N.Y. Pattern Jury Instr.--Civil 3:29

New York Pattern Jury Instructions--Civil | December 2023 Update
Committee on Pattern Jury Instructions Association of Supreme Court Justices

Division 3. Torts Other Than Negligence

D. Defamation

II. Instructions—Intentional Torts—Defamation

G. Damages

1. Compensatory Damages—Presumed Damages—Neither Actual Harm Nor Special Harm Required

PJI 3:29 Intentional Torts—Defamation—Compensatory Damages—Presumed Damages—Neither Actual Harm Nor Special Harm Required

I am now going to instruct you on the law of damages. The fact that I instruct you on the law of damages must not be taken as an indication that you should decide for the plaintiff. You will decide on the evidence presented and the rules of law that I have given you whether the plaintiff is entitled to recover from the defendant.

If you decide that the plaintiff is entitled to recover, you will award an amount as, in the exercise of your good judgment and common sense, you decide is fair and just compensation for the injury to plaintiff's reputation and the humiliation and mental anguish in (his, her) public and private life which you decide was caused by defendant's statement. In fixing that amount you should consider the plaintiff's standing in the community, the nature of defendant's statement made about the plaintiff, the extent to which the statement was circulated, the tendency of the statement to injure a person such as the plaintiff, and all of the other facts and circumstances in the case. These damages cannot be proved with mathematical accuracy. Fair compensation may vary, ranging from one dollar, if you decide that there was no injury, to a substantial sum if you decide that the injury was substantial.

Comment

[See Introductory Statement, preceding PJI 3:23.]

Based on Macy v New York World-Telegram Corp., 2 NY2d 416, 161 NYS2d 55, 141 NE2d 566 (1957); Abell v Cornwall Industrial Corporation, 241 NY 327, 150 NE 132 (1925); Gressman v Morning Journal Ass'n, 197 NY 474, 90 NE 1131 (1910), and in part on the charge in Kern v News Syndicate Co., 20 AD2d 528, 244 NYS2d 665 (1st Dept 1963); see Cohen v Bratt & Doxey Supply Co., 51 AD2d 719, 379 NYS2d 155 (2d Dept 1976). Compensatory and punitive damages are defined and compared in Crane v New York World Telegram Corporation, 308 NY 470, 126 NE2d 753 (1955). Generally, as to compensatory damages in defamation actions, see 2 Seelman, The Law of Libel & Slander (Rev Ed), Chap. XIII; Prosser & Keeton, Torts (5th Ed) 843 § 116A; Restatement, Second, Torts §§ 620–623. The pattern charge assumes that defendant has not put plaintiff's reputation in issue, see PJI 3:29.1 infra this Comment.

The pattern charge is only applicable in three categories: cases involving private plaintiffs and matters of purely private concern where the defamation takes the form of libel on its face or slander per se; cases involving public officials and public figures where the defamation takes the form of libel on its face or slander per se; and cases involving private plaintiffs and speech raising matters of public concern where the defamation takes the form of libel on its face or slander per se and where the plaintiff has proved constitutional malice.

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At common law, plaintiff did not have to plead or prove damages, at least with respect to libel on its face and slander per se. Libel on its face refers to written (or broadcast) statements whose defamatory meaning is clear without regard to extrinsic facts. Slander per se refers to oral defamatory communications that relate to one of four categories: imputation of serious sexual misconduct; imputation of a loathsome disease; imputation of a trait that indicates dishonesty or incompetence in plaintiff's trade, occupation or business; and imputation of a crime involving moral turpitude. Arguably, a fifth category, imputing homosexuality to the plaintiff, has recently been added as an additional category of slander per se, see commentary accompanying PJI 3:24.3. Damages are presumed when the defamatory statement takes the form of libel on its face (serious because it is complete on its face, and being in writing, is more or less permanent and capable of broad dissemination) or slander per se (serious because of the aggravated nature of the defamatory import). However, in cases involving libel by extrinsic fact (unless it falls within one of the slander per se categories) and plain slander, plaintiff is required to allege and prove special harm, meaning pecuniary loss. Thus, at common law, libel on its face and slander per se are actionable without proof of special harm whereas libel by extrinsic fact and plain slander are actionable only upon proof of special harm, Liberman v Gelstein, 80 NY2d 429, 590 NYS2d 857, 605 NE2d 344 (1992) (slander); Talbot v Johnson Newspaper Corp., 124 AD2d 284, 508 NYS2d 80 (3d Dept 1986) (libel by extrinsic fact). For a more detailed discussion of slander per se, see PJI 3:24.3; for plain slander see PJI 3:24.4; for libel on its face see PJI 3:24, 3:24.1; for libel by extrinsic fact see PJI 3:24.1. The pattern charge reflects these common law rules and is thus to be used in cases involving slander per se and libel on its face, unless the constitutional constraints described infra apply.

