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SLANDER & SLANDER DAMAGES AFTER GERTZ AND DUN & BRADSTREET

RUSS VERSTEEG*

I. Introduction

This Article investigates the damages that are available in an action for slander.1 Although fewer slander cases reach the appellate courts than libel cases, slander remains an interesting and enigmatic area of tort law. Part I of this Article examines the various damages that, traditionally, have been available to plaintiffs in slander actions, namely: nominal, general, special, emo-

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tional distress, and punitive damages. Part II discusses two United States Supreme Court decisions that theoretically alter the law of slander and slander damages: *Gertz v. Robert Welch, Inc.* and *Dun & Bradstreet v. Greenmoss Builders, Inc.* Although these cases involved libel not slander, the Supreme Court painted its analysis with a broad brush. Both opinions frame “rules” regarding defamation and defamation damages that are phrased in terms of the law of defamation as a whole—not restricting these “rules” only to libel cases. Taken at face value, the *Gertz* case

2. Professor Ingber has pointed out the weaknesses inherent in trying to assess damages for intangible injuries such as those for defamation:

[S]uch injuries cannot be readily quantified. Translating pain and suffering or emotional distress into monetary terms poses tremendous problems of proof because, unlike the situations with property, no market exists to provide a standard for compensating a victim of such a loss. Such injuries have no measurable dimensions, mathematical or financial.

Ingber, *supra* note 1, at 778 (footnotes omitted). Nevertheless Professor Ingber acknowledges that “[i]f society is to signify its commitment to the support of psychic well-being, damages for intangible injuries must be permitted.” *Id.* at 781 (footnotes omitted). Furthermore, Professor Ingber adds that “[a]lthough money damages may not be an equivalent to the injury experienced, they can serve as an important symbolic means of preserving the entitlement of personal security and autonomy against infringement.” *Id.* at 781-82 (footnotes omitted).

5. See Jacron Sales Co., Inc. v. Sindorf, 350 A.2d 688, 695 (Md. 1976). In *Jacron*, the court held that “as a matter of state law . . . the *Gertz* holding should apply to media and non-media defendants alike, and to both libel and slander.” *Id.* (emphasis added). The *Restatement (Second) of Torts (Restatement)* lends support for this proposition. *Restatement (Second) of Torts § 580B cmt. e* (1977). The *Restatement* provides:

The defendant in the *Gertz* case was the publisher of a magazine. The Court speaks frequently of “news media” and “communications media” and states the rule in terms of a “publisher or broadcaster.” The precise holding of the case, therefore, does not extend beyond a statement published by a member of the communications media; and the constitutional requirement of fault on the part of the defendant may turn out to be limited to this holding, though this seems unlikely. Other limitations on the scope of the constitutional restriction are also possible. Thus, it may be limited to public statements. *Or it may be limited to libelous statements, as distinguished from slanderous ones. There is presently no definitive holding that the Constitution imposes restrictions of any kind on an oral defamatory communication by one private individual to another private individual.*

But the principle of the *Gertz* decision would appear to be broad enough to cover this latter situation. As the Supreme Court declares, the protection of the First Amendment extends to freedom of speech as well as to freedom of the press, and the interests that must be balanced to obtain a proper accommodation are similar. It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a
rewrote the law of slander and slander damages. Eleven years later, in Dun & Bradstreet, the United States Supreme Court limited the scope of Gertz in a significant manner, and in doing so, added another chapter to the Gertz revision. Part II further analyzes to what extent, at least theoretically, Gertz and Dun & Bradstreet change slander and the types of damages available for slander. Part II contends that together Gertz and Dun & Bradstreet abolish the need for the traditional distinction between ordinary slander and slander per se in cases where the allegedly slanderous expression relates to a matter of purely public concern. Furthermore, not only in cases in which the alleged slander relates to a matter of public concern, but also in cases in which the alleged slander relates to a purely private matter, Gertz and Dun & Bradstreet theoretically have replaced the traditional categories of ordinary slander and slander per se by creating four new types of slander that this Article designates as follows: 1) “slander in re publica”;
2) “slander in re privata”;
3) “slander cum malevolentia”;
and 4) “slander sine malevolentia.”

Part III briefly sums-

private person, engaged in a casual private conversation with a single
person, can be held liable at his peril if the statement turns out to be
false, without any regard to his lack of fault.

Even if the constitutional restriction should be held not to be im-
posed on actions for private slander, however, the common law of the
states is almost certain to apply the same standard. The common law
cases that imposed strict liability prior to the development of the con-
stitutional restrictions involved libel actions against the communications
media rather than slander actions against private individuals.
There is little reason to conclude that the states would now be disposed
to take the traditional strict liability approach for libel actions against
the communications media, which has now been declared unconsti-
tutional, and apply it to slander actions against private individuals, where
it has not previously been significant.

Restatement § 580B cmt. e.
6. For a discussion of the Dun & Bradstreet decision and its effect on the Gertz
decision, see infra notes 100-19 and accompanying text.
7. For a discussion of the assertion that Gertz and Dun & Bradstreet abolish
the need for the distinction between ordinary slander and slander per se where
the slanderous statement relates to a purely public or private matter, see infra
notes 80-119 and accompanying text.
8. “Slander in a matter of public concern.” It seems fitting to replace the
old Latin appellations with new Latin appellations.
9. “Slander in a matter of private concern.”
10. “Slander with malice.”
11. “Slander without malice.” Dun & Bradstreet created slander in re publica
and slander in re privata. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
472 U.S. 749, 758-59 (1985) (noting distinction between private and public def-
amation and holding “speech on matters of purely private concern is of less First
Amendment concern” than speech on matters of public concern which is “at the
heart of First Amendment protection”). Gertz created slander cum malevolentia

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rizes the actual impact that *Gertz* and *Dun & Bradstreet* have had on the status of subsequent slander law. Finally, part IV offers two sets of "flow charts" consisting of the elements that a court and a trier of fact should consider when determining a damage award in an action for slander. The first chart illustrates the traditional approach to slander damages and the second represents the theoretical model that *Gertz* and *Dun & Bradstreet* dictate.

II. PROLOGUE: LIBEL & SLANDER

Before considering what types of damages are available in an action for slander, it is important to understand what constitutes slander. There is, however, no simple definition. Originally, the tort of defamation was divided into two subcategories: libel and slander. Libel "originally concerned written or printed words" and slander concerned statements "of oral character." New (1974) (noting distinction between defamation made with knowledge of falsity or reckless disregard of truth and defamation made without such knowledge or reckless disregard).

12. Prosser defines "defamation" as communication: which tends to injure "reputation" in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory, or unpleasant feelings or opinions against him. It necessarily, however, involves the idea of disgrace; and while a statement that a person is a Republican may very possibly arouse adverse feelings against him in the minds of many Democrats, and even diminish him in their esteem, it cannot be found in itself to be defamatory, since no reasonable person could consider that it reflects upon his character.

