Defamation

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DEFAMATION

§ 11.2

I. [§ 11.1] Introduction

A. [§ 11.2] Purpose and Scope of Chapter

The law of defamation contains much that is at times confusing and seemingly illogical\(^1\) and has been rightly called an area of law renowned for its complexity.\(^2\) This chapter’s purpose is to lessen confusion about damage rules in defamation cases in Wisconsin.

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\(^1\) See W. Page Keeton, *Prosser & Keeton on the law of Torts* § 111, at 771 (5th ed. 1984) (candidly stating at outset of discussion of defamation: “It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense.”); see also Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 457, 113 N.W.2d 135 (1962) (noting presence of anomalies and absurdities in this area of the law).

After providing a general overview of liability rules in defamation cases, this chapter discusses the extent to which money damages can be awarded in such cases in Wisconsin. It discusses the three types of money damages recoverable in defamation cases, the rules concerning the burden of proof and admissibility of evidence in such cases, the standards by which trial and appellate courts will scrutinize the amount of such awards, and the special matters of form and procedure applying to such cases at the pleading and verdict stages.

B. [§ 11.3] Related Matters

For a discussion of compensatory damages in general, see Chapter 1, supra. For a discussion of punitive damages in general, see Chapter 2, supra. For a discussion of nominal damages in general, see Chapter 3, supra. For a discussion of damages that may be awarded under 42 U.S.C. § 1983 for injury to reputation, see Chapter 13, infra. For a discussion of additur and remittitur in general, see Chapter 40, infra.

II. [§ 11.4] Nature of Liability in Defamation Actions

A. [§ 11.5] Definitions

Defamation is composed of the twin torts of libel and slander and is concerned with the invasion of a person’s interest in his or her reputation and good name. Matter is said to be defamatory if it tends to harm a person’s reputation so as to deter third persons from associating or dealing

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3 Keeton, supra note 1, § 111, at 771; see also Martin, 15 Wis. 2d at 457–58 (calling the torts not twins, but siblings); Keeton, supra note 1, § 111, at 737–39 (discussion of historical development of law of libel and slander and jurisdictional competition between ecclesiastical and common law courts that has resulted in some peculiarities of defamation law).

4 Keeton, supra note 1, § 111, at 771. The Restatement (Second) of Torts (1977) entitles Chapter 24, which consists of sections (558–581A) concerning liability rules for the tort of defamation, “Invasion of Interest in Reputation.” When any section in Chapter 24 of the Restatement (Second) of Torts is cited, the reader should also consult Restatement (Second) of Torts app. §§ 504–587 (1987 & Supp. 1992–1993) for further case authorities.
with that person. The victim need not be identified by name in the defamatory statement; it is sufficient that the defamatory statement refer to a person whose identity is ascertainable. A person has “published” defamatory matter about another person if the first has communicated the matter intentionally or by negligent act to a person other than the person who is being defamed. Such a defamatory communication may be by spoken word, by written or printed word, or by conduct. If the communication is by written or printed word or by other means having similar

5 Vultaggio v. Yasko, 215 Wis. 2d 326, 330, 572 N.W.2d 450 (1998); Denny, 106 Wis. 2d at 643; Voit v. Madison Newspapers, Inc., 116 Wis. 2d 217, 222, 341 N.W.2d 693 (1984); Converters Equip. Corp. v. Condes Corp., 80 Wis. 2d 257, 262, 258 N.W.2d 712 (1977); Schaefer v. State Bar, 77 Wis. 2d 120, 122, 252 N.W.2d 343 (1977); Polzin v. Helmbrecht, 54 Wis. 2d 578, 583, 196 N.W.2d 685 (1972); D’Amato v. Freeman Printing Co., 38 Wis. 2d 589, 595, 157 N.W.2d 686 (1968); Frinzi v. Hanson, 30 Wis. 2d 271, 275, 140 N.W.2d 259 (1966); Ranous v. Hughes, 30 Wis. 2d 452, 460, 141 N.W.2d 251 (1966); Schauer v. Thornton, No. 98-1180, 1999 WL 642946 (Wis. Ct. App. Aug. 25, 1999) (unpublished opinion not to be cited as precedent or authority per section 809.23(3) of the Wisconsin Statutes); Liberty Mut. Fire Ins. Co. v. O’Keefe, 205 Wis. 2d 524, 527, 556 N.W.2d 133 (Ct. App. 1996); Towne Realty, Inc. v. Zurich Ins. Co., 193 Wis. 2d 544, 555, 534 N.W.2d 886 (Ct. App. 1995), aff’d in part, rev’d in part, 201 Wis. 2d 260, 548 N.W.2d 64 (1996); Bauer v. Murphy, 191 Wis. 2d 517, 523, 530 N.W.2d 1 (Ct. App. 1995); Fields Found., Ltd. v. Christensen, 103 Wis. 2d 465, 482, 309 N.W.2d 125 (Ct. App. 1981); Stern v. Credit Bureau, 105 Wis. 2d 647, 653, 315 N.W.2d 511 (Ct. App. 1981); Prahl v. Brosamle, 98 Wis. 2d 130, 139, 295 N.W.2d 768 (Ct. App. 1980), dismissed on other grounds, 142 Wis. 2d 658, 420 N.W.2d 372 (Ct. App. 1987); see also Tatur v. Solsrud, 174 Wis. 2d 735, 498 N.W.2d 232 (1993) (misrepresentations of voting record are not actionable unless they are defamatory on their face); Restatement (Second) of Torts § 559 (1977). The criminal law defines defamatory matter as “anything which exposes the other to hatred, contempt, ridicule, degradation or disgrace in society or injury in his business or occupation.” Wis. Stat. § 942.01(2).

Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 1997–98 Wisconsin Statutes, as affected by acts through 1999 Wisconsin Act 198.


7 Voit, 116 Wis. 2d at 223; Ranous, 30 Wis. 2d at 461; Restatement (Second) of Torts § 577 (1977).
nontransitory qualities, the defamation is called *libel*. It is called *libel per se* if the matter is defamatory on its face, even without need for reference to extrinsic explanatory matter. It is called *libel per quod* if resort to extrinsic facts or circumstances must be made to show the matter’s defamatory quality. If the communication is by spoken word or by mere transitory gesture, the defamation is called *slander*. If the slander contains matter falling within one of the four types of slander historically treated as especially heinous, it is called *slander per se*. These four types of slander are (1) that which imputes to the victim a loathsome disease; (2) that which imputes to the victim the commission of a crime; (3) that which affects the victim’s business, trade, profession, office, or calling; and (4) that which imputes unchastity in a woman.

The term *damages* is itself used in two senses in defamation cases, sometimes to describe the harm inflicted and at other times to describe the amount awarded to compensate for such harm. For example, while the

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8 Restatement (Second) of Torts § 568(1) (1977) (“Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.”).

For the proposition that conduct can be the basis for a libel action, see *Schultz v. Frankfort Marine, Accident & Plate Glass Insurance Co.*, 151 Wis. 537, 545, 139 N.W. 386 (1913), and *Starobin v. Northridge Lakes Development Co.*, 94 Wis. 2d 1, 9, 287 N.W. 2d 747 (1980).

9 *Martin*, 15 Wis. 2d at 458.

10 Restatement (Second) of Torts § 568 (1977).

11 “Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than [libel].” Restatement (Second) of Torts § 568(2) (1977). For the Restatement (Second)’s definition of libel, see note 8, supra. Note that because of the potentially harmful effects of the broadcasting of defamatory matter on radio or television, the Restatement (Second) treats such broadcasts as libel. See id. § 568A.

12 *Martin*, 15 Wis. 2d at 459; *Starobin*, 94 Wis. 2d at 13; Restatement (Second) of Torts §§ 570–574 (1977); *Bauer*, 191 Wis. 2d at 524–25; *Keeton, supra* note 1, § 112, at 788–93; see also *Brody, Defamation Law of Wisconsin*, 65 Marq. L. Rev. 505, 505–6 (1982). The Restatement (Second) of Torts would modify and broaden the fourth category to apply to imputations of “serious sexual misconduct” by a person of either sex. Restatement (Second) of Torts § 574 (1977).
term *general damages* has most often been used to describe harm of a type not easily estimable in monetary terms, such as injury to feelings or reputation, and anguish or humiliation, the term has also been used to describe the amount to be awarded to a plaintiff for such harm. Likewise, although the term *special damages* has been used most often to describe harm of a material, economic, or pecuniary nature, it has also been used to describe the amounts to be recovered by a plaintiff for such harm.

Although confusion would be avoided if the terms *general harm* and *special harm* were used to describe the types of injuries inflicted and the terms *general damages* and *special damages* to describe amounts awarded as compensation for injuries, the cases make no such clear distinction.

**B. [§ 11.6] Liability Rules**

1. [§ 11.7] In General

The law of the tort of defamation imposes *strict liability* on those who publish defamatory matter about another. This rule of strict liability places those who injure others by the written and spoken word in the same

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14 50 Am. Jur. 2d Libel and Slander § 356 (1970 & Supp. 1992); see also *Martin*, 15 Wis. 2d at 459 (calling amounts recoverable for injury to reputation, good name, and feelings *general compensatory damages*); Restatement (Second) of Torts § 621 cmt. a (1977) (describing general damages as those imposed to compensate plaintiff for injury to plaintiff’s reputation).

15 *Lawrence*, 53 Wis. 2d at 660; *Starbin*, 94 Wis. 2d at 13; see also Keeton, *supra* note 1, § 112, at 794.


17 The Restatement (Second) of Torts uses the term *special harm* in place of *special damages*. Restatement (Second) of Torts §§ 570, 575, 576 (1977). For the Restatement (Second) definition of such “special harm,” see comment b to section 575 of the Restatement (Second) of Torts (1977).

18 See Keeton, *supra* note 1, § 113, at 809.
class as those who use explosives or keep dangerous animals.\textsuperscript{19} Except in certain situations where constitutional First Amendment questions are presented,\textsuperscript{20} the defamer’s good faith or good motives are irrelevant to the question of the defamer’s initial civil liability.\textsuperscript{21}

While it has been said that malice is an essential element of a cause of action sounding in defamation,\textsuperscript{22} this is somewhat misleading because the law in fact \textit{presumes} or \textit{implies} such malice from the mere fact of the publication of the defamatory matter, and good faith or good motives alone are not inconsistent with such legal presumption of malice.\textsuperscript{23}

As will be seen, however, in some cases a person publishing an otherwise defamatory communication may seek to avoid liability by establishing that the communication was conditionally privileged.\textsuperscript{24} In those situations where the existence of such conditional privilege is established, the legal presumption of the requisite malice is rebutted, and

\textsuperscript{19} \textit{Id.} The term \textit{strict liability} is used here because the defamer need not have wrongful intent or even know that the matter communicated is defamatory. There must, however, be some intentional or negligent communication (i.e., publication) of the matter before liability will attach. For a discussion of this distinction between a foreseeable publication of matter unexpectedly defamatory (for which act there is liability) and the unforeseeable publication of predictably defamatory matter (for which act there is no liability), see Keeton, \textit{supra} note 1, at 808–9. For a further discussion of strict liability and negligence concepts as they relate to defamation liability rules, see the dissent in \textit{Denny}, 106 Wis. 2d at 674, wherein Justice Abrahamson suggests that the rule of strict liability in defamation cases is transformed to a negligence test by the application of the notions of conditional privilege and abuse of conditional privilege.