These common law rules were dramatically affected by Gertz v Robert Welch, Inc., 418 US 323, 94 SCt 2997 (1974), which held that a private plaintiff could not recover presumed damages or punitive damages unless plaintiff could prove constitutional malice. Thus, absent constitutional malice, a private plaintiff suing a media defendant who publishes a defamatory statement affecting a matter of public concern must establish actual damages. Actual damages is not the equivalent of special harm. Actual damages is not limited to pecuniary loss but includes impairment of reputation and standing in the community, personal humiliation and mental anguish and suffering, id; Time, Inc. v Firestone, 424 US 448, 96 SCt 958 (1976); Hogan v Herald Co., 84 AD2d 470, 446 NYS2d 836 (4th Dept 1982), aff'd, 58 NY2d 630, 458 NYS2d 538, 444 NE2d 1002 (1982); Matherson v Marchello, 100 AD2d 233, 473 NYS2d 998 (2d Dept 1984); see Liberman v Gelstein, 80 NY2d 429, 435 n.23, 590 NYS2d 857, 605 NE2d 344 (1992), but see France v St. Clare's Hospital and Health Center, 82 AD2d 1, 441 NYS2d 79 (1st Dept 1981); Salomone v MacMillan Pub. Co., Inc., 77 AD2d 501, 429 NYS2d 441 (1st Dept 1980).

Dun & Bradstreet, Inc. v Greenmoss Builders, Inc., 472 US 749, 105 SCt 2939 (1985), explicitly limited the Gertz holding to cases involving matters of public concern. Reasoning that speech on matters of purely private concern is entitled to less protection under the First Amendment, the Supreme Court held that a private plaintiff can recover presumed or punitive damages without proving constitutional malice if the defamatory statement does not involve matters of public concern.

Compensatory damages are thus available, without proof of actual harm or special harm, in three categories of cases. First, the pattern charge applies to cases involving private plaintiffs and matters of purely private concern where the defamation takes the form of libel on its face or slander per se, 60 Minute Man, Ltd. v Kossman, 161 AD2d 574, 555 NYS2d 152 (2d Dept 1990). Second, the pattern charge applies to cases involving public officials and public figures where the defamation takes the form of libel on its face or slander per se because constitutional malice is a part of plaintiff's prima facie case which thus permits the states to award presumed or punitive damages without proof of actual harm, New York Times Co. v Sullivan, 376 US 254, 84 SCt 710 (1964) and Curtis Pub. Co. v Butts, 388 US 130, 87 SCt 1975 (1967). Third, the pattern charge applies to cases involving private plaintiffs and speech raising matters of public concern where the defamation takes the form of libel on its face or slander per se and where the plaintiff has proved constitutional malice.

In cases where damages may be presumed, unless defendant establishes a complete defense, e.g. absolute privilege or truth, a person who has been defamed is entitled as a matter of law to some award of damages, Abell v Cornwall Industrial Corporation, 241 NY 327, 150 NE 132 (1925); Mattice v Wilcox, 147 NY 624, 42 NE 270 (1895); Holmes v Jones, 147 NY 59, 41 NE 409 (1895); Wood v Lee, 41 AD2d 730, 341 NYS2d 738 (1st Dept 1973). Although proof of damage is not required, plaintiff may offer evidence of particular incidents showing injury to his or her reputation and feelings, Bishop v New York Times Co., 233 NY 446, 135 NE 845 (1922); Sanderson v Caldwell, 45 NY 398 (1871). In most cases such evidence will be offered, since

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whether plaintiff's recovery will be substantial or nominal will depend upon whether or not the evidence establishes a substantial injury, Abell v Cornwall Industrial Corporation, supra. The damages awarded must be commensurate with the injury, Gressman v Morning Journal Ass'n, 197 NY 474, 90 NE 1131 (1910).