13. Keeton et al., supra note 1, § 112, at 785. One commentator provides the following historical sketch:

[S]lander and libel were "two closely allied torts," created in the late-seventeenth century. Slander, the older tort, was based on the complex rules which had evolved, mainly in the period c. 1590-c. 1640, within the framework of the action on the case. This tort, partly because of its exclusive concern with damage to the plaintiff, partly because of the *mitiori sensu* rule, which required that, whenever possible, words must be construed in a non-defamatory sense, and the considerable body of tortious learning which had grown up as to the meaning of particular words, was "wholly unsatisfactory," and so the judges created the newer tort, libel, to be free from its complexities. The gist of libel was, not the damage to the plaintiff, but the nature of the insult offered. The judges were further motivated, first, by a feeling that, as libel was a crime, this severity ought to be reflected in the civil law, secondly, by a wish to provide a useful alternative to duelling as a way of reacting to insults. The newer tort, once established, "reacted favorably" on its older companion; by its influence the *mitiori sensu* rule and the old code of interpretation of words were abolished. On a jurisprudential level, Holdsworth saw slander as a "case tort," actionability depending on proof of damage, while libel was a "trespass tort," a libel being wrongful in itself and therefore actionable without proof of damage.
technology and new forms of communication have made that distinction archaic. As a general rule, the most salient characteristic that distinguishes libel from slander is that libel generally involves expression with an "embodiment in some more or less permanent physical form." The Restatement (Second) of Torts (Restatement), in a section entitled "Libel and Slander Distinguished," suggests the following:

(1) 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.

(2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).

(3) The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander.

The historical note in the Restatement emphasizes this problematic distinction:

[N]o respectable authority has ever attempted to justify the distinction on principle; and in modern times, with the discovery of new methods of communication, many courts have condemned the distinction as harsh and unjust. This anomalous and unique distinction is in fact a

J. M. Kaye, Libel And Slander—Two Torts Or One?, 91 LAW Q. REV. 524, 524-25 (1975); see also Robert D. Sack, Libel, Slander, and Related Problems 43 (1980) ("[L]ibel is written or visual defamation; slander is oral or aural defamation.").

14. New technologies have expanded the reach of ephemeral discourse. One commentator has made this point well: "Prima facie the more widely diffused the publication the heavier the damages." Samuels, supra note 1, at 68. Samuels continues this line of reasoning, explaining that "although diffusion cannot aggravate the gravity of the libel itself, nevertheless the more people that read the libel the greater the risk of injury to the plaintiff's reputation." Id. (footnote omitted). This logic is equally applicable to the broad dissemination of oral communication—even when unrecorded—via radio and television.

15. Keeton et al., supra note 1, § 112, at 787; see also Hartmann v. Winchell, 296 N.Y. 296, 299 (1947) (holding defamatory radio broadcast constitutes libel not slander); Restatement § 568 (1977) (same).

16. Restatement (Second) of Torts § 568.
survival of historical exigencies in the development of
the common law jurisdiction over defamation.\textsuperscript{17}

Thus, a slander generally consists of a false statement that the
defendant publishes\textsuperscript{18} to a third party in such a way that the
method of publication is more or less ephemeral or transitory
(\textit{i.e.}, not fixed in a tangible form or medium of expression).\textsuperscript{19} The
most common type of slander is probably unrecorded speech.

\section*{III. TRADITIONAL DAMAGES FOR SLANDER}

\textbf{A. Ordinary Slander and Slander Per Se}

The rules that govern the law of defamation are complex and
often opaque. Dean Prosser wrote:

\begin{quote}
It must be confessed at the beginning that there is a
great deal of the law of defamation that makes no sense.
It contains anomalies and absurdities for which no legal
\end{quote}

\begin{thebibliography}{99}
\bibitem{17} Id. \S 568 cmt. b.
\bibitem{18} The word "publish" is a term of art employed in defamation law to
mean something quite different from its ordinary English meaning. For
purposes of the law of defamation, the word "publish" refers to any communication
by the defamer to a third party in such a way that the third party could reasonably
understand the defamatory statement. \textit{See, e.g.}, Loughry v. Lincoln First
Bank, N.A., 494 N.E.2d 70, 74 (N.Y. 1986) (holding that "publication" in slan-
der action occurred when two employees overheard statement about another
employee, and understood statement to disgrace or discredit plaintiff); \textit{see also}
\textit{Restatement} \S 577 cmt. b, illus. 1 ("A and B are in the woods on a hunting trip.
During a quarrel, A accuses B of murder. There is no one else in the vicinity
who hears the accusation. A has not published a slander."); \textit{Keeton et al., supra}
note 1, \S 115, at 797 (stating that "publish" includes communications whether
printed, written, oral, conveyed by gestures, or exhibited by picture to anyone
except plaintiff) (footnote omitted).
\bibitem{19} Of course this definition is not perfect. \textit{See Gray v. WALA-TV, 384 So.
2d 1062, 1065 (Ala. 1980) (classifying television broadcast as libel); Arno v.
Stewart, 54 Cal. Rptr. 392, 396 (Cal. Dist. Ct. App. 1966) (holding that defama-
tion by radio or television is slander); Charles Parker Co. v. Silver City Crystal
Co., 116 A.2d 440, 443 (Conn. 1955) (holding that radio broadcast read from
manuscript is libel); Matherson v. Marchello, 473 N.Y.S.2d 998, 1004 (N.Y. App.
Div. 1984) (classifying broadcast by radio or television as libel); Shor v. Billing-
sly, 158 N.Y.S.2d 476, 482-83 (N.Y. Sup. Ct. 1956) (classifying speech over ampli-
ifier to crowd as slander but media broadcast or telecast as libel). The
\textit{Restatement} includes radio and T.V. broadcasts as forms of libel (apparently even
when not recorded because of their potentially harmful characteristics): "Broadcast-
ing of defamatory matter by means of radio or television is libel, whether or
not it is read from a manuscript." \textit{Restatement} \S 568A; \textit{see also R.C. Donnelly,
Defamation by Radio, A Reconsideration, 34 Iowa L. Rev. 12, 40 (1948) (proposing
that all defamatory statements made over radio should be classified as libel);
Donald H. Remmers, Recent Trends in Defamation by Radio, 64 Harv. L. Rev.
727, 730 (1951) (noting that courts almost unanimously hold radio is libel); Lawrence
Vold, The Basis of Liability for Defamation by Radio, 19 Minn. L. Rev. 611, 613
(1935) (noting that "defamation by radio is properly to be dealt with as libel").
\end{thebibliography}
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writer ever has a kind word, and it is a curious com-

