NOTES

DAMAGES FOR DEFAMATION IN NEW JERSEY—Damages for defamation are divided into two main categories referred to as compensatory and punitive or exemplary damages.

The damages referred to as compensatory are further separated into two classes depending upon whether or not the words are actionable *per se*. If the words are not actionable *per se*, the plaintiff must allege and prove that the publication by the defendant has caused him some material harm in the nature of special damage;[1] on the other hand, where the words are actionable *per se*, the plaintiff need not show any special harm.[2] The defamation is actionable *per se* if:

(a) Slander imputes to the person defamed an indictable crime involving either an infamous punishment or an offense of moral

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1 McCuen v. Ludlum, 17 N.J.L. 12 (1839). (Postmaster was accused of opening letters. The court did not consider this a charge of crime nor of official misconduct. Hence to be actionable, it was held that the words must have resulted in some speial damage.) For further authority, see HARRIS, PLEADING AND PRACTICE IN NEW JERSEY 1926), page 301, note 35.

2. Freisinger v. Moore, 65 N J.L. 286, 47 Atl. 432 (1900). (Nonsuit was reversed where the defendant had charged the plaintiff, an art-dealer, with misrepresenting a painting and thereby swindling a customer, the latter subsequent to the defamatory statements, refusing to carry out the contract. This was considered sufficient for general damage; special damage was not considered here although conceivably also present in the loss of the contract.) Johnson v. Shields, 25 N.J.L. 116 (1885). (Words imputing a crime and also dishonesty in official capacity were held actionable without proof of special damage.) Kruse v. Rabe, 80 N.J.L. 378, 79 Atl. 316 (1910). (Charge that real estate broker demanded outrageous commissions held to require no proof of special damage.) Shaw v. Bender, 90 N.J.L. 147, 100 Atl. 196 (1917). (Charge that the plaintiff was a thief and a prostitute was sufficient to charge defendant with liability without any show of special damage.)

"A distinction between defamation which is, and defamation which is not, actionable without 'special', or, as it is termed in the code, 'actual damage' is the issue, not of any deliberate or thought-out scientific theory, as is commonly supposed, but purely of a series of events, connected mainly with the growth and decay of the struggle between the ecclesiastical and the King's courts. The basis and origin of the demarcation is, in other words, historical and not rational or doctrinal." BOWERS CODE OF ACTIONABLE DEFAMATION (1923), p. 22, note (a).

turpitude.[3] It is not material that the prosecution for the crime charged has been barred by the statute of limitations.[4] Imputations of adultery or fornication are included within this group, as are charges of inchastity; the latter is construed as suggesting that the plaintiff has committed either adultery or fornication as the case might be.[5].

(b) Slander imputes a venereal disease to the plaintiff[6].

(c) Slander charges the plaintiff with a lack of proper conduct, characteristics, or capabilities necessary to the proper exercise of his trade, business, profession, or public or private office.[7]

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3. Cole v. Grant, 18 N.J.L. 327 (1841) (perjury); Johnson v. Shields, *supra*, note 2 (larceny); Moore v. Beck, 71 N.J.L. 7, 58 Atl. 166 (1904) (keeping a disorderly house); Shaw v. Bender, *supra*, note 2 (larceny).

"The words ignominous or infamous have a known and definite meaning in the law. Mutilation, whipping, branding, pillory, hard labor in the house of correction, or otherwise, and the stocks are of this character." McCuen v. Ludlum, *supra*, note 1, at page 18.

A crime of moral turpitude might well be defined as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow-men or society in general, contrary to the accepted and customary rule of right and duty between man and man." See, BLACK'S LAW DICTIONARY, Third Edition (1923), pp. 1765-6.

4. Brightman v. Davies, 3 N.J.Misc. 113, 127 Atl. 327 (1925). (Decided by N. J. Supreme Court.)

5. Brightman v. Davies, *supra*, note 4 (a *per curiam* opinion where it is said: "Therefore the sense in which the words were uttered and understood is for the jury, who may properly find that the words are actionable *per se*, as imputing a want of chastity in the plaintiff.") Joraleman v. Pomeroy, 22 N.J.L., 271, 275 (1850). (Charges of being a "public whoremaster" and "riding women along the street" were held actionable *per se* since imputing an offense involving moral turpitude and indictable as such.) Shaw v. Bender, *supra*, note 2. ("It is actionable to call a woman a prostitute and no innuendo is necessary, as adultery or fornication is implied accordingly as the woman is married or unmarried. A suit lies for words actionable *per se* without proof of special damage.") But compare: AMERICAN LAW INSTITUTE, RESTATEMENT OF TORTS, P.F.D. No. 3, section 1015, which makes this an entirely separate class of defamation actionable per se.

6. No New Jersey authority has been found on this point; however, this seems to be the general rule in both America and England: HARPER-TORTS (1933), pp. 512-3; RESTATEMENT OF TORTS, P.F.D. No. 3, section 1011A(b); BOWERS CODE OF ACTIONABLE DEFAMATION (1923), p. 25.