In a slander per se case, where plaintiff has failed to establish actual damages, plaintiff is entitled to recover nominal damages of one dollar, Orlowski v Koroleski, 234 AD2d 436, 651 NYS2d 137 (2d Dept 1996). If the injuries are substantial, it may be error to instruct the jury that they may award nominal damages, see Sanderson v Caldwell, 45 NY 398 (1871); Kehoe v New York Tribune, 229 App Div 220, 241 NYS 676 (1st Dept 1930).

Injury to plaintiff's reputation is a major component of compensatory damages, Crane v New York World Telegram Corporation, 308 NY 470, 126 NE2d 753 (1955). The circumstances surrounding plaintiff, including the nature of plaintiff's business or profession, plaintiff's marital status and social standing, and the tendency of the statement to injure plaintiff in the public estimation are all to be considered, Bishop v New York Times Co., 233 NY 446, 135 NE 845 (1922); Gressman v Morning Journal Ass'n, 197 NY 474, 90 NE 1131 (1910); Morey v Morning Journal Ass'n, 123 NY 207, 25 NE 161 (1890). To reduce the value of the injured interest, defendant may prove plaintiff's bad general reputation prior to publication, Crane v New York World Telegram Corporation, supra; Holmes v Jones, 147 NY 59, 41 NE 409 (1895), but specific acts of misconduct are admissible on that issue only if connected with the charge made by defendant, ibid; Theodore v Daily Mirror, 282 NY 345, 26 NE2d 286 (1940); Cudlip v New York Evening Journal Pub. Co., 180 NY 85, 72 NE 925 (1904); Fraser v Park Newspapers of St. Lawrence Inc., 257 AD2d 961, 684 NYS2d 332 (3d Dept 1999), and mere rumor or report as distinguished from reputation is inadmissible for this purpose, Abell v Cornwall Industrial Corporation, 241 NY 327, 150 NE 132 (1925); Bush v Prosser, 11 NY 347 (1854). The “libel-proof plaintiff doctrine,” developed by the Second Circuit, operates as a defense in a libel action where the allegedly libelous statement cannot realistically damage plaintiff's reputation because it is already so low; see Guccione v Hustler Magazine, Inc., 800 F2d 298 (2d Cir 1986); Cardillo v Doubleday & Co., Inc., 518 F2d 638 (2d Cir 1975); see also Gage & Conniff, “The Libel-Proof Plaintiff Doctrine,” NYLJ, 2/23/94.

Since plaintiff's good reputation is presumed, plaintiff may not offer evidence that his reputation was good unless defendant attacks it or puts it in issue by a denial, Stafford v Morning Journal Ass'n, 142 NY 598, 37 NE 625 (1894); see Diamantstein v Friedman, 199 AD2d 458, 606 NYS2d 16 (2d Dept 1993). However, defendant may show, on the issue of compensatory but not punitive damages, that plaintiff enjoyed such high public esteem that the defamation did plaintiff no harm, Toomey v Farley, 2 NY2d 71, 156 NYS2d 840, 138 NE2d 221 (1956); Abell v Cornwall Industrial Corporation, 241 NY 327, 150 NE 132 (1925). Generally, as to proof concerning plaintiff's reputation, see NY Damages Law §§ 772–774; Richardson, Evidence (10th Ed) §§ 156, 159, 161.

In a case in which evidence of plaintiff's good or bad reputation is offered, the pattern charge should be modified by inserting before the antepenultimate sentence the following:

PJI 3:29.1 Intentional Torts—Defamation—Compensatory Damages—Presumed Damages—Neither Actual Harm Nor Special Harm Required [Supplemental Instruction]

See Comment in main volume for use of this instruction

[In a case in which evidence of plaintiff's good or bad reputation is offered, the pattern charge should be modified by inserting before the antepenultimate sentence the following:]

Defendant claims that plaintiff's reputation and standing in the community at the time defendant's statement was published was so (good, bad) that only slight, if any, harm could have been caused by the statement. In deciding the amount of compensatory damages, you will take into consideration the evidence offered by both sides regarding plaintiff's reputation at the time defendant's statement was published. With respect to that part of your award relating to damage to reputation, you will fix an amount that you find to be fair and adequate compensation for the injury suffered by plaintiff to (his, her) reputation.

