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COMMENTS ON JUDICIAL NULLIFICATION OF JURY AWARDS IN PUBLIC OFFICIAL AND PUBLIC FIGURE LIBEL SUITS

WILLIAM P. MURPHY*

I. INTRODUCTION

The United States Supreme Court in *New York Times Co. v. Sullivan* held that a public official suing for libel must show that a media defendant knowingly or recklessly disregarded the falsity of a published defamation. The Court deemed this "actual malice" standard necessary to prevent the chilling effects upon protected speech which might flow from any lesser threshold of liability. Prior to *New York Times*, a public official plaintiff might recover by simply proving that a written and published statement was defamatory, thus often shifting the burden to a defendant to prove in defense, if it could, that the statement was true.

The *New York Times* actual malice standard, which must be met by clear and convincing evidence, has several apparent and predictable effects on libel litigation. Because actual malice is difficult to prove, the *New York Times* standard deters some suits from being filed at all: losing the case might foster the impression, however mistaken, that the libel was true. *New York Times* also permits a judicial pretrial screening of cases not presenting evidence of actual malice. Moreover, suits filed are less likely to succeed

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1 376 U.S. 254 (1964).
2 Id. at 279-80.
5 376 U.S. at 285-86.
because success is hinged upon a finding of aggravating and presumably uncommon circumstances showing major departures from the truth. Each of these effects in turn serves the broader purpose of giving the press more “breathing space” in which to write about public officials and public figures.7

After New York Times, the Court amplified its restrictions on state law libel actions by holding in Gertz v. Robert Welch, Inc.,8 that even where the plaintiff is not a public official or a public figure he or she must still prove that a defamatory publication was at least the product of negligence. This injected a first amendment requirement of fault even in “private plaintiff” libel suits.9

The Supreme Court in Gertz also imposed limitations on recovery of a form of libel damages traditionally termed “presumed damages.”10 These are damages which are based not on specific proof of injury to the plaintiff’s reputation, but on the high probability that a libel caused serious unprovable harm to its victim. In Gertz, the Supreme Court ruled out the recovery of such presumed damages in the absence of proof of knowing or reckless falsity.11 These are essentially the constitutional parameters of the modern libel suit.

Twenty years after New York Times, another issue emerges in public plaintiff libel litigation. Because of the occurrence of several substantial jury awards, notwithstanding the actual malice standard, the question arises whether and to what extent courts possess the power to reduce a jury’s libel verdict or subject a victorious plaintiff to a new trial on the ground that the award is excessive. A consideration of this issue includes several related subjects: the jury’s province at common law; the seventh amendment right to a civil jury trial in federal court; standards for granting new trials and remittitur; and, perhaps most significantly, the nature of recoverable damages in a libel suit. Although some recent cases appear to afford both trial and appellate courts wide discretion to grant a remittitur or new trial where a substantial verdict is reached,12 it is suggested that in order to preserve the

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9 418 U.S. at 347.
10 Where the defamatory nature of a written statement appears on its face without reference to extrinsic facts, it is generally agreed that presumed damages are available. See RESTATEMENT (SECOND) OF TORTS § 621 comment a (1977); PROSSER, supra note 4, at 762-63; infra text accompanying notes 34-43.
11 418 U.S. at 349.
12 See infra text accompanying notes 14-32 and 80-81.
historical integrity of the jury's role a jury award in a public official or public figure libel case should not be remitted or vacated unless that award is demonstrably against the great weight of the evidence.

The trial and appellate court in a libel case may indeed be tempted to substitute their subjective judgment for the jury's fact-finding due in part to the inherently subjective nature of many facets of damages in libel cases. Nevertheless, particularly because the measure of libel damages is inexact, courts should restrict their attention to assuring that a verdict is within proper legal boundaries by ascertaining whether there is evidence which even arguably supplies some rationale for the jury's award. This approach will help to assure uniformity and reviewability, and will avoid the appearance of judicial paternalism which can be inimical to the judge-jury relationship and to the civil justice system. Certainly a trial court should not be tempted to presume that a substantial libel verdict in itself means that the New York Times standard has failed.\(^\text{13}\)

\(^{13}\) A study of 190 reported appeals in media libel cases decided during the period from 1977 through nine months of 1980, revealed that defendants won final judgments on appeal in 66% of those cases. By contrast, plaintiffs won final judgments in only 5% of such cases. (Some of the appellate dispositions were inconclusive remands, thus accounting for the remaining percentage.) Franklin, supra note 6, at 803.

Thirty-nine of the appeals disposed of in defendants’ favor were found by Franklin to have been based on the New York Times malice standard. Id. at 823. On appeal, defendants prevailed in 92% of those cases turning on the New York Times issue. Id. at 823-24.

Of the 190 reported appeals which were studied, the author states that 104 were concluded by rulings for the defendant prior to trial. Id. at 804. Only 29 of the 190 cases presented an actual verdict. Twenty-four were jury verdicts, of which 20 were favorable to the plaintiff. Id. at 804. Of that 20, the following charts based solely on Franklin's information, id. at 804-05, indicate the obstacles confronting the plaintiff.

Chart 1. Disposition at Trial Level

<table>
<thead>
<tr>
<th>20 Jury Verdicts for Plaintiff</th>
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<tr>
<td>17 upheld by trial court</td>
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<tr>
<td>2 reduced by trial court</td>
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<tr>
<td>1 judgment N.O.V. granted</td>
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Chart 2. Disposition by Appellate Court

<table>
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<tr>
<th>19 Jury Verdicts for Plaintiff on Appeal</th>
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<tr>
<td>8 aff'd (5 reduced)</td>
</tr>
<tr>
<td>2 reversed and remanded</td>
</tr>
<tr>
<td>9 reversed and dismissed</td>
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</tbody>
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II. ANATOMY OF JUDICIAL RESPONSES TO SUBSTANTIAL JURY AWARDS

There are three basic reasons given for judicial nullification of large jury awards in public official and public figure libel cases. First, there is the perception that large damage awards are not based on sufficient evidence. This may be due to the frequent lack of proof of economic loss or to a broader feeling by some courts that libel damages are not adequately governed by guidelines for computing amounts. A court may feel more comfortable with a jury’s subjective award for pain and suffering in a case involving bodily injury. Courts typically have more experience with evaluation of such subjective harm than with assessment of damage to the reputations of public persons. A second reason for judicial nullification is the view that a substantial jury verdict of either compensatory or punitive damages is itself chilling to protected first amendment activities. The third reason encountered is the occasional belief that compensatory damages supplant punitive damages in a public official or public figure libel suit. All three supposed rationales for rejection of jury verdicts bear illustration and scrutiny.