7. Freisinger v. Moore, *supra*, note 2. ("Words spoken of a person [art-

(d) Any libel which, had it been oral rather than in writing, would be slanderous *per se;* which holds up the person defamed as an object of ridicule, hatred or contempt; or which leads other people to shun the plaintiff.[8]

Where a corporation sues for defamation, it is normally held that even if the words are actionable *per se* the plaintiff must prove some special harm; however, this doctrine is rather doubtful in the present state of the law in New Jersey.[9]

Although special harm need not be shown when the words are

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dealer] in his office, business, or employment, imputing a want of integrity, common honesty, or credit, or charging personal incapacity are actionable * * *") Heller v. Duff, 62 N.J.L. 101, 40 Atl. 691 (1898) (sheriff charged with using his position to protect a disorderly house.) Johnson v. Shields, *supra*, note 2, ("any lawful employment or situation of trust is within the rule"—applied to a corporate director.) Kruse v. Rabe, *supra*, note 2, (real estate dealer). McCuen v. Ludlum, *supra*, note 1, at pp. 14, 16 (postmaster). Reilley v. Curtiss, 83 N.J.L. 77, 84 Atl. 199 (1912) (member of an election board). Ritchie v. Widdemer, 59 N.J.L. 290, 35 Atl. 825 (1896) (Minister charged with disgraceful and immoral conduct.)

The quotation from Johnson v. Shields included in this footnote would apparently indicate that the same rule would apply whether the office be for pay or is a mere honorary position without any compensation.

8. Fedor v. Herrick, 43 N.J.L. 24 (1881). (It was considered unnecessary that the libel have any connection with the business of the plaintiff.) Garvin v. Finch, 97 N.J.L. 329, 116 Atl. 771 (1922). (Libels need not charge a crime to be actionable *per se.*) Hand v. Wanton, 38 N.J.L. 122 (1875). (To print that a man accepted a bribe in the exercise of his political privileges holds him up to ridicule and contempt, is a libel, and special damage need not be shown.) Hartkorn v. Paterson Gas & Electric, 67 N.J.L. 42, 50 Atl. 354 (1901) (theft). Kilpatrick v. Edge, 85 N.J.L. 7, 88 Atl. 839 (1913). (Libel charged the keeping of a disorderly house, a criminal offense.) Ramsdell v. P.R.R., 79 N.J.L. 379, ??? Atl. 444 (1910); Vail v. P.R.R., 103 N.J.L. 213, 136 Atl. 425 (1927) (crime).

For an indication that a libel which leads people to shun the plaintiff is defamation which is actionable *per se.* See: RESTATEMENT OF TORTS, P.F.D. No. 3, section 1001, combined with T. No. 12, section 1011, and the same section in P.F.D. No. 3.

9. Trenton Mutual Life v. Perrine, 23 N.J.L. 402, 408, 57 Am. Dec. 400 (1852). ("A corporation has not, like an individual, any character to be affected by the libel, independent of its trade or business. It has no individual character in which it can suffer an injury independent of its pecuniary affairs and therefore in an action for libel which affects its trade or business, the corporation

actionable *per se*, yet special damage may be recovered if special harm has been sustained and proved, thus increasing the verdict above the general damages which the jury is permitted to find.[10]

A. COMPENSATORY DAMAGES

I. General Damage

a. *General damages may be awarded where the defamation is actionable per se.*

General damages, as distinct from special damage, may be recovered whenever the publication is actionable *per se*, a "presumption" arising on the mere proof of such words that the plaintiff has suffered substantial harm.[11] But this "presumption" is not even an inference of fact for the jury, since the plaintiff need neither allege nor prove any harm whatsoever to win a substantial verdict. On the other hand, the jury may return a verdict for nominal damages. It is therefore self-evident that this terminology is misleading.[12] Similarly, where the publication is actionable *per se*, the trial court may not order a nonsuit on

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must show that the words, not being in themselves actionable, have occasioned a special pecuniary loss or damage.") This same view has been adopted in Harris, *supra*, note 1, at page 301, and also by the Restatement of Torts, P.F.D. No. 3, section 1003(1)

But see Empire Cream v. DeLaval, 75 N.J.L. 207 (1907). (The court without considering the Perrine decision held a writing about a corporation to be actionable *per se* without any proof of special damage.)

10. Butler v. Hoboken Printing, 73 N.J.L. 45, 49, 62 Atl. 272 (1905); Lawless v. Muller, 99 N.J.L. 9, 11, 123 Atl. 104 (1923); Restatement of Torts, T.D. No. 13, section 1066.

11. Collins v. Tansey, 100 N.J.L. 127, 126 Atl. 136 (1924) (libel); Brightman v. Davies, *supra*, note 4 (slander imputing inchastity); Reilley v. Curtis, 83 N.J.L. 77, 84 Atl. 199 (1912) (slander imputing drunkenness to a member of an election board while on duty.)

In Brightman v. Davies, *supra*, note 4, the court said: "The law presumes damages where the words are actionable *per se* and the rule applies as well when taken in connection with surrounding circumstances and facts as when actionable *per se* without any inducement."

