

44 N.Y. Jur. 2d Defamation and Privacy § 230

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Defamation and Privacy

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Part One. Defamation of Persons

XI. Damages

A. In General

§ 230. Punitive or exemplary damages

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Libel and Slander](#)  120

Trial Strategy

[Proof of Facts Establishing a Party's Entitlement to Punitive Damages in a Defamation Cause of Action](#), 104 Am. Jur. Proof of Facts 3d 221

[Litigating Defamation Claims](#), 128 Am. Jur. Trials 1

Forms

[Am. Jur. Pleading and Practice Forms, Libel and Slander § 11 \(Complaint—Allegation—Punitive damages\)](#)

[Am. Jur. Pleading and Practice Forms, Libel and Slander § 39 \(Complaint, petition, or declaration—Allegation—Punitive damages—Reckless publication by newspaper\)](#)

Am. Jur. Pleading and Practice Forms, Libel and Slander §§ 298 to 303 (Jury instructions as to punitive damages for defamation)

Punitive damages may be assessed in a defamation action¹ as a means to deter the libeler so that he or she will not repeat the offense, and to serve as a warning to others.² But punitive or exemplary damages may not be awarded unless the defamatory statement was made out of hatred, ill will, spite, criminal mental state, or that traditionally required of common-law malice.³

"Actual malice" as defined by the United States Supreme Court,⁴ is insufficient by itself to justify an award of punitive damages, because that malice focuses on the defendant's state of mind in relation to the truth or falsity of the published information.⁵ This does not measure up to the level of outrage or malice underlying the public policy which would allow an award of punitive damages to punish a person for outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another's rights. This kind of common-law malice focuses on the defendant's mental state in relation to the plaintiff and the motive in publishing the falsity—the pointed factors that punitive damages are intended to remedy.⁶ Such malice implies the desire to injure or indicates that the party was activated by spite or ill will.⁷ There must be evidence of intentional and malicious conduct to justify punitive damages.⁸

Illustrations:

Disinterested malevolence on the part of the defendant, who was responsible for blog and Web site postings containing remarks and pornographic materials that, on their face, impugned the plaintiff's chastity, and thus were libelous per se, entitled the plaintiff to an award of both compensatory and punitive damages.⁹

A punitive damages award of \$117,500 was warranted in the plaintiff's action against a building supply store, its owner, and the owner's son-in-law for defamation, malicious prosecution, and trespass, where the defendants' acts of defaming the plaintiff and causing a criminal proceeding to be initiated against him without probable cause to believe him guilty resulted in the plaintiff's suspension and ultimate resignation from his position as a code enforcement officer, a decrease in carpentry work and income from his position as a substitute teacher, and the plaintiff suffered emotional and physical harm and incurred legal expenses in defending himself against the charges.¹⁰

An award of punitive damages in the amount of \$30,050 was supported by the evidence in a defamation action, despite the defendant's self-serving testimony that she never harbored any ill will or bad feelings toward the plaintiff, where the defendant falsely accused the plaintiff of sexually abusing his daughter, and the evidence suggested that she intentionally made such false accusations against him out of spite and anger over his tumultuous relationship with her daughter and his then-recent success in obtaining temporary custody of her grandchildren.¹¹

Where the plaintiff is neither a public official, nor a public figure, but the statement involves a matter of public concern, the plaintiff must prove malice to recover punitive damages.¹²

Observation:

According to the United States Supreme Court, the First Amendment prohibits awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth,¹³ but that this rule does not apply where the false and defamatory statements in question do not involve matters of public concern.¹⁴

Where a publication is libelous per se and is found by the jury to be false, and there is no claim that it was privileged, the jury may, from the fact of publication, infer the express malice requisite to sustain exemplary damages.¹⁵ Malice may be implied from the publication itself, where the natural inference from the libel is that it was aimed directly at the plaintiff's reputation;¹⁶ where the inference does not flow naturally from the facts, however, adequate evidence of actual malice or its equivalent should be produced if punitive damages are sought.¹⁷

Punitive damages may not be assessed against an employer for false statements maliciously published by its employee in the course of employment unless a "superior officer" of the employer, in the course of employment, orders, participates in, or ratifies such conduct, and the term "superior officer" contemplates a high level of general managerial authority in relation to the nature and operation of the employer's business and not a mere "ordinary" officer, or an employee vested with some supervisory or decision-making responsibility.¹⁸

The amount of punitive damages to be allowed for a libel is discretionary with the jury.¹⁹

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Footnotes

1 Toomey v. Farley, 2 N.Y.2d 71, 156 N.Y.S.2d 840, 138 N.E.2d 221 (1956); Leser v. Penido, 96 A.D.3d 578, 947 N.Y.S.2d 441 (1st Dep't 2012); Strader v. Ashley, 61 A.D.3d 1244, 877 N.Y.S.2d 747 (3d Dep't 2009); Dobies v. Brefka, 45 A.D.3d 999, 846 N.Y.S.2d 669 (3d Dep't 2007); Nellis v. Miller, 101 A.D.2d 1002, 477 N.Y.S.2d 72 (4th Dep't 1984).