pound of a strict liability imposed upon innocent de-

fendants, as rigid and extreme as anything found in the

law, with a blind and almost perverse refusal to compen-

sate the plaintiff for real and very serious harm. 20

For any number of reasons, many of which are historical, two

types of slander have developed: ordinary slander and slander per

se. 21 To fully appreciate the traditional scheme of damages for

slander and the theoretical ramifications of Gertz and Dun & Brad-

street, it is important to understand the distinction between slan-

der per se and ordinary slander. In general, except under certain

circumstances, 22 a plaintiff in an action for ordinary slander must

plead and prove special damage to obtain an award of money dam-

ages. 23 One commentator has defined "special damage" as proof

of a pecuniary loss "with some degree of exactitude." 24 Assess-

ing a plaintiff's injury to reputation is one of the most difficult

problems in the law of defamation. Professor McCormick ex-

plained that this requirement forces a slander plaintiff to "plead
definitely and prove that publishing the accusation has caused

him specific material harm." 25 Four exceptions to the general

rule that a plaintiff, in an action for slander, must plead and prove

pecuniary loss have evolved. These four exceptions are known
collectively as "slanders per se."

The four types of slander per se—which do not require a

plaintiff to prove special harm to recover—are as follows: 26

1) false statements imputing criminal behavior to the plaintiff; 27

2)
false allegations that the plaintiff is currently suffering from a venereal or other loathsome or communicable disease; 28) false allegations adversely reflecting on the plaintiff’s fitness to conduct his/her business, profession, trade or office; 29) and 4) false allegations accusing the plaintiff of sexual misconduct. 30

Establishing a cause of action for slander per se has, in the past, been crucial to a plaintiff’s case. 31 Unless a plaintiff can prove that the slander complained of is a slander per se, “[a]ll other slanderous words, no matter how grossly defamatory or insulting they may be . . . are actionable only upon proof of ‘special’ damage—special in the sense that it must be supported by specific proof.” 32 Furthermore, “courts [have] made matters worse [for plaintiff’s suing for ordinary slander] by requiring that the special damage be pecuniary in its nature.” 33 On the other hand, if the slander complained of is actionable per se, a plaintiff has been able, traditionally, to recover general damages—e.g., for injury to reputation, loss of business, wounded feelings, and bodily suffering—which are presumed without actual proof of those damages. 34 Furthermore, a majority of courts have held that pu-

One court recently held that the words “you stole my money” constituted slander per se because the words implied criminal activity that involved both possible imprisonment and moral turpitude. Hruby v. Kalina, 424 N.W.2d 130, 132 (Neb. 1988).


29. Restatement § 573; see, e.g., Taturn v. Liner, 749 S.W.2d 251, 258 (Tex. Ct. App. 1988) (“As a general rule, slander is actionable per se . . . if it injures a person in his office, business, profession or occupation.”); see also Alexander v. Jenkins, 1 Q.B. 797, 800-01 (1892) (stating that such slander must be “something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would shew [sic] that he is a man who, by reason of his want of ability or honesty, is unfit to hold the office”).

30. Restatement § 574. For a history of the sexual misconduct exception, see Keeton et al., supra note 1, § 112, at 792-93. This type of slander per se typically, although not exclusively, applies to women. Id. But see Meyer v. Somlo, 482 N.Y.S.2d 156, 157 (N.Y. App. Div. 1984) (holding that defendant’s allegation that plaintiff was having an “affair” with defendant’s wife was slanderous per se).

31. This has traditionally been the case. For a discussion suggesting that the Gertz decision may force a change in this traditional approach, which made it crucial for a plaintiff to establish a cause of action for slander per se, see infra notes 82-100 and accompanying text.

32. Keeton et al., supra note 1, § 112, at 793.

33. Id. § 112, at 794; see also McCormick, supra note 1, § 114, at 419.

34. See, e.g., Contento v. Mitchell, 104 Cal. Rptr. 591, 592 (Cal. Ct. App. 1972) (holding that for libel per se plaintiff is entitled to presumed damages for injury to reputation, feeling and mental suffering without proof of special damages); Ventresca v. Kissner, 136 A. 90, 92 (Conn. 1927) (same); Wolfson v. Kirk,
nitive damages are always available in actions for slander *per se.* However, for ordinary slander, punitive damages are only available upon proof of special damage.

**B. Damage Categories**

Damage awards for defamation often seem disproportionately higher than damages for physical injuries. A plaintiff in a slander action traditionally has been able to recover five distinct types of damages: 1) nominal damages; 2) general damages for harm to reputation; 3) damages for proved or special harm to reputation; 4) damages for emotional distress and bodily harm resulting therefrom; and 5) punitive damages.

1. **Nominal Damages**

Generally speaking, "[n]ominal damages are a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages." The Restatement provides:

> When a cause of action for a tort exists but no harm has been caused by the tort or the amount of harm is not significant or is not so established that compensatory damages can be given, judgment will be given for nominal damages, consisting of a trivial award against a wrongdoer who has caused no harm or an insignificant


37. See, e.g., Groom v. Crocker, 1 K.B. 194, 231 (1839) ("I have been struck by the contrast between the frequent niggardliness of verdicts in cases of personal injury and the invariable profuseness in claims for defamation. A soiled reputation seems assured of more liberal assuagement than a compound fracture.").

38. *Restatement* § 620; *Eldredge*, *supra* note 1, § 95, at 537.


40. *Id.* § 622.

41. *Id.* § 623.

42. *Id.* § 621 cmt. d.

43. *Id.* § 907.
harm. 44

Under traditional rules of defamation, a jury may award nominal damages in a slander action for any one of several reasons. 45 Nominal damages are awarded if the defendant's slanderous statement has not caused substantial harm to the plaintiff's reputation due to either the "the insignificant character of the defamatory matter" or "the plaintiff's bad character." 46 Additionally, nominal damages may be awarded if the jury determines that the plaintiff has not produced evidence "that serious harm has resulted from the defendant's attack upon the plaintiff's character or reputation." 47 A jury may also award nominal damages "when they are the only damages claimed, and the action is brought for the purpose of vindicating the plaintiff's character by a verdict of a jury that establishes the falsity of the defamatory matter." 48 Like all nominal damage awards, nominal damages in an action for slander are "usually fixed at some trivial amount" and "must be insubstantial." 49 Courts often fix nominal damages at one dollar, or even less, in order to illustrate both the defendant's breach of duty and the plaintiff's minimal injury. 50 Succinctly, "[n]ominal damages are damages awarded in a trivial amount merely as a recognition of some breach of duty owed by a defendant to plaintiff and not as a measure of recompense for loss or detriment sustained." 51