12. Collins v. Tansey, *supra*, note 11. (One plaintiff, Halverin, received six cents while the other plaintiff, Collins, was awarded $500.)

the motion of the defendant;[13] nor may the court itself direct that the verdict be limited to nominal damages;[14] the determination of general damages is, within reasonable limits, at the sole discretion of the jury.

Under the guise of this "presumption", the jury may assess damages for harm done to the reputation and feelings of the plaintiff.[15] To assist the jury in its final determination of general damages, the plaintiff may give evidence of harm to his reputation and feelings. Therefore the plaintiff may show his rank and position in life as well as his social and financial standing, thus supplying the jury with a basis for determining the harm to his reputation. To the same end, testimony by those to whom the defamation was communicated may be introduced as to their impressions after hearing the defamatory words. Evidence of change of manner and conduct of the plaintiff's family and friends may also be shown to assist the jury.[16]

b. *Emotional disturbance is a proper element of general damage but physical injury resulting therefrom may not be considered by the jury.*

Emotional distress may be compensated for either as an element of general damage or, where special harm has already been shown, as parasitic damages to be tacked on to the special damage.[17] This

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13. *Ibid*, at page 171.

14. Reilley v. Curtiss, *supra*, note 11.

15. Neafie v. Publishing Co., 75 N.J.L. 564, 68 Atl. 146 (1907); McCormick, Damages (1935), at pp. 53, 423; Odgers, Libel and Slander, Sixth Edition (1929), p. 308. The plaintiff himself may prevent such a "presumption" from arising in his favor by setting forth in the complaint that his reputation had not been injured and that he was seeking merely nominal damages. See: Cole v Richards, 108 N.J.L. 356, 357, 158 Atl. 424 (1931), where the plaintiff was himself a lawyer and probably should have known better.

16. McCormick, *supra*, note 15, at pp. 424, 426, 429. This result seems also to be implied in the Restatement of Torts, P.F.D. No. 3: "One who is liable for a libel or a slander actionable *per se* is liable for harm caused thereby to the reputation of the person defamed or in the absence of proof of such harm, for the harm which normally results from such defamation."

17. Butler v. The Hoboken Printing Co., *supra*, note 10; Neafie v. Publishing Co., *supra*, note 15; Deyo v. Clough, 43 Atl. 653 (1899) (never officially reported)

doctrine originated in the dictum of a per curiam opinion,[18] where the court intimated that compensatory damages depends solely on actual harm done to reputation and feelings. Subsequent decisions have translated this vague dictum into the rule of law that the jury may always consider emotional disturbance in calculating the damages to be awarded for the defamation.[19] Generally, in New Jersey tort law there is no recovery for the nervous shock negligently caused by the defendant unless accompanied by some impact. It is perhaps unnecessary that the impact itself be actionable to recover for the combination of the impact and the emotional disturbance, but the impact must always be shown.[20] This suggests, in effect, that damages for nervous shock may be tacked on as parasitic after computing the actual harm done by the defamation. The distinction is based on the natural reluctance of courts to compensate for emotional disturbance in itself, a harm easily feigned by the plaintiff. It is therefore logical to draw the same distinction in defamation; that is, emotional disturbance is an element of the verdict only as part of general damage or where there has already been established special harm of a pecuniary or otherwise substantial nature.

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18. Knowlden v. Guardian Printing Co., 69 N.J.L. 670, 55 Atl. 287 (1903). ("But when damages are sought which are compensatory only, such evidence of mitigation [proof of good faith in the publication] is not admissible, the compensation depending not upon malice or intent, but solely on actual injury done by the publication to reputation and feelings.") For similar language, see Garrison v. Robinson, 81 N.J.L. 497, 79 Atl. 278 (1911).

19. Deyo v. Clough, *supra*, note 17; Garrison v. Newark Call Co., 87 N.J.L. 17, 93 Atl. 590 (1914). (Mental anguish and nervousness "is often more popularly used to characterize state of mental agitation and to exclude idea of physical sickness in connection with it.") Neafie v. Publishing Co., *supra*, note 15 (mental sickness and mental suffering).

20. Porter v. D. L. & W. RR., 73 N.J.L. 405, 63 Atl. 860 (1906). ("Proof by plaintiff was that she was hit by something on the neck and that dust from falling debris went into her eyes. Proof of either of these physical injuries would take the case of the rule as to non-recovery for fright alone.") Ward v. West Jersey RR., 65 N.J.L. 383, 47 Atl. 561 (1900). ("It seems universally conceded that mere fright from which no subsequent physical suffering results, affords no ground of action; but in cases where physical injuries follow therefrom, the decisions are not harmonious. In my judgment, however, those cases which hold to the view that there can be no recovery for such injuries, rest upon sound legal principles and should be followed.")

