

8.50 INVASION OF PRIVACY DAMAGES (01/2016)

NOTE TO JUDGE

A plaintiff who has established a cause of action for invasion of privacy is entitled to recover damages for (1) the harm to the plaintiff's interest in privacy resulting from the invasion; (2) mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and (3) any special damages that plaintiff can prove of which the invasion is a legal cause. *Restatement, Torts 2d*, § 652H (1977).

A. Damages — General Instructions

[Plaintiff] seeks to recover damages for the invasion of his/her privacy.

Damages are sought by [plaintiff] for recovery of the money value of his/her loss(es). I will now explain the law on compensatory damages.¹

If [plaintiff] has established the essential elements of his/her claim as explained in these instructions, (s)he is entitled to compensatory damages for all of the detrimental effects of the invasion of his/her privacy. In assessing damages you may consider and award damages to compensate [plaintiff] for (a) the harm to his/her interest in privacy resulting from the invasion; (b) his/her emotional distress proved to be suffered if it is of a kind that normally results from such an

¹ Where punitive damages are being sought, they should be addressed separately where appropriate. See subsection (F).

invasion and is reasonable in extent; and (c) actual damages caused by the invasion. Damages awarded for such purposes are compensatory.²

Cases:

Rumbauskas v. Cantor, 138 N.J. 173, 179 (1994) (citing *Canessa v. J.I. Kislak, Inc.*, 97 N.J. Super. 327 (Law. Div. 1967)); *Rumbauskas v. Cantor*, 266 N.J. Super. 399, 404 (App. Div. 1993), *judgment reversed by*, 138 N.J. 173 (1994) (citing *Restatement of Torts § 652H*); *Faber v. Condecor*, 195 N.J. Super. 81, 90-91 (App. Div. 1984); *Carleen v. TJX Companies*, 2009 WL 3081969 (App. Div. Sept. 17, 2009) at *2; *Restatement (Second) of Torts § 652H* (1977).

B. Compensatory Damages (Damages for Harm to Plaintiff's Privacy Interest)

[Plaintiff] seeks recovery for damages which the law presumes to follow naturally and necessarily from the invasion of privacy and which are recoverable by [plaintiff] without proof of causation and without proof of actual injury or

² Compensatory damages are further classified in defamation law as general damages and actual damages. The Committee 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). Because of the similarity between presumed damages in defamation cases and invasion of privacy cases, *see Rumbauskas v. Cantor*, 266 N.J. Super. 399, 404 (App. Div. 1993), *judgment reversed by*, 138 N.J. 173 (1994), it is the Committee's opinion that the standards applicable to defamation claims apply to invasion of privacy claims. *See, e.g., DeAngelis v. Hill*, 180 N.J. 1, 19 (2004) ("A false light claim against a public official, similar to a defamation claim, utilizes the actual malice standard").

pecuniary loss.³ The law recognizes that there may not always be direct evidence of the amount of damage caused by invasion of privacy or the amount of money that would compensate for the injury.⁴

Therefore, you are permitted to award nominal damages to compensate [plaintiff] for any injury to his/her privacy interest, which you have found (s)he sustained.⁵ Nominal damages are a small amount of money damages that are not

³ *Rumbauskas v. Cantor*, 266 N.J. Super. 399, 404 (App. Div. 1993), *judgment reversed by*, 138 N.J. 173 (1994) (citing *Restatement of Torts* § 652H); *Restatement (Second) of Torts* § 652H(a).

⁴ *Faber v. Condecor*, 195 N.J. Super. 81, 90-91 (App. Div. 1984) (citing *Fairfield v. American Photocopy Co.*, 291 P.2d 194, 198 (Ct.App. 1955)).

⁵ General damages for a *per se* invasion of privacy are akin to the general, or presumed, damages available for defamation *per se*. See, *Rumbauskas*, *supra*, 266 N.J. Super. at 404 (“Apart from the emotional reaction the individual plaintiff may or may not suffer from the intrusion, the harm to the plaintiff’s interest in privacy is itself a loss to be compensated in damages. Intrusion upon seclusion, like defamation *per se*, is actionable in the absence of proof of resulting special harm”) (citing *Hall v. Heavey*, 195 N.J. Super. 590, 594-95, 481 A.2d 294 (App. Div. 1984); *Restatement* §§ 69-70; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50, 94 S.Ct. 2997, 3011-12, 41 L.Ed.2d 789 (1974)).