A. The Insufficient Evidence Theory

In Burnett v. National Enquirer,\textsuperscript{14} the jury awarded the plaintiff Carol

\begin{table}[h]
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\begin{tabular}{c c c}
\hline
& Chart 3. & \textit{Disposition at Trial Level} \\
\hline
& 47 Jury and Bench Verdicts for Plaintiff & \\
\hline
& 8 reduced by trial court & 1 new trial granted & 2 judgments N.O.V. granted \\
\hline
\end{tabular}
\end{table}

\begin{table}[h]
\centering
\begin{tabular}{c c}
\hline
& Chart 4. & \textit{Disposition by Appellate Court} \\
\hline
& 26 Jury Verdicts for Plaintiff on Appeal & \\
\hline
& 7 affirmed & 18 set aside & 1 reduced \\
\hline
\end{tabular}
\end{table}

The 1983 study, although incomplete because few appeals had been decided, is similar in its findings.

Burnett $300,000 in general compensatory damages and $1.3 million in punitive damages. The defendant National Enquirer had published a report which suggested that the plaintiff was intoxicated and caused a public spectacle at a restaurant. As the trial court's opinion relates, the evidence established not only that the story defaming the plaintiff was false, but also that the author had serious doubts about the truth of the story and very probably fabricated part of it for the sensational effect. The trial court gratuitously pointed out that the New York Times malice standard was proved not only by convincing clarity but "beyond a reasonable doubt."

Nevertheless, the court observed that: "the jury award [of $300,000 in compensatory damages] is clearly excessive and is not supported by substantial evidence. The court finds that the sum of $50,000 is a more realistic recompense for plaintiff's emotional distress and special damage [$250.00 for attorneys fees in seeking a retraction]." The trial court thus gave its mathematical answer, but, like a poor math student, did not show its work. There is no discussion of the standard by which the court came to its "more realistic" figure.

The court also remitted the award of $1.3 million in punitive damages to $750,000 after acknowledging that "the evidence ... cries out for a substantial award of punitive damages." This latter sum, the trial court said, "should be sufficient to deter the defendant from future misconduct." The court stated that "the function of punitive damages is not served by an award that exceeds the level necessary to properly punish and deter." The evidence had shown that the earnings of defendant during a ten-month period had been $1.3 million after taxes and without regard to the salaries of corporate officials.

Although not giving specific reasons for its reduction, the court did review the evidence. Because both of plaintiff's parents had died at an early age due to complications from alcoholism and because plaintiff had been active in working against alcohol abuse, the plaintiff was emotionally distressed by the article's portrayal of her. She also testified that she had even been taunted with the libel by a cab driver in New York. The evidence did not prove any permanent emotional injury and no professional psychological treatment was needed. There was likewise no evidence of a pecuniary loss.

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15 Id. at 1321-22.
16 Id. at 1321.
17 Id. at 1323-24 (emphasis added).
18 Id. at 1324.
19 Id.
20 Id.
21 Id.
22 Id. at 1323.
The article which falsely defamed the plaintiff by depicting her as drunk and boisterous had, however, been circulated to no less than 16 million readers.\textsuperscript{23}

Obviously, in granting a remittitur the court came to different conclusions on the inescapably factual issue of the scope of damage. The court's reduced figures were submitted to the plaintiff for acceptance or rejection. The price of rejecting the trial court's calculation of damages was of course, the certainty of an entirely new trial. The order of a new trial would not only erase the verdict, it would erase the jury which had been chosen by both parties to decide the facts of their case. The plaintiff accepted the remittitur and the defendant's motion for a new trial was denied.

From that disposition the defendant appealed. The inroads into the jury's finding of damages were then profoundly deepened. Not only was the jury's award of punitive damages treated as excessive, but the trial court's remittitur was itself considered suspect.

The court of appeal recited several factors which it said should guide the measure of punitive damages. These included the reprehensibility of the conduct at issue, the wealth of the defendant, and the scope of actual harms.\textsuperscript{24} The court then observed: "it is our duty to intervene in instances where punitive damages are so palpably excessive or grossly disproportionate as to raise a presumption that they resulted from passion or prejudice."\textsuperscript{25} The net result of the appellate court's treatment was to uphold the reduced $50,000 compensatory award and remit the $1.3 million verdict on punitive damages still lower to $150,000, subject to a new trial on punitive damages if the plaintiff rejects the offer. Because no error in the trial court's instructions to the jury was cited, because the evidence would not change at a second trial, and because there were no prejudicial influences to be purged; it is hard to understand what the appellate court hoped to accomplish by ordering a new trial, except to foster a veto power over verdicts which for one reason or another are not factually acceptable.

If the court of appeal found the jury's award of punitive damages palpably excessive, it still failed to give any concrete legal explanation for its action. Its only attempt was to say that the defendant's net worth was $2.6 million and its net income during the relevant period was $1.56 million. The court reasoned:

Such being the case, and in the effort required of us to find acceptable only that balance between the gravity of a defendant's illegal act and a penalty necessary to properly punish and deter such unlawful conduct as will serve

\textsuperscript{22} Id.


\textsuperscript{24} Id.
the function of punitive damages, we hold the exemplary award herein to be excessive...26

The court of appeal thereby reached a conclusion that punitive damages representing about 10% of the defendant's income was the maximum permitted to punish and deter the defendant's knowing or reckless disregard for truth. Reasonable minds may disagree with that view just as the dissent, the trial judge, and the jury all disagreed with the court of appeal. There is no manifest justice or mathematical clarity in the appellate court's resolution. Quoting another case, the dissent incisively observed:

[The jury's estimate] of what would be sufficient as a punishment and a deterrent and an example was very high as compared with the actual damages assessed and high from any point of view, but it would hardly be candid to invite them...to fix such sum which expressed their judgment in such matter, and then charge them with bias or perversity because the measure of their abhorrence of defendant's conduct and their judgment of what would be a sufficient punishment and deterrent was represented by a larger sum of money than that which some other man or men would have allowed.27

The record of judicial treatment of the jury's award in the Burnett case is characterized more by confusion and contradiction than by the development of a reasoned and principled statement of the proper roles of judge and jury. It is just such treatment which threatens the integrity of the right to a jury trial.

B. Open Reliance on the First Amendment

In Kidder v. Anderson,28 the Court of Appeal of Louisiana for the First Circuit addressed the question whether a jury verdict of $400,000 in "actual damages" was excessive where the defendant had falsely accused an acting police chief of involvement in a house of prostitution and illegal gambling. The trial court had allowed the jury verdict, but the appellate court reduced the amount to $100,000. The court stated:

We are persuaded that an award in such amount [$400,000] would have a 'chilling effect' upon the legitimate exercise of the rights of freedom of the press and would lead to undesirable self-censorship, the prevention of which has been the object and purpose of the United States Supreme Court since New York Times Company v. Sullivan.29

This straightforward approach, which imposed a standard exceeding the New

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26 Id. at 219, 9 Med. L. Rptr. at 1931.
27 Id. at 224, 9 Med. L. Rptr. at 1935 (Beach, J., concurring and dissenting, quoting Di Giorgio Fruit Corp. v. APL-CIO, 215 Cal. App. 2d 560, 581, 30 Cal. Rptr. 380, 362 (emphasis added).
29 Id. at 942.
York Times malice test, made no reference to any analysis of facts and no criticism of the jury’s findings as such. The court’s recitation of evidence showed only the seriousness of the defamation; and its result was squarely hinged on first amendment considerations. What the court appears to have decided is that one factual issue in public official libel suits is reserved for the court: whether the amount of the verdict is too high to preserve a free press. If this was a fact finding, it was doubtlessly made without having been part of the evidence at trial.