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Subject to the constitutional limitations described above, injury to plaintiff's business or profession is compensable as general damages, even though the defamatory statement did not refer to plaintiff's business or profession, and even though loss of business or clientele is alleged only generally, Gedeon v News Syndicate Co., 288 NY 541, 41 NE2d 939 (1942); Bergmann v Jones, 94 NY 51 (1883); Sanderson v Caldwell, 45 NY 398 (1871). (The rule is different, of course, in cases requiring proof of special harm, see PJI 3:29A, infra.) Loss of business may be shown by evidence of reduction in daily sales, Bergmann v Jones, supra; see Tex Smith, The Harmonica Man, Inc. v Godfrey, 198 Misc 1006, 102 NYS2d 251 (Sup 1951). It may also be shown that plaintiff lost an election for public office after publication of the libel, Cortright v Anderson, 208 App Div 1, 202 NYS 729 (4th Dept 1924); Hope v Hearst Consol. Publications, Inc., 294 F2d 681 (2d Cir 1961).

Damages for special harm, in presumed damages cases, may also be recovered, provided they are properly pleaded and proved, Macy v New York World-Telegram Corp., 2 NY2d 416, 161 NYS2d 55, 141 NE2d 566 (1957); Hogan v Herald Co., 84 AD2d 470, 446 NYS2d 836 (4th Dept 1982), aff'd for reasons in AD opinion, 58 NY2d 630, 458 NYS2d 538, 444 NE2d 1002 (1982); see also Fitzgerald v Herald Co., 119 AD2d 974, 500 NYS2d 871 (4th Dept 1986); Restatement, Second, Torts § 622. Thus, while plaintiff may, as stated above, recover as compensatory damages for loss of business without proving the loss of particular customers, plaintiff may also recover as special damages, if properly pleaded, for the loss of named customers, W.C. Loftus & Co. v Bennett, 68 App Div 128, 74 NYS 290 (1st Dept 1902); but see Prince v Fox Television Stations, Inc., 93 AD3d 614, 941 NYS2d 488 (1st Dept 2012) (product-disparagement plaintiff must plead lost customers with requisite specificity), or for potential earnings lost up to the time of the verdict as a result of the defamatory publications, Faulk v Aware, Inc., 19 AD2d 464, 244 NYS2d 259 (1st Dept 1963), aff'd, 14 NY2d 899, 252 NYS2d 95, 200 NE2d 778 (1964). Expenses incurred to counteract the injurious effect of the defamation, Den Norske Ameriekalinje Actiesselskabet v Sun Printing & Publishing Ass'n, 226 NY 1, 122 NE 463 (1919), or incurred in defending removal proceedings brought as a result of the defamation, Murphy v Klein, 12 AD2d 683, 207 NYS2d 794 (3d Dept 1960); cf Raines v New York Press Co., 37 NYS 45 (Sup 1895), may be recovered as special damages, but the expense of the defamation action itself may not, Halstead v Nelson, 24 Hun 395 (NY Gen Term 1881).