2 Wachs v. Winter, 569 F. Supp. 1438 (E.D. N.Y. 1983); Toomey v. Farley, 2 N.Y.2d 71, 156 N.Y.S.2d 840, 138 N.E.2d 221 (1956); Faulk v. Aware, Inc., 35 Misc. 2d 302, 35 Misc. 2d 315, 35 Misc. 2d 317, 231 N.Y.S.2d 270 (Sup 1962), judgment rev'd on other grounds, 19 A.D.2d 464, 244 N.Y.S.2d 259 (1st Dep't 1963), order aff'd, 14 N.Y.2d 899, 252 N.Y.S.2d 95, 200 N.E.2d 778 (1964).

3 Celle v. Filipino Reporter Enterprises Inc., 209 F.3d 163 (2d Cir. 2000) (applying New York law); Morsette v. "The Final Call," 309 A.D.2d 249, 764 N.Y.S.2d 416 (1st Dep't 2003); Prozeralik v. Capital Cities

Communications, Inc., 82 N.Y.2d 466, 605 N.Y.S.2d 218, 626 N.E.2d 34 (1993); *Zaidi v. United Bank Ltd.*, 194 Misc. 2d 1, 747 N.Y.S.2d 268 (Sup 2002).

4 *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964) (stating that a statement was made with "actual malice" when it was made with knowledge that it was false or with reckless disregard of whether it was false or not).

5 *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163 (2d Cir. 2000) (applying New York law); *Morsette v. "The Final Call"*, 309 A.D.2d 249, 764 N.Y.S.2d 416 (1st Dep't 2003); *Prozeralik v. Capital Cities Communications, Inc.*, 82 N.Y.2d 466, 605 N.Y.S.2d 218, 626 N.E.2d 34 (1993); *Zaidi v. United Bank Ltd.*, 194 Misc. 2d 1, 747 N.Y.S.2d 268 (Sup 2002).

6 *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163 (2d Cir. 2000) (applying New York law); *Morsette v. "The Final Call"*, 309 A.D.2d 249, 764 N.Y.S.2d 416 (1st Dep't 2003); *Prozeralik v. Capital Cities Communications, Inc.*, 82 N.Y.2d 466, 605 N.Y.S.2d 218, 626 N.E.2d 34 (1993); *Zaidi v. United Bank Ltd.*, 194 Misc. 2d 1, 747 N.Y.S.2d 268 (Sup 2002).

7 *Wachs v. Winter*, 569 F. Supp. 1438 (E.D. N.Y. 1983).

8 *K. Capolino Const. Corp. v. White Plains Housing Authority*, 275 A.D.2d 347, 712 N.Y.S.2d 158 (2d Dep't 2000).

9 *Leser v. Penido*, 96 A.D.3d 578, 947 N.Y.S.2d 441 (1st Dep't 2012).

10 *Strader v. Ashley*, 61 A.D.3d 1244, 877 N.Y.S.2d 747 (3d Dep't 2009).

11 *Dobies v. Brefka*, 45 A.D.3d 999, 846 N.Y.S.2d 669 (3d Dep't 2007).

12 *Huggins v. Moore*, 94 N.Y.2d 296, 704 N.Y.S.2d 904, 726 N.E.2d 456 (1999).

13 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

For New York cases following or recognizing this rule, see *Shulman v. Hunderfund*, 12 N.Y.3d 143, 878 N.Y.S.2d 230, 905 N.E.2d 1159, 244 Ed. Law Rep. 275 (2009); *Mahoney v. Adirondack Pub. Co.*, 71 N.Y.2d 31, 523 N.Y.S.2d 480, 517 N.E.2d 1365, 44 Ed. Law Rep. 557 (1987); *O'Brien v. Troy Pub. Co., Inc.*, 121 A.D.2d 794, 504 N.Y.S.2d 243 (3d Dep't 1986); *Nellis v. Miller*, 101 A.D.2d 1002, 477 N.Y.S.2d 72 (4th Dep't 1984).

14 *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985).

15 *Brandt v. Morning Journal Ass'n*, 81 A.D. 183, 80 N.Y.S. 1002 (1st Dep't 1903), *aff'd*, 177 N.Y. 544, 69 N.E. 1120 (1904).

16 *Unker v. Joseph Markovits, Inc.*, 643 F. Supp. 1043 (S.D. N.Y. 1986).

17 *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260, 10 A.L.R. 662 (1920).

18 *Loughry v. Lincoln First Bank, N.A.*, 67 N.Y.2d 369, 502 N.Y.S.2d 965, 494 N.E.2d 70 (1986).

19 *Toomey v. Farley*, 2 N.Y.2d 71, 156 N.Y.S.2d 840, 138 N.E.2d 221 (1956).

As to the excessiveness or adequacy of damage awards for defamation, generally, see § 229.