C. The Theory that Compensatory Libel Damages Displace Punitive Damages

In Sprouse v. Clay Communication, Inc.,20 the West Virginia Supreme Court of Appeals posited a slightly different first amendment effect on a jury’s award of damages. The court held that “punitive damages may only be recovered in cases where the award of actual damage is insufficient to dissuade others in like circumstances from committing similar acts in the future.”21 It then extinguished a jury’s $500,000 punitive damage verdict but let stand a $250,000 compensatory award. The court explained its reduction on the ground that it would prevent threatening a newspaper’s existence when not necessary “to protect the public from similar conduct in the future or to make possible the vindication of plaintiff’s rights in the absence of demonstrable actual damages.”22 The court said that it was “of the opinion that an award of $250,000 actual damages is adequate for the purpose of dissuading publishers from similar willful and reckless conduct in the future.”23 Thus, even Sprouse creates a standard which saves for the court the last word on the factual issue of what amount of compensatory damages is adequate to foreclose punitive damages on first amendment grounds.

III. DAMAGES AVAILABLE FOR LIBEL

The foregoing decisions must be sharply contrasted with the recent decision of the Seventh Circuit Court of Appeals in Gertz v. Robert Welch, Inc., (Gertz II).24 That decision represents the final disposition on remand from the Supreme Court’s famous ruling in 1974 that Elmer Gertz was not a public figure. The United States Court of Appeals, Seventh Circuit, upheld a verdict of $100,000 in compensatory damages and $300,000 in punitive damages. This resulted from a defamatory article falsely accusing attorney Elmer Gertz of being a communist and being involved in a communist plot to subvert the nation’s police force.

20 211 S.E.2d 674 (W. Va. 1975).
21 Id. at 692.
22 Id.
23 Id.
24 680 F.2d 527 (7th Cir. 1982), cert. denied, 103 S. Ct. 1233 (1983).
Curiously, the trial court on remand in *Gertz* applied the *New York Times* actual malice standard as a prerequisite to liability despite Gertz' private plaintiff status. The reason was in part that the trial court upheld a state law conditional privilege because among the defendant's reference materials were two congressional reports which linked an organization to which Gertz allegedly belonged to communist activities. To overcome this state law privilege Gertz had to prove actual malice. It may indeed seem ironic that the landmark case establishing that Gertz was not a public figure and that he could recover on proof of negligence alone would turn out to be tried on the *New York Times* actual malice test in any event. It is also ironic that upon such a test the jury awarded a total of $400,000 instead of the $50,000 award which the defendant originally appealed from and which was a product of pre-*Gertz* Illinois libel law not requiring a showing of fault.

The most interesting feature of *Gertz II* for present purposes, however, is its treatment of several aspects of the libel damages issue. The defendant publisher had argued on appeal in *Gertz II* that because the actual malice standard was applied as a prerequisite to both compensatory and punitive damages the punitive aspect of the award flowed over into the compensatory award. The court of appeals disposed of this claim by pointing out that the trial court's instructions, which were not claimed to be erroneous, adequately spelled out the difference for the jury. The court further stated: "Nor is the implication that the compensatory damages award was excessive borne out by the record. 'The determination of an adequate verdict is peculiarly within the province of the jury and great weight must be given to its determination.'" By this reference, the *Gertz II* court gave great and presumptive respect to the jury's verdict. It upheld both the compensatory award and the punitive award without concocting an amalgam unique to libel suits.

In addressing the predictable argument that there was insufficient evidence of "actual injury" the court explained: "because there was evidence of actual malice in the publication of the defamatory statements, which were libel *per se*, Illinois law would permit, and the Constitution would not prohibit, *presumed damages." This reflects the standard *Restatement (Second) of Torts* principle that in libel suits a plaintiff is relieved of the burden of proving actual injury in recovering damages. In the landmark *Gertz* decision, the

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11 *Id.* at 534-35.
12 *Id.*
13 *Id.*
14 *Id.* at 540 (quoting Ball v. Continental Southern Lines, 45 Ill. App. 3d 827, 831, 360 N.E.2d 81, 84 (1977)). Notably, the citation made by the court of appeals in *Gertz II* was to a state court decision. Because *Gertz* is a federal diversity case, the seventh amendment right to a jury trial was, of course, directly applicable. The citation to a state court authority signifies the consensus by which the jury's high status as factfinder was achieved at common law.
15 *Id.* at 540 (emphasis added).
Supreme Court barred such damages only where actual malice was not shown.

The Supreme Court in *Carey v. Piphus* explained this unique category of damages as follows:

The doctrine has been defended on the grounds that those forms of defamation that are actionable *per se* are *virtually certain to cause serious injury* to reputation, and that this kind of injury is extremely difficult to prove . . . . Moreover, statements that are defamatory *per se* by their very nature are likely to cause mental and emotional distress, as well as an injury to reputation, so there arguably is little reason to require proof of this kind of injury either.

The Court further explained in a footnote that recovery for presumed damage is traditionally available at common law for the written publication of defamatory statements, that is, statements which tend to injure a person's reputation, and for those spoken utterances imputing to the plaintiff a crime, loathsome disease, lack of moral fitness in trade or profession or sexual misconduct.

Presumed damages, of course, need not stand alone in a public official or public figure libel case. They may coexist with proven general damages supported by particular evidence of emotional distress, humiliation, ridicule, loss of community standing, illness, and any other untoward consequences of the libel, including taunts which may follow a libel. These "actual damages" are still a form of general compensatory damages along with presumed damages. Special damages, which consist only of the pecuniary loss caused by a defamation, are distinct from any form of general damages and are most important to slander actions not falling into the *per se* category of loathsome diseases and the like. In such slander suits, proof of special damage is an essential element of a prima facie case.

The requirement laid down by the Supreme Court in *Gertz* that only actual damages can be recovered in libel cases not meeting the *New York Times* malice test is a requirement that in such cases general damages be limited to the proven actual harm, such as emotional distress, humiliation, ridicule, and illness. In *Gertz II* such actual injury was proven, just as it was in *Burnnett*, by the plaintiff's testimony of anxiety and distress and by testimony of taunts and ridicule. In *Gertz II* there was also testimony that the accusation that Gertz was a communist would be injurious to his professional reputation. Because, further, in both *Burnnett* and *Gertz II* the actual

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41 Id. at 282 (emphasis added) (footnote omitted).
42 Id. at n.18. See PROSSER, supra note 4, § 112, at 754-60. See also RESTATEMENT (SECOND) OF Torts § 569 (1977) (liability for libel despite no special damages).
43 680 F.2d at 540.
malice test was satisfied, presumed damages were also constitutionally available.

