

DEFAMATION ACTIONABLE *PER SE*—PUBLIC FIGURE OR OFFICIAL—PRESUMED DAMAGES¹

The (*state number*) issue reads:

“What amount of presumed damages² is the plaintiff entitled to recover?”

You will consider this issue only if you have answered Issue Number (*state issue number*) “Yes” in favor of the plaintiff.

If you have answered Issue Number (*state issue number*) “Yes,” the plaintiff is entitled to be awarded compensation for presumed damages even without proof of actual damages. Presumed damages are damages that are assumed, without proof, to have occurred to the plaintiff as a result of the publication by the defendant of the [libelous] [slanderous] statement.³ -Presumed damages include matters such as loss of reputation or standing in the community, mental or physical pain and suffering, inconvenience, or loss of enjoyment which cannot be definitively measured in monetary terms.⁴

Presumed damages arise by inference of law and are not required to be specifically proved by evidence.⁵ This means you need not have proof that the plaintiff suffered loss of reputation or standing in the community, mental or physical

¹For an introduction to the category of presumed damages in defamation cases, see N.C.P.I.—Civil 806.40 (“Defamation—Preface”), nn.20-21, 26, 29-30, 32 and accompanying text.

Presumed damages are available only in defamation cases actionable *per se*. Plaintiffs in middle-tier libel cases or defamation cases actionable *per quod* must prove actual damages in order to recover. See N.C.P.I.—Civil 806.40 (“Defamation—Preface”), nn.22 and 34 and accompanying text.

²Under *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 11 L.Ed.2d 686, 706 (1964), a public official or public figure plaintiff must prove that the defendant published the statement with actual malice, that is with knowledge that it was false or in reckless disregard of whether it was true or false. Because a public official/public figure plaintiff must prove actual malice for liability purposes (see N.C.P.I.—Civil 806.53, Defamation—Libel Actionable *Per Se*—Public Figure or Official and N.C.P.I.—Civil 806.67, Defamation—Slander Actionable *Per Se*—Public Figure or Official), the jury is not required to find actual malice a second time when considering damages (*cf.* N.C.P.I.—Civil 806.82, Defamation Actionable *Per Se*—Private Figure—Matter of Public Concern—Presumed Damages). See N.C.P.I.—Civil 806.40 (“Defamation—Preface”), n.27 and accompanying text.

³*Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 760-61, 86 L.Ed.2d 593, 604 (1985).

⁴*Iadanza v. Harper*, 169 N.C. App. 766, 779-80, 611 S.E.2d 217, 221 (2005) (citing 22 Am. Jur.2d § 42).

⁵*Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1139 (7th Cir. 1987).

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pain and suffering, inconvenience or loss of enjoyment in order to award *him* damages for such harm because such harm is presumed by the law when a defendant publishes a [libelous] [slanderous] statement with the knowledge that it is false or with reckless disregard of whether it is false.⁶

The determination of the amount of presumed damages is not a task which can be completed with mathematical precision⁷ and is one which unavoidably includes an element of speculation. The amount of presumed damages is an estimate, however rough, of the probable extent of actual harm, in the form of loss of reputation or standing in the community, mental or physical pain and suffering, and inconvenience or loss of enjoyment which the plaintiff has suffered or will suffer in the future as a result of the defendant's publication of the [libelous] [slanderous] statement.⁸ However, any amount you allow as future damages must be reduced to its present value, because a sum received now is equal to a larger sum received in the future.

⁶Pennsylvania Suggested Standard Civil Jury Instructions—Civil 13.10 (“Damages—Defamation”) (“If you find that the defendant acted either intentionally or recklessly in publishing the false and defamatory communication, you may presume that the plaintiff suffered both injury to [his] [her] reputation and the emotional distress, mental anguish, and humiliation that would result from such a communication. This means you need not have proof that the plaintiff suffered emotional distress, mental anguish, and humiliation in order to award [him] [her] damages for such harm because such harm is presumed by the law when a defendant publishes a false and defamatory communication with the knowledge that it is false or in reckless disregard of whether it is true or false.”).

⁷New York Pattern Jury Instructions—Civil 3:29 (“Compensatory Damages—Presumed Damages—Neither Actual Harm Nor Special Harm Required”) (“These damages cannot be proved with mathematical accuracy.”); *see also Sunward Corporation v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 588 (10th Cir. 1987) (“Ascertainment of presumed general damages is difficult at best and unavoidably includes an element of speculation.”); *cf. Republic Tobacco v. North Atlantic Trading*, 381 F.ed 717, 734 (7th Cir. 2004) (“While we are mindful that under the doctrine of presumed damages a party is not required to show specific loss, there must be some meaningful limit on the magnitude of a jury award when it is arrived at by pure speculation. Presumed damages serve a compensatory function—when such an award is given in a substantial amount to a party who has not demonstrated evidence of concrete loss, it becomes questionable whether the award is serving a different purpose.” The court thereupon reduced the trial court's award of \$3.36 million in presumed damages to \$1 million.).

⁸*Brown & Williamson*, 827 F.2d at 1138 (quoting *Prosser & Keeton on Torts*, § 116A, p. 843).

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You may award the plaintiff presumed damages, for example, in a nominal amount, which is a trivial amount such as one dollar, that shows that the plaintiff is entitled to recover from the defendant. You may also, in the exercise of your good judgment and common sense,⁹ award the plaintiff presumed damages in an amount that will compensate the plaintiff, as far as money can do, for injury that you find is a direct and natural consequence¹⁰ of the [libel] [slander] of the plaintiff by the defendant.

As to this issue, I instruct you that you are to base your decision on the rules of law with respect to presumed damages that I have given you and that you are not required to accept the amount of damages suggested by the parties or their attorneys. You should remember that you are not seeking to punish either party, and you are not awarding or withholding anything on the basis of sympathy or pity.

Finally as to this issue, if you have answered Issue Number (*state issue number*) in favor of the plaintiff, then you will answer this issue by writing in the blank space provided that amount of presumed damages which you have determined to award the plaintiff under the instructions I have given you.

⁹See n.7 *supra*.

¹⁰See *Fields v. Bynum*, 156 N.C. 413, 418, 72 S.E. 449, 451 (1911) (“General damages . . . embrace compensation for those injuries which the law will presume must naturally, proximately, and necessarily result from the utterance of words which are actionable *per se* Such damages include injury to the feelings and mental suffering endured in consequence. General damages need not be pleaded or proved.”); see also 50 Am. Jur.2d, *Libel and Slander* § 478 (“Under the common law, . . . general damages are presumed to result from a defamation that is actionable *per se*, so that recovery may be had of damages naturally and proximately resulting from the defamation even though they are not proved.” (citations omitted)).