Mental distress and physical suffering may be proved and recovered as general damages, Bishop v New York Times Co., 233 NY 446, 135 NE 845 (1922); Garrison v Sun Printing & Publishing Ass'n, 207 NY 1, 100 NE 430 (1912); Brancaleone v Mesagna, 290 AD2d 467, 736 NYS2d 685 (2d Dept 2002); Dazzo v Meyers, 83 AD2d 14, 443 NYS2d 245 (2d Dept 1981); Ideal Pub. Corp. v Creative Features, Inc., 59 AD2d 862, 399 NYS2d 118 (1st Dept 1977); Restatement, Second, Torts § 623, but it is improper to permit proof of the defamed party's debilitated physical condition to support an inference that he suffered more than a healthy person would have, absent evidence of causal connection, Maybruck v Haim, 40 AD2d 378, 340 NYS2d 469 (1st Dept 1973). Specific instances of ostracism and rejection by friends and acquaintances may be shown provided they are "the proximate result of the defamation," Macy v New York World-Telegram Corp., 2 NY2d 416, 161 NYS2d 55, 141 NE2d 566 (1957); Bishop v New York Times Co., supra; see Wilcox v Newark Valley Cent. School Dist., 129 AD3d 1230, 11 NYS3d 703 (3d Dept 2015). Plaintiff's own testimony may not be admissible absent evidence of causal connection; the better practice is to call the persons who are said to have spoken or acted adversely, Macy v New York World-Telegram Corp., supra; Faulk v Aware, Inc., 19 AD2d 464, 244 NYS2d 259 (1st Dept 1963), aff'd, 14 NY2d 899, 252 NYS2d 95, 200 NE2d 778 (1964). Plaintiff may not show, either through plaintiff's own testimony, Bishop v New York Times Co., supra, or through the testimony of relatives, De Martino v News Syndicate Company, 213 App Div 835, 208 NYS 852 (2d Dept 1925), that distress to plaintiff's relatives resulting from the defamation added to plaintiff's distress. However, when the person defamed is married, the other spouse has a cause of action for loss of services resulting from the defamed spouse's mental distress or physical suffering, Garrison v Sun Printing & Publishing Ass'n, supra; Dazzo v Meyers, supra; Millington v Southeastern Elevator Co., 22 NY2d 498, 293 NYS2d 305, 239 NE2d 897 (1968). A person defamed may not prove changes of his or her habits, such actions being voluntary and the subject of simulation, Bishop v New York Times Co., 233 NY 446, 135 NE 845 (1922), nor is evidence of statements by plaintiff's friends as to the serious nature of the defamation admissible, since it constitutes opinion evidence on a matter which is for the jury alone, Bishop v New York Times Co., supra; Linehan v Nelson, 197 NY 482, 90 NE 1114 (1910); Michaels v Gannett Co., 10 AD2d 417, 199 NYS2d 778 (4th Dept 1960); see PJI 3:25, comment.

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Extent of circulation means the geographic area in which the defamatory statement is disseminated, and the size of the audience and the number of times the circulation is made, see Restatement, Torts § 621, Comment c, (Restatement, Second, Torts has no corresponding comment); see Dattner v Pokoik, 81 AD2d 572, 437 NYS2d 425 (2d Dept 1981). Repetition of the same charge, though not necessarily in the same language, by defendant, before commencement of the action, may be shown, Cassidy v Brooklyn Daily Eagle, 138 NY 239, 33 NE 1038 (1893); Enos v Enos, 135 NY 609, 32 NE 123 (1892); Cruikshank v Gorden, 118 NY 178, 23 NE 457 (1890); Distin v Rose, 69 NY 122 (1877), but repetition of the libel by others is not ordinarily the responsibility of the original publisher, see Macy v New York World-Telegram Corp., 2 NY2d 416, 161 NYS2d 55, 141 NE2d 566 (1957) and Comment to PJI 3:26.

In addition to harms suffered up to the date of trial, general damages may be awarded for such future harm to reputation which the jury finds it is reasonable to assume will follow, Restatement, Torts § 621 Comment d. (Restatement, Second, Torts has no corresponding comment), and see Faulk v Aware, Inc., 35 Misc2d 302, 35 Misc2d 315, 35 Misc2d 317, 231 NYS2d 270 (Sup 1962), rev'd on other grounds 19 AD2d 464, 244 NYS2d 259 (1st Dept 1963), aff'd, 14 NY2d 899, 252 NYS2d 95, 200 NE2d 778 (1964), but see Halstead v Nelson, 24 Hun 395 (NY Gen Term 1881). Thus, if plaintiff's complaint demands judgment for future harm, the pattern charge should be modified to add the following after the first sentence of the second paragraph:

PJI 3:29.2 Intentional Torts—Defamation—Compensatory Damages—Presumed Damages—Neither Actual Harm Nor Special Harm Required [Supplemental Instruction]

See Comment in main volume for use of this instruction

[If plaintiff's complaint demands judgment for future harm, the pattern charge should be modified to add the following after the first sentence of the second paragraph:]

If you find that plaintiff's reputation will be injured in the future as a result of defendant's statement, or that plaintiff will suffer humiliation or mental anguish in the future as a result of defendant's statement, you will award such additional amount as will compensate plaintiff for such injuries.