The continuing availability of general or presumed damages in defamation cases for injury to reputation has been called into question by *Rocci v. Ecole Secondaire*, 165 N.J. 149 (2000). 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)).

designed to compensate a plaintiff for actual economic or noneconomic losses 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

No fixed standard exists for deciding the amount of nominal damages for invasion of privacy. You must use your judgment to decide a reasonable amount based on the evidence and your common sense. Among the factors you may consider are (a) the location of the alleged invasion, (b) the means used, (c) the severity of the alleged invasion, (d) the frequency and duration of the alleged invasion and (e) the defendant's purpose behind the alleged invasion.⁷

C. Past Emotional Distress In An Invasion of Privacy Case

NOTE TO JUDGE

A plaintiff who has proven an invasion of privacy is entitled to recover damages for emotional distress, even if the injury suffered is mental anguish alone. Expert testimony is not required. *Faber v. Condecor*, 195 N.J. Super. 81, 90-92 (App. Div. 1984); *Carleen v. TJX Companies*, 2009 WL 3081969 (App. Div. Sept. 17, 2009) at *2; *Restatement (Second) of Torts* § 652H(b) (1977).

Because of the similarity between presumed damages in defamation cases and invasion of privacy cases, it is the Committee's opinion that the standards applicable to defamation claims apply to invasion of privacy claims. *See, e.g., DeAngelis v. Hill*, 180 N.J. 1, 19 (2004) ("A false light claim against a public official, similar to a defamation claim, utilizes the actual malice standard").

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

⁷ *See Polay v. McMahon*, 468 Mass. 379, 383 (2014) (establishing factors to be used to determine the seriousness of an invasion of privacy).

However, in *Battaglia v. United Parcel Service, Inc.*, 214 N.J. 518 (2013), the Supreme Court held that it was error for a court to instruct a jury in an employment law case to consider life expectancy in connection with emotional distress damages where the plaintiff did not offer any expert testimony as to the permanency of the emotional distress. The Court held that while an employment law plaintiff can claim emotional distress damages without expert testimony, such damages are limited to past emotional distress through the time of trial. For an employment law plaintiff to claim future emotional distress, he or she must offer expert testimony as to the permanency of the distress. *Id.* at 551-55.

The Court has not decided whether a plaintiff who proves an invasion of privacy may recover damages for future emotional distress without expert testimony. However, in the Committee's opinion, it is likely that the Court would apply the requirement of expert testimony for such damages established by *Battaglia* in invasion of privacy cases.

Accordingly, the following charge is intended for use in cases in which the plaintiff has not offered expert testimony and is claiming damages only for past emotional distress through the time of trial. Charge 8.50 D. should be used if the plaintiff is claiming future emotional distress based on expert testimony regarding permanency.

A plaintiff who is awarded a verdict is entitled to fair and reasonable compensation for any emotional distress (s)he has actually suffered if it is of a kind that normally results from such an invasion and reasonable in its extent.⁸ The plaintiff here is not seeking damages for emotional distress continuing into the

⁸ *Tellado v. Time-Life Books, Inc.*, 643 F.Supp. 904, 907-10 (D.N.J. 1986); *Faber v. Condecor*, 195 N.J. Super. 81, 90-92 (App. Div. 1984); *Carleen v. TJX Companies*, 2009 WL 3081969 (App. Div. Sept. 17, 2009) at *2; *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J. Super. 72 (Ch.Div. 1967); *Restatement (Second) of Torts* § 652H (1977).

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future; rather, (s)he is only seeking damages for the emotional distress (s)he has suffered from the date of the defendant's unlawful conduct through the date of your verdict. Emotional distress includes embarrassment, humiliation, indignity, and other mental anguish. The measure of damages is what a reasonable person would consider to be adequate and just under all the circumstances of the case to compensate plaintiff for his/her emotional distress.

You should consider the nature, character, and seriousness of any emotional distress. You must also consider the duration of the emotional distress, as any award you make must cover the damages suffered by plaintiff to the present time. Plaintiff has the burden of proving his/her damages through credible, competent evidence, although (s)he does not have to offer any witnesses to corroborate his/her emotional distress; the distress need not be permanent; physical or psychological symptoms are not necessary; and plaintiff need not have obtained any type of professional treatment.⁹ The plaintiff's testimony standing alone is enough to support an award of emotional distress damages. On the other hand, you are free to disbelieve all or part of the plaintiff's testimony, and if you do, you should act accordingly by either

⁹ *Tarr v. Ciasulli*, 181 N.J. 70, 81 (2004).