There is, of course, no possible means of bringing into court all the evidence of harm from a widespread libel. Indeed, the more widely a libel is spread the more difficult this would become. Not every recipient of the libel could testify at trial and few indeed would be willing to come to court on the plaintiff's behalf to say they think less of the plaintiff because of the defamation. Therefore, proof of actual general damages is illustrative and merely subserves the common law presumption that the injury to reputation is widespread and beyond the specific proof. This presumption is both an evidentiary principle, allowing juries to infer harm which would logically flow from the proven libelous words, and it is a substantive legal principle balancing the limitations inherent in the trial system.

IV. ANATOMY OF A SUBSTANTIAL JURY AWARD

Even a recognition of the legal validity of presumed and other general damages may do little to mitigate the discomfort of a trial or appellate court when confronted with a large damage award in favor of a living, breathing, healthy public official who is in all probability not out of work because of the defamation against him. Nevertheless, in a case like Burnett and others, the jury is instructed on the applicable law and is undoubtedly instructed to decide all the pertinent facts—including the amount of compensatory and punitive damages to be awarded in the event liability is found. The jury is, after all, selected by both parties after voir dire; and the jury hears arguments and evidence from both sides. Hence, it is important to further examine some of the foundations of large awards in public official and public figure libel suits.

A. Vindication and Compensation

The value of reputation and the harm done to it by a defamation are not tangible in form. Reputation itself is not a palpable commodity. There is no need here to recount the age-old dicta revealing the enormous pride which men and women have taken in being regarded as honest and decent by their community. One's reputation is in a sense the disembodied image of one's character, mind and soul. It sometimes reflects a lifetime of hard work and

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"Although trial courts upheld 17 of the 20 successful jury verdicts for plaintiffs reported in Franklin, supra note 6, at 804-05, appellate courts upheld only 8 (less than half) and then reduced the award in 5 of the 8. See supra note 13, Chart I.

Trial judges sitting without a jury rendered 2 verdicts for plaintiff and 3 for defendant as compared to jury verdicts favorable to plaintiffs 20 out of 24 times. One might reasonably worry, without delving into statistical significance, based on data from Franklin, supra note 6, at 804, that trial judges as factfinders are not hospitable to libel plaintiffs. The Libel Defense Resource Center Studies, supra note 13, at Chart 3 do not confirm this conclusion."
can be expected to live on after death. When a defamation falsely distorts that image it can produce serious disturbance both within the victim and within his or her community. It can cause the victim to suffer self-doubt, isolation, and feelings of despair at the injustice of the false defamation. The wider the dissemination of such a lie, the deeper the wound. It can also cause the community to be less secure in the values and virtues which nurture it.

Notably, defamation does not hurt thieves, pimps and drug dealers; instead, it hurts people who have placed value in integrity and made sacrifices to preserve it. For this very reason a defendant may always show prior bad reputation as a means of mitigating the damage to reputation. There is no indication, however, that such evidence was presented on defendant's behalf in Burnett, Sprouse or Kidder.

One of the venerable purposes of libel law is to provide a vehicle by which to set the record straight. The libel award in favor of a plaintiff may legitimately serve as a pronouncement of the wrong done to his or her reputation. The amount of the verdict may accordingly stand as a public expression of the value of the plaintiff's reputation. To win the case only to be awarded the lowest coin in the realm is hardly vindication.

The specific injury to one's reputation consists in its narrowest sense of a degradation in the way one is regarded in the community where he or she is known and operates. As a reflection of the individual, that reputation has a life of its own. When the plaintiff is a public figure or public official, the community is of course very wide indeed and if a libel has been spread to a thousand people, a jury may infer from the nature of the libel that it has caused some degree of degradation of the image which the plaintiff created for himself. This injury to reputation grows larger depending on the grievousness of the defamatory statement as evidenced by the words themselves and the magnitude of its distribution. The difficulty of vindication grows in proportion.


4 This interest is expressed in Restatement (Second) of Torts § 623, Special Note on Remedies for Defamation Other Than Damages at 326 (1977). As stated by Justice Eagan in Gaetano v. Sharon Herald Company, 426 Pa. 179, 183, 231 A. 2d 753, 755 (1967): "The most important function of an action for defamation is to give the innocent and injured plaintiff a public vindication of his good name. Its primary purpose is to restore his unjustly tarnished reputation . . . ."

The importance of reputation is such that it has risen to the level of a constitutional right in some state constitutions. In Oregon, for instance, its Constitution provides: "every man shall have remedy by due course of law for injury done him in his person, property, or reputation." OR. CONST. art. I, § 10 (1981 Repl. Part) (emphasis added). See also W. Va. CONST. art. 3, § 17 (similar provision). Perhaps the most desirable remedy is the restoration of one's good reputation.

4 See Franklin supra note 6, at 609. As pointed out by Mr. Justice White in his Gertz dissent, the traditional definition of a defamation is "material tending 'so to harm the reputation of
The measure of vindication is also affected by a plaintiff's public official or public figure status. The notion is not new to the law that where a public official is found to have been libeled the damage may be acute. Indeed, Tillotson v. Cheetham, 2 a case almost as old as the republic, held that because the plaintiff's character as a public official was at issue, punitive damages were particularly appropriate. Labeling a public official was regarded as an immoral act. 3 A modern day jury may keep that public plaintiff's position and prior good reputation in mind. The award to such a plaintiff may be justifiably large to compensate the public plaintiff if the degradation is great and widespread. The compensation in turn serves to herald the full restoration of the injured reputation.

B. Punitive Damages and the Legacy of New York Times

The New York Times actual malice standard undoubtedly serves as a genuine obstacle to recovery in a public official or public figure libel suit. In light of the higher legal standard of proof, some suits are simply unable to withstand motions to dismiss or for summary judgment. 4 Added to this is the effect of state shield laws preventing the plaintiff in many states from ascertainment as to lower him in the estimation of the community or to deter third persons from associating or dealing with him . . . . " 418 U.S. at 371 (quoting RESTATEMENT OF TORTS § 559 (1938)) (footnote omitted).

The published words themselves are at once the most obvious and direct evidence of injury to reputation. The written accusation that a public figure or official committed a crime or acted immorally may engender an inference of substantial injury. Since there are many degrees of injury, the exact level achieved by a defamation is a question of fact for the jury. 3 Am. Dec. 459, 563 (N.Y. 1808); see C. Lawhorne, DEFAMATION AND PUBLIC OFFICIALS: THE EVOLVING LAW OF LIBEL 71-72 (1971) [hereinafter cited as DEFAMATION AND PUBLIC OFFICIALS].

In the Franklin study, supra note 13, elected public officials as a group had the highest percentage of definitive victories through the appeals process. However, the figure was still only 18%. Id. at 808-09.

DEFAMATION AND PUBLIC OFFICIALS at 72.


