

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

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

#### 2. Compensatory Damages—Special Harm Required

### PJI 3:29A Intentional Torts—Defamation—Compensatory Damages—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.

As I have already explained, in order to recover, plaintiff must prove financial harm. It is not sufficient for plaintiff to claim generally a loss of business or a loss of customers. Plaintiff must prove specific financial loss. The financial loss which plaintiff claims to have suffered as a result of defendant's statement is *[state the pecuniary loss plaintiff claims to have sustained, such as loss of job causing financial loss, loss of specified customers]*. If you find that plaintiff did suffer such financial loss, you will award plaintiff a sum of money that equals the amount of the financial loss actually suffered by plaintiff.

If you find that plaintiff did suffer financial loss, you may also award plaintiff such amount as, in the exercise of your good judgment and common sense, you find 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 find was directly and actually caused by defendant's statement. In fixing that amount you should consider the plaintiff's standing in the community, the nature of defendant's charge against the plaintiff, the extent to which the charge was circulated, the tendency of the charge to injure such a person as the plaintiff, and all of the other facts and circumstances surrounding the parties. Such damages cannot be proved with mathematical certainty. 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 and comment to PJI 3:29.]*

The pattern charge is intended for use in cases involving plain slander (see PJI 3:23C), libel by extrinsic fact (see PJI 3:24.1), and single instance (see PJI 3:24.2).

Although general damages are insufficient to make actionable claims involving either plain slander or libel by extrinsic fact or single instance cases, all of which require special harm as an essential element, general damages are compensable in such cases once the requisite special harm has been proved, *Restatement, Second, Torts* § 623, Comment a, § 621, Comment a, § 575, Comment c; *Prosser & Keeton, Torts* (5th Ed) 794 § 112.

The special harm must be pleaded and proved and must be of a pecuniary or economic character, *Wehringer v Allen-Stevenson School*, 46 AD2d 641, 360 NYS2d 429 (1st Dept 1974), *aff'd*, 37 NY2d 864, 378 NYS2d 46, 340 NE2d 478 (1975); *Meehan v Newsday, Inc.*, 54 AD2d 560, 387 NYS2d 13 (2d Dept 1976); *Langdon v Shearer*, 43 App Div 607, 60 NYS 193 (2d Dept 1899); Restatement, Second, Torts § 575, Comments b and c; see *Kelly v CBS Inc.*, 59 AD2d 686, 398 NYS2d 673 (1st Dept 1977). Special harm must be pleaded with specificity, *Matherson v Marchello*, 100 AD2d 233, 473 NYS2d 998 (2d Dept 1984); see *Boyle v Stiefel Laboratories Inc.*, 204 AD2d 872, 612 NYS2d 469 (3d Dept 1994) (round figure of one million dollars insufficient); see *Falk v Anesthesia Associates of Jamaica*, 228 AD2d 326, 644 NYS2d 237 (1st Dept 1996) (allegations of “loss of income and benefits” insufficient). General loss of business, damage to credit or reputation or loss of customers without specifying the persons who ceased to be customers is not sufficient, *Drug Research Corp. v Curtis Pub. Co.*, 7 NY2d 435, 441, 199 NYS2d 33, 166 NE2d 319 (1960); *Garland v Vermilyea*, 88 AD2d 1044, 452 NYS2d 265 (3d Dept 1982); *Murphy v Klein*, 12 AD2d 683, 207 NYS2d 794 (3d Dept 1960), nor is a claim of damages in round numbers, with no attempt at itemization, *Drug Research Corp. v Curtis Pub. Co.*, *supra*; *Continental Air Ticketing Agency, Inc. v Empire Intern. Travel, Inc.*, 51 AD2d 104, 380 NYS2d 369 (4th Dept 1976); *Berman v Medical Soc. of State of N.Y.*, 23 AD2d 98, 258 NYS2d 497 (1st Dept 1965). It is not sufficient for plaintiff to allege loss of employment alone without proof that the loss of employment resulted in financial loss, see *Carroll v Watterson*, 186 App Div 703, 175 NYS 24 (1st Dept 1919); *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). Mental distress or physical prostration is not sufficient, *Garrison v Sun Printing & Publishing Ass'n*, 207 NY 1, 100 NE 430 (1912); *Terwilliger v Wands*, 17 NY 54 (1858), nor does loss of social position constitute special harm unless it results in financial loss, such as the loss of a marriage, *Moody v Baker*, 5 Cow 351 (NY Sup 1826), see *Terwilliger v Wands*, *supra*, or of the hospitality or other pecuniary benefit that would otherwise have been conferred, although gratuitously, *Bassell v Elmore*, 48 NY 561 (1872); *Pettibone v Simpson*, 66 Barb 492 (NY Gen Term 1867); see *Terwilliger v Wands*, *supra*.