\textsuperscript{20} See infra §§ 11.13 (discussion of constitutional privilege available as a defense in some cases); 11.48 (discussion of how First Amendment considerations have been invoked to limit type and extent of damages awarded).

\textsuperscript{21} \textit{Denny}, 106 Wis. 2d at 657–58; \textit{Williams v. Hicks Printing Co.}, 159 Wis. 90, 101, 150 N.W. 183 (1914). The defamer’s motive or good faith may be important if matters of conditional privilege are involved, see infra § 11.11, or if punitive damages are sought, see infra § 11.44. In criminal prosecutions for defamation, a defendant’s “good motives” are a defense. See Wis. Stat. § 942.01.

\textsuperscript{22} See, e.g., \textit{Denny}, 106 Wis. 2d at 657–58; \textit{Williams}, 159 Wis. at 101.

\textsuperscript{23} See, e.g., \textit{Williams}, 159 Wis. at 101; \textit{Denny}, 106 Wis. 2d at 657–58.

\textsuperscript{24} See infra § 11.11 (discussion of conditional privilege defense).
in such cases “malice in fact,” or “express malice,” must be established before liability will attach.\(^{25}\)

In some cases a person publishing defamatory matters may seek to avoid liability by claiming an absolute privilege.\(^{26}\)

Malice in fact, or express malice, that is, malice beyond any malice implied or presumed from the fact of the defamatory publication itself, is required at all times to support any award of punitive damages.\(^{27}\)

In some cases involving allegations of slander, liability will attach only if the plaintiff pleads and proves an element that is not required at all in libel actions—special damages (i.e., harm of an economic, material, or pecuniary nature).\(^{28}\) In Wisconsin all libels are actionable whether special harm is present or not.\(^{29}\) Originally, however, all slander cases required proof of special, or pecuniary, damage to be actionable.\(^{30}\) Four exceptions to this general rule in slander cases have developed: a defamer is subject to liability for slander even in the absence of any special harm or damage to the person slandered if the slander (1) imputes to the victim a loathsome

\(^{25}\) *Denny*, 106 Wis. 2d at 657–58; *Williams*, 159 Wis. at 101.

\(^{26}\) See infra § 11.12 (discussion of absolute privilege defense).

\(^{27}\) *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, 506, 228 N.W.2d 737 (1975); *Williams*, 159 Wis. at 102; *Eviston v. Cramer*, 57 Wis. 570, 575, 15 N.W. 760 (1883); *Wilson v. Noonan*, 35 Wis. 321, 351 (1874); *Rogers v. Henry*, 32 Wis. 327, 334 (1873).

\(^{28}\) See authorities cited supra notes 15–17 (discussion of terms “special harm” and “special damages”).

\(^{29}\) See *Martin*, 15 Wis. 2d at 460–61, where section 569 of the first Restatement of Torts (1938) was adopted for Wisconsin. The language of the second Restatement is in all important respects the same: “One who falsely . . . publishes matter defamatory of another in such a manner as to make the publication a libel is liable to the other although no special harm, or loss of reputation results therefrom.” Restatement (Second) of Torts § 569 (1977).

For an enlightening discussion of the difference between communications that are “defamatory per se” and those that are “actionable per se,” see *Martin*, 15 Wis. 2d at 460–62.

\(^{30}\) *Starobin*, 94 Wis. 2d at 13; *Martin*, 15 Wis. 2d at 459; Restatement (Second) of Torts §§ 570–574 (1977); *Keeton*, supra note 1, § 112, at 788; see also *Brody*, supra note 12, at 505–6.
disease; (2) imputes to the victim the commission of a crime; (3) affects the victim’s business, trade, profession, office, or calling; or (4) imputes unchastity in a woman victim.\textsuperscript{31} These types of slander are called \textit{slander per se}.\textsuperscript{32} In all other slander cases, proof of special harm is needed.\textsuperscript{33}

In those cases where the defamatory matter does not identify by name the person or persons referred to, a plaintiff has the burden of establishing that the plaintiff is the person, or one of the persons, to whom the defamatory matter refers.\textsuperscript{34}

In those libel cases involving written or printed copies of the defamatory matter (e.g., cases involving newspapers or magazines), every sale and delivery of a written or printed copy is a fresh publication of the defamation.\textsuperscript{35}

A plaintiff must commence an action for defamation within two years of the date the cause of action accrues, or the action is barred.\textsuperscript{36}

\textsuperscript{31} See authorities cited supra note 29. The Restatement (Second) of Torts would modify and broaden the fourth category to apply to imputations of “serious sexual misconduct” by one of either sex. Restatement (Second) of Torts § 574 (1977).

\textsuperscript{32} See authorities cited supra note 29.

\textsuperscript{33} Martin, 15 Wis. 2d at 459.

\textsuperscript{34} DeWitte v. Kearney & Trecker Corp., 265 Wis. 132, 137, 60 N.W.2d 748 (1953); Ogren v. Employers Reinsurance Corp., 119 Wis. 2d 379, 382, 350 N.W.2d 725 (Ct. App. 1984). In \textit{Ogren}, Wisconsin adopted the rule of section 564A of the Restatement (Second) of Torts (1977), concerning the right of a group member to recover for defamatory statements made concerning that group.

\textsuperscript{35} Voit, 116 Wis. 2d at 223; Street v. Johnson, 80 Wis. 455, 458, 50 N.W. 395 (1891); see infra § 11.60.

\textsuperscript{36} Wis. Stat. § 893.57.
2. [§ 11.8] Defenses Available

a. [§ 11.9] In General

Defendants in defamation cases in Wisconsin can raise a number of defenses. Some defenses, such as truth, conditional privilege, absolute privilege, the political reporters’ exemption, and the contract printers’ exemption, may, if proven, be complete bars to liability. Other defenses, such as retraction and failure to mitigate damages, do not defeat liability but may reduce the damages ultimately awarded. The constitutional privilege can serve both functions—it may defeat liability entirely in some situations and limit the types of damages awarded in others.37

b. [§ 11.10] Truth

The truth of the defamatory matter published by a defendant is a defense to any action for libel or slander.38 It is not necessary for the defendant to prove the literal truth of the precise statement published, and slight inaccuracies in the statement published are immaterial to the success of the defense.39 Nor is it necessary to prove that the statement was true in every particular.40 All that is necessary to establish the defense of truth is that the matter was substantially true.41

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37 See Keeton, supra note 1, §§ 114–116, at 815–42 (general discussion of defenses available in defamation cases); see also Brody, supra note 12, at 520–43.

38 DiMiceli v. Klieger, 58 Wis. 2d 359, 363, 206 N.W.2d 184 (1973); Lathan v. Journal Co., 30 Wis. 2d 146, 158, 140 N.W.2d 417 (1966); Williams v. Journal Co., 211 Wis. 362, 370, 247 N.W. 435 (1933); Zinda v. Louisiana Pac. Corp., 140 Wis. 2d 277, 409 N.W.2d 436 (Ct. App. 1987), aff’d in part, rev’d in part, 149 Wis. 2d 913, 440 N.W.2d 436 (Ct. App. 1989); Fields Foundation, 103 Wis. 2d at 454; Prahl, 98 Wis. at 141; see also Oetzman v. Ahrens, 145 Wis. 2d 560, 571, 427 N.W.2d 421 (Ct. App. 1988); Keeton, supra note 1, § 116, at 839; Brody, supra note 12, at 520.

39 Lathan, 30 Wis. 2d at 158; Fields Foundation, 103 Wis. 2d at 486.

40 Prahl, 98 Wis. 2d at 141.

41 DiMiceli, 58 Wis. 2d at 363; Lathan, 30 Wis. 2d at 158; Meier v. Meurer, 8 Wis. 2d 24, 29, 98 N.W.2d 411 (1959); Williams, 211 Wis. at 370; Fields Foundation, 103 Wis. 2d at 482; Prahl, 98 Wis. 2d at 141; see Maguire v. Journal Sentinel, Inc., 232 Wis. 2d 236, 605 N.W.2d 881 (Ct. App. 1999).
c. [§ 11.11] Conditional Privilege

A defendant may avoid liability by establishing that its otherwise defamatory communications were conditionally privileged. Wisconsin has used the rule of conditional privilege set forth in section 594 of the Restatement (Second) of Torts and recognizes a communication as conditionally privileged if the person publishing the otherwise defamatory matter reasonably believes that the information affects his or her important interests and that the recipient’s receipt of the defamatory matter will be of service in the lawful protection of those interests. Stated another way, a conditional privilege is granted when public policy recognizes the social utility of encouraging the free flow of information in respect to certain vocations or persons, even at the risk of causing harm by defamation. For example, an employer has a conditional privilege to communicate information concerning a former employee to that employee’s prospective employer. What makes these kinds of privileges conditional is that they

42 “An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient’s knowledge of the defamatory matter will be of service in the lawful protection of the interest.”

43 See Miller v. Minority Bd. of Fire Protection, 158 Wis. 2d 589, 463 N.W.2d 690 (Ct. App. 1990); Converters, 80 Wis. 2d at 264 (applying Restatement (Second) rule); accord Kensington Dev. Corp. v. Israel, 142 Wis. 2d 894, 903, 419 N.W.2d 241 (1988); see also Zinda v. Louisiana Pac. Corp., 149 Wis. 2d 264, 440 N.W.2d 548 (1989); Posyniak v. School Sisters of St. Francis, 180 Wis. 2d 619, 511 N.W.2d 241 (Ct. App. 1993); Wildes, 160 Wis. 2d at 449.