In the ordinary case the court will refrain from entering summary judgment if there is the least doubt . . . . In other words, in an ordinary summary judgment case the burden of the plaintiff (if the plaintiff is the non-moving party) is very slight; it is easy to avoid entry of summary judgment . . . . However, in a case involving the first amendment the burden of the plaintiff is heavier-not enormously heavier but nevertheless definitely heavier. In such a case, . . . to avoid entry of summary judgment "[i]t is not enough for the plaintiff . . . to argue that there is a jury question as to malice; he must make a showing of facts from which malice may be inferred . . . . Such an inference must be clear . . . ." Id. at 608, 422 A.2d at 636 (emphases in original) (citations omitted). Accord Stuart v. Gambling Times, Inc., 534 F. Supp. 170 (D.N.J. 1982); Mark v. Seattle Times, 96 Wash. 2d 473, 635 P. 2d 1081 (1981), cert. denied, 457 U.S. 1124 (1982). But see Hutchinson v. Proxmire, 443 U.S. 111 (1979), where the Supreme Court observed that: "The proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." Id. at 120 n.9.
taining the identities of confidential sources, let alone meeting the *New York Times* standard. Nevertheless, the media's reliance upon *New York Times* at trial is not without its subtle hazards. The relatively few cases to survive the pretrial stage carry proven strengths.

Because actual malice is a prerequisite to recovery, a public official must, without any room for doubt, devote his full energy toward proving that malice. Evidence of an author's ill-will, while not exactly the same as *New York Times* actual malice, will be vigorously pursued. If discovered, such evidence will be relevant to show a motive which can make the charge of reckless or knowing disregard believable to the jury. Such a single-minded strategy would seem risky in an ordinary tort action. But in a libel setting, the *New York Times* mandate turns risk into a necessity. Where the plaintiff's claim reaches the jury, the evidence may be characterized by the most unflattering proof of misconduct. This is the kind of evidence which, as a result *New York Times*, will be searched for and therefore doubtlessly discovered with a greater regularity.

In simplifying trial strategy, *New York Times* also has the effect of consolidating the elements of general and punitive damages. The proof of actual malice required to establish a prima facie libel case is the same as that which, by all traditional accounts, warrants punitive damages to punish the defendant and to deter it from repeating a malicious, libelous course. As the United States Supreme Court stated in *Curtis Publishing Co. v. Butts*:

"misconduct sufficient to justify the award of compensatory damages also justifies the imposition of a punitive award, subject of course to the limitation that such award is not demonstrated to be founded on the mere prejudice of the jury."

Notwithstanding the difficulties to a plaintiff presented by the *New York Times* actual malice standard, this union of elements of proof only reinforces the sharpness of a plaintiff's argument and strategy at trial. There is no fear that a demand for punitive damages will stretch the jury's sensibilities too far and risk the loss of an otherwise sound case.

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The contest at trial between a public figure or public official plaintiff and the corporate media defendant thus places the plaintiff in a position to make penetrating arguments of the defendant's malice. If there is any substantial evidence at all to support this, the defendant is forced to respond with the distinctly unarousing argument that an article, although perhaps false and carelessly published, was not malicious. In cases presented to the jury after New York Times, the defendant is probably not able to be portrayed as an unblemished champion of the free press.

Additionally, while some major daily newspapers have recently ceased to exist, the media industry in general is growing and thriving. Even locally-based media are frequently parts of larger corporate conglomerates. Depending on the form of ownership of a newspaper, television or radio station, the net wealth of the corporate conglomerate may be brought into evidence at trial. The evidence of the wealth of a defendant is relevant and even necessary to the factual determination of the amount of damages needed to punish and deter a defendant found to have acted with knowing or reckless indifference. Though this evidentiary impact may be the most immediate consequence of the media's modern financial base, it does not preclude, in combination with other evidence, a separate factual inference at trial that primary emphasis is placed on profits rather than on newsworthy content.

New York Times could also have produced another effect which must not be overlooked. Just as it is a well known law of physics that vapors fill their containers, the expansion of “breathing space” wrought by New York Times permitted the media’s exercise of speech to expand to the outer limits of the New York Times restraints. The risk of such an expansion was one which the Supreme Court in 1964 accepted in exchange for assuring that the press would not withhold publications out of fear that those publications would be interpreted as exceeding the traditional strict liability boundaries of libel. The Supreme Court surely did not mean to make a journalistic model in New York Times; but the creation of the actual malice standard gave protection to and therefore cushioned the effects of journalistic laxity. In the end, of course, one can only speculate whether the press' reaction to New York Times has been to grow lax in some measure. But one may naturally expect more traffic across even the new constitutional line of malice once New York

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53 See K. Gilpin, Newspapers Keep Growing, N.Y. Times, April 25, 1982, sec. 3, p. 1, col. 1: “In spite of the demise of three major dailies in the last twelve months the [newspaper] industry is proving to be surprisingly durable in the face of a declining economy.”


55 See supra note 15 and accompanying text.

56 See supra notes 2 & 3 and accompanying text.
Times made safer the approach. Only the jury institution may stand in the way of such unfortunate misadventures.

Since New York Times, virtually every public official or public figure libel case which reaches the jury presents some claim of aggravating circumstances, for each such case makes some claim that the defendant acted with knowing or reckless indifference to the truth. If a verdict is rendered for the plaintiff, the jury will have had no doubt about the rightness of the plaintiff’s case and about the wrongness of the libel. Moreover, the jury will not likely be restrained in awarding a full measure of compensatory damages. There is nothing legally or factually improper about this. A jury may be persuaded quietly to reduce its award of damages in cases where a defendant, although liable, committed a more or less understandable mistake in judgment. But a jury cannot be criticized for refusing to practice this form of nullification where the tortious conduct reflects contempt or gross misfeasance of a professional duty.59

The primary effect of the successful proof of actual malice is, however, on the punitive damage award. The jury is told that it is privileged to punish a defendant who has committed an outrageous wrong. It is told that it may award damages in the amount which it believes is needed to deter any recurrence of this conduct by the defendant. Sometimes the jury is told that punitive damages must bear some relation in size to compensatory damages.60 But in the end the matter is handed to the jury for factual assessment. If a public official or figure has maliciously been subjected to a grievous libel on a broad scale, such instructions and indeed the law itself reasonably explain the sizeable awards which result. Where evidence shows that the “malice” stems from actual antipathy by the author for the libeled plaintiff or from a profit motive, the punitive damages may rightly be increased. If the defendant has been advised in advance of its error prior to publication, but forged ahead anyway, or if it has refused to retract in the face of its “mistake,” there is a further reasonable boost for punitive damages. If the defendant also has millions of dollars of net assets, a jury may further properly conclude that only a large award of punitive damages would ever serve the purpose which the court’s instructions explained. This is simply part of the economy of a public official libel suit explainable by resort to reasoning. It should not be shocking to any judicial conscience.