Physical injury is said to be neither the natural nor the necessary consequence of defamation hence New Jersey juries may not award damages for physical harm sustained by the plaintiff.[21] As applied to general damage, there is no quarrel with this doctrine since, as already seen, general damage involves no proof on the part of the plaintiff but merely is an estimate by the jury of the harm done or supposed to have been done to the reputation and feelings of the plaintiff.

c. *The rank, position, and wealth of the defendant is admitted and of the plaintiff probably should be admitted to increase general damage.*

Since the greater the wealth the defendant is reputed to have, the greater damage he can do to the plaintiff's reputation, it is well settled that the reputed wealth of the defendant may be shown to increase general damage. The theory underlying this tenet is that the general public is apt to place more emphasis on the statements of a defamer reputedly rich than one reputedly impoverished.[22] By the same token, the rank and social position of the defendant may be shown, since his imputations also are usually considered more credible when his position in life is more advanced socially.[23] On a parity of reasoning, it might be argued that, since the plaintiff with a high reputation for wealth, rank, or social position has much more to lose than one with lesser

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21. Butler v. Hoboken Printing Co., *supra*, note 10; Molt v. Public Indemnity, 10 N.J.Misc. 879, 880, 161 Atl. 346 (Sup. Ct. 1932); Neafie v. Publishing Co., *supra*, note 15.

22. Bahrey v. Poniatishin, 95 N.J.L. 128, 112 Atl. 481 (1920); Weiss v. Weiss, 95 N.J.L. 125, 112 Atl. 184 (1920); Zambory v. Csipo, 3 N.J.Misc. 153, 127 Atl. 573, rehearing denied in 3 N.J.Misc. 322, 128 Atl. 209. (Decided by Supreme Court of New Jersey.) (In each of these cases, the distinction is clearly drawn that, on the issue of compensation, only the reputed wealth of the defendant is admissable while on the issue of punitive damages, only the actual wealth of the defendant may be shown.) But see: Flaacke v. Stratford, 72 N.J.L. 487, 64 Atl. 146 (1905). (In this case, no such distinction was drawn, but evidence of actual wealth was held admissible on the issue of compensatory damages.)

In view of the consistency of the later cases on this dictinction, Flaacke v. Stratford might well be considered as impliedly overruled on this point.

23. Zambory v. Csipo, *supra*, note 22; 18 AM. & ENG. ENC. OF L. (Second Edition) 1906

amounts of these tangible and intangible advantages, such evidence should also be considered to increase the award of general damages on the theory of increased harm to the plaintiff's reputation. However, no indication to this effect has been found in the cases.

It is submitted that this doctrine, although supported by authority and logic, nevertheless contradicts fundamental principles of jurisprudence, since the theory of the law courts has been that all people, be they wealthy or indigent, stand equal in the eyes of the law.[24] Therefore any principle enabling evidence of wealth or reputed wealth to be introduced undermines this concept of equality. In addition, evidence that the defendant is extremely wealthy might easily be prejudicial to him; the jury might assume that the defendant is liable, without considering the evidence on this issue, and proceed to assess damages on this assumption that the defendant is at fault.

d. *Bad reputation of the plaintiff may decrease general damage.*

A person with a bad reputation is said to have little to lose when he is defamed, hence he is said to be entitled to but little compensation for his small loss; the defendant is therefore allowed to show, in mitigation of general damage, the community reputation of the plaintiff for bad character.[25] However, this reputation may not be shown by evidence of specific acts but must necessarily take the form of general reputation of the community.[26]

e. *A retraction by the defendant should go in mitigation of general damage.*

It is submitted that an apology or retraction by the defendant, insofar as made seasonably and in public, or in such other fashion as

24. 35 A.L.R. 9n.

25. Fodor v. Fuchs, 79 N.J.L. 529, 76 Atl. 1081 (1910); Pier v. Speer, 73 N.J.L. 633, 64 Atl. 161 (1906); Sayre v. Sayre, 25 N.J.L. 235 (1855); McCormick, *supra*, note 15, at p. 440.

26. Fodor v. Fuchs, *supra*, note 25; Pier v. Speer, *supra*, note 25; 38 L.R.A. (N.S.) 1176n; McCormick, *supra*, note 15, at p. 442. But the evidence must concern itself with the reputation at the time of the defamation; see Pier v. Speer, *supra*. Yet it need not be limited to the particular traits of character involved in the defamation; Sayre v. Sayre, *supra*, note 25.

to qualify the defamation, should diminish an award of compensation, since a timely retraction published in the same manner as was the original defamation might go far in restoring to the plaintiff some of his lost reputation. To the extent that it is restored, this should go in mitigation, but the retraction should not be shown to defeat damages completely since the restoration of the reputation can hardly be in full.

f. *Evidence of bad faith of the defendant may not increase general damage nor may evidence negativing bad faith diminish general damage.*

Although the existence of bad faith as a basis for punitive damages may be shown by introducing evidence of other defamation uttered by the defendant concerning the plaintiff, such statements are not considered in determining the amount of general damage.[27] This is equally true when a plea of justification unsupported by testimony is introduced to establish "malice".[28]

Under the statute permitting the plaintiff to prove an unsatisfied demand for retraction from a newspaper printing a libel, as an alternative to the proof of actual bad faith, as a basis for an award of exemplary damages,[29] the failure to demand such a retraction is not evidential to diminish compensatory damages.[30] It has been suggested that, if the contrary were true, the statute would be unconstitutional.[31] Similarly lack of ill-will may not be shown to reduce a compensatory verdict[32] nor may belief in truth,[33] nor previous publication by others[34] be shown for the same purpose.

