

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

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

3. Compensatory Damages—Actual Harm Required

PJI 3:29B Intentional Torts—Defamation—Compensatory Damages—Actual 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 actual harm. This means that you may not presume that plaintiff has been damaged. Rather, plaintiff must prove damage to (his, her) reputation or standing in the community, or damages such as personal humiliation, mental anguish and suffering. In order to do this, plaintiff need not offer evidence which assigns an actual dollar amount to the injury. If you find that plaintiff did suffer such actual harm, you will award plaintiff a sum of money that in the exercise of your good judgment and common sense, you find is fair and just compensation for that injury which you find was directly and actually caused by defendant's statement.

If you find that plaintiff did suffer actual harm, 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.]

Based on *Time, Inc. v Firestone*, 424 US 448, 96 SCt 958 (1976); *Gertz v Robert Welch, Inc.*, 418 US 323, 94 SCt 2997 (1974); *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); *Matherson v Marchello*, 100 AD2d 233, 473 NYS2d 998 (2d Dept 1984).

Gertz v Robert Welch, Inc., 418 US 323, 94 SCt 2997 (1974), held that, absent constitutional malice, plaintiff could not recover presumed damages or punitive damages. Thus, absent constitutional malice, a private plaintiff suing a media defendant which 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, *Gertz v Robert Welch, Inc.*, 418 US 323, 94 SCt 2997 (1974); *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* for reasons in AD opinion, 58 NY2d 630, 458 NYS2d 538, 444 NE2d 1002 (1982); *Matherson v Marchello*, 100 AD2d 233, 473 NYS2d 998 (2d Dept 1984); 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), limited the applicability of *Gertz* by distinguishing defamatory speech that affects private concerns from defamatory speech that affects public concerns. Finding that speech on matters of purely private concern warrants less First Amendment protection, 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.

The pattern charge should thus be used in conjunction with PJI 3:23A covering cases involving private plaintiffs and speech regarding matters of public concern. The pattern charge is not appropriate for use in cases involving public officials or public figures because, as a result of *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), constitutional malice is a part of plaintiff's prima facie case which thus permits the award of presumed or punitive damages without proof of actual harm.

The pattern charge assumes that the jury has been charged with respect to causal connection. Causal connection between the defamatory statement and the harm claimed must be established for plaintiff to recover for actual harm, see *Macy v New York World-Telegram Corp.*, 2 NY2d 416, 161 NYS2d 55, 141 NE2d 566 (1957); *Bishop v New York Times Co.*, 233 NY 446, 135 NE 845 (1922); *Sanderson v Caldwell*, 45 NY 398 (1871).

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 PJI3:29B 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 actual harm. (If there is more than one defendant, each defendant should be listed separately with signature lines for five jurors 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 for five jurors 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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