C. Conclusion

These various factors which may, without proof of special pecuniary loss,

underlie a substantial jury award should cause no surprise or outrage. To reject a jury's substantial award because there has been no evidence of pecuniary loss misses the point that such damage is only one of the historically recognized damage elements. For the common-sense reason of difficulty of proof, the development of the common law of torts has not required this form of damage in any per se defamation case, libels included. One cannot be expected directly to prove in court that he lost some business or professional opportunity from a person who secretly shunned him because of the libel. To the extent it is deemed relevant that the plaintiff has not lost income by the time of trial, that matter should be presented to the jury by the defendant.  

Vindication and compensation for the recognized and separate noneconomic forms of damage are not tied by any formula or ratio to actual economic loss.

V. THE ROLE OF THE JURY

The seventh amendment right to a civil jury trial is, of course, applicable in all libel cases which find their way into federal court based upon diversity or pendant jurisdiction. That amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

In all libel cases in federal courts the seventh amendment right to a jury trial has direct application in defining the relation between judge and jury, even though state law dictates the kind of damages available. Although the seventh amendment has no direct application in state court civil trials, state constitutions establish analogous principles born out of the common law tradition of trial by jury shared by federal and state systems.

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61 It is open to question whether in a public official libel case where damages are not alleged for pecuniary loss, a defendant may introduce the lack of financial injury by any way other than on cross-examination of the plaintiff to impeach any testimony of humiliation, embarrassment and other mental suffering.

62 U.S. Const. amend. VII.

63 Consistent with the constitutional mandate of the seventh amendment, federal courts in diversity cases, including libel actions, use federal standards to decide when a remittitur is appropriate. This is because the granting of a remittitur by the court necessarily involves the judge-jury relation, regardless whether it is viewed as substantive law. E.g., Dorin v. Equitable Life Assurance Soc'y, 382 F.2d 73, 78-79 (2d Cir. 1967); Karlson v. 305 East 43rd Street Corp., 370 F.2d 467, 472 n.1 (1966), cert. denied, 387 U.S. 905 (1967).

64 E.g., Wartman v. Branch 7, Civil Division, County Court, 510 F.2d 130, 134 (7th Cir. 1975); O'Connor v. State of Nevada, 507 F. Supp. 546, 548 (D. Nev. 1981), aff'd, 686 F.2d 749 (9th Cir. 1982).

65 Indeed, some states have the very highest tradition of respect for the jury's role. As stated in Lecates v. Justice of the Peace, 637 F.2d 898 (3d Cir. 1980): In Delaware the right of trial by jury is deemed to be a fundamental liberty. The Declaration of Rights and Fundamental Rules of Delaware § 13 (1776) proclaims "That trial
A. Methods for Altering the Amount of Jury Verdicts

There are two methods by which some civil jury damages awards are dismantled. First, a trial court on a defendant’s post-trial motion may grant a new trial on the stated ground that the damages awarded are excessive or based on insufficient evidence. Granting a new trial on the ground of excessiveness amounts inescapably to a review of the jury’s fact finding on damages. To this extent the successful plaintiff loses his right, if any, to that verdict rendered by that chosen jury. But he still has the privilege of going through the entire process once again and theoretically as many times as are necessary to bring the award in line with the court’s thinking. Granting a new trial on the ground that there was insufficient evidence can be the same as granting a new trial due to excessiveness or it can mean that the defendant would be entitled to a favorable zero damage judgment because there is not a scintilla of evidence of recoverable harm. If indeed there is not a scintilla of evidence, the trial court is doing nothing more than applying a legal standard. If, however, there is some evidence of damage but the court does not regard it so highly, then disagreement with the jury is factual in nature. It is essentially a finding by the court of excessiveness. A new trial ordered in such a setting simply means one must begin again with another jury.

The second device available to a court post-trial is a remittitur. By this method the court selects a damage figure lower than the supposedly excessive one awarded by the jury. The court informs the plaintiff that a new trial will be granted unless the plaintiff accepts this lower damages amount.

In order to give perspective to these methods of nullifying jury awards, it is appropriate to examine their historical underpinnings and use.

B. Judicial Review of Damages

1. The Historical Background

Although Mr. Justice Story in 1822, sitting as a circuit judge, approved a remittitur and although thereafter the practice was uniformly approved as

by jury of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people.” This principle is embodied in Article I, § 4 of the State Constitution, which provides for a right to a jury trial in civil cases as it existed at common law.

Id. at 909. In Florida, “trial by jury is an organic right and should under no circumstance be denied.” Orr v. Avon Florida Citrus Corp., 130 Fla. 306, 311, 177 So. 612, 614 (1938). But see Walker v. Sauvinet, 92 U.S. 90 (1876), where the United States Supreme Court had before it an 1871 Louisiana statute allowing the judge to find facts and decide a case if the jury was unable to agree. The Supreme Court noted, however, that since the seventh amendment does not bind the states there was no federal issue.

within the ambit of the seventh amendment, the common law origins of this practice are unclear. Having reference to the seventh amendment's command that the jury's fact finding shall be subject to a new trial only for the reasons previously recognized at common law, one might seriously question the support for remittiturs after the advent of the seventh amendment.

Mr. Justice Sutherland, writing for the Court in *Dimick v. Schiedt,* severely criticized the remittitur device by stating that in none of the cases approving the practice after Justice Story's 1822 opinion "was there any real attempt to ascertain the common law rule on the subject." The only common law foundations for remittitur, Mr. Justice Sutherland found, were cases employing a patently illegitimate practice of withholding judgment altogether unless the plaintiff consented to a reduction of damages. That practice had been criticized as indefensible and, as the *Dimick* court held, did not represent the common law.

In *Dimick,* the Supreme Court would not disturb the historical acceptance of remittiturs, but stated that "in the light reflected by the foregoing review of the English decisions and commentators, it therefore may be that, if the question of remittitur were now before us for the first time, it would be decided otherwise." The Court then reached the remarkable conclusion that, although in theory reductions of damages did not per se offend the seventh amendment, any judicial increase of an "inadequate" jury verdict did. A federal court may not, therefore, condition the denial of plaintiff's motion for new trial upon the acceptance by the defendant of a higher award than granted by the jury.

Lengthy discussion of the constitutional restraints upon remittiturs and additurs may hardly seem worthwhile when it is realized that as a practical matter the judge can nearly equal the effectiveness of both through informal post-trial settlement negotiations while post-trial motions are pending. All the judge need do is communicate a suggestion that the damages are high or low and that the case ought to settle for a more reasonable figure. But even accepting the formal practice of a remittitur, what causes jeopardy to the right to a jury trial is not the proposed reduction in damages, but rather the...
threat of a new trial itself. It is, after all, the granting of a new trial which ultimately extinguishes the verdict, not the trial court’s proposal of a different damages figure. In this sense a remittitur would seem far more sensible than an unmitigated granting of a new trial. It at least gives the plaintiff some choice.