44 Calero, 68 Wis. 2d at 498; Lathan, 30 Wis. 2d at 152.

45 See, e.g., Calero, 68 Wis. 2d at 498; Hett v. Ploetz, 20 Wis. 2d 55, 59, 62, 121 N.W.2d 270 (1963); Wolf v. F & M Banks, 193 Wis. 2d 439, 460–61, 534 N.W.2d 877 (Ct. App. 1995) (recognizing conditional privilege of employee to discuss defamatory allegations of coemployee with company-hired psychologist and other employees). See also Vultaggio v. Yasko, 215 Wis. 2d 326, 572 N.W.2d 450 (1998) (recognizing conditional privilege for those testifying voluntarily at city council meetings); Heggy v. Grutzner, 156 Wis. 2d 186, 456 N.W.2d 845 (Ct. App. 1990) (recognizing conditional privilege to make defamatory statements to law enforcement officers); Miller v. Minority Bd. of Fire Protection, 158 Wis. 2d 589, 463 N.W.2d 690 (Ct. App. 1990) (public employees have conditional privilege to report to supervisors on alleged racial bias of coworkers); Keeton, supra note 1, § 115, at 827 (further discussing other conditional privileges and calling such
will be lost if they are abused, such as by transmitting the communication with express malice.\(^{47}\)

d. [§ 11.12] Absolute Privilege

In certain situations, such as in judicial or investigatory proceedings, a defendant’s privilege is absolute, as long as the statements bear a proper relationship to the matters at issue in those situations.\(^{48}\) Note that the privilege extends not merely to statements made during a hearing, but also to statements made during prehearing conferences and to extrajudicial comments made in an informal setting, provided that the comments are relevant to the litigation.\(^{49}\)

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\(^{46}\) See Restatement (Second) of Torts §§ 599–605A (1977) (listing situations in which conditional privileges may be lost by abuse); see also Zinda, 149 Wis. 2d at 924–25; Wildes, 160 Wis. 2d at 451; Posyniak, 180 Wis. 2d at 628–32 (all citing principles from Restatement (Second) of Torts).

\(^{47}\) See, e.g., Tannenbaum v. Foerster, 648 F. Supp. 1300 (E.D. Wis. 1986), aff’d, 863 F.2d 885 (7th Cir. 1988); Calero v. Del Chem. Corp., 68 Wis. 2d 487, 228 N.W.2d 737 (1975); Otten v. Schutt, 15 Wis. 2d 497, 113 N.W.2d 152 (1962); Wolf, 193 Wis. 2d at 462; Zinda v. Louisiana Pac. Corp., 140 Wis. 2d 277, 409 N.W.2d 618 (Ct. App. 1987); Gerol v. Arena, 127 Wis. 2d 1, 377 N.W.2d 550 (Ct. App. 1985); see also Hartman v. Buerger, 71 Wis. 2d 393, 398, 238 N.W.2d 898 (1974) (rule of conditional privilege is similar to that of absolute privilege, see infra § 11.12, except that conditional privilege is subject to additional limitation that person making statement must have reasonable grounds for believing truth of statements made).

\(^{48}\) Converters, 80 Wis. 2d at 265; Hartman, 71 Wis. 2d at 398; Bergman v. Hupy, 64 Wis. 2d 747, 749, 221 N.W.2d 898 (1974); Spoehr v. Mittelstadt, 34 Wis. 2d 653, 659, 150 N.W.2d 502 (1967); see Restatement (Second) of Torts §§ 585–592A (1977) (further treatment of subject of absolute privileges in defamation cases); Rady v. Lutz, 150 Wis. 2d 2d 643, 647–48, 444 N.W.2d 58 (Ct. App. 1989); see also Kensington Dev. Corp., 142 Wis. 2d at 903; State v. Cardenas-Hernandez, 219 Wis. 2d 516, 537 n.7, 579 N.W.2d 678 (1998). Note that there is no absolute privilege granted to one testifying voluntarily at city council meetings. Vultaggio v. Yasko, 215 Wis. 2d 326, 572 N.W.2d 450 (1998).

\(^{49}\) Rady, 150 Wis. 2d at 649.
e. [§ 11.13] Constitutional Privilege

As a matter of federal constitutional law, a conditional constitutional privilege has been recognized for media defendants and for nonmedia defendants publishing material concerning public figures; this privilege is forfeited only on a showing of “actual malice” on the part of the defendant.\(^{30}\) Media defendants are given special conditional constitutional protections, as they may not be held subject to liability even for communications concerning nonpublic figures (i.e., private individuals) without some showing of fault.\(^{31}\) Further, media defendants enjoying this additional constitutional privilege do not labor against the presumption of general damages enjoyed by the plaintiff in libel or slander per se cases that do not involve the constitutional privilege.\(^{32}\)

\(^{30}\) See Brody, supra note 12, at 529–43 (general discussion of creation and development of this constitutional privilege in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny, and the application of this privilege by Wisconsin courts); see also *Calero*, 68 Wis. 2d at 499–500 (discussion of actual malice and how it differs from express malice involved in cases that do not involve constitutional privilege); *infra* § 11.50 (discussion of how creation of this constitutional privilege affects damage rules in cases involving media defendants).

For a discussion of the appropriate summary judgment methodology in public figure defamation cases and concerning the meaning of “actual malice,” see *Torgerson v. Journal Sentinel, Inc.*, 210 Wis. 2d 524, 563 N.W.2d 472 (1997). For application of the constitutional privilege in a case involving a “limited purpose” public figure, see *Erdmann v. S.F. Broadcasting of Green Bay, Inc.*, 229 Wis. 2d 156, 599 N.W.2d 1 ( Ct. App. 1999) and *Bay View Packing Co. v. Taff*, 198 Wis. 2d 653, 676, 543 N.W.2d 522 ( Ct. App. 1995).


f. [§ 11.14] Failure to Mitigate Damages

A defendant may seek to lessen the amount of damages for which it is found liable by showing that the plaintiff unreasonably increased the plaintiff’s own harm or failed to take reasonable steps to keep the harm to a minimum. For example, a defendant may seek to show that the plaintiff could reasonably have prevented harmful republication of the defamatory matter but did not do so.


g. [§ 11.15] Political Reporters’ Exemption

The Wisconsin legislature has granted newspaper proprietors, publishers, editors, writers, and reporters an exemption from liability for any “true and fair” report of judicial, legislative, or other public proceedings authorized by law, or of any public statement, speech, argument, or debate in the court of such proceedings. The legislature has also granted the owners, licensees, and operators of television or radio stations or networks an exemption from defamation liability for any statements made by a candidate for political office, at least to the extent that such stations are prohibited by federal law from censoring such political broadcasts.


54 See Suick v. Krom, 171 Wis. 254, 177 N.W. 20 (1920) (defendant should not be held liable for damage caused by circulation of defamatory matter by plaintiff himself); see also Ranous v. Hughes, 30 Wis. 2d 452, 141 N.W.2d 251 (1966) (permitting defense to show that consensual (i.e., preventable) publication of defamatory matter was source of plaintiff’s damages); infra § 11.35 (further discussion of “mitigation” evidence and description of varying ways in which that term has been used in defamation actions).

55 Wis. Stat. § 895.05(1).

56 Wis. Stat. § 895.052.
h. [§ 11.16] Contract Printers’ Exemption

Wisconsin courts recognize an exemption from liability for contract printers who unwittingly print defamatory matter if it is shown they did not know or have reason to know of the libelous nature of the matter printed. 57

i. [§ 11.17] Retraction

Retraction following publication of defamatory matter is not strictly speaking a defense to liability, but it may limit the nature and extent of the damages awarded. A timely retraction (or “correction”) limits to actual compensatory damages the award that a person defamed by libelous publication of matter in a newspaper, magazine, or periodical may recover from those responsible. 58 Indeed, there is a special prerequisite to any liability in covered cases, as the one so defamed by the publication in the newspaper, magazine, or periodical must give the alleged defamer a prescribed notice and “opportunity to correct” before any action may even be commenced. 59

58 Wis. Stat. § 895.05(2).
59 It’s In the Cards, Inc. v. Fuschetto, 193 Wis. 2d 429, 435, 535 N.W.2d 11 (Ct. App. 1995); see Hucko v. Joseph Schlitz Brewing Co., 100 Wis. 2d 372, 376, 302 N.W.2d 68 (Ct. App. 1981); see also Zawistowski v. Kissinger, 160 Wis. 2d 292, 303, 466 N.W.2d 664 (Ct. App. 1991); Super Valu Stores, Inc. v. D-Mart Food Stores, Inc., 146 Wis. 2d 568, 579, 431 N.W.2d 721 (Ct. App. 1988) (both citing Hucko with approval). Note that a computer network service bulletin board is not a “periodical” under section 895.05(2). It’s In the Cards, 193 Wis. 2d at 437.
j. [§ 11.18] Exclusivity of Worker’s Compensation Act

Defamation claims by an employee against an employer, or against another coemployee, for statements made in the scope of employment are barred by the exclusivity provisions of the Worker’s Compensation Act.60

k. [§ 11.19] Causation Rules and Extent of Liability for Repetition of Defamatory Material

Once the tort of defamation has been established, the limits of a defendant’s liability are measured by a traditional “proximate cause” test.61 Losses that are a natural and probable result of the defamatory publication will be chargeable to the defendant.62 Accordingly, a person who published defamatory matter is liable for harm resulting from republication (i.e., repetition) of the defamatory matter by third persons, at least if the republication was reasonably to be expected and was itself a natural consequence of the defendant’s original act of defamation.63

3. [§ 11.20] Procedures for Determining Defamatory Character of Communication

The question of whether a particular statement or communication is capable of having a defamatory meaning (as well as a nondefamatory

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61 See Keeton, supra note 1, § 112, at 794–95.

62 See Restatement (Second) of Torts § 323 (1977) (using “substantial factor” language); Laurent v. Van Somple, 161 Wis. 354, 355, 154 N.W. 366 (1915) (claimed items of damage held to be outside realm of any “natural or proximate” results of defamation).

63 Hucko, 100 Wis. 2d at 377; Restatement (Second) of Torts § 576 (1977); 53 C.J.S. Libel and Slander § 199 (1987 & Supp. 1992); Keeton, supra note 1, § 112, at 795.
meaning) is initially a matter of law for the court to decide. If as a matter of law the material allegedly communicated cannot be reasonably understood to have a defamatory connotation, no defamation action may be maintained, and a motion to dismiss for failure to state a claim should be granted. If the court determines that the alleged communication might reasonably be given either a defamatory or a nondefamatory connotation, a fact question is presented. The trier of fact then determines whether the communication found by the court to be at least capable of defamatory meaning was in fact so understood by its recipients.

III. [§ 11.21] Types of Damages Recoverable

A. [§ 11.22] In General

In a defamation action a plaintiff may recover compensatory, punitive, or nominal damages. The plaintiff’s entitlement to one or more of these types of damages depends on the character of the alleged defamatory material, the intent of the person defaming the plaintiff, and the character and extent of the injuries inflicted thereby.

B. [§ 11.23] Compensatory Damages

Compensatory damages are those awarded for the purpose of compensating the wronged party for the harm suffered. In defamation cases, recoverable compensatory damages may include general damages, special damages, or both, depending on the nature of the defamation involved.