Defendant may offer evidence to show that compensatory damages were never suffered, or that they have been partially extinguished, Fleckenstein v Friedman, 266 NY 19, 193 NE 537 (1934). One example of evidence to show that damage was not suffered is that the plaintiff enjoyed such high esteem that his or her reputation was not harmed by the defamation, see PJI 3:29.1. Other examples of evidence in reduction, each of which will require appropriate modification of the pattern charge, are:

1. ***Partial truth***

Facts tending but failing to prove the truth of the defamatory charge in the defamatory statement, since they indicate that plaintiff's reputation was not wholly untarnished even before the defamatory publication, may be shown to reduce compensatory damages, Crane v New York World Telegram Corporation, 308 NY 470, 126 NE2d 753 (1955); Fleckenstein v Friedman, 266 NY 19, 193 NE 537 (1934); Gressman v Morning Journal Ass'n, 197 NY 474, 480, 90 NE 1131 (1910). Such facts, however, must have some relation to, and tend to prove the precise charge made by the publication, Crane v New York World Telegram Corporation, supra. Of course, to the extent that a part of the claimed defamation is shown to be true, the jury may not take that part into consideration in fixing damages, Holmes v Jones, 121 NY 461, 24 NE 701 (1890); and see Comment to PJI 3:27.

2. ***Retraction***

It has been held that publication of a retraction may be shown only in mitigation of punitive but not of compensatory damages, Kehoe v New York Tribune, 229 App Div 220, 241 NYS 676 (1st Dept 1930), but some doubt is cast on that holding by the reservation of the question in a later decision by the same court, O'Connor v Field, 266 App Div 121, 41 NYS2d 492 (1st

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Dept 1943), and by the failure of the Kehoe decision to mention the earlier decision of the Court of Appeals in Den Norske Ameriekalinje Actiesselskabet v Sun Printing & Publishing Ass'n, 226 NY 1, 122 NE 463 (1919), in which the court discussed but reserved the question. The Restatement, Torts § 621, Comment c adopts the position that the timeliness and adequacy of the retraction bears on the probable harm to the plaintiff's reputation (Restatement, Second, Torts has no corresponding comment), and Seelman argues forcefully that evidence of retraction should be received in reduction of compensatory damages, 1 Seelman, The Law of Libel & Slander (Rev Ed) 430, ¶ 325. Note also that defendant's refusal of plaintiff's request for a retraction may be shown by plaintiff as bearing on defendant's malice in the original publication, Crane v Bennett, 177 NY 106, 69 NE 274 (1904); Prosser & Keeton, Torts (5th Ed) 846 § 116A; see Restatement, Second, Torts, (2) of Special Note following § 623. "Retraction in its traditional role is considered some evidence of lack of ill will and can be used to mitigate damages," Di Lorenzo v New York News, Inc., 78 AD2d 669 (2d Dept 1980); see Kerwick v Orange County Publications Division of Ottaway Newspapers, Inc., 53 NY2d 625, 438 NYS2d 778, 420 NE2d 970 (1981); see also Dattner v Pokoik, 81 AD2d 572, 437 NYS2d 425 (2d Dept 1981) (limited circulation of newspaper in which defendant's defamatory statement was published, and fact that paper published prominently the exoneration of the plaintiff served to justify reduction of both compensatory and punitive awards).

3. ***Provocation***

Provocation may be shown in mitigation of damages, see Gressman v Morning Journal Ass'n, 197 NY 474, 90 NE 1131 (1910); 44 NYJur2d, Defamation & Privacy § 228; Prosser & Keeton, Torts (5th Ed) 848 § 116A.