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reducing the amount of damages you award for emotional distress or by not awarding any emotional distress damages at all.

The law does not provide you with any table, schedule or formula by which a person's emotional distress may be measured in terms of money. The amount is left to your sound discretion. You are to use your discretion to attempt to make plaintiff whole, so far as money can do so, based upon reason and sound judgment, without any passion, prejudice, bias or sympathy. You each know from your common experience the nature of emotional distress and you also know the nature and function of money. The task of equating the two so as to arrive at a fair and reasonable award of damages requires a high order of human judgment. For this reason, the law can provide no better yardstick for your guidance than your own impartial judgment and experience.

You are to exercise sound judgment as to what is fair, just and reasonable under all the circumstances. You should consider all of the evidence presented by the parties on the subject of plaintiff's emotional distress. After considering the evidence, you shall award a lump sum of money that will fairly and reasonably compensate plaintiff for any emotional distress you find [s]he has proven.

D. Past, Present and Future Emotional Distress In An Invasion of Privacy Case

A plaintiff who is awarded a verdict is entitled to fair and reasonable compensation for any emotional distress (s)he has actually suffered if it is of a kind that normally results from such an invasion and is reasonable in its extent.¹⁰ “Emotional distress” includes embarrassment, humiliation, indignity, and other mental anguish.

The measure of damages is what a reasonable person would consider to be adequate and just under all the circumstances of the case to compensate plaintiff for his/her emotional distress. You may consider the plaintiff’s age, usual activities, occupation, family responsibilities and similar relevant facts in evaluating the probable consequences of the [invasion of privacy] on plaintiff’s emotional state. You should consider the nature, character, severity and duration of the emotional distress in determining how much to award, as any award you make must cover the damages suffered by plaintiff since the [invasion of privacy] to the present time and into the future if you find that plaintiff’s emotional distress has continued to the present time and can reasonably be expected to continue into the future.

¹⁰ *Faber v. Condecor*, 195 N.J. Super. 81, 90-92 (App. Div. 1984); *Carleen v. TJX Companies*, 2009 WL 3081969 (App. Div. Sept. 17, 2009) at *2; *Restatement (Second) of Torts* § 652H (1977), Comment b.

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Plaintiff has the burden of proving his/her damages through credible, competent evidence. To recover damages for past or present emotional distress, plaintiff does not have to present corroborating testimony from any witness; the distress need not be permanent; physical or psychological symptoms are not necessary; and plaintiff need not have obtained any type of professional treatment.¹¹ The plaintiff's testimony standing alone may be sufficient to support an award of past or present emotional distress damages. On the other hand, you are free to disbelieve all or part of the plaintiff's testimony and, if you do, you should act accordingly by either reducing the amount of damages you award or by not awarding any emotional distress damages at all.

Unlike past or present emotional distress, the law requires a plaintiff to prove that his/her emotional distress will continue into the future through evidence of permanence or other likely duration in the form of expert testimony. This ensures that the plaintiff will be made whole while preventing an improper award of damage based on conjecture or speculation.¹² Therefore, in determining whether plaintiff has suffered emotional distress that will continue into the future, you should consider the testimony of plaintiff's expert in addition to the other evidence

¹¹ *Battaglia v. United Parcel Service, Inc.*, 214 N.J. 518, 551-555 (2013); *Tarr v. Ciasulli*, 181 N.J. 70, 81 (2004).

¹² *Battaglia*, 214 N.J. at 553.

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presented by the parties. If, after considering all of the evidence, you find plaintiff's expert's testimony on plaintiff's future emotional distress credible, you should award plaintiff damages for future emotional distress. If, after considering all of the evidence, you do not find plaintiff's expert's testimony on plaintiff's future emotional distress credible, you should not award future emotional distress damages. You should keep in mind that you can award past or present emotional distress damages even if you do not find that the plaintiff has proven future emotional distress.

The law does not provide you with any table, schedule or formula by which a person's emotional distress may be measured in terms of money. The amount is left to your sound discretion. You are to use your discretion to attempt to make plaintiff whole, so far as money can do so, based upon reason and sound judgment, without any passion, prejudice, bias or sympathy. You each know from your common experience the nature of emotional distress and you also know the nature and function of money. The task of equating the two so as to arrive at a fair and reasonable award of damages requires a high order of human judgment. For this reason, the law can provide no better yardstick for your guidance than your own impartial judgment and experience.

