

8.46 DEFAMATION DAMAGES (PRIVATE OR PUBLIC) (Approved 06/2014; Revised 11/2022)

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. There are three main types of damages available in an action for defamation: “(1) compensatory or actual, which may be either (a) general or (b) special; (2) punitive or exemplary; and (3) nominal.” *W.J.A. v. D.A.*, 210 N.J. 229, 239 (2012) (quoting *Prosser and Keeton on Torts* § 116A at 842 (5th ed. 1984)).

“All compensatory damages . . . depend on showings of actual harm . . . and may not include a damage award presumed by the jury.” *Nuwave Investment Corp. v. Hyman Beck & Co., Inc.*, 221 N.J. 495, 499 (2015). Special actual damages “compensate a plaintiff for specific economic or pecuniary loss,” while general actual damages “address harm that is not capable of precise monetary calculation.” *Ibid.* Therefore, actual damages may include “impairment to reputation and standing in [a] community.” *W.J.A.*, 210 N.J. at 239 (citation omitted). Unlike compensatory damages, “[n]ominal damages . . . do not attempt to compensate the plaintiff for an actual loss. Rather, they are a trivial amount” *Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 48 (1984) (citation omitted). Nominal damages “‘serve[] the purpose of vindicating’ the character of ‘a plaintiff who has not proved a compensable loss.’” *Nuwave*, 221 N.J. at 499 (quoting *W.J.A.*, 210 N.J. at 240-41). If “compensatory damages are otherwise available to the plaintiff,” nominal damages are not to be awarded. *Id.* at 500. With regard to defamation cases, if a statement is found to be defamatory without a finding of actual harm, then “only nominal damages can be awarded.” *Id.* at 499. New Jersey’s court rules do not define nominal damages, but *N.J.S.A.* 2A:155.10, which provides “[d]efinitions relative to punitive damages awards,” states that “[n]ominal damages’ are damages that are not designed to compensate a plaintiff and are less than \$500.”

Defamation 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 plaintiff's 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 [plaintiff's] 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 [plaintiff's] claim as explained in these instructions, [plaintiff] is entitled to compensatory damages for all the detrimental effects of a defamatory statement relating to [plaintiff's]

¹ As noted above, if “compensatory damages are otherwise available to the plaintiff,” nominal damages are not to be awarded. *Nuwave*, 221 N.J. at 500. In turn, nominal damages are not mentioned herein. Where punitive damages are not being sought, the first paragraph should be appropriately modified to delete any references to punitive damages.

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* § 84.05 (4th ed. 1987).

B. Compensatory Damages (Actual Damages)³

[Plaintiff] seeks compensatory damages for particular material, economic or financial losses suffered directly by [plaintiff] as the proximate result of the injury to [plaintiff's] 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

² As discussed herein, compensatory damages are further classified in defamation law as general damages and actual damages. The subcommittee feels that compensatory (or actual) damages should, wherever possible, be generally referred to as compensatory damages for ease of understanding by the jury. We further note 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, plaintiff must prove actual damages (damages for slander or libel will not be presumed, nor will presumed damages be awarded). The question of whether presumed damages should be awarded on 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).

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

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 plaintiff 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].

[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 [plaintiff] may be compensated by you for such ill effects only if you find that [plaintiff] experienced them because of the actual damage done to [plaintiff's] reputation. If you find that [plaintiff's] emotional suffering was caused only by [plaintiff] having [*read the libel/heard the slander*], and not by the publication's impact upon

[plaintiff's] 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. Nominal Damages (Slander or Libel)

In the event you find [plaintiff] is not entitled to actual damages [plaintiff] claims was caused by [defendant's] wrongful act,⁴ [plaintiff] seeks recovery for nominal damages, 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 opportunity may be closed to the person without the person's knowledge. Damage to character or reputation could occur without the person knowing of the [libel/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. For those reasons, you are permitted to award nominal damages to [plaintiff] for injury to reputation, which you reasonably believe [plaintiff] sustained. Nominal damages are a small amount of money

⁴ Do not charge this portion of first sentence if special damages have not been claimed.

damages that are awarded for the infraction of a legal right. They are a token amount of no more than \$500. Nominal damages are not designed to compensate a plaintiff, but rather to recognize that plaintiff has suffered an infraction and to vindicate plaintiff's character where the extent of the loss is not shown (or where the right is one not dependent upon loss or damage).⁵ The law presumes that nominal damages follow naturally and necessarily from the [*publication of a libel/utterance of a slander per se*] even when actual loss has not been proven (or where the right is one not dependent upon proving loss or damage).