General damages are recoverable as compensation for injury to feelings or reputation or because of anguish or humiliation—harms of a type not

64 Starobin, 94 Wis. 2d at 10; Lathan, 30 Wis. 2d at 153; Fields Foundation, 103 Wis. 2d at 482.

65 Starobin, 94 Wis. 2d at 10. The plaintiff is required to include in the complaint the particular words complained of. Wis. Stat. § 802.03(6). Solsrud, 174 Wis. 2d at 740.

66 Schaefer, 77 Wis. 2d at 124; Frinzi, 30 Wis. 2d at 275–76.


68 See supra Chapter 1 (discussion of purposes of compensatory damages).
easily estimable in monetary terms. So predictable is the infliction of such!harm by the publication of libel or of slander per se that when libel or slander per se are involved, the law actually presumes the presence of injury or harm and provides for the award of general damages even without affirmative proof of any such injury, harm, or damage.  

A plaintiff need not rest with this presumed harm or damage; the plaintiff may seek to enhance an award for general damage by offering proof of the actual—not just presumed—harm to the plaintiff’s feelings, reputation, community standing, and so forth.

Special damages are those damages awarded as compensation for harm of a material, economic, or pecuniary nature. Examples of such harm are loss of income, loss of earnings, or loss of professional position.


70 Dalton v. Meister, 52 Wis. 2d 173, 179, 188 N.W.2d 494 (1971); Wozniak, 57 Wis. 2d at 730; see Restatement (Second) of Torts § 569 (1977); infra § 11.51 (discussion of constitutional limitations on use of such presumption of damages).

71 See, e.g., Dalton, 52 Wis. 2d at 179; see also Restatement (Second) of Torts §§ 575, 622, 623 (1977).

72 Starobin, 94 Wis. 2d at 13; Lawrence, 53 Wis. 2d at 660; Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 113 N.W.2d 135 (1962); see also Keeton, supra note 1, § 112, at 793–95 (discussing historical development of concept of special damages). The Restatement (Second) of Torts uses the term special harm in place of special damages. See Restatement (Second) of Torts § 575 cmt. b (1977).

73 See, e.g., Calero v. Del Chem. Corp., 68 Wis. 2d 487, 228 N.W.2d 737 (1975); Dalton v. Meister, 52 Wis. 2d 173, 188 N.W.2d 494 (1971); Prahl v. Brosamle, 98 Wis. 2d 130, 295 N.W.2d 768 (Ct. App. 1980), dismissed on other grounds, 142 Wis. 2d 658, 420 N.W.2d 372 (Ct. App. 1987).

74 See, e.g., Dalton v. Meister, 52 Wis. 2d 173, 188 N.W.2d 494 (1971); see also Restatement (Second) of Torts § 575 cmt. b (1977) (further discussion of what constitutes loss of pecuniary or material advantage so as to constitute special harm); supra § 11.5 (discussion of definition of special damages).
The distinction between general damages (either actually proved or presumed in law) and special damages awardable upon proof of special harm is not important merely for the purposes of determining jury instructions or verdict form. In fact, the presence of special damages is a prerequisite for any liability in cases of slander other than the four types designated slander per se; for a more detailed discussion of the need to show such special harm to recover in such slander cases, see section 11.31, infra.

C. [§ 11.24] Punitive Damages

In tort actions, punitive damages may be awarded not as compensation, but as punishment or a deterrent when a defendant’s actions have been actuated by malice, ill will, or spite. A similar rule applies in defamation cases; if the person publishing defamatory matter was actuated by express malice, punitive damages may be awarded. In some cases, punitive damages are disallowed on constitutional First Amendment grounds. For a more detailed discussion of the burden of proof and the evidentiary rules governing claims for punitive damages, see section 11.36, infra.

D. [§ 11.25] Nominal Damages

Nominal damages are those damages recoverable when a legal wrong has been done but no actual compensable loss has occurred or been proven. In defamation cases, nominal damages are said to be properly awarded for the purpose of vindication if there has been language constituting libel or slander per se (in which case a jury may award compensation for injury to feelings or reputation even without proof of actual harm)

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50 Am. Jur. 2d Damages § 351 (1970 & Supp. 1992); see also supra Chapter 3 (general discussion of concept of nominal damages).
but where the jury chose to award nothing for compensatory damages. In Wisconsin, nominal damages are traditionally six cents.80

IV. [§ 11.26] Proof of Damages

A. [§ 11.27] Nature of Damages Sought

In defamation actions, the proof of damages varies with the nature of the damages that are sought.

1. [§ 11.28] Compensatory Damages

a. [§ 11.29] Burden and Necessity of Proof

(1) [§ 11.30] Libel Cases and Slander Per Se Cases

When defamatory matter is communicated in the form of libel, the person defamed has the benefit of a conclusive presumption of the existence of general damages (i.e., humiliation, injury to feelings, damage to reputation or good name), and such presumption supports a monetary award for such damages even without any affirmative proof on the subject at the time of trial.81

In slander cases, however, only certain categories of defamatory words entitle the person defamed to a presumption of general damages, without specific proof of such damages. Originally, in no case of mere slander (as opposed to libel) was such a presumption of damage raised; the creation of the four categories of slander for which harm is to be presumed was due to the apparent recognition that such words, by their very nature, were

79 50 Am. Jur. 2d Libel and Slander § 351 (1970 & Supp. 1992); 53 C.J.S. Libel and Slander § 188 (1987 & Supp. 1992); Restatement (Second) of Torts § 620 (1977); see also D.R.W. Corp. v. Cordes, 65 Wis. 2d 303, 315–16, 222 N.W.2d 671 (1974) (if jury finds libel was committed but finds no actual damages were sustained, jury should assess nominal damages).

80 D.R.W. Corp., 65 Wis. 2d at 315–16.

81 Williams, 159 Wis. at 101–2; Lawrence, 53 Wis. 2d at 660; Calero, 68 Wis. 2d at 510; Keeton, supra note 1, § 112, at 795.
especially likely to cause harm. The four types of slander—called slander per se—that raise the presumption of general damages are (1) that which imputes to the victim a loathsome disease; (2) that which imputes to the victim the commission of a crime; (3) that which affects the victim’s business, trade, profession, office, or calling; or (4) that which imputes unchastity in a woman. Slanders that do not fall into one of these “artificial” or “arbitrary” categories, no matter how obvious or insulting, do not raise such presumption of damages.

A person defamed by libel or by slander per se need not rely solely on this presumption of damages; such a plaintiff may go forward with affirmative proof as to harm to the plaintiff’s feelings or reputation, or may prove the existence of other types of general damages or of special damages.

There is never any presumption of special damages in defamation cases.

A person defamed by libel or by slander per se may seek general damages only, establishing them either by use of the presumption of general damages or by affirmative proof of such general damages; the person does not have to prove the defamation caused any special damages.

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82 Starobin, 94 Wis. 2d at 13; see also Keeton, supra note 1, § 112, at 788 (discussion of historical development of these four categories of slander per se).

83 Starobin, 94 Wis. 2d at 13; Martin, 15 Wis. 2d at 459; Bauer, 191 Wis. 2d at 524–25; Restatement (Second) of Torts §§ 570–574 (1977); Keeton, supra note 1, § 112, at 788–93; see also Brody, supra note 12, at 505–06. Note that the Restatement (Second) would modify and broaden the fourth category to apply to imputations of “serious sexual misconduct” by one of either sex. Restatement (Second) of Torts § 574 (1977). One who calls another a “disgrace” has not committed slander per se. Bauer, 191 Wis. 2d at 533.

84 Martin, 15 Wis. 2d at 459.

85 Id. at 459.

86 See Keeton, supra note 1, § 112, at 793.

87 Dalton, 52 Wis. 2d at 179–80; see also Restatement (Second) of Torts § 621 (1977) (allowing for recovery of actual provable harm to reputation).

88 Martin, 15 Wis. 2d at 460–61; Restatement (Second) of Torts § 569 (1977).
It has been held that First Amendment considerations forbid using a presumption of general damages in any case in which the defendant has a conditional constitutional privilege.89

(2) [§ 11.31] All Other Cases

In cases involving all slander other than slander per se, the defendant does not have the benefit of any presumption of general damages; accordingly, general damages may not be awarded unless established by affirmative proof. Moreover, general damages may not be awarded at all in such cases (even if abundant proof supporting such award is adduced) unless the person defamed first proves that special damages have been sustained.90

In such cases, however, once special damages are proven, the barriers are lowered and the person defamed may also recover for whatever general damages the person can prove;91 these general damages (not recoverable at all if they are the only damages proven) become recoverable in a parasitic manner once an entitlement to special damages is established.92

(3) [§ 11.32] Summary of Presumptions and Proof Requirements

The following table summarizes which types of damages are presumed, and which must be proved, in cases involving various types of defamatory matter.

89 See Denny, 106 Wis. 2d at 659 (discussing Gertz and the constitutional considerations precluding use of any presumption of general damages in such First Amendment cases); infra § 11.49 (further discussion of constitutional privileges and their impact on awards of damages).

90 Starobin, 94 Wis. 2d at 13; Martin, 15 Wis. 2d at 459; see also Restatement (Second) of Torts §§ 575, 621 (1977).

91 Martin, 15 Wis. 2d at 459; Keeton, supra note 1, § 112, at 794; see Restatement (Second) of Torts §§ 575, 621 (1977).

92 Martin, 15 Wis. 2d at 459; Keeton, supra note 1, § 112, at 794–95.
<table>
<thead>
<tr>
<th>TYPE OF DAMAGES SOUGHT</th>
<th>GENERAL DAMAGES</th>
<th>SPECIAL DAMAGES</th>
</tr>
</thead>
<tbody>
<tr>
<td>LIBEL</td>
<td>General damages presumed without proof; no special damages need be pleaded or proven</td>
<td>Special damages not presumed but recoverable upon proof; special damages need not be proven to warrant award of general damages</td>
</tr>
<tr>
<td>SLANDER PER SE</td>
<td>General damages presumed without proof; no special damages need be pleaded or proven</td>
<td>Special damages not presumed but recoverable upon proof; special damages need not be proven to warrant award of general damages</td>
</tr>
<tr>
<td>OTHER SLANDER</td>
<td>No presumption of general damages; general damages recoverable if special damages pleaded and proven</td>
<td>Special damages not presumed but recoverable upon proof; special damages must be proven before award of general damages can be made</td>
</tr>
</tbody>
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b. [§ 11.33] Evidence Admissible on Extent of Damages Sustained

(1) [§ 11.34] Plaintiff’s Evidence—General Damages and Special Damages

As noted in section 11.30, supra, plaintiffs may go beyond any mere presumption of general damages and may prove such general damages as they can through affirmative evidence. In regard to a claimed loss of good name or reputation, plaintiffs themselves are of course competent to

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93 *Dalton*, 52 Wis. 2d at 179; *see also* Restatement (Second) of Torts § 621 (1977) (allowing recovery of damages for actual proven harm to reputation).
testify. No corroboration of their testimony is necessary. A plaintiff may show prior reputation or the closeness of the relationships claimed to have been harmed. The plaintiff may show prior standing in the community, prior social station and relations, and the particular character of the plaintiff’s business. The plaintiff’s holding a position of special public trust or esteem can be shown and considered. The plaintiff may show the extent to which the defamatory matter was disseminated, as the number of persons exposed to the defamatory matter is itself an important fact to be weighed in determining the extent of harm.