2. **General Damages**

Common law tort principles teach that "'[g]eneral damages' are compensatory damages for a harm so frequently resulting from the tort that is the basis of the action that the existence of the damages is normally to be anticipated and hence need not be alleged in order to be proved." 52 In defamation law, "'[g]eneral damage may be perhaps roughly classified as injury to reputation,

44. Id. § 907 cmt. a.
45. Id. §§ 569-570.
46. Id. § 620 cmt. a.
47. Id.
48. Id.
49. McCormick, supra note 1, § 21, at 87.
50. See, e.g., Buckley v. Littell, 539 F.2d 882, 897 (2d Cir. 1976) (awarding one dollar compensatory damages where court found plaintiff's reputation suffered "not at all" from defamatory book), cert. denied, 429 U.S. 1062 (1977).
51. McCormick, supra note 1, § 20, at 85.
52. Restatement § 904(1).
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53. Samuels, supra note 1, at 66.
54. Restatement § 621.
56. Erick Bowman Remedy Co. v. Jensen Salsbury Labs., 17 F.2d 255, 260 (8th Cir. 1926) (noting that general damages are those damages that “flow in the ordinary course of things from the mere invasion of the plaintiff’s rights”); see also Slaughter v. Valleydale Packers, Inc., 94 S.E.2d 260, 266 (Va. 1956) (holding that general damages are those that “the law presumes to be the natural, proximate, and necessary result of the publication”).
57. Restatement § 621 cmt. a.
58. Id.
59. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (holding that plaintiff could not recover presumed damages without proof of actual harm). The Restatement, unlike Gertz, does not specifically resolve the issue. In a caveat, the Restatement provides:

The Institute takes no position on whether the traditional common law rule allowing recovery in the absence of proof of actual harm, for the harm that normally results from such a defamation, may constitutionally be applied if the defendant knew of the falsity of the communication or acted in reckless disregard of its truth or falsity.

Restatement § 621 caveat. Arguably, this result may be unfortunate because “[p]rimary cost avoidance arguments strongly support the propriety of general damage awards to cover the nonpecuniary costs of intangible injuries.” Ingber, supra note 1, at 799. However, in discussing the pre-New York Times standards, Professor Ingber has noted that:

permitting general or inferred damages in defamation cases created a risk of fraud and abuse. Lacking any heavy evidentiary responsibility, the plaintiff could easily fabricate reputational injury. Moreover juries, without any guidelines to evaluate evidence of injury, could use damages to punish unpopular defendants. General damages also created
However, in *Dun & Bradstreet*, the Supreme Court recognized that:

> [t]he rationale of the common-law rules has been the experience and judgment of history that “proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.”

3. Special Damages

“‘Special damages’ are compensatory damages for a harm other than one for which general damages are given.” For slanders that are not *per se*, a plaintiff must prove special harm. “The 'special damage' required in defamation cases must be some material or pecuniary injury. Injury to reputation without more, humiliation, mental anguish, physical sickness—these do not suffice.” This strict requirement of proof is the reason why the distinction between ordinary slander and slander *per se* has traditionally been so crucial to a plaintiff. A plaintiff whose case is based upon slander *per se* has the benefit of presumed general damages. However, a plaintiff suing for ordinary slander has been required to plead and prove this difficult to define thing called “special harm.” “Special harm . . . is the loss of something having economic or pecuniary value.” Modern courts have construed items such as the “loss of the society, companionship and association of friends” to constitute special damage amounting to a type of “pecuniary loss” that has deprived the plaintiff “of [a]
benefit which has a more or less indirect financial value to him.”

In short, special harm must be some “material loss capable of being measured in money.” Even if the slander complained of is actionable per se, some courts will still permit a plaintiff to prove special damage “to strengthen the plaintiff’s case and increase his damages.”

4. Emotional Distress

“One who is liable to another for . . . slander is liable also for emotional distress and bodily harm that is proved to have been caused by the defamatory publication.” The Restatement notes that “[t]he principal element of damages in actions for . . . defamation . . . is frequently the disagreeable emotion experienced by the plaintiff.” Traditionally, however, courts have chosen not to consider emotional distress, even if accompanied by physical manifestations, as “special harm.”

This rule presents a multitude of problems. As a purely logical consideration, a plaintiff should be able to recover only for the emotional distress and bodily harm which is legally caused by the loss to his or her reputation. Under this rule, a plaintiff may recover only for the emotional and physical distress that results from the plaintiff’s reaction to the loss of reputation. Yet as a practical matter, a plaintiff would surely prefer to recover for the anger, frustration and anxiety he or she experiences upon learning of the defendant’s defamatory statement. In either case, the emotional distress and physical manifestations resulting from that distress present a distinct problem for the jury in assessing damages for slander actions.

5. Punitive Damages

As a general rule, punitive damages “serve to give outlet, in cases of outrageous conduct, to the indignation of the jurors, and they are defended as furnishing a needed deterrent to wrongdo-

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64. Restatement § 575 cmt. b.
65. Id.
66. Id.
67. Id.
68. Restatement § 905 cmt. c.
69. Id.
70. For a further discussion of the limitations that have been placed on a plaintiff’s ability to recover damages for emotional distress, see infra notes 96-98, 133-40 and accompanying text.
Punitive damages generally are awarded only when the defendant has acted with genuine ill will or a conscious disregard of consequences to others.\textsuperscript{72}

Under established principles of American defamation law, punitive damages are always available when the slander under consideration is actionable \textit{per se}, even in cases where the plaintiff fails to prove actual damages.\textsuperscript{73} In contrast, when the slander is not actionable \textit{per se}, the plaintiff must prove either general or special damages to recover punitive damages.\textsuperscript{74} Some jurisdictions now permit a jury that awards nominal damages to supplement these damages with a punitive award, even in the case of ordinary slander.\textsuperscript{75} Precisely how much ill will is necessary to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{71} McCormick, supra note 1, § 77, at 275. According to the \textit{Restatement}:
\begin{enumerate}
\item Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
\item Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.
\end{enumerate}
\textit{Restatement} § 908.

\item \textsuperscript{72} See, e.g., Hunt v. Liberty Lobby, 720 F.2d 631, 650 (11th Cir. 1983) (stating that punitive damages are appropriate only where defendant acted with "ill will, hostility or an evil intention to defame and injure" (quoting Matthews v. Deland State Bank, 344 So. 2d 164, 166 (Fla. Dist. Ct. App. 1976))); Hansen v. Stoll, 636 P.2d 1236, 1241 (Ariz. Ct. App. 1981) (determining that punitive damages must be based on finding of "ill will, hatred, spite, or a desire to injure" plaintiff); Burnett v. National Enquirer, Inc., 193 Cal. Rptr. 206, 217 (Cal. Ct. App. 1983), appeal dismissed, 465 U.S. 1014 (1984) (holding that plaintiff must prove defendant acted with motive to "vex, harass, annoy or injure" to recover punitive damages); see also McCormick, supra note 1, § 79, at 280 (same). One commentator explains that:

\begin{quote}
It is precisely because the "real" damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach; it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered on the pain of a false accusation. . . . The "punitive" element is not something which is or can be added to some known factor which is non-punitive.
\end{quote}

Samuels, supra note 1, at 76.

