatory damages or \$350,000, whichever is greater. The jury shall not be informed that there is a cap on punitive damages.
- (f) Before entering judgment for punitive damages, the trial judge must ascertain whether the award is reasonable and justified in light of the purposes of punitive damages. The judge may reduce or eliminate the award if the judge considers that such action is necessary to satisfy the requirements of the statute. *N.J.S.A. 2A:15-5.14(a)*.

If you find that [defendant] has *[insert a description of the specific defamatory conduct giving rise to a claim for punitive damages]*, you must consider whether or not to award punitive damages to [plaintiff]. Punitive damages are awarded as a punishment of [defendant]. A plaintiff is not automatically entitled to punitive damages simply because you have found that a defendant has *[insert a description of the specific defamatory conduct giving rise to a claim for punitive damages]* or because you have awarded damages to compensate the plaintiff for his/her losses. You may award punitive damages only if the plaintiff has proven certain matters, as I explain to you.

The purposes of punitive damages are different from the purposes of compensatory damages. Compensatory damages are intended to compensate a plaintiff for the actual injury or loss plaintiff suffered as a result of the

defendant's misconduct. In contrast, punitive damages are intended to punish a wrongdoer and to deter the wrongdoer from similar wrongful conduct in the future.²¹ Punitive damages are designed to require the wrongdoer to pay an amount of money sufficient to punish him/her for particular conduct and to deter [defendant] from misconduct in the future.

I will now explain how you determine whether punitive damages will be awarded to [plaintiff]. To support an award of punitive damages you must find that [plaintiff] has proved, by clear and convincing evidence, that the harm suffered by him/her was the result of [defendant's] conduct²² and that either (1) [defendant's] conduct was malicious or (2) [defendant] acted in wanton and willful disregard of another's rights. Malicious conduct is intentional wrongdoing in the sense of an evil-minded act. Willful or wanton conduct is a deliberate act or omission with knowledge or a high degree of probability of harm to another who foreseeably might be harmed by [defendant's] acts or omissions and reckless indifference to the consequence of the acts or omissions.

²¹ *Nappe v. Anshelewitz, Barr, Ansell & Bonello, supra* at 48-49; *DiGiovanni v. Pessel, supra* at 190-91.

²² *N.J.S.A. 2A:15-5.12(a)*.

NOTE TO JUDGE

When the plaintiff is a public official or private figure, and the speech at issue is of a public concern, the jury instructions on punitive damages must contain the following:

- (1) The jury must be instructed that punitive damages can only be awarded if the plaintiff demonstrates that the defendant knew the statement to be false or acted in reckless disregard of its truth or falsity.²³
- (2) The jury must be instructed that plaintiff's burden of proof is "with convincing clarity" or by "clear and convincing evidence."²⁴

These two modifications apply to non-media as well as to media defendants.²⁵

Because the Punitive Damages Act now requires the "clear and convincing" standard of proof, the only significant modification for this category of cases is (1) above.

To prevail on this claim, [plaintiff] must prove certain factors by clear and convincing evidence to be awarded punitive damages. Clear and convincing evidence means that standard of evidence which leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. This

²³ *Burke v. Deiner*, supra at 477 n.2; *Vassallo v. Bell*, supra at 374; *Gertz v. Robert Welch, Inc.*, supra at 349-50.

²⁴ *Lawrence v. Bauer Pub. & Print., Ltd.*, supra at 466, 468; *Burke v. Deiner*, supra at 481. See also *Dairy Stores, Inc. v. Sentinel Pub. Co.*, supra at 155.

²⁵ *Dairy Stores, Inc. v. Sentinel Pub. Co.*, supra at 153. See also, *Turf Lawnmowers Repair v. Bergen Record Corp.*, supra at 402-403.

standard does not mean that the plaintiff must persuade you beyond a reasonable doubt, but it does require more than a preponderance of evidence.

In determining whether punitive damages are to be awarded, consider all relevant evidence, including but not limited to the following: (1) the likelihood, at the relevant time, that serious harm would arise from [defendant's] conduct; (2) [defendant's] awareness or reckless disregard of the likelihood that such serious harm would arise from [defendant's] conduct; (3) the conduct of [defendant] upon learning that its initial conduct would likely cause harm; and (4) the duration of the conduct or any concealment of that conduct by [defendant].²⁶

If you decide that the defendant has engaged in the type of wrongdoing that justifies punitive damages, you must then decide the amount of punitive damages that should be awarded. In determining that amount, you must consider all relevant evidence, including but not limited to, evidence of the four factors that I previously mentioned to you in connection with your determination as to whether punitive damages should be awarded at all. As you may recall,

²⁶ See *N.J.S.A.* 2A:15-5.12(b). Sec. 5.12(b) provides that the trier of fact must consider these four factors in determining whether punitive damages should be awarded. However, the trier of fact may consider additional factors since the four statutory factors are not intended to be exclusive.

these factors are (1) the likelihood, at the relevant time, that serious harm would arise from [defendant's] conduct; (2) the [defendant's] awareness or reckless disregard of the likelihood that such serious harm would arise from [defendant's] conduct; (3) the conduct of [defendant] upon learning that its initial conduct would likely cause harm; and (4) the duration of the conduct of any concealment of it by [defendant]. In addition to these factors, you should also consider the profitability of the misconduct to [defendant]; consider when the misconduct was terminated; and consider the financial condition of [defendant] or the [defendant's] ability to pay the punitive damages award.²⁷

Finally, there must be a reasonable relationship between the actual injury and the punitive damages.²⁸

After considering all these factors, exercise your judgment and determine (1) whether punitive damages should be awarded and (2), if so, what the proper amount should be.

²⁷See *N.J.S.A. 2A:15-5.12(c)*. Sec. 5.12(c) provides that the trier of fact must consider these factors in determining the amount of punitive damages that should be awarded. However, the trier of fact may consider additional factors, if appropriate, since the statutory factors are not intended to be exclusive. See, e.g., the factors in Model Civil Charge 8.60 (*i.e.*, nature of the wrongdoing; the extent of the harm inflicted by the wrongdoing, the intent of the defendant; or the effect of the judgment on the defendant). The trial judge should also instruct the jurors on any other aggravating or mitigating factors, if warranted by the evidence that may justify an increase or reduction in the amount of punitive damages. With regard to the “financial condition” factor, see *Herman v. Sunshine Chemical Specialities, Inc.*, *supra* at 345.

²⁸*Fischer v. Johns-Manville Corp.*, *supra* at 675.