Notably, there appears in Dimick no criticism of the trial court’s power simply to grant a new trial under measured circumstances. Indeed, Mr. Justice Sutherland quoted approvingly and at length from an opinion of the House of Lords rendered in 1919:

Where damages are at large and the Court of Appeal is of opinion that the sum awarded is so unreasonable as to show that the jury has not approached the subject in a proper judicial temper, has admitted considerations which it ought not to have admitted, or rejected or neglected considerations which it ought to have applied, it is the right of the party aggrieved to have a new trial.72

The common law standard for granting a new trial, quoted by the Court, did not give carte blanche discretion to the trial court, but defined strict boundaries.

2. The Modern Practice

Lately it has become axiomatic that a motion for new trial is addressed to the trial court’s “sound discretion,”73 and that appellate review is limited to determining whether the trial court committed an abuse of its discretion. If these statements are taken at face value in all contexts, the right to a jury trial would be subject to the trial court’s factual agreement on all the elements of liability and damages. Because judges have varying backgrounds and their discretion may be nurtured by different viewpoints, there is little hope for uniformity or reviewability in such a setting.

Although a wide unreviewable discretion by the trial court is well recognized where the trial court has denied a motion for a new trial, the standard should become more scrutinizing when the trial court has taken away a jury’s verdict on the grounds of excessiveness or insufficient evidence. The reason for this shift, at least in federal court, is the need to respect the seventh amendment right to a jury trial. In Spurlin v. General Motors Corporation,74 the Fifth Circuit Court of Appeals held that:

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71 Id. at 484.
74 528 F.2d 612 (5th Cir. 1976).
The district court should not grant a new trial motion unless the jury verdict is "at least . . . against the great weight of the evidence . . . . A rule which would permit a court to grant a new trial when the verdict was merely against the "greater weight" of the evidence, this Court said, "would destroy the role of the jury as the principal trier of the facts, and would enable the trial judge to disregard the jury's verdict at will.""

Accordingly, the court of appeals reversed the trial court's granting of a new trial. Although the precise matter at issue in Spurtlin was evidence of negligence, not damages, the issue is quite the same where the amount of damages is the basis for the motion for new trial.

The decision rendered by the Fifth Circuit Court of Appeals in Shows v. Jamison Bedding, Inc., recognizes the presumptive sanctity of a jury's factual decision:

where a new trial is granted on the ground that the verdict is against the weight of the evidence, we exercise particularly close scrutiny, to protect the litigants' right to a jury trial.

In a further effort to prevent the trial judge from simply substituting his judgment for that of the jury, we require that new trials should not be granted on evidentiary grounds "unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence."

....

On appeal, we review the evidence closely to ensure that this standard has been met.

The approach stated by Judge Wisdom and reflected in the most modern federal court analysis is plainly the only one which preserves the integrity of the factfinding role of the jury. It presumes that the trial judge should assure the fairness of the trial by presiding over that process while underway and not by later asserting wide and unreviewable discretion to recalculate the amount of damages. As stated by the court in Shows, "[w]e will reverse an award as excessive only when it 'clearly exceeds that amount that any reasonable man could feel the claimant is entitled to.'"

The Supreme Court in Marbury v. Madison once said that it is the function of courts to say what the law is. Only by limiting the analysis to the

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528 F.2d at 620 (emphasis in original) (quoting Cities Service Oil Co. v. Launey, 403 F.2d 537, 540 (5th Cir. 1968)); see Dagnello v. Long Island R.R., 193 F. Supp. 552, 553 (S.D. N.Y. 1960) (Weinfeld, J.), aff'd, 289 F.2d 797 (2d Cir. 1961). As stated in Dagnello, the jury must have a wide discretion in awarding damages "particularly where damages are not capable of exact or slide rule determination." 193 F. Supp. at 553 (emphasis added).

671 F.2d 927 (5th Cir. 1982).

Id. at 930.

Id. at 934 (emphasis in original). As stated by the court in Steele v. Brewery & Soft Drink Workers Local 1162, 432 F. Supp. 369 (N.D. Ind. 1977), "partly because the right [to a jury trial] is so precious, every reasonable presumption should be indulged in its favor." Id. at 372.

5 U.S. (1 Cranch) 137, 177 (1803).
strict standard applied in Shows can a court preserve its role, and keep this role separate from that of the jury. Neither the seventh amendment nor the common law grant a right to trial by judge. The historical reality is that a jury trial of the facts is the fair, proper and necessary means to the peaceful resolution of civil controversies in the community. The court who undertakes to assert a veto control over a jury's findings without reference to specific and persuasive reasons showing that the jury acted improperly marches out of step with the established tradition.

Even in Taylor v. Washington Terminal Company,60 the court, on review of an order granting a new trial, at least recognized that the standard for the trial court was whether the verdict amount is "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate."61 However, in apparent deference to the district courts in the District of Columbia Circuit, the court held that the granting of a motion for new trial due to excessive damages is to be upheld on appeal unless the jury's verdict was clearly within the permissible range.

The standard of review expressed in Taylor is, of course, contrary to that articulated in Shows. According to Taylor, the trial court's view of damages will presumptively prevail unless the appellate court believes that the jury's result was "clearly" reasonable as a matter of fact. Any doubt at all by the reviewing court would favor upsetting, not preserving, the jury's decision. This uncritical approval still makes the granting of a new trial temptingly easy and also makes it practically unreviewable since there are no standards by which to determine when a verdict is clearly within the permissible range. Correspondingly, there can be no real development of uniformity at the trial level where such nonreview is allowed to prevail. As the views and impressions of trial judges vary, so may the granting of motions for new trial. Judge Wright may have had an especial confidence in the factual assessments of the trial courts in his circuit, but the common law tradition does not.

3. The Influence of the First Amendment on the Amount of Damages.

Those cases which rely upon the first amendment as a ground in itself for reducing a damage award refer to the "chilling effects" such an award would have on the free press. Notably, this principle is not stated in New York Times or its progeny, but is derived from the perceived need by some other courts to avoid "self-censorship, the prevention of which has been the object and purpose of the United States Supreme Court since New York Times Company v. Sullivan."62 It remains therefore to examine New York Times'

61 Id. at 149.
reference to the evil of chilling effects with a view to determining whether any federal constitutional principle supports the reduction of a jury’s award of damages in a public plaintiff libel suit.

*New York Times* never gave direct first amendment protection to any form of libel. What it did was to shield the press from the chilling fear that certain stories about public officials might be construed as libelous by strict common law standards and hence result in a damages award if published. Because libel may sometimes be separated from nonlibel by only a “dim and uncertain line,”\(^a\) strict enforcement of civil libel law could cause the press to forego the publication of at least some stories which are indeed nonlibelous, protected speech. In assuring the necessary breathing space, the Supreme Court required proof in public official cases of actual malice—knowing or reckless disregard for the truth or falsity of the printed report. Otherwise, even where the press has published a libel of a public official with merely careless and negligent disregard for the truth, no liability accrues. The press may thus breathe freely so long as it is not fearful that its publication was recklessly or knowingly false. That is the change which *New York Times* worked on the law of libel.