\item \textsuperscript{73} See Johnson v. Life Ins. Co., 88 S.E.2d 260, 270 (S.C. 1955) ("The statement imputed to [plaintiff] was slanderous per se, and that fact alone was sufficient to justify a verdict of punitive damages." (emphasis added)). For a further discussion of this issue, see supra note 35 and accompanying text.

\item \textsuperscript{74} For a discussion of this requirement, see supra note 36 and accompanying text.

\item \textsuperscript{75} See Roden v. Empire Printing Co., 135 F. Supp. 665, 666 (D. Alaska
\end{itemize}
\end{footnotesize}
SLANDER DAMAGES

support an award of punitive damages is a difficult question. The cases on the subject invoke a continuum of standards ranging from actual or express malice 76 to malice "implied by law." 77 The United States Supreme Court, in Gertz v. Robert Welch, Inc., 78 addressed the issue of a plaintiff's recovery of punitive damages in an action for defamation. In reaching the conclusion that a plaintiff may only recover for actual injury, the Supreme Court theoretically altered a plaintiff's ability to recover punitive damages. 79

IV. GERTZ AND DUN & BRADSTREET: THEIR THEORETICAL IMPACT ON SLANDER DAMAGES

The First Amendment demands that certain limitations be placed on liability and damages for defamation. 80 The natural conflict inherent between the exercise of free speech and the law of defamation makes evaluating and defining defamation damages a complex process. "'[I]ntangible injuries to reputation ... create a unique problem for the legal system not found in intangible injuries generally: a direct conflict between important social values and the danger that legal support of one will jeopardize the other.'" 81

A. Gertz

1. Slander Cum Malevolentia & Slander Sine Malevolentia

Elmer Gertz was a lawyer who represented the family of a youth who had been shot and killed by a Chicago police officer. 82

1955) (holding that plaintiff may recover punitive damages in defamation action even though actual damages are nominal), aff'd, 247 F.2d 8 (9th Cir. 1957).

76. See Conard v. Dillingham, 206 P. 166, 170 (Ariz. 1922) (holding that jury may award punitive damages only if defendant acted "maliciously and wantonly"); Boulet v. Beals, 177 A.2d 665, 669 (Me. 1962) (stating that punitive damages are not recoverable absent proof of "actual malice").

77. See Davenport v. Armstead, 255 S.W.2d 132, 136 (Mo. Ct. App. 1952) ("'[W]hatever may be the rule in other jurisdictions, the rule in Missouri is that the jury may award punitive damages based merely on malice implied by law. They [the jury] are not required to find actual or express malice before they can award punitive damages.'").


79. For a discussion of the availability of punitive damages for slander under Gertz, see infra notes 141-43 and accompanying text.


81. Ingber, supra note 1, at 823.

Robert Welch, Inc. published a right-wing magazine that printed defamatory statements about Gertz.83 Justice Powell, writing for the United States Supreme Court, framed the principal issue of the case as "whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements."84 The Court held that states may define their own standards of liability for defamation of a private individual by a "publisher or broadcaster" provided "they do not impose liability without fault."85 Justice Powell's opinion also contains a number of other broad assertions that affect the law of defamation in general. These assertions are not necessarily restricted to libel and are not necessarily confined to cases in which a "publisher or broadcaster" is the defendant. Some of the assertions are couched as part of the holding, while others are clearly dicta. The question addressed in this Article is to what extent does the holding in

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83. Id. at 326-27. The publication asserted that Gertz was an official of a Marxist organization planning the overthrow of the government, and labelled Gertz as a "Leninist," and a 'Communist-fronter,' " and a member of an organization that helped plan a Communist attack on the Chicago Police Department during the 1968 Democratic National Convention. Id. at 326. All of these assertions contained serious inaccuracies. Id.

84. Id. at 332. Like Gertz, this Article focuses on issues in which the defamation sub judice does not involve either a public official or a public figure. The ramifications of characterizing a plaintiff as either a public official or a public figure are beyond the scope of this Article. See generally Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (addressing defamatory statements that do not involve matters of public concern).

85. Gertz, 418 U.S. at 347. In New York Times v. Sullivan, the Court established that a public official must prove that the defendant published the defamatory statement with malice—i.e., either knowing that the statement was false or recklessly disregarding its veracity—to recover any damages for defamation. 376 U.S. at 279-80. For an excellent general discussion of New York Times, see Samuel R. Pierce, Jr., The Anatomy of an Historic Decision: New York Times Co. v. Sullivan, 43 N.C. L. Rev. 315 (1964). New York Times specifically addressed situations in which the plaintiff was a "public official." 376 U.S. at 268. Later, the Court expanded the constitutional "actual malice" standard to apply to "public figures." Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967). In Butts, the Court required a "showing of highly unreasonable conduct constituting an extreme departure from the standards of investigating and reporting ordinarily adhered to by responsible publishers." Id. The Court has furthered defined "reckless disregard": "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
SLANDER DAMAGES

Gertz affect the law of slander and the availability of damages to a plaintiff in an action for slander.

Although expressed in a variety of ways, the thrust of the Gertz opinion is that a "private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times [v. Sullivan] may recover only such damages as are sufficient to compensate him for actual injury." The Court also stated that "[i]t is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." These statements, if taken at face value, eviscerate the distinction between ordinary slander and slander per se. Traditionally, the plaintiff’s principal advantage in an action for slander per se has been that the plaintiff is not required to prove damages to recover substantial sums—damage to the plaintiff's reputation is simply presumed. Instead of recognizing the distinction between ordinary slander and slander per se, the Gertz Court created, at least in theory, a new distinction between slander cum malevolentia and slander sine malevolentia. In many respects, Gertz implies that the amenities that have traditionally attached to actions for slander per se will now attach to this new slander cum malevolentia category. Similarly, it would appear that the evidentiary obstacles that traditionally impeded plaintiffs in actions for ordinary slander will now stand in the way of plaintiffs suing for slander sine malevolentia. To some extent, this hypothesis must be true. For example, Gertz established that if a private individual cannot prove that the defendant’s slanderous statement was published with knowledge of its falsity or reckless disregard for its veracity, the individual may only recover damages for "actual injury." Formerly, under traditional notions of slander damages, recoverable damages were severely restricted unless the plaintiff proved either “special harm” or that the slander was actionable per se.