You are to exercise sound judgment as to what is fair, just and reasonable under all the circumstances. You should consider all the evidence presented by both parties on the subject of plaintiff's emotional distress, including the testimony of the doctor(s) who appeared. After considering the evidence, you shall award a lump sum of money that will fairly and reasonably compensate plaintiff for his/her emotional distress you find that (s)he has proven.

E. Compensatory Damages (Actual/Special Damages)¹³

[Plaintiff] seeks compensatory damages for particular material, economic or financial losses suffered directly by him/her as the proximate result of the invasion of privacy. 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 invasion of privacy. [Plaintiff] can recover these damages only if you determine

¹³ These instructions should only be given when the plaintiff has properly asserted special damages.

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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.

If you find that [plaintiff] is entitled to recover from [defendant], you may consider the following factors in determining the amount of damages that would justly and fairly compensate the plaintiff [*use such of the following as the evidence warrants*]: (a) the fair market value of the use of plaintiff's (name, picture); (b) the value of plaintiff's (name, picture) to the defendant; (c) the actual monetary harm resulting to plaintiff; and (d) the harm to [plaintiff's] reputation. "Actual monetary harm" means those economic losses that the plaintiff has sustained to date and/or is reasonably certain to suffer in the future in respect to property, business, trade, profession or occupation, which were proximately caused by the alleged invasion of privacy. "Actual monetary harm" includes but is not limited to the actual amount of money that plaintiff has expended or will expend as a result of the alleged invasion of privacy as well as all past and future lost income plaintiff has sustained as a result of the alleged invasion of privacy.¹⁴

¹⁴ See Cal. Jury Instr. 7.27 Invasion of Privacy by False Light – Damages (Sept. 2015); Cal. Jury Instr. 7.28 Damages (Sept. 2015); Judicial Council of California Civil Jury Instruction 1820 Damages (Sept. 2015); Colorado Jury Instructions, 4th, Civil 28:14 Invasion of Privacy –

Here, [plaintiff] claims that (s)he suffered certain specific damage as a result of the invasion of privacy. I shall now outline the specific damages claimed by [plaintiff].

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

F. Punitive Damages (For Defamation Actions Filed On or After 10/27/95)¹⁵

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, 1995.¹⁶ 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

Damages (June 2015); New York Pattern Jury Instructions – Civil 3:46 Intentional Torts – Right of Privacy – Damages (Dec. 2014); *Restatement (Second) of Torts*, § 652H.

¹⁵ 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 damages action when discussing the trial days it will take to complete the case.

¹⁶ On the effective date of the *Punitive Damages Act*, see ***NOTE TO JUDGE*** in Model Civil Charge 8.60 “Damages—Punitive.”

such a request. The statute also requires a bifurcated trial with the liability and damages phase of a punitive damages 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.
- (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 invasion of privacy 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 invasion of privacy 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.¹⁷ 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] conduct¹⁸ and that either (1)

¹⁷ *Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 48-49 (1984); *DiGiovanni v. Pessel*, 55 N.J. 188, 190-91 (1970).

¹⁸ N.J.S.A. 2A:15-5.12(a).

[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.

NOTE TO JUDGE

When the plaintiff is a public official or private figure, and the invasion of privacy relates to an issue 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.¹⁹
- (2) The jury must be instructed that plaintiff's burden of proof is "with convincing clarity" or by "clear and convincing evidence."²⁰

These two modifications apply to non-media as well as to media defendants.²¹

¹⁹ *Burke v. Deiner*, 97 N.J. 465, 477 n.2 (1984); *Vassallo v. Bell*, 221 N.J. Super. 347, 374 (App. Div. 1987); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).

²⁰ *Lawrence v. Bauer Pub. & Print., Ltd.*, 89 N.J. 451, 466, 468 (1982); *Burke v. Deiner*, *supra* at 481. See also *Dairy Stores, Inc. v. Sentinel Pub. Co.*, 104 N.J. 125, 155 (1986).

²¹ *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).

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 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].²²

²² 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.

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, 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.²³

²³ See *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

Finally, there must be a reasonable relationship between the actual injury and the punitive damages.²⁴

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.

condition” factor, *see Herman v. Sunshine Chemical Specialities, Inc.*, 133 N.J. 339, 345 (1993).

²⁴*Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 675 (1986).