When loss of reputation and community standing are at issue, the plaintiff may offer corroborating testimony of others in the community who state that the publication of the defamatory matter lowered the plaintiff’s esteem as a person.

A plaintiff seeking to offer affirmative evidence of the loss of reputation and good name is not required to show that those receiving the defamatory communication necessarily believed the defamatory allegations, although the fact of purported nonbelief by the receiver of the defamatory communications may be considered in fixing damages.

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94 See, e.g., Lisowski v. Chenenoff, 37 Wis. 2d 610, 155 N.W.2d 619 (1968).
95 Id. at 631–33. The absence of corroboration, while not fatal to a jury award, was cited as one factor in upholding the trial court’s remittitur of a portion of the compensatory award.
96 See Wozniak, 57 Wis. 2d at 729–31 (in determining propriety of jury’s award of damages, court compared plaintiff’s relationships with his neighbors before and after the defamation).
97 Id. at 730–31 (considering testimony of plaintiff’s neighbors as to how well they knew plaintiff).
98 Williams, 159 Wis. at 104.
99 Dalton, 52 Wis. 2d at 179–80.
100 Wozniak, 57 Wis. 2d at 730; Suick, 171 Wis. at 259; 53 C.J.S. Libel and Slander § 187 (1987 & Supp. 1992).
101 See, e.g., D.R.W. Corp., 65 Wis. 2d at 315.
102 Hacker v. Heiney, 111 Wis. 313, 319, 87 N.W. 249 (1901). Hacker involved slander per se, so a presumption of general damages was raised. The case states that evidence of nonbelief by recipients of the slanderous communication does not
If plaintiffs seek to offer affirmative proof of that aspect of general damages concerned with mental anguish, humiliation, or injury to feelings, they themselves may testify as to such losses. For example, they can testify to any nervousness or mental upset the defamation caused them, or to any sense of humiliation or demoralization they felt. A plaintiff may testify to the distress and suffering that was sustained from seeing the effect of the defamation on the plaintiff’s own family. Corroborating testimony from family members or others concerning the plaintiff’s inability to sleep or relax is properly admitted.

If plaintiffs seek to prove that they have sustained special harm (i.e., pecuniary injury), they may testify themselves, without need of corroboration, to their loss of wages or credit opportunities. Loss of earnings may be proven by a comparison of salary actually earned before the defamation and income earned in subsequent years. If a plaintiff claims the defamation caused prospective employers to reject the plaintiff’s job applications, evidence may be offered of the probable salary figures for those jobs. Actual loss of customers by a business owner may also be shown. Testimony of a plaintiff’s prospective business associate that, on hearing the defamatory charge, the associate hesitated to deal with the

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103 Lawrence, 53 Wis. 2d at 659.
104 Calero, 68 Wis. 2d at 510.
106 Lawrence, 53 Wis. 2d at 659.
107 For the definition of special harm, see sections 11.5 and 11.23, supra.
108 See, e.g., Lisowski, 37 Wis. 2d at 633.
109 Calero, 68 Wis. 2d at 510.
110 Id.
111 See Servatius v. Pichel, 34 Wis. 292, 298–99 (1874).
plaintiff is admissible to show the nature or extent of lost business opportunities or lost income.\footnote{\textit{Prahl}, 98 Wis. 2d at 156. The testimony of such prospective associates, though admissible as evidence of lost business income, is not technically admissible as evidence of the plaintiff’s reputation in the community.}

\section{(2) [\S 11.35] Defendant’s Evidence—In General and Mitigation Evidence}

In opposing a claim for injury to reputation, a defendant may show that the plaintiff had a bad reputation even before the claimed defamation.\footnote{\textit{Keeton, supra note 1, \S 116A, at 847; 50 Am. Jur. 2d \textit{Libel and Slander} \S 381 (1971 & Supp. 1992); 53 C.J.S. \textit{Libel and Slander} \S\S 188, 195 (1987 & Supp. 1992); see also \textit{Wozniak}, 57 Wis. 2d at 730–31 (admitting and considering testimony from plaintiff’s neighbors concerning their low opinion of him before the defamation).} The defense may show that prior defamatory communications by others were the real cause of the plaintiff’s harm.\footnote{\textit{See, e.g., Lisowski}, 37 Wis. 2d at 627 (defense attempted to show existence of such earlier defamation of plaintiff by others).} Likewise, the defense may attempt to limit any award of damages by showing that those persons who heard the defamatory allegations about the plaintiff did not even believe the allegations.\footnote{\textit{Hacker}, 111 Wis. at 319.}

If the plaintiff claims the defamation has caused nervousness or emotional upset, the defense is allowed to offer evidence of the plaintiff’s prior medical condition (e.g., by showing the plaintiff had used tranquilizers even before the claimed defamation).\footnote{\textit{Lawrence}, 53 Wis. 2d at 659.} Further, to negate a claim of disabling emotional harm, the defense may show that the plaintiff has required no active medical care since the alleged defamation.\footnote{\textit{Id.}}

If the plaintiff claims special harm in the form of lost income, the defense may offer evidence of the plaintiff’s prior financial condition, such
as by offering into evidence tax returns showing actual past earnings history.\(^{118}\)

The defendant may also show that the real cause of the plaintiff’s harm was either the plaintiff’s own circulation of the defamatory matter\(^{119}\) or a circulation by others to which the plaintiff consented\(^{120}\).

Although the defendant’s motives may be highly relevant on issues of punitive damages,\(^{121}\) in Wisconsin the defendant’s good faith or laudable intent is not to be considered in determining the amount of compensatory damages.\(^{122}\)

The defense may also raise the matter of mitigation of damages. In defamation cases in Wisconsin and elsewhere, the term *mitigation* has been used in two senses: (1) to restate the requirement that the plaintiff take reasonable steps to avoid damage or at least not increase his or her own damages; and (2) to describe the notion that evidence concerning the plaintiff’s or the defendant’s background or the circumstances surrounding the defamation is sometimes admitted, at the defense’s request, to persuade the trier of fact to award a smaller amount of compensatory damages than that to which the plaintiff would otherwise be entitled.\(^{123}\)

The first sense in which the term *mitigation* is used (i.e., concerning the plaintiff’s duty not to unreasonably permit an increase of his or her own harm) is in principle no different in defamation cases from what it is in other cases. For example, the defendant may show that all or a share of the

\(^{118}\) *Lehner*, 211 Wis. at 132.

\(^{119}\) *Suick*, 171 Wis. at 258.

\(^{120}\) *Ranous*, 30 Wis. 2d at 462–63; *see supra* § 11.19 (discussion of defamer’s liability for damages caused by natural and predictable repetition of defamatory matter by third persons).

\(^{121}\) *See infra* § 11.44 (role of malice in claims of punitive damages in defamation cases).

\(^{122}\) *Denny*, 106 Wis. 2d at 657; *Williams*, 159 Wis. at 101–02. Some courts have adopted a minority view that does allow evidence of good faith to be considered in fixing compensatory damages, on the theory that the amount of the plaintiff’s humiliation and mental suffering may be affected by the degree of ill will exhibited by the defendant. *See Keeton, supra* note 1, § 116A, at 848.

plaintiff’s harm resulted from a republication of the defamatory matter and that the plaintiff was to blame for the republication and could have prevented it. Indeed, the statutory requirement that a person defamed in a newspaper, magazine, or other periodical seek a timely retraction can be seen as recognition of the plaintiff’s duty to minimize the harm if possible.

The other sense in which the term mitigation is used (i.e., concerning the offer of evidence not amounting to a legal excuse or to a bar to the plaintiff’s claim but offered to convince the trier of fact to award smaller compensatory damages than otherwise might be found owing) has been important in a number of situations. Evidence of stains on a plaintiff’s reputation independent of the claimed defamation has been referred to as “mitigation evidence.” Evidence concerning the defamer’s questionable mental or physical health at the time of the defamation has been held relevant on “mitigation” grounds. Evidence that the defendant retracted a libelous publication has been said to be admissible to “mitigate” a plaintiff’s claim for compensatory damages.

Confusion will be lessened if the term mitigation is only used (at least in compensatory damage cases) to describe the requirement that the plaintiff not enhance his or her own damages or unreasonably acquiesce in their infliction. Counsel should avoid using the term mitigation to discuss defensive evidence offered to show that the plaintiff had an already imperfect reputation or to claim extenuating circumstances surrounding the defendant’s decision to publish defamatory matter. Furthermore, any

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124 See, e.g., Suick, 171 Wis. at 258 (considering evidence that plaintiff himself had spread defamatory charge); see also Ranous, 30 Wis. 2d at 462 (considering evidence of publication of defamatory matter by others with plaintiff’s consent).

125 Wis. Stat. § 895.05(2).


127 Hacker, 111 Wis. at 318.

128 Hucko, 100 Wis. 2d at 379; see also Keeton, supra note 1, § 116A, at 846. The Hucko court observed that a timely correction or retraction can be a better remedy than damages. Hucko, 100 Wis. 2d at 379 n.5.

129 See infra § 11.48 (discussion of role of “mitigation evidence” in cases involving punitive damage).
mitigation evidence of the type that concerns the defendant’s actions or motives should rightly be seen as admissible only when punitive damages are being considered.\(^{130}\)

### 2. [§ 11.36] Punitive Damages

#### a. [§ 11.37] Burden and Necessity of Proof

Punitive damages in defamation actions are not awarded as a matter of right, but they may be given at the discretion of the trier of fact to punish the wrongdoer and to serve as a deterrent against like conduct in the future.\(^{131}\)

Punitive damages have one thing in common with those general damages presumed to have occurred in libel cases and slander per se cases: neither needs to be specifically proved as to amount.\(^{132}\) Before punitive damages can be awarded, however, a defamed plaintiff *does* have the burden of establishing (1) its entitlement to at least some compensatory damages and (2) malice on the part of the defendant.