E. Punitive Damages (For Defamation Actions Filed On or Before 10/26/95)⁶ (Approved 01/1997; Revised 11/2022)

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

⁵ *W.J.A. v. D.A.*, 210 N.J. 229, 240-41 (2012).

⁶ 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 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.”

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 [plaintiff's] losses.⁷

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 defendant's misconduct. In contrast, punitive damages are intended to punish a wrongdoer and to deter similar wrongful conduct in the future.⁸ 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.⁹

⁷ 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 defendant is making is false or when defendant entertains serious doubts as to its truth (*citing Burke v. Deiner*, 97 N.J. 465, 481 (1984)).

⁸ *Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 48-49 (1984); *DiGiovanni v. Pessel*, 55 N.J. 188, 190-91 (1970).

⁹ 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

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].¹⁰ In making this determination, consider whether [defendant] was motivated by an actual desire 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.]

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.

¹⁰ *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).

(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.*¹¹

(2) *The jury must be instructed that plaintiff's burden of proof is "with convincing clarity" or by "clear and convincing evidence."*¹²

*These two modifications apply to non-media as well as to media defendants.]*¹³

**[TO BE INSTRUCTED IN ALL DEFAMATION CASES
SEEKING PUNITIVE DAMAGES]**

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].¹⁴ You may also consider any mitigating

¹¹ *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.

¹² *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.

¹³ *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).

¹⁴ *Leimgruber v. Claridge Associates, Ltd.*, 73 N.J. 450, 456 (1977). See also *Herman v. Sunshine Chemical Specialities, Inc., supra* at 345.

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.¹⁵

Finally, there must be a reasonable relationship between the actual injury and the punitive damages.¹⁶ Punitive damages may, however, be higher than, equal to, or lower than compensatory damages. Punitive damages may also be awarded for wrongful conduct even if you do not award compensatory damages.¹⁷

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.

F. Punitive Damages (For Defamation Actions Filed On or After 10/27/95)¹⁸ (Approved 01/1997; Revised 11/2022)

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*

¹⁵ *Leimgruber v. Claridge Associates, Ltd.*, *supra* at 456.

¹⁶ *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 673 (1986).

¹⁷ *Nappe v. Anschelewitz, Barr, Ansell & Bonella*, *supra* at 50.

¹⁸ 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.

be used for causes of action filed on or after October 27, 1995.¹⁹ 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 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 that defendant.

(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

¹⁹ On the effective date of the *Punitive Damages Act*, see Note to Judge in Model Civil Charge 8.60 “Damages—Punitive.”

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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 plaintiff's 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.²⁰ Punitive damages are designed to require the wrongdoer to pay an amount of money sufficient

²⁰ *Nappe v. Anshelewitz, Barr, Ansell & Bonello, supra* at 48-49; *DiGiovanni v. Pessel, supra* at 190-91.

to punish the wrongdoer 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 [plaintiff] was the result of [defendant's] conduct²¹ 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.

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.²²

²¹ *N.J.S.A. 2A:15-5.12(a)*.

²² *Burke v. Deiner, supra* at 477 n.2; *Vassallo v. Bell, supra* at 374; *Gertz v. Robert Welch, Inc., supra* at 349-50.

(2) The jury must be instructed that plaintiff's burden of proof is "with convincing clarity" or by "clear and convincing evidence."²³

These two modifications apply to non-media as well as to media defendants.²⁴

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

²³ *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.

²⁴ *Dairy Stores, Inc. v. Sentinel Pub. Co.*, *supra* at 153. See also *Turf Lawnmowers Repair v. Bergen Record Corp.*, *supra* at 402-403.

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].²⁵

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

²⁵ 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.

financial condition of [defendant] or the [defendant's] ability to pay the punitive damages award.²⁶

Finally, there must be a reasonable relationship between the actual injury and the punitive damages.²⁷

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.

²⁶ 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 condition” factor, see *Herman v. Sunshine Chemical Specialities, Inc.*, *supra* at 345.

²⁷ *Fischer v. Johns-Manville Corp.*, *supra* at 675.