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27. Evening Journal v. McDermott, 44 N.J.L. 430, 43 Am. Rep. 393 (1881); Schenk v. Schenk, 20 N.J.L. 208 (1848).

28. Moore v. Beck, *supra*, note 3.

29. I Revised Statutes of New Jersey (1937) 2:59-2 (set forth in full in *post*, note 67.)

30. Marsh v. Edge, 68 N.J.L. 61, 54 Atl. 834 (1902); Neafie v. Publishing Co., *supra*, note 15.

31. Neafie v. Publishing Co., *supra*, note 15

32. Garrison v. Robinson, *supra*, note 18; Knowlden v. Guardian Printing, *supra*, note 18.

33. *Ibid.*

II. Special Damage

a. *In proving special damage, either as a basis for a cause of action or where a cause of action has already been established, the plaintiff must show that the harm was a pecuniary or material one.*

Special damage must be alleged and proved with great particularity.[35] The plaintiff must assert and establish the loss of money or some material advantage capable of being assessed in money. Such harm ordinarily would arise from the loss of or failure to acquire some position or right.[36] Hence the loss of a particular sale, position, office, or customer may be shown; that the loss of a marriage already contracted may be shown as special damage was indicated in a recent case.[37]

Damages for emotional disturbance may only be awarded as an element of general damage, where the words are actionable *per se*, or in addition to special damage already proved. This type of harm may not be shown as the sole basis for special damage.[38] This proposition is consistent with the general rule of special damage since emotional disturbance has never been considered a pecuniary or otherwise material harm.

As indicated previously, New Jersey juries may not award the plaintiff compensation for physical injury resulting from the defamation because of an absence of causal connection between the publica-

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34. Fodor v. Fuchs, *supra*, note 25; Schwarz v. Evening News, 84 N.J.L. 486, 87 Atl. 148 (1913).

35. Molt v. Public Indemnity, *supra*, note 21.

36. McCormick, *supra*, note 15, p. 419. Odgers, *supra*, note 15, p. 310. 1 Starkie, Libel and Slander, American Edition, pp. 168, et seq.

37. Minsky v. Satenstein, 6 N.J.Misc. 979, 981-2 (1928). (The theories of action included "malicious interference with a contract to marry and a malicious conspiracy to bring about this breach" but the opinion of the court, in discussing the privilege of parents to interfere with a contract to marry, suggests in *obiter dictum* that if there had been an interference by false and slanderous charges, this would have been actionable as libel or slander rather than as an interference with a contract.) (Decision of N. J. Supreme Court.)

38. Butler v. Hoboken Printing, *supra*, note 10. (Dictum of the court considers mental suffering as a proper element of general damage.) Neafie v. Publishing Co., *supra*, note 15. (Mental suffering held a proper element of damage.) See also: Harper, *supra*, note 6, section 342.

tion and the physical harm.[39] It is submitted that the contrary result might well be reached to conform with the weight of authority in the United States and also to attain fundamental symmetry in the law of the state.[40] Although the theory underlying the doctrine has been severely criticized,[41] New Jersey follows the minority rule that physical injury resulting from negligently-caused nervous shock is not actionable if unaccompanied by some physical impact.[42] Yet a slight physical impact will support a verdict with parasitic damages, which in themselves are far out of proportion to the harm actually caused by the physical contact.[43] It is probably unnecessary that the impact itself be actionable to attain this result. In defamation, there is no question in New Jersey that emotional disturbance may be tacked on by way of parasitic damages.[44] By contrast it seems far less hazardous to add damages for physical harm once an actionable injury has been established than it is to tack on compensation for emotional distress. From the standpoint of certainty of proof, physical injury is more easily established and with a greater measure of certainty. Since proximate causation must be established in practically every tort case, the objection that physical harm is not the proximate result of defamation should not be solidified into an absolute exclusionary principle but rather should be decided as a factual question depending upon the particular facts of each case. In the field of torts generally, compensation for emotional disturbance is frequently questioned but an award for physical injury is rarely withheld. If, in defamation, the former is allowed,

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39. See *supra*, note 21.

40. 90 A.L.R. 1199; See: Throckmorton, *Damages for Fright*, 34 HARV. L REV. 260, 265.

41. Throckmorton, *supra*, note 32, at p. 264.

42. Ward v. West Jersey RR., *supra*, note 20; Mitchell v. Rochester RR. 151 N.Y. 107, 45 N.E. 499 (1896).

43. Porter v. D. L. & W. RR., *supra*, note 20.

44. See *supra*, note 17.

Compare RESTATEMENT OF TORTS, P.F.D. No. 3, section 1016: "One who is liable to another for libel or slander is liable also for emotional distress and bodily harm resulting therefrom which is proved to have been caused by the defamatory publication or, in the absence of such proof, for such emotional distress as normally results from such a publication."

the latter should not be excluded. This rule in New Jersey is not so well established as to preclude its reconsideration.