The requirement that compensatory damages be owing before punitive damages may be awarded is consistent with the general rule in tort cases.\(^{133}\) In defamation cases, punitive damages may be awarded only if compen-

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\(^{130}\) The Wisconsin cases already state that a defendant’s good faith is immaterial to a defendant’s liability for compensatory damages. *Denny*, 106 Wis. 2d at 657–58; *Williams*, 159 Wis. at 101. A defendant’s good faith should also be seen as immaterial to the extent of liability for compensatory damages. But see *Wiegel v. The Capital Times Co.*, 145 Wis. 2d 71, 79–80, 426 N.W.2d 43 (Ct. App. 1988), in which the court held that *Denny* does not set the standard as one of simple negligence in *all* such actions by private individuals; the “actual malice” standard does not apply *only* to public figures.

\(^{131}\) *Dalton*, 52 Wis. 2d at 180; *Calero*, 68 Wis. 2d at 511. Punitive damages have also been called “vindictive damages,” “smart money,” or “punitory damages” in defamation cases. *See Eviston*, 57 Wis. at 575; *Wilson*, 35 Wis. at 354. For a discussion of punitive damages in general see Chapter 2, *supra*.

\(^{132}\) *Lawrence*, 53 Wis. 2d at 661.

\(^{133}\) See Chapter 2, *supra*, especially section 2.22.
satory damages are first awarded—mere nominal damages are not sufficient to support an award for punitive damages.\(^{134}\)

While proof of malice is unnecessary to warrant an award of general or special compensatory damages, it is indispensable to any award of punitive damages.\(^{135}\) In defamation cases, the malice referred to in regard to prayers for punitive damages is correctly called “express malice,” which means ill will, envy, spite, or revenge.\(^{136}\) Express malice must be proven by a preponderance of evidence before any request for punitive damages can be considered.\(^{137}\)

b. [§ 11.38] Evidence Admissible on Amount of Punitive Damages

(1) [§ 11.39] Plaintiff’s Evidence

Once the trier of fact has found that compensatory damages are owing and that punitive damages are appropriate because of the defendant’s express malice, an award of punitive damages may be made even in the absence of any specific evidence as to the amount of punitive damages that should be awarded.\(^{138}\) The parties may, however, submit evidence bearing on the amount of punitive damages to be awarded.

\(^{134}\) *Barnard v. Cohen*, 165 Wis. 417, 418, 162 N.W. 480 (1917).

\(^{135}\) *Calero*, 68 Wis. 2d at 506; *Dalton*, 52 Wis. 2d at 179; *Williams*, 159 Wis. at 102; see *Bradley v. Cramer*, 66 Wis. 297, 301, 28 N.W. 372 (1886); *Wilson*, 35 Wis. at 351.

\(^{136}\) *Polzin*, 54 Wis. 2d at 588; *Calero*, 68 Wis. 2d at 507. Express malice has been called “common law malice” and must be distinguished from “actual malice,” which in constitutional cases describes an abuse of the conditional constitutional privilege, occurring when one makes the defamatory communication “with knowledge that it was false or with reckless disregard of whether it was false or not.” See *Polzin*, 54 Wis. 2d at 588; *Calero*, 68 Wis. 2d at 499–500 (quoting *New York Times v. Sullivan*, 376 U.S. 254 (1964)). Express malice has also been called “malice in fact.” See *Denny*, 106 Wis. 2d at 657 (quoting *Williams v. Hicks Printing Co.*., 159 Wis. 90, 101, 150 N.W. 183 (1914)).

\(^{137}\) *Calero*, 68 Wis. 2d at 506.

\(^{138}\) *Lawrence*, 53 Wis. 2d at 661.
The plaintiff may offer evidence of the defendant’s wealth, since consideration of that factor is important to the punishment and deterrent aspects of an award of punitive damages. Such evidence need not be so precise that it amounts to a showing of the defendant’s exact net worth on the day of trial. Evidence that provides a reasonably accurate basis for estimating the defendant’s wealth is sufficient. The plaintiff may elicit proof of the defendant’s liquid assets (checking account, savings account, cash) both at a given point in time and in the form of an average balance. Evidence of a defendant’s real property holdings is likewise admissible. Evidence of a defendant’s borrowing power is relevant evidence of the defendant’s overall financial condition. If the plaintiff seeks punitive damages against more than one defendant, however, evidence of the wealth of one defendant is not admissible and may not be considered in fixing an award of punitive damages against the others, at least when joint and several liability for the award of punitive damages is claimed.

The amount of actual harm inflicted (i.e., the amount of compensatory damages owing) may be considered in determining the amount of punitive damages, if any, to award. A plaintiff may also ask the jury to consider the grievousness of the defamation itself, the degree of the defendant’s malicious intent, and even the potential harm that such defamation might have done beyond the harm actually inflicted.

139 Bradley, 66 Wis. at 302; Dalton, 52 Wis. 2d at 181.
140 Dalton, 52 Wis. 2d at 181; see also Welty v. Heggy, 145 Wis. 2d 828, 835, 429 N.W.2d 546 (Ct. App. 1988) (sufficient to show defendant’s worth with “reasonable accuracy”).
141 Lisowski, 37 Wis. 2d at 635.
142 Id.
143 Id.
144 Lehner, 211 Wis. at 128–29; see also Meke v. Nicol, 56 Wis. 2d 654, 658, 203 N.W.2d 129 (1973); Franz v. Brennan, 146 Wis. 2d 541, 550, 431 N.W.2d 711 (Ct. App. 1988), aff’d, 150 Wis. 2d 1, 440 N.W.2d 562 (1989).
145 Lehner, 211 Wis. at 128–29; see also Meke, 56 Wis. 2d at 658.
146 Dalton, 52 Wis. 2d at 180.
(2) [§ 11.40] Defendant’s Evidence

A defendant may show evidence of any provocation by the plaintiff. Such evidence may be used not only by the defendant to negate a charge of malice itself, but also by the trier of fact as bearing on the amount of punitive damages that is appropriate.

A defendant’s attempts at a retraction, even though untimely, may be proven and considered as bearing on the propriety and amount of punitive damages.

In determining whether a jury’s award of punitive damages is excessive, courts often look to the statutory maximum in the criminal libel and slander statutes. No Wisconsin case has determined whether the jury in a given case should be told in the first instance of the presence of such criminal statute limitation. Given the relative absence of meaningful jury guidelines on punitive damages, the better rule would be to allow the jurors to be told of the criminal statute limitation and require they be told they are not bound by that limitation as either a maximum or a minimum.

3. [§ 11.41] Nominal Damages

Nominal damages are awarded when liability has been established but, in the eyes of the trier of fact, there has been a failure of proof as to a right to compensatory damages in any substantial amount. No “proof” as to the amount of nominal damages can be made, since nominal damages are awarded not to compensate, punish, or deter but merely to vindicate, by the

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147 Rogers v. Henry, 32 Wis. 327, 334 (1873).

148 See Keeton, supra note 1, § 116A, at 848.

149 See Bradley, 66 Wis. at 300. Timely compliance with Wisconsin’s retraction statute precludes an award of punitive damages, as a matter of law, in those situations falling within the statute. See Wis. Stat. § 895.05(2).

150 See infra note 205 and accompanying text.

151 See supra §§ 2.19–.22 (general discussion of criticisms of unfettered discretion that juries have in awarding punitive damages).

152 D.R.W. Corp., 65 Wis. 2d at 315–16; Lawrence, 53 Wis. 2d at 661; Jones v. King, 33 Wis. 422, 423 (1873); Restatement (Second) of Torts § 620 (1977); 50 Am. Jur. 2d Libel and Slander § 239 (1970 & Supp. 1992).
award of a token figure, a plaintiff who has claimed and proven an invasion of his or her interest in a good name and reputation.\textsuperscript{153} In Wisconsin cases, including defamation cases, the appropriate amount of nominal damages to be awarded is traditionally said to be six cents.\textsuperscript{154}

B. [\$ 11.42] Effect of Malice or Good Faith on Damage Awards

1. [\$ 11.43] Compensatory Damages

Although malice is a necessary element to a defamation action,\textsuperscript{155} in some cases a plaintiff need not actually prove such malice on the defendant’s part to be entitled to an award of compensatory damages. This is because in libel cases and slander per se cases the law will presume or imply malice—called “malice in law”\textsuperscript{156} or “constructive malice”\textsuperscript{157}—from the mere fact of the defamatory publication.\textsuperscript{158} In such cases, the plaintiff need not go forward with evidence concerning the defendant’s state of mind or motive to establish a prima facie entitlement to compensatory damages.\textsuperscript{159} In cases involving slanderous remarks not defamatory per se, no such presumption arises.\textsuperscript{160}


\textsuperscript{154} D.R.W. Corp., 65 Wis. 2d at 315–16; see also supra § 3.4.

\textsuperscript{155} Denny, 106 Wis. 2d at 657; Flynn v. Western Union Tel. Co., 199 Wis. 124, 127, 225 N.W. 742 (1929); Williams, 159 Wis. at 101. See, e.g., Wiegel, 145 Wis. 2d at 79–81.

\textsuperscript{156} Denny, 106 Wis. 2d at 657–58; see also supra note 155.

\textsuperscript{157} Williams, 159 Wis. at 101.

\textsuperscript{158} Denny, 106 Wis. 2d at 657; Williams, 159 Wis. at 101; 50 Am. Jur. 2d Libel and Slander § 454 (1970 & Supp. 1992).

\textsuperscript{159} See supra note 158.

If the defendant establishes a prima facie entitlement to the protection of a conditional privilege,\(^\text{161}\) any presumption of malice is rebutted.\(^\text{162}\) The plaintiff must then prove express malice (ill will, envy, spite, revenge, or other bad or corrupt motive\(^\text{163}\)), also called “malice in fact.”\(^\text{164}\)

In certain cases involving constitutional considerations, compensatory damages must await a showing of actual malice. For a discussion of such actual malice, which is really not malice at all, see section 11.50, \textit{infra}. In constitutional cases, in which the concept of actual malice is at issue, the plaintiff must meet the middle-level burden of proof and establish actual malice by clear and convincing evidence.\(^\text{165}\)

If an absolute privilege is established, the defense’s malice and motive are irrelevant to the claim for damages.\(^\text{166}\)

\section*{2. [§ 11.44] Punitive Damages}

Express malice (i.e., ill will, spite, envy, revenge, or other bad or corrupt motive) must be shown by affirmative proof before any award of punitive damages can be made.\(^\text{167}\) Constructive malice (the type of malice deemed present whenever libel or slander per se is published\(^\text{168}\)) and actual

\small
\begin{footnotesize}
\begin{enumerate}
\item See \textit{supra} § 11.11 (discussion of conditional privilege).
\item \textit{Calero}, 68 Wis. 2d at 499; \textit{Otten}, 15 Wis. 2d at 504; \textit{Williams}, 159 Wis. at 101; see also 50 Am. Jur. 2d Libel and Slander § 454 (1970 & Supp. 1992).
\item \textit{Calero}, 68 Wis. 2d at 499; \textit{Polzin v. Helmbrecht}, 54 Wis. 2d 578, 196 N.W.2d 685 (1972); \textit{Williams v. Hicks Printing Co.}, 159 Wis. at 101.
\item \textit{Williams}, 159 Wis. at 101; see also \textit{Denny}, 106 Wis. 2d at 657.
\item \textit{Calero}, 68 Wis. 2d at 500.
\item See Brody, \textit{supra} note 12, at 521, and the authorities cited therein for a discussion of absolute privileges and the irrelevance of the defendant’s malice or motives in such cases.
\item See authorities cited \textit{supra} note 135.
\item \textit{Williams}, 159 Wis. at 101; see also \textit{Denny}, 106 Wis. 2d at 657–58.
\end{enumerate}
\end{footnotesize}
malice (important in constitutional cases) are wholly insufficient when punitive damages are sought.