4. ***Other recovery***

Civil Rights Law § 76 provides that "…. the defendant may prove, for consideration by the jury in fixing the amount of verdict, that the plaintiff has already recovered damages, or has received, or agreed to receive, compensation in respect of a libel or libels of a similar purport or effect as the libel for which such action has been brought." While the statute refers expressly to libel and makes no mention of slander, its rule should be applied in a slander case on common law principles of mitigation of damages, see Livant v Livant, 18 AD2d 383, 239 NYS2d 608 (1st Dept 1963). It has been held that Civil Rights Law § 76 does not warrant a charge to the jury that defendant is entitled to a credit of payments made by other publishers against the damages defendant caused, because the jury has no way of knowing whether the earlier recoveries included punitive damages for which the instant defendant would be entitled to no credit, Goodrow v New York Times Co., 241 App Div 190, 271 NYS 855 (3d Dept 1934), aff'd, 266 NY 531, 195 NE 186 (1935). However, where all defendants were charged with the same publication and it was clear that the earlier payment did not include punitive damages, such a deduction was directed, Faulk v Aware, Inc., 19 AD2d 464, 244 NYS2d 259 (1st Dept 1963), aff'd, 14 NY2d 899, 252 NYS2d 95, 200 NE2d 778 (1964).

The amount of damages in a defamation action "is peculiarly within the province of the jury," Holmes v Jones, 147 NY 59, 41 NE 409 (1895); Rupert v Sellers, 65 AD2d 473, 411 NYS2d 75 (4th Dept 1978), aff'd, 50 NY2d 881, 430 NYS2d 263, 408 NE2d 671 (1980); Yammine v DeVita, 43 AD3d 520, 840 NYS2d 652 (3d Dept 2007); Calhoun v Cooper, 206 AD2d 497, 614 NYS2d 762 (2d Dept 1994), and rests "in their good sense and discretion," Mattice v Wilcox, 147 NY 624, 42 NE 270 (1895). On that question the jury has been called the "supreme arbiter," Rupert v Sellers, supra; see Toomey v Farley, 2 NY2d 71, 156 NYS2d 840, 138 NE2d 221 (1956); Kruglak v Landre, 23 AD2d 758, 258 NYS2d 550 (2d Dept 1965). While the discretion of the jury is arguably broader in libel cases than in any other area of tort law, Lynch v New York Times Co., 171 App Div 399, 157 NYS 392 (1st Dept 1916), and should not be disturbed unless clearly wrong, Polakoff v New York World-Telegram Corp., 1 AD2d 884, 149 NYS2d 872 (1st Dept 1956), aff'd, 2 NY2d 901, 161 NYS2d 151, 141 NE2d 634 (1957), an award which is manifestly motivated by passion or prejudice, Toomey v Farley, supra, or shockingly excessive, Faulk v Aware, Inc., 19 AD2d 464, 244 NYS2d 259 (1st Dept 1963), aff'd, 14 NY2d 899, 252 NYS2d 95, 200 NE2d 778 (1964); see Angel v Levittown Union Free School Dist. No. 5, 171 AD2d 770, 567 NYS2d 490 (2d Dept 1991); Kern v News Syndicate Co., 20 AD2d 528, 244 NYS2d 665 (1st Dept 1963), or so inadequate as to constitute a denial of justice, Kehoe v New York Tribune, 229 App Div 220, 241 NYS 676 (1st Dept 1930), will be set aside. Where, however, the jury returns a "no cause" verdict instead of the nominal damages it should have awarded, the verdict will not be set aside, Lynch v New York Times Co., supra; Throckmorton v Evening Post Pub. Co., 35 App Div 396, 54 NYS 887 (1st Dept 1898).

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Pre-verdict interest may not be awarded in a defamation action, CPLR 5001(a); Rupert v Sellers, 50 NY2d 881, 430 NYS2d 263, 408 NE2d 671 (1980).

The use of a special verdict is particularly appropriate, see PJI 1:26. The jury must be told to fix compensatory damages and punitive damages separately, see Comment to PJI 2:278. A special verdict form for use in conjunction with the pattern charge follows. When the special verdict form is prepared for use, signature lines should be included after each question, see Comment, PJI 1:95. The completed special verdict form should be marked as a court exhibit.

Special Verdict Form PJI3:29 SV
If your verdict is in favor of the plaintiff, answer the following:

1. State the amount of compensatory (presumed) damages, if any, awarded to the plaintiff. (If there is more than one defendant, each defendant should be listed separately with signature lines for five jurors following each name.)

Amount
$___

If you decide not to make an award, you will insert the word “none”.

At least five jurors must agree on the answer to this question.

[Insert signature lines]

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