2. "Actual Damages"

Although the Gertz opinion used the terms "actual damages"

86. 376 U.S. 254 (1964).
88. Gertz, 418 U.S. at 349.
89. Restatement (Second) of Torts § 569 cmt. b (1977).
90. For a discussion of the actual malice requirement set forth in Gertz, see supra text accompanying notes 87-89.
and "actual injury," it is apparent that the Court was not using those terms as synonyms for the traditional "special damages" or "special harm."\textsuperscript{91} Indeed, the term "actual damages" as used in \textit{Gertz} is a concept quite different from the five traditional types of damages available to a plaintiff in an action for slander.\textsuperscript{92}

"Actual damages" under \textit{Gertz} are meant to encompass more than the traditional category of "special damages." If one thinks in terms of Venn Diagrams, it is clear that the types of damages that have heretofore been delineated "special harm" ought now be considered within the category of "actual damages." However, the Court's statement that "actual injury is not limited to out-of-pocket loss" but also includes "more customary types of actual harm," suggests that there are aspects of "actual harm" other than merely those with pecuniary implications.\textsuperscript{93} In many respects "actual damages," as articulated in \textit{Gertz}, are actually a hybrid of general damages, special damages, and damages for emotional distress.

Two other dimensions of traditional slander damages appear to be part of the \textit{Gertz} definition of "actual damages." Under traditional theories of slander damages, one critical prerequisite to recovery for special harm has been that the slanderous statement must be "a substantial factor in bringing about the harm."\textsuperscript{94} "In the ordinary [slander] case, this means that the defamation must be a necessary antecedent of the harm, which would not have occurred without it."\textsuperscript{95} It is only logical that this causation requirement should now be engrafted as a requirement for "actual damages" under \textit{Gertz}. Consequently, to recover damages for slander \textit{sine malevolentia}, a plaintiff would now have to prove that the defendant's slanderous statement was a substantial factor in bringing about whatever harm the plaintiff claims.

Furthermore, under traditional notions of slander damages,

\begin{itemize}
  \item \textsuperscript{91} For a discussion of the traditional meaning of the terms "special damages" or "special harm," see \textit{supra} notes 61-66 and accompanying text.
  \item \textsuperscript{92} Although he neither specifically defined "actual damages" nor fully enumerated what sorts of items were within its scope, Justice Powell at least outlined what he meant by "actual damages": "Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." \textit{Gertz}, 418 U.S. at 350.
  \item \textsuperscript{93} See Miami Herald Publishing Co. v. Ane, 458 So. 2d 239, 242-43 (Fla. 1984) (holding that \textit{Gertz} does not require actual damage to reputation provided that evidence of some actual injury exists).
  \item \textsuperscript{94} \textit{Restatement (Second) of Torts} \textsection{} 622A (1977).
  \item \textsuperscript{95} \textit{Id.} \textsection{} 622A cmt. b.
\end{itemize}
neither emotional distress nor the resulting bodily harm were deemed "special harm" sufficient to warrant recovery in an action for ordinary slander. To recover damages for emotional distress, the traditional rule required a plaintiff to prove either special harm or that the slander was actionable *per se*. Nevertheless, in *Gertz*, the Supreme Court characterized "personal humiliation, and mental anguish and suffering" as among "the more customary types of actual harm inflicted by defamatory falsehood." It appears that *Gertz* has made it possible for all plaintiffs, even plaintiffs in actions for what has been traditionally called "ordinary slander," to recover damages for emotional distress, because under *Gertz*, emotional distress is undeniably a type of "actual harm." This reasoning assumes that the slander was a substantial factor in bringing about the emotional distress. The rule that emotional distress cannot be characterized as "special harm" is no longer of consequence, because *Gertz* casts emotional distress squarely within the category of "actual damages."

**B. Dun & Bradstreet: Slander In re Publica & Slander In re Privata**

The facts of *Dun & Bradstreet* are not complicated. Dun & Bradstreet is a corporation that "provides subscribers with financial and related information about businesses." Due to the error of one of its employees—a 17 year old high school student—Dun & Bradstreet erroneously reported to five subscribers that Greenmoss Builders, Inc. had filed for voluntary bankruptcy. When Greenmoss discovered the defamatory report, it contacted Dun & Bradstreet and requested that Dun & Bradstreet issue a correction to the five subscribers. After investigating the matter, Dun & Bradstreet did issue a correction to the five recipients of the false report but refused to divulge the identities of the five recipients to Greenmoss. Greenmoss informed Dun & Bradstreet that it was "dissatisfied with the notice" and subsequently filed suit against Dun & Bradstreet for libel, alleging "that the

96. *Id.* § 575 cmt. c.
97. *Id.* § 623 cmt. a.
99. *Id.*
101. *Id.* at 751.
102. *Id.*
103. *Id.* at 751-52.
false report had injured its reputation.\textsuperscript{104} Greenmoss sought both compensatory and punitive damages.\textsuperscript{105} "After trial, the jury returned a verdict in favor of [Greenmoss] and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages."\textsuperscript{106} Dun & Bradstreet moved for a new trial, arguing that \textit{Gertz} precluded recovery of presumed or punitive damages absent a showing of actual malice and that "the judge's instructions in this case permitted the jury to award such damages on a lesser showing."\textsuperscript{107} The trial court granted a new trial because it was dissatisfied with its instructions and because it wanted to fulfill the interests of justice.\textsuperscript{108} The Vermont Supreme Court reversed the lower court's decision to grant a new trial.\textsuperscript{109} Subsequently, the United States Supreme Court affirmed the judgment of the Vermont Supreme Court, "although for reasons different from those relied upon by the Vermont Supreme Court."\textsuperscript{110}

Justice Powell wrote the plurality opinion, joined by Justices Rehnquist and O'Connor.\textsuperscript{111} Chief Justice Burger and Justice White each wrote separate concurring opinions.\textsuperscript{112} Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented.\textsuperscript{113} Justice Powell's plurality opinion first summarized the holdings of \textit{New York Times}, \textit{Gertz}, and their respective progeny.\textsuperscript{114}