The burden of proving express malice is on the person claiming an entitlement to punitive damages and is measured by the minimal level “preponderance” or “greater weight of the . . . evidence” standard.

C. [§ 11.45] Effect of Retraction on Damage Awards

1. [§ 11.46] In General

Evidence that a defendant has retracted a defamatory publication has been generally held admissible for three purposes: (1) to show that, by way of actual damages to reputation, the plaintiff has suffered less harm than the plaintiff claims; (2) to negate a claim of malice or outrageous conduct that might otherwise form the basis for an award of punitive damages; or (3) to show good intention or worthy motive to negate a claim that a conditional privilege has been abused.

2. [§ 11.47] Compensatory Damages

Evidence that a defendant has published a retraction of a defamatory publication is admissible for the purpose of showing that the “net damage” the plaintiff sustained was substantially less than the plaintiff claims. In assessing such net damage, the jury may consider the retraction’s completeness and conspicuousness. The jury may also consider the retraction’s

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169 See Calero, 68 Wis. 2d at 500 (discussion of distinction between express malice and actual malice).

170 Id. at 504–6.

171 Webb v. Call Publishing Co., 173 Wis. 45, 50, 180 N.W. 263 (1920); see Hucko, 100 Wis. 2d at 379 n.5; Keeton, supra note 1, § 116A, at 845.


173 Keeton, supra note 1, § 116A, at 846.

174 Webb, 173 Wis. at 52.

175 Id.
Section 895.05(2) of the Wisconsin Statutes, the retraction/correction statute, specifically limits the liability of one responsible for the publication of defamatory matter in newspapers, magazines, or periodicals to liability for actual compensatory damages, assuming the defendant has in fact complied with the statute’s requirements. If a defendant entitled to the benefits of the statute has published a retraction in the manner and form prescribed by section 895.05(2), the plaintiff is only able to recover such compensatory damages as can be proven by competent evidence; no general compensatory damages will be presumed, without proof, to have occurred.

As with a retraction not governed by or not meeting the formal requirements of section 895.05(2), a retraction that complies with the statutory requirements may always be considered by the jury in weighing the net harm to the plaintiff’s reputation; in other words, evidence of the statutory retraction may also be considered by the jury in determining the net damage that has occurred.

3. [§ 11.48] Punitive Damages

Evidence of a retraction may be offered by a defendant to negate a claim that the defendant’s original defamatory publication was activated by express malice. Absent a specific statutory provision to the contrary, however, the question of the absence or presence of express malice and a consequent entitlement to punitive damages remains a question of fact for the jury, since a retraction does not automatically preclude recovery of punitive damages. In Wisconsin, a specific statute does preclude

176 Bradley, 66 Wis. at 303.

177 Textual references to Wisconsin Statutes are hereinafter indicated as “chapter xxx” or “section xxx.xx” without the designation “of the Wisconsin Statutes.”

178 Hucko, 100 Wis. 2d at 379 n.5.


recovery of punitive damages in certain cases involving defamatory materials published in newspapers, magazines, and periodicals if a retraction of a specific nature is published in a prescribed manner.\textsuperscript{181}

D. [§ 11.49] Constitutional Limitations on Damage Awards

1. [§ 11.50] In General

The U.S. Supreme Court’s decision in \textit{New York Times v. Sullivan}\textsuperscript{182} created a conditional constitutional privilege based on First Amendment considerations for those who make written or oral statements concerning public officials. Within the terms of that conditional privilege, statements concerning a public official, even if proven to be false, would not thereafter be the basis of civil liability unless actual malice—i.e., actual knowledge that the statement was false or a reckless disregard for whether the statement was false or not—was shown.\textsuperscript{183} The Court created this conditional constitutional privilege to afford freedom of expression adequate “breathing space” when activities of public officials are being discussed.\textsuperscript{184} The Court later expanded the privilege and held it applicable to situations in which the object of the allegedly defamatory statement is a mere public figure, not an actual public official.\textsuperscript{185} Even in regard to statements about nonpublic figures (that is, private individuals), the Court

\textsuperscript{181} See Wis. Stat. § 895.05(2); \textit{Ogren}, 119 Wis. 2d at 384 (timely publication of sufficient retraction constitutes complete defense to claim for punitive damages).

\textsuperscript{182} 376 U.S. 254 (1964); accord \textit{Stevens v. Tillman}, 855 F.2d 394 (7th Cir. 1988).

\textsuperscript{183} \textit{Sullivan}, 376 U.S. at 280.

\textsuperscript{184} \textit{Id.} at 271–72.

\textsuperscript{185} \textit{Curtis Publishing Co. v. Butts}, 388 U.S. 130 (1967). Many cases diverge from or do not follow \textit{Curtis}. See also \textit{Lewis v. Coursolle Broadcasting of Wisconsin, Inc.}, 127 Wis. 2d 105, 377 N.W.2d 166 (1985), and \textit{Pronger v. O’Dell}, 127 Wis. 2d 292, 379 N.W.2d 330 (Ct. App. 1985), which discuss persons who are considered public figures for such purposes.
has held that the First Amendment considerations preclude states from imposing defamation liability without fault on media defendants.\footnote{Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).  Many cases diverge from or do not follow Gertz. See Brody, supra note 12, at 529–43 (discussion of New York Times case, extension of the constitutional privilege in subsequent cases, and Wisconsin’s treatment of the constitutional privilege created by New York Times case and its progeny).}

The Court has also held that First Amendment considerations require limitations on the types of damages that may be awarded in defamation cases in which constitutional considerations are at work.\footnote{See infra §§ 11.51–.21.

\footnote{Denny, 106 Wis. 2d at 659 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)).  For a discussion of the presumption of general damages available in libel and slander per se cases that do not involve constitutional privilege, see sections 11.23 and 11.30–.32, supra.}  

\footnote{Denny, 106 Wis. 2d at 659; see also, e.g., Wiegel, 145 Wis. 2d at 79–81.

\footnote{Denny, 106 Wis. 2d at 659.}  

\footnote{See id. at 661.}}

2. [§ 11.51] Compensatory Damages

As a matter of federal constitutional law, a plaintiff in a defamation action brought against a media defendant may not benefit from any presumption of general damages\footnote{See infra §§ 11.51–.21.} and may recover only those compensatory damages (either general or special) that the plaintiff can establish by affirmative proof \textit{unless} the plaintiff can prove actual malice on the part of the media defendant.\footnote{Denny, 106 Wis. 2d at 659.} Once such actual malice is proven, however, no such constitutional prohibition against a presumption of damages applies.\footnote{See id. at 661.} Nonmedia defendants, however, do not have the benefit of any constitutional limitation on their defamation liability in cases involving statements concerning private plaintiffs; the liability of nonmedia defendants to private plaintiffs is determined in accordance with Wisconsin’s common law.\footnote{See id. at 661.}
3. [§ 11.52] Punitive Damages

In cases in which a constitutional privilege obtains, a plaintiff cannot recover punitive damages unless the plaintiff proves (1) actual malice, which is required to overcome the constitutional privilege in the first place so as to permit any recovery at all and (2) express malice, which is the traditional prerequisite to any recovery of punitive damages even in cases that do not involve constitutional privilege.\footnote{Polzin, 54 Wis. 2d at 588. For a case where evidence of actual malice was found to be insufficient to justify submission of the punitive damages issue to a jury, see Maguire v. Journal Sentinel, Inc., 232 Wis. 2d 236, 605 N.W.2d 881 (Ct. App. 1999).}

V. [§ 11.53] Amount of Damages

A. [§ 11.54] Review of Size of Jury Award

1. [§ 11.55] General Test for Review by Trial Court

The trial court will not disturb the jury’s findings on damage issues in defamation cases if there is any credible evidence to support the findings.\footnote{D.R.W. Corp., 65 Wis. 2d at 314; see also Tim Torres Enters. v. Linscott, 142 Wis. 2d 56, 74–75, 416 N.W.2d 670 (Ct. App. 1987) (upholding compensatory damages award to business defamed by false advertising).} This rule applies whether the jury’s finding is challenged as being too low\footnote{See D.R.W. Corp., 65 Wis. 2d at 314 (fact that evidence would support award does not require jury to make any award).} or too high.\footnote{Calero v. Del Chem. Corp., 68 Wis. 2d 487, 228 N.W.2d 737 (1975).} In such cases, the trial court may not substitute its own judgment for that of the jury.\footnote{See id. at 509.} Awards are not to be disturbed unless they are so excessive or so inadequate as to shock the judicial conscience.\footnote{Id.}

When the trial court specifically looks at the jury’s findings on issues of punitive damages in defamation cases, it must also consider the public

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policy considerations of punishment and deterrence. Awards must be sustained that accomplish the punitive and deterrent purposes without “overreaction” in the form of unreasonably harsh penalty.

There is no arbitrary maximum for the punitive damages that may be awarded in a given case, either in dollar terms or in terms of the comparison to the compensatory damages awarded. Likewise, punitive damages awarded need not bear any arithmetical proportion to the defendant’s wealth. Each award of punitive damages must be viewed on its own merits. Although awards in other reported cases may be looked to for guidance, care must be exercised. The verdict in one case can be compared with the verdict in another only in a very general way.

When a trial court reviews a jury’s award of punitive damages, the trial court may also consider the criminal penalty for defamation, since the purposes of the criminal penalty and of the award of punitive damages are the same.