If a public official or public figure plaintiff has in fact proven actual malice in accordance with *New York Times*, and a high verdict has been rendered by the jury, judicial rejection of the damages award on the ground that a sizeable verdict is chilling raises one unavoidable question—chilling to what? If such an award is chilling to malicious libel, so be it.\(^b\) The first amendment never directly protected libel, let alone malicious libel.\(^c\) It is the interest in free publication of nonlibels which supports the breathing space


\(^b\) Cf. Herbert v. Lando, 441 U.S. 153, 171 (1979): [W]e are urged by respondents to override these important interests because requiring disclosure of editorial conversations and of a reporter’s conclusions about the veracity of the material he has gathered will have an intolerable chilling effect on the editorial process and editorial decisionmaking. But if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what New York Times and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials. "[T]he value in free expression is in the absence of constraint and interference, not in the message itself." *Id.* at 171 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)).


The Ninth Circuit Court of Appeals in Maheu v. Hughes Tool Co., 569 F.2d 459, 479-80 (9th Cir. 1977), used a slightly different analysis to reach the same conclusion. That court balanced the chilling effects of punitive damages with the need to deter malicious defamation and to protect reputations. This approach gives some weight to the long history of strict common law liability in defamation cases and declines to go any further than *New York Times* instructed. It is suggested, however, that no balancing is needed, since based on current case law, malicious libel is absolutely unprotected and does not fall within the bounds of the *New York Times* breathing space.
given by New York Times. A court which reduces a jury award for malicious libel on the ground that the amount is chilling must consider the unlikelihood that such an award would ever dissuade the publication of matter not libelous at all.

This is not to say that a trial court must let stand all jury verdicts. Truly aberrant verdicts can, however, be handled without the development of a first amendment doctrine on reducing damages. In the event a verdict is not so excessive as to be susceptible to reduction or rejection based on the proper application of standards governing trials, the first amendment should not supply a separate avenue for reduction.

VI. A PROPOSED APPROACH

To afford the jury's fact finding on damages in a public plaintiff libel case the measure of respect mandated by the common law and (where applicable) the seventh amendment, a trial court should on consideration of defendant's motion for new trial or remittitur give presumptive weight and deference to the jury's award. Because, particularly in libel cases, the damages are not measured precisely by any standard, the trial court should interfere in the jury's assessment only with reluctance and where the award is demonstrably against the great weight of the evidence. Where the jury's verdict is arguably based on reasons derived from the evidence, the award should not be disturbed. Such a standard, while by no means mathematically exact, would help avoid the kind of judicial license witnessed in the Burnett v. National Enquirer\textsuperscript{60} decisions. It would make the presumption favor the jury's assessment of facts, not the court's. Trial and appellate courts alike should apply this standard, mindful of the virtues of judicial restraint and respectful of verdicts such as that rendered in Burnett where the evidence of fabrication, defamation, wide distribution and defendant's income provided the clear reasons for the jury's award.

In a public plaintiff libel case, the trial court must temper its limited survey of the evidence with an understanding that proof of pecuniary loss (special damages) is not essential in a libel case and its absence from evidence does not legally diminish the scope of other forms of damage which may in any event go more to the heart of the loss suffered from a libel. The court must keep in mind that mere proof of a libel itself justifies an inference of serious, not insignificant, injury to reputation even without any other proof. The breadth of that injury may be further ascertained by reference to the particular defamatory words used, the meaning they reasonably conveyed, and the extent of their dissemination. The plaintiff's public official or public

figure status should also be of relevance in determining whether, owing to the plaintiff's particular occupation and public exposure, the libel at issue is more likely to be injurious. In assessing actual forms of general damage, the trial court must also consider, as complementary proof, such personal factors as the plaintiff's emotional distress and any physical responses.

Beyond this survey of the evidence of general compensatory damages, the trial court must consider any aggravating circumstances which might justify a large punitive damage award. Such circumstances may consist particularly of a refusal to retract, a failure to respond to advance notice that a story was false, any ill will or other bad motive borne by the defendant toward the plaintiff, and the wealth of the defendant. Any of these factors may give a sizeable verdict a reasonable foothold in reality.

Furthermore, the function of New York Times is fulfilled so long as the only awards for libel in public official and public figure cases stem from proof of actual malice. New York Times does not authorize any encroachment of judicial power upon the role and function of a jury in assessing damages. Indeed, the respect for a state's interest in protecting reputations and the historical confidence in the civil jury trial system combine to counsel against such a course. In light of all the factors which may produce large libel verdicts, including the filtering effects of New York Times, courts should be mindful of that respect and confidence. They should also be mindful that an award which chills malicious libels is not offensive to first amendment interests. The verdicts in Kidder v. Anderson and Sprouse v. Clay Communication, Inc., accordingly, should not have been disturbed on claimed first amendment grounds.

The actual malice standard imposed by New York Times twenty years ago has not put to rest all of the many issues affecting public official and public figure libel suits, but it has matured into an established first amendment privilege which has been workably applied in numerous public plaintiff cases. The New York Times standard has not proved insufficient to protect genuine first amendment interests simply because some large verdicts have been rendered for some public plaintiffs. As it cannot be asserted with certainty that New York Times in fact fostered a proliferation of lax and libelous publication, so it cannot be denied with certainty that the press has more often taken greater liberties with the facts since that decision. The appearance of significant awards in some cases (a very small percentage of the total number of libel actions) is a warning to the press not to cross the line of reckless or knowingly indifferent reporting. New York Times never undertook to destroy public plaintiff libel litigation, nor did it provide a constitu-

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88 211 S.E.2d 674 (W. Va. 1975).
tional foundation upon which to do so. Likewise, it was not meant to remove all chilling effects.

The message of *New York Times* surely must not be read to imply a power in judges to act freely in nullifying sizeable jury awards. There sometimes appears, however, an implied sentiment among some courts that free press interests make juries untrustworthy. This sentiment, even if quietly reserved for public plaintiff libel cases, cannot help but undermine confidence in the jury trial system itself.

To counteract any ingrained fear that libel verdicts will run unfairly high, courts should act in a positive way that will reflect and reinforce confidence in the jury system. One such judicial course of action is to permit wide latitude both to plaintiff and defendant during voir dire. The defendant should certainly be given full opportunity to ascertain from the would-be juror whether he bears any preconceived animosity against the press generally and the defendant in particular, and whether he bears any bias in favor of the public plaintiff. At trial the court may take steps to avoid the introduction of any prejudicial and inadmissible testimony. It may also hear discussion of objections at side bar only. The court should make its instructions to the jury concerning *New York Times* particularly clear and consider the use of limited special interrogatories to assure in writing that any verdict rendered for the plaintiff has indeed been made upon clear and convincing proof of the defendant's knowing or reckless indifference to the truth. Such steps are the building blocks of assurance that the jury's verdict is based on findings assimilated from the fair presentation of the evidence at a fair trial. Absent indicia of actual prejudice, a court who has diligently taken such steps may feel less inclined to infer prejudice and excessiveness from the four corners of the verdict slip, and more inclined to honor the jury's decision.