\begin{itemize}
  \item \textsuperscript{104} \textit{Id.} at 752.
  \item \textsuperscript{105} \textit{Id.}
  \item \textsuperscript{106} \textit{Id.}
  \item \textsuperscript{107} \textit{Id.}
  \item \textsuperscript{108} \textit{Id.}
  \item \textsuperscript{109} Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 461 A.2d 414 (Vt.), aff'd on other grounds, 464 U.S. 959 (1983). The Vermont Supreme Court stated: [D]efendant's motion for new trial was granted on the basis of the trial court's belief that its charge to the jury, insofar as it related to the \textit{Gertz} standards of liability, was confusing. In view of the fact that our decision today holds \textit{Gertz} totally inapplicable to the present case, we find the error harmless. \textit{Id.} at 421.
  \item \textsuperscript{110} \textit{Dun \& Bradstreet}, 472 U.S. at 753. The Vermont Supreme Court focused on the fact that Dun & Bradstreet, a credit reporting agency, provided its information to a limited number of subscribers. \textit{Greenmoss Builders}, 461 A.2d at 417. Consequently, the Vermont court rejected "the assertion that credit agencies such as defendant are the type of media worthy of First Amendment protection as contemplated by \textit{New York Times} and its progeny." \textit{Id.} at 417-18. Thus, the Vermont Supreme Court decided "that as a matter of federal constitutional law, the media protections outlined in \textit{Gertz} are inapplicable to nonmedia defamation actions." \textit{Id.} at 418 (citation omitted).
  \item \textsuperscript{111} \textit{Dun \& Bradstreet}, 472 U.S. at 751-63.
  \item \textsuperscript{112} \textit{Id.} at 763-74.
  \item \textsuperscript{113} \textit{Id.} at 774-96.
  \item \textsuperscript{114} \textit{Id.} at 755-58.
\end{itemize}
Justice Powell stressed that each of these cases had imposed an actual malice standard—i.e., in these cases "th[e] Court found constitutional limits to state defamation laws" only when the allegedly defamatory expression was "on a matter of undoubted public concern." Justice Powell then concluded that "speech on matters of purely private concern is of less First Amendment concern." Finally, the Court held that a private individual—as opposed to a public official or public figure—is not required to prove "actual malice" as a condition precedent to recovering presumed and punitive damages provided that the defendant's defamatory statement does not involve "matters of public concern." In Justice Powell's words: "[P]ermitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." To determine whether a slander should be characterized as in re publica or in re privata, Justice Powell suggested that a court must examine "[the expression's] content, form, and context . . . as revealed by the whole record."

In summary, Dun & Bradstreet holds that in order to recover presumed and punitive damages, a plaintiff alleging slander in re publica must prove that the defendant published the slander with actual malice. In contrast, in order to recover presumed and punitive damages, a plaintiff alleging slander in re privata need not prove that the defendant published the slander with actual malice. Consequently, in cases involving slander in re publica, the traditional distinction between slander per se and ordinary slander has dissipated. However, in cases involving slander in re privata, the traditional distinction apparently survives.

115. Id. at 756.
116. Id. at 759. Justice Powell supported this conclusion:
As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated New York Times and Gertz are absent. In such a case, "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling."

Id. at 759-60 (quoting Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359, 1363 (Or. 1977).
117. Id. at 763.
118. Id.
119. Id. at 761 (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983)).
C. Slander In re Publica: The Traditional Categories Under Gertz and Dun & Bradstreet

Because the principal changes to the law of slander and slander damages wrought by Gertz and Dun & Bradstreet exist in cases involving slander in re publica, the following discussion of the traditional damage categories evaluates the categories in the context of slander in re publica. In addition to abolishing the distinction between ordinary slander and slander per se, in light of the Court’s statements concerning actual injury, Gertz and Dun & Bradstreet arguably alter the five traditional types of damages available for slander: nominal damages, general damages, special damages, damages for emotional distress and punitive damages.120

1. Nominal Damages

As was previously noted, nominal damages have traditionally been awarded in trivial amounts to slander plaintiffs primarily to vindicate the plaintiff’s character.121 In Gertz, the United States Supreme Court held “that the States may not permit recovery of presumed . . . damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.”122 Whether this holding takes away a plaintiff’s opportunity to obtain nominal damages without proving “actual injury” is questionable. Throughout the opinion, the Court stressed that a plaintiff should not be permitted to recover damages “far in excess of any actual injury.”123 Because nominal damages are not trivial by definition—i.e., not “far in excess” of actual injury—it is unlikely that a jury could, even in the absence of proof, award nominal damages that would be grossly disproportionate to the injury caused by the falsehood. Nevertheless, if strictly interpreted, the Gertz holding could be construed to mean that some proof of “actual harm” is a necessary prerequisite to an award of even nominal damages.

120. It is probably wise to remember, as Justice Thurgood Marshall noted, that the amount of damages in defamation suits should be of greater concern than liability. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 82 (1971) (Marshall, J., dissenting).
121. For a discussion of the treatment of nominal damages under the traditional framework, see supra notes 43-51 and accompanying text.
123. Id.
2. General Damages

The United States Supreme Court's holding in *Gertz* apparently bars a slander plaintiff from recovering traditional, presumed general damages unless the jury determines that the defendant acted with actual malice—i.e., the defendant knew that the statement was false or recklessly disregarded its veracity. However, the Court did not actually frame a positive rule, for example: "Only if the defendant uttered the defamatory statement knowing that it was false or recklessly disregarding its veracity may a plaintiff recover presumed damages." Instead the Court stated that, "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."124 The Court stated that one of the purposes of this restriction was to prevent juries from awarding "gratuitous awards of money damages far in excess of any actual injury."125 Unlike the traditional rule that allowed plaintiffs to recover presumed, general damages when the slander was actionable *per se*, *Gertz* requires the slander to be *cum malevolentia* before a plaintiff can recover presumed, general damages.

Although this is a reasonable conclusion, lower courts may split on this issue because the Court did not actually frame a positive rule. In fact, the *Restatement* extends a caveat in which it abstains from taking a position on the issue.126 The American Law Institute's position is a cautious one. Nevertheless, the logical implication of the *Gertz* opinion is that if a jury determines that the defendant acted with actual malice, the plaintiff is entitled to presumed, general damages, even in the absence of proof of actual harm.

If, on the other hand, the jury determines that the defendant did not utter the slanderous statement with "actual malice," *Gertz* appears to limit recovery only to those "actual damages" that the plaintiff can prove. Nevertheless, shortly after deciding *Gertz*, the Supreme Court appeared to retreat from this hard line. In *Time,*

124. Id. (emphasis added).
125. Id.
126. The *Restatement* states:
The Institute takes no position on whether the traditional common law rule allowing recovery in the absence of proof of actual harm, for the harm that normally results from such a defamation, may constitutionally be applied if the defendant knew of the falsity of the communication or acted in reckless disregard of its truth or falsity.

*Restatement (Second) of Torts* § 621 caveat (1977).
Inc. v. Firestone, the Supreme Court upheld a $100,000 jury award to Firestone in the absence of any evidence of injury to her reputation. Justice Rehnquist posited that "[t]here was competent evidence introduced to permit the jury to assess the amount of injury" and stated that the Court "ha[d] no warrant for re-examining" the jury's decision. In dissent, Justice Brennan focused on the incongruity of the majority's decision with Gertz. Brennan noted that to allow recovery of defamation damages "without proof ‘by competent evidence’ of any other ‘actual injury’ is to do nothing less than return to the old rule of presumed damages supposedly outlawed by Gertz in instances in which the New York Times standard is not met." Thus, the Time, Inc. v. Firestone holding pushed ajar the door that Gertz ostensibly had closed.