Generally, where the plaintiff seeks special damage, he must allege and prove the situation with such a degree of particularity as is possible under the circumstances. If he claims loss of profits or patronage in his trade, business, or profession, he must prove the loss of special customers, sales, patients, or clients. But special damage may be stated generally without indicating particular persons or sales where the individuals may be supposed to be unknown to the plaintiff, where it is impossible to specify them, or where they are so numerous as to excuse specific discription.[45]

Where the defamation is actionable *per se*, a cause of action is established without the proof of special damage.[46] However, if the plaintiff has suffered some special harm, this may be shown to increase the verdict above the general damage which the jury is permitted to find.[47] Although it might be argued that, in establishing special harm in this situation, some departure from strict rules of certainty might be allowed, the indication is that the rules discussed above will not be deviated from to any great extent.[48]

III. Causation

The plaintiff must show that the injuries were the type of risks which the defamer might reasonably contemplate.

Whenever the plaintiff seeks to recover for some harm allegedly

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45. Trenton Mutual Life v. Perrine, *supra*, note 9; Ritchie v. Widdemer, *supra*, note 7; 86 A.L.R. 848, 849; 2 Saunders Reports, 411, note 4.

It is submitted that the exception, excusing the rule of certainty in the specific cases, is not as wide as the general rule requiring certainty, since the application of the general rule is not excused in the usual case of special damage as the loss of a particular position or contract.

46. See *supra*, note 2.

47. See *supra*, note 10

48. Butler v. Hoboken Printing, *supra*, note 10, at p. 49. ("Mr. Odgers, after stating the rule respecting special damages in the first class, if they have been properly pleaded, proceeds to say that the law is not quite so strict in actions where the words are actionable *per se*, and that, although when the words are not actionable *per se*, mental distress, illness, etc., do not constitute

resulting from the defendant's publication, he must establish the harm suffered as resulting from and being either the natural or probable or intended consequence of the defamation. The harm suffered must be the type of risk reasonably to be expected from the publication.[49]

B. EXEMPLARY DAMAGES

I. General Principles

a. *Punitive damages may be awarded on the proof that the defendant was actuated by a wrongful motive or published the defamation with wanton or reckless disregard of the rights of the plaintiff.*

Whereas compensatory damages are awarded for actual injury sustained by the plaintiff, the theory underlying the award of exemplary damages is that the defendant had a wrongful motive to injure the plaintiff or that he was reckless and did not consider the rights of the plaintiff.[50] These damages are imposed as a punishment to the offender and a warning to others.[51]

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special damage, yet where the words are actionable *per se*, the jury may take such matters into their consideration in according damages.")

49. Hughes v. McDonough, 43 N.J.L. 438, 39 Am. Rep. 603, 45 L.R.A. 87n (1881). (Absence of natural and direct causal sequence between the injury claimed and the defamation will be a basis for the exclusion of all damages.) King v. Patterson, 49 N.J.L. 417, 9 Atl. 705 (1887). (Juries may only consider injuries to the plaintiff from the defamation which was either intended or were of such a nature as to be clearly the natural and necessary consequence of the words.) Potter v. Bath, 72 N.J.L. 470, 63 Atl. 282 (1906). (Words of the defendant must be predominating cause of the harm. It is insufficient that the words contributed to the harm complained of; they must be the actuating power causing this harm.)

Corpus Juris, Libel and Slander, section 544; Bowers, Code of Actionable Defamation (1923), p. 31; Odgers, *supra*, note 15.

50. Garrison v. Robinson, *supra*, note 18; Neafie v. Publishing Co. *supra*, note 15; Weir v. McEwan, 94 N.J.L. 92, 109 Atl. 355 (1903). "Wherever injury has been done the fair fame, reputation, or character of the plaintiff, juries generally are invited to give and are justified in giving, such a sum as marks their sense of the maliciousness or recklessness of the wrongdoer in offering the insult and injury, their belief in the groundlessness of the charge and their desire to vindicate the character of the plaintiff." Hoboken Printing v. Kahn, 59 N.J.L. 218, 221, 35 Atl. 1053 (1896).

51. Hulbert v. Arnold, 83 N.J.L. 114, 83 Atl. 497 (1912).

There is no presumption of the existence of a state of mind necessary for the award of punitive damages, but the plaintiff must plead and prove "malice",[52] by showing either that the defendant had a wrongful intent to injure the plaintiff or that he acted with a reckless and wanton disregard of the rights of the complaining party.[53]

The cases distinguish, not too clearly it is true, between "implied malice", a remnant of antedated pleading, which consists in publishing without justifiable cause that which is injurious to the character of another, such "implied malice" being presumed from the mere fact of publication[54] and "express malice" which is the publication with ill-will or recklessness needed for the award of punitive damages.[55] This distinction, although not sharp in the cases, indicates that the problem of "implied malice" will only arise procedurally while the proof of "express malice" is essential to the substantive right of exemplary damages. So "implied malice" is essentially merely a procedural device indicating that, in the absence of contrary evidence, the publication is actionable and not privileged, thereby shifting to the defendant the burden of establishing circumstances sufficient to indicate that the defamation was privileged.[56] On the other hand, in considering the question of punitive damages, plaintiff must prove ill-will, fraud, or reckless indifference on the part of the defendant.[57] As a result of this distinction, if the plaintiff introduces sufficient evidence to estab-

52. Weiss v. Weiss, *supra*, note 22; McCormick, *supra*, note 15, at pp. 280, 431.

53. Haines v. Schultz, 50 N.J.L. 491, 14 Atl. 488 (1888); Hintz v. Roberts, 98 N.J.L. 768, 121 Atl. 711 (1923); Lawless v. Muller, *supra*, note 10.