2. [§ 11.56] General Test for Review by Appellate Court

The appellate court is bound to uphold a jury’s finding on the damage questions if any credible evidence reasonably supports the verdict. Appellate courts must be especially hesitant to disturb any jury finding on

198 Dalton, 52 Wis. 2d at 180; see also Calero, 68 Wis. 2d at 511.
199 Dalton, 52 Wis. 2d at 181.
200 Id.; see § 11.56 (further discussion of “proportionality” of punitive and compensatory awards).
201 Dalton, 52 Wis. 2d at 181.
202 Lisowski, 37 Wis. 2d at 634.
203 See, e.g., Calero, 68 Wis. 2d at 511; Dalton, 52 Wis. 2d at 181. In Calero and Dalton, earlier reported awards of punitive damages were examined.
204 Lisowski, 37 Wis. 2d at 634; see also Calero, 68 Wis. 2d at 511.
205 Calero, 68 Wis. 2d at 511; Meke, 56 Wis. 2d at 664; Wozniak, 57 Wis. 2d at 731; Lisowski, 37 Wis. 2d at 634.
206 Calero, 68 Wis. 2d at 509; D.R.W. Corp., 65 Wis. 2d at 314–16.
Because the trial court heard the evidence and saw the witnesses, the trial court is particularly able to make a proper determination as to the propriety of the award. Of course, if the jury’s award was approved by the trial court because of the trial court’s consideration of improper factors, the appellate court can and will overturn an excessive award of compensatory damages.

3. [§ 11.57] Proportionality of Punitive Damage Award to Compensatory Damage Award

Some courts, in discussing the claimed excessiveness of awards of punitive damages, have stated that the punitive damages awarded in a given case should be “proportionate” to the compensatory damages awarded in that case. This should not be taken to mean that the punitive damages cannot exceed the compensatory damages or cannot exceed them beyond some arbitrary point. Despite language in one defamation case seeming to require such a proportionate cap on punitive damages, the concept of proportionality in defamation cases is better used as it is in other cases in which awards of punitive damages are considered; that is, in testing the appropriateness of the award of punitive damages, the court may consider the amount of harm actually inflicted (the amount of compensatory damages found), but an award of punitive damages that is greater than an award of compensatory damages will not be set aside on that ground alone.

207 Calero, 68 Wis. 2d at 509.

208 See id. at 511–12.


210 See, e.g., Calero, 68 Wis. 2d at 510; Wozniak, 57 Wis. 2d at 731.

211 See Maxwell v. Kennedy, 50 Wis. 645, 7 N.W. 657 (1880).

212 See Dalton, 52 Wis. 2d at 180 (in evaluating propriety of size of jury’s award of punitive damages, court examined amount of actual harm inflicted); see also Malco Inc. v. Midwest Aluminum Sales, Inc., 14 Wis. 2d 57, 109 N.W. 2d 516 (1961) (nondefamation case).

213 See Lisowski v. Chenenoff, 37 Wis. 2d 610, 155 N.W. 2d 619 (1968) (award of $5,000 for compensatory damages and $10,000 for punitive damages sustained...
B. [§ 11.58] Additur and Remittitur

If the trial court finds a jury award excessive, though not based on passion or prejudice, the court can apply the so-called Powers rule and reduce the award of damages to an amount that is reasonable under the evidence, giving the plaintiff the option to remit the excess or suffer a new trial. The appellate court can likewise invoke the Powers rule if an award is clearly excessive. The Powers rule may be invoked in regard to compensatory damages, punitive damages, or both, and regardless of whether the damages were sought for libel or for slander. If the trial court invokes the Powers rule and sets a reasonable amount as the award of damages, the appellate court will not disturb the trial court’s action unless it determines that the trial court has erroneously exercised its discretion. To determine whether the trial court has erroneously exercised its discretion in fixing the amount of the award, the appellate court asks whether if the trial court had been the sole finder of fact and determined this amount, the appellate court would have disturbed the finding; if not, the trial court has not erroneously exercised its discretion in fixing the award.

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on appeal); see also Malco Inc. v. Midwest Aluminum Sales, Inc., 14 Wis. 2d 57, 109 N.W.2d 516 (1961) (in nondefamation case, court found that award of punitive damages 15 times as great as award of compensatory damages was not excessive, given defendant’s especially unworthy motives and conduct).

Powers v. Allstate Ins. Co., 10 Wis. 2d 78, 102 N.W.2d 393 (1960). For defamation cases where the rule has been invoked, see Dalton v. Meister, 52 Wis. 2d 173, 188 N.W.2d 494 (1971); Wozniak v. Local 1111 of United Elec., Radio & Mach. Workers, 57 Wis. 2d 725, 205 N.W.2d 369 (1973); and Lisowski v. Chenenoff, 57 Wis. 2d 610, 155 N.W.2d 619 (1968). Accord Tucker v. Marcus, 142 Wis. 2d 425, 463, 418 N.W.2d 818 (1988); O’Connell v. Schrader, 145 Wis. 2d 554, 558, 427 N.W.2d 152 (Ct. App. 1988).

See, e.g., Lawrence v. Jewell Cos., Inc., 53 Wis. 2d 656, 193 N.W.2d 695 (1972).

For example, in Lisowski and Wozniak, both compensatory damage awards and punitive damage awards were reduced.

See Lisowski v. Chenenoff, 37 Wis. 2d 610, 155 N.W.2d 619 (1968).

Id. at 631; Wozniak, 57 Wis. 2d at 730.

Wozniak, 57 Wis. 2d at 730.
VI. [§ 11.59] Practice and Procedure

A. [§ 11.60] Joinder of Claims—Single/Multiple Publication Rule

The court has stated that in cases involving written or printed defamatory matter, every sale or delivery of a copy of such matter is a “fresh” publication.\(^{220}\) If this rule is applied so as to allow a plaintiff to bring separate actions for each such “fresh” publication—i.e., for each copy disseminated—a plaintiff could conceivably commence as many actions as there were people who read the defamatory matter. With cases involving newspapers or magazines, hundreds or thousands of actions could be commenced. Faced with the prospect of one plaintiff commencing multiple lawsuits based on a single issue or edition of a newspaper or magazine, the court would likely adopt the approach of the Restatement (Second) of Torts\(^{221}\) or the Uniform Single Publication Act\(^ {222}\) and hold that the plaintiff must recover all damages in a single action.\(^{223}\)

B. [§ 11.61] Venue

Wisconsin has no special venue statute for defamation actions. The court has, however, specifically interpreted section 801.50(6) as it relates to newspaper libel actions. If a newspaper allegedly containing defamatory matter is circulated in a particular county, an essential part of the plaintiff’s cause of action has occurred in that county, making it a proper place for trial.\(^{224}\)

\(^{220}\) Voit, 116 Wis. 2d at 223; Street v. Johnson, 80 Wis. 455, 458, 50 N.W. 395 (1891).

\(^{221}\) Restatement (Second) of Torts § 577A (1977).

\(^{222}\) 14 U.L.A. 353 (1980).

\(^{223}\) In Voit, deliveries of copies of newspapers to readers in separate counties were treated as separate or “fresh” publications of the libel. The court appropriately gave the plaintiff the right to venue his action in the county where the damage to his reputation had been done. Justice Abrahamson’s concurring opinion notes that while treating such delivery as a separate publication may be appropriate for determining venue, the plaintiff may not start multiple actions. Voit, 116 Wis. 2d at 226–27.

\(^{224}\) Id. at 224.
C. [§ 11.62] Pleading Damages

1. [§ 11.63] Plaintiff’s Complaint

In libel cases, a plaintiff need not plead an entitlement to special damages (as opposed to general damages) to state an actionable claim.\(^{225}\) The plaintiff need not prove special damages in such cases, either. Likewise, in slander per se cases (i.e., those involving one of the four categories of slander for which no special damages need be proven\(^{226}\)) the plaintiff need not \textit{plead} any entitlement to special damages.\(^{227}\) In all other defamation cases, however, the plaintiff must include in the complaint an allegation that the plaintiff has suffered special (i.e., pecuniary) harm.\(^{228}\)

The use of specific words in a plaintiff’s complaint may have significance in another context. As some defendants may have resorted to liability coverage for defamation claims under “personal injury liability” or “advertising injury liability” provisions, the presence of the words \textit{defamation} or \textit{libel} or \textit{slander}, or even a mere allegation (without the \textit{defamation} label) of harm to a plaintiff’s reputation may trigger a duty to defend on the part of an insurer.\(^{229}\)

\(^{225}\) Martin, 15 Wis. 2d at 460–61. The Martin court adopted section 569 of the Restatement of Torts (1938), which is now, with minor changes, section 569 of the Restatement (Second) of Torts (1977).

\(^{226}\) For discussion of the four types of slander per se, see sections 11.5, 11.7, and 11.30, \textit{supra}.

\(^{227}\) Martin, 15 Wis. 2d at 460–61; Restatement (Second) of Torts § 569 (1977).

\(^{228}\) Martin, 15 Wis. 2d at 461. Special pleading requirements exist for \textit{liability} issues in defamation cases. Section 802.03(6) requires that the words complained of be set forth in the complaint. For a discussion of this special pleading requirement and a suggested procedure for the plaintiff who cannot learn the exact defamatory words communicated until discovery is underway, see W. Harvey, \textit{Rules of Civil Procedure} § 2049, at 139 (1975).

2. [§ 11.64] Defendant’s Pleadings

Defendants in defamation cases must take care at the pleading stage with respect to the defense of “mitigation of damages.” Some older cases in Wisconsin state that a defendant may not offer evidence in “mitigation” of the plaintiff’s claimed damages unless this defense is specifically pleaded.\(^{230}\) These cases concern the type of “mitigation evidence” of the plaintiff’s unsavory background or of the defendant’s motives or state of mind that was introduced in order to cause a trier of fact to reduce the damages that might otherwise be awarded.

Today, no such pleading requirements should obtain. Any listing of defensive matters that must be pleaded or be waived should be circumscribed by the requirements of section 802.02(3), which lists those defenses that may be waived if not pleaded. Note that one defense that is included in this list is “failure to mitigate damages.”\(^{231}\) In a defamation case this type of mitigation evidence concerns a claim that the plaintiff failed to take reasonable steps to lessen the harm from the defendant’s defamatory communication or otherwise caused the harm to be more extensive than it otherwise would have been.\(^{232}\)

D. [§ 11.65] Instructions and Verdict

Wisconsin has a standard jury instruction governing a verdict question inquiring as to compensatory damages in defamation cases,\(^{233}\) as well as one governing a verdict question inquiring as to punitive damages.\(^{234}\) These pattern instructions provide for separate verdict questions on general compensatory damages and special compensatory damages. Assuming the jury is otherwise properly instructed, it is apparently not error, however, for the trial court to ask but a single catchall question on compensatory


\(^{231}\) Wis. Stat. § 802.02(3).

\(^{232}\) See supra § 11.35 (discussion of two types of “mitigation evidence” relevant in defamation cases).


\(^{234}\) See Wis. J.I.—Civil 2520 (1993).
damages, requiring the jury to combine any general and special damages in a single answer concerning compensatory damages.\textsuperscript{235}

\textsuperscript{235} See Lisowski, 37 Wis. 2d at 623.