Plaintiff may 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), 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); see *Roche v Claverack Co-op. Ins. Co.*, 59 AD3d 914, 874 NYS2d 592 (3d Dept 2009) (payment of deductible under existing professional liability policy and higher premiums to renew policy), 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), nor may legal fees incurred to determine plaintiff's rights, *Kowalczyk v McCullough*, 55 AD3d 1208, 868 NYS2d 773 (3d Dept 2008); *Tourge v Albany*, 285 AD2d 785, 727 NYS2d 753 (3d Dept 2001). Generally, as to special harm, see *Prosser & Keeton, Torts* (5th Ed) 793 § 112; 2 Seelman, *The Law of Libel and Slander* (Rev Ed) 1002, ¶¶ 72, 73.

The pattern charge assumes that the jury has been charged with respect to causal connection. The words spoken must be a substantial factor in bringing about the special harm, *Anonymous*, 60 NY 262 (1875); *Terwilliger v Wands*, 17 NY 54 (1858); *Murphy v Klein*, 12 AD2d 683, 207 NYS2d 794 (3d Dept 1960); *Langdon v Shearer*, 43 App Div 607, 60 NYS 193 (2d Dept 1899); Restatement, Second, Torts §§ 575, Comment d, 622A; see PJI 2:70; *Aronson v Wiersma*, 65 NY2d 592, 493 NYS2d 1006, 483 NE2d 1138 (1985) (loss of a non-tenured position does not constitute special harm as a matter of law where there is no causal connection between the loss of that position and the alleged oral defamation). It is not enough that a contract debtor refuses to pay what he owes for that results not from the defamation but from the debtor's intervening wrongful act, *Reporters' Ass'n of America v Sun Printing & Publishing Ass'n*, 186 NY 437, 79 NE 710 (1906). Generally, the repetition of defamatory language by a person other than its originator is not considered a natural consequence of the first publication, and therefore a pecuniary loss resulting from the repetition does not constitute special harm attributable to the originator, see *Karaduman v Newsday, Inc.*, 51 NY2d 531, 435 NYS2d 556, 416 NE2d 557 (1980). But where the repetition is justifiable or innocent, as for example, where it is privileged, then the pecuniary loss caused by such repetition is special harm attributable to the originator, *Bassell v Elmore*, 48 NY 561 (1872); *Fowles v Bowen*, 30 NY 20 (1864); *Pettibone v Simpson*, 66 Barb 492 (NY

Gen Term 1867); see *Terwilliger v Wands*, supra at 58; 2 Seelman, the Law of Libel and Slander (Rev Ed) 1005, ¶ 73. The originator is also responsible if the repetition was authorized or intended by the originator or made under such circumstances that repetition might reasonably have been anticipated by the originator, as when the statement is made to a reporter knowing it will be published, see *Schoepflin v Coffey*, 162 NY 12, 56 NE 502 (1900); *Campo v Paar*, 18 AD2d 364, 239 NYS2d 494 (1st Dept 1963); *Valentine v Gonzalez*, 190 App Div 490, 179 NYS 711 (1st Dept 1920); *Weston v Weston*, 83 App Div 520, 82 NYS 351 (4th Dept 1903); *Prosser & Keeton, Torts* (5th Ed) 799–801 § 113; *Restatement, Second, Torts* § 576; Annot: 96 ALR2d 373. In a case involving special harm caused by a repetition for which the originator may be liable and in which there are issues of fact, the pattern charge must be modified.

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 PJI3:29A SV**

If your verdict is in favor of the plaintiff, answer the following:

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

Amount  
\$ \_\_\_\_

If you decide not to make an award as to any person listed above, you will insert the word “none”.

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

*[Insert signature lines]*

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

Amount  
\$ \_\_\_\_

If you decide not to make an award as to any person listed above, 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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