54. King v. Patterson, *supra*, note 49; Weir v. McEwan, *supra*, note 50.

55. Weir v. McEwan, *supra*, note 50. ("Express malice consists of such a publication from ill-will, or some wrongful motive implying a willingness or intent to injure, in addition to intent to do an unlawful act. It requires affirmative proof beyond the act of publishing indicating ill-will or such want of feeling as to impute a bad motive. It does not become an issue, where the article is libelous on its face, unless punitive damages are claimed.")

56. Vail v. P.R.R., *supra*, note 8. ("Implied malice" is so far procedural that it disappears entirely as soon as the defendant establishes the facts showing privilege. Harper, *supra*, note 6, at pp. 546, 547.)

57. Lawless v. Muller, *supra*, note 10; McCormick, *supra*, note 15, at pp. 280, 431. ("Implied malice" has also been called "malice in law" or "legal

lish bad faith or recklessness by the defendant, the procedural device of "implied malice" ceases to have any significance since, in the face of proof of bad faith or recklessness, any proof by the defendant showing a privilege is usually immaterial.[58]

There are several factual situations having a bearing on the existence of bad faith or recklessness. To this end, evidence of prior, contemporaneous, or subsequent utterances by the defendant made about the plaintiff may be introduced to show *quo animo* the words in suit were spoken.[59] Proof of such repetition is admissable even if made after the commencement of the action for the original defamation.[60] If the new publication mingles with the old some new defamation, the whole statement may be introduced since the defendant has not the right to require separation.[61] The words introduced to show degree of malignity need not necessarily be similar to the publication which is the basis of the cause of action[62] and it is immaterial that the new publication is itself actionable or not.[63]

When the defendant enters a plea of truth, in effect repeating the original defamation, failure to establish this plea with competent evidence should be considered by the jury as bearing on the existence

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malice"—see King v. Patterson, *supra*, note 49; "express malice" has also been referred to as "malice in fact"—see Weir v. McEwan, *supra*, note 50.)

58. Fahr v. Hayes, 50 N.J.L. 275, 13 Atl. 261 (1888); Savage v. Stover, 86 N.J.L. 478, 92 Atl. 284 (1914), *aff'd* in 87 N.J.L. 711, 94 Atl. 1103. (The burden of showing privilege is on the defendant, and, if he sustained this burden, the plaintiff may still hold him liable by showing express malice which negatives the privilege usually.)

59. Bartow v. Brands, 15 N.J.L. 248 (1835); 12 A.L.R. 1028n; McCormick, *supra*, note 15, at p. 436.

60. 12 A.L.R. 103n.

61. Schenk v. Schenk, *supra*, note 27.

62. 12 A.L.R. 1033n.

63. Evening Journal v. McDermott, *supra*, note 25. Also at 44 N.J.L. 430, 43 Am. Rep. 392; Hulbert v. Arnold, *supra*, note 53. (But the defendant is entitled to a careful instruction to the effect that whether the words introduced to show malice are themselves actionable or not, and whether or not they carry the same imputations as the words in suit, yet the jury may not consider these words to increase damages in any way, but may only consider them on the issue of the existence of "express malice". See Schenk v. Schenk, *supra*, note 41.)

of bad faith or recklessness.[64] But the New Jersey courts have limited consideration of this unsustained plea as indicating the existence of such bad faith or recklessness to the situation where it was entered in bad faith to injure or harass the plaintiff or without just expectations of sustaining it by proof.[65] On the other hand, however, if the defendant later withdraws his plea of justification, even by leave of the court, the plaintiff may show this as bearing on the existence of bad faith or recklessness, apparently without showing any bad faith at all.[66]

The plaintiff may recover exemplary damages without establishing defendant's bad faith or recklessness under an early statute[67] by showing, in a libel action against a newspaper, that the defendant had been requested in writing to print a retraction and had failed to do so within a reasonable time. This omission to retract by the defendant is an alternative basis on which to base exemplary damages, in the cases within the scope of the statute, since the plaintiff may always prove bad faith or recklessness to recover exemplary damages. The statute relates only to the proof requisite for such punitive damages,[68] a defense that the plaintiff had not complied with either alternative having no

64. McCarmick, *supra*, note 15, p. 436; 34 A.C. (1914D) 1059n.

65. Fodor v. Fuchs, *supra*, note 25; Moore v. Beck, *supra*, note 3; McCormick, *supra*, note 15, at p. 436; 34 A.C. (1914D) 1060n. ("Where defendant interposes substantial evidence tending to support his plea, the mere fact that the proofs offered failed to convince the jury of the truth of the alleged slanderous words affords no grounds for holding as a matter of law, that the plea of justification was filed in bad faith, or that the words were spoken with a malicious motive, and therefore justifies the jury in assessing exemplary damages against the defendant.")

66. 1 Revised Statutes of New Jersey (1937), 2:59-2; P.L. (1898), p. 476. ("In every civil action for libel, against the owner or owners, manager, editor, publisher, or reporter of any newspaper, magazine, publication, periodical, or serial in this state, defendant may give proof of intention and unless plaintiff shall prove either malice in fact or that the defendant, having been requested by him in writing to retract the libelous charge in as public a manner as that in which it was made, failed to do so within a reasonable time, he shall recover only his actual damage proved and specially alleged in his declaration.")

67. Pamph. L. 1898, p. 476.

68. Marsh v. Edge, 68 N.J.L. 661, 54 Atl. 834 (1902). Neafie v. Publishing Co., *supra*, note 15; also in 72 N.J.L. 340, 62 Atl. 1129 (1905).

bearing on the calculation of compensatory damages.[69] In fact, one court suggested that were this statute to exclude compensatory damages on the failure of the plaintiff to comply with either alternative, such a construction would render the legislation unconstitutional, since the legislature may not authorize any one unjustifiably to injure the reputation of another without making ample compensation.[70] It is submitted that this is not a necessary result since a law-making body might well establish statutory conditions precedent in the alternative, before the plaintiff may recover for defamation, provided each alternative is in itself reasonable.

Facts which indicate that the defendant neither harbored ill-will nor was reckless are evidential to decrease the amount of exemplary damages.[71] The defendant may establish absence of ill-will either in the abstract or by one of two other methods; honest belief in the truth of the publication may be shown to cut down punitive damages but may not completely exclude them[72] even though, apparently, complete absence of bad faith or recklessness is thereby established; similarly, evidence that the defamation was a matter of common rumor tends to negative the existence of bad faith or recklessness, hence the defendant may show that the publication was a matter of common gossip,[73] or that he merely copied the statements from another paper, or was merely repeating the imputation as made to the defendant by another.[74]

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69. Lindsey v. Evening Publishing Association, 10 N.J.Misc. 1275, 163 Atl. 245 (1932) (decided by New Jersey Supreme Court).

70. Neafie v. Publishing Co., *supra*, note 15.

71. Fodor v. Fuchs, *supra*, note 25; Garrison v. Robinson, *supra*, note 18; Weir v. McEwan, *supra*, note 50.

72. Garrison v. Robinson, *supra*, note 18; Lindsey v. Evening Journal Association, *supra*, note 69; Schwarz v. News Publishing Co., *supra*, note 34. (The publication must also have been made in good faith—see Fodor v. Fuchs, *supra*, note 25.)

73. Stuart v. News Publishing Co., 67 N.J.L. 317, 51 Atl. 709 (1902); Garrison v. Newark Call, *supra*, note 19.

74. Cook v. Barkley, 2 N.J.L. 156, 3 Am. Dec. 343 (1902); Garrison v. Newark Call, *supra*, note 19; Hoboken Printing v. Kahn, *supra*, note 50. Also in 59 N.J.L. 218, 35 Atl. 1053 (1896); Lindsey v. Evening Journal Association, *supra*, note 69; Stuart v. News Publishing, *supra*, note 73; McCormick, *supra*, note 15, p. 436.

b. *The actual wealth may be considered to increase exemplary damages.*

Since the primary purpose of exemplary damages is to punish the defendant, the jury may properly consider his actual wealth in computing the extent of his punishment. This doctrine finds support in the argument that an award which might easily bankrupt an impoverished individual would be a comparative light punishment to a man of wealth.[75]

In passing, it might be mentioned that where the plaintiff has provoked such anger and passion in the defendant that the defamation results, such provocation may be considered in diminution of exemplary damages even to the extent of excluding such damages completely and limiting recovery to compensatory damages.[76]

c. *The master is liable for exemplary damages only where he has participated in the defamation of his servant, by previous authorization or by subsequent conduct which amounts to ratification of the defamatory publication.*

The mere fact that an agent has published defamation does not necessarily impose upon a principal liability for exemplary damages for the bad faith or recklessness of the agent.[77] Whether or not the doctrine of respondeat superior will impose upon the principal such liability should depend upon his participation in the publication. If he expressly or impliedly authorized the defamation in advance, or subsequently acted in such a fashion that his ratification may fairly be inferred, he is answerable for exemplary damages.[78]

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75. See *supra*, note 22.

76. Clewans v. O'Connor, 105 N.J.L. 117, 143 Atl. 354 (1928); LaPorta v. Leonard, 88 N.J.L. 663, 97 Atl. 251 (1916); McCormick, *supra*, note 15, p. 438; 37 C.J. 123; 8 R.C.L. 551; 12 Cyc. 66.

77. 48 L.R.A. (N.S.) 68n.

78. Hoboken Printing Co. v. Kahn, *supra*, note 50. (The corporation was publishing a newspaper. The circumstances were such that it could be inferred that the person publishing the libel was employed for that particular purpose by the officials; under the circumstances, punitive damages were recoverable since there was actual precedent authority. But there was the added fact that after