3. Special Damages

According to defamation law prior to Gertz, a plaintiff in a slander action was required to plead and prove special damages in cases in which the alleged slander did not fit into one of the niches of slander per se. If Gertz has, in fact, rendered the distinction between ordinary slander and slander per se meaningless, at least when the slander is in re publica, the traditional category of "special damages" is, in that sense, also meaningless. Nevertheless, the concept has been incorporated into the notion of "actual damages" articulated in Gertz.

128. Id. at 460-61. The Court further noted that:
Several witnesses testified to the extent of respondent's anxiety and concern over Times' inaccurately reporting that she had been found guilty of adultery, and she herself took the stand to elaborate on her fears that her young son would be adversely affected by this falsehood when he grew older. The jury decided these injuries should be compensated by an award of $100,000.
Id. (footnote omitted).
129. Id. at 475 n.3 (Brennan, J., dissenting).
130. Id. Justice Brennan further posited: "It seems clear that by allowing this type of recovery the State has subverted whatever protective influence the 'actual injury' stricture may possess. Gertz would, of course, allow for an award of damages for such injury after proof of injury to reputation." Id.
131. For a discussion of the different traditional standards of proof required for ordinary slander and for slander per se, see supra notes 22-36 and accompanying text.
132. For a discussion of "actual damages" as articulated in Gertz, see supra notes 100-18 and accompanying text.
4. Emotional Distress

As was previously noted, Gertz has changed the role of damages for emotional distress in actions for slander in re publica. Under traditional notions of slander damages, a plaintiff could not recover damages for either emotional distress or the resulting bodily harm—e.g., nausea, symptoms of fever, insomnia, etc. caused by the emotional distress—unless the plaintiff could prove special damage or slander per se.133 However, in Gertz, the Court included emotional distress within the category of actual damages.134 Therefore, if a plaintiff can prove that the defendant’s slanderous statement was a substantial factor in causing the alleged emotional distress or resulting bodily harm, the plaintiff should be able to recover damages for that injury regardless of whether the slander fits into the traditional categories of slander per se or “special harm.”

Exactly what sort of qualitative nexus is required between the slanderous statement and the plaintiff’s emotional distress is one question that remains unanswered by Gertz. The quantitative nexus is clear—the slanderous statement must be a substantial factor in causing the harm. What is meant by qualitative nexus is best illustrated by example. Suppose Citizen A stands up in front of a crowd at a local football game, and during half time, microphone in hand, exclaims: “Citizen B is a rotten, no-good, lousy thief! He has been walking under the bleachers during the first half of today’s game stealing pocketbooks!” Assume that Citizen A’s statement is slanderous because in reality, Citizen B is as honest as possible, and in fact, has spent the entire first half of the game selling soft drinks at the March of Dimes concession stand. As a result of hearing Citizen A’s statement, Citizen B is outraged, angry, upset and annoyed. He has been embarrassed. “How can Citizen A get away with saying things like that?” he thinks to himself. For the next several days Citizen B can neither eat nor sleep, and consequently, he loses weight. Finally, he visits his doctor seeking a cure. The qualitative issue is this: how much of Citizen B’s emotional and physical distress resulted from his perception that his reputation has been damaged and how much of the distress resulted from his indignation that anyone could have the gall to tell lies about him?

133. Restatement (Second) of Torts § 623 cmt. a (1977).
Strictly speaking, in an action for slander, Citizen B should only be capable of recovering damages for the injury to his reputation because injury to reputation is the crux of defamation law. Thus, a judge in a slander action must be careful to instruct the jury that it cannot award damages for emotional distress merely because the slanderous statement was a substantial factor in causing the plaintiff’s emotional distress. Rather, the judge must instruct the jury that it can only award emotional distress damages to the extent that the emotional distress was substantially caused by the plaintiff’s perception that his or her reputation was, or would be, damaged by the defendant’s slanderous statement.

The emotional distress that the plaintiff incurs as a result of his or her anger and indignation—the “How can anybody say things like that about me?” reaction—as opposed to the truly defamatory “Now everybody’s going to distrust me and think I’m a thief!” reaction, can be more properly claimed under a theory of intentional infliction of emotional distress. The Restatement has recognized this problem and notes that “[i]f the defendant’s conduct is extreme and outrageous and he intends to bring about severe emotional distress, he may be liable for it and for resulting bodily harm, under the rule stated in § 46.”

Section 46 of the Restatement provides: “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” The comments and illustrations to this Restatement section, however, make it clear that normally this rule will not apply in most slander suits. “The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” Would lies and other slanderous statements be included in the category of “other trivialities?” In most cases, probably yes. But it is not difficult to imagine instances in which a slanderer publishes a statement in such an outrageous manner that it could conceivably come under the rule articulated in the Restatement. Therefore, a plaintiff who is suing for slander and claiming emotional distress, and who believes that the defendant’s conduct can colorably be characterized

135. See, e.g., Restatement § 46.
136. Id. § 523 cmt. d.
137. Id. § 46(1).
138. Id. § 46 cmt. d.
139. Id.
as “extreme and outrageous,” ought to include a claim for intentional infliction of emotional distress along with the slander claim. Otherwise, the plaintiff’s claim for emotional distress will be limited to only that emotional distress that was substantially caused by the damage to plaintiff’s reputation. Simply stated, emotional distress that is not directly connected with the plaintiff’s loss of reputation, but rather is connected with the plaintiff’s emotional reaction to the defendant’s slanderous statements, does “not depend upon the defamatory character of the statements made and [is] therefore not to be included as a part of the law of defamation.”

5. Punitive Damages

Gertz radically changes the availability of punitive damages in an action for slander. In Gertz, the Court clearly stated: “[W]e hold that the States may not permit recovery of . . . punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.” This statement once again raises the question of whether the traditional distinction between ordinary slander and slander per se is still viable. In short, the Gertz holding indicates that a plaintiff must prove that a defendant acted cum malevolentia to recover punitive damages in a slander action. Failure to sustain that burden of proof negates a plaintiff’s recovery of punitive damages. Although in the pre-Gertz era a plaintiff could always recover punitive damages provided that the alleged slander was actionable per se, Gertz plainly mandates that this cannot be the rule today.

It is interesting to note that punitive damages have traditionally been awarded “to punish [the defendant] for his outrageous conduct.” Therefore, perhaps it is conceivable that, instead of adding a separate claim for intentional infliction of emotional distress, a plaintiff could recover for the defendant’s outrageous conduct under a punitive damage theory.

140. Id. § 623 cmt. d.
142. For a discussion of a plaintiff’s ability to recover punitive damages under the traditional slander framework, see supra notes 74-78 and accompanying text.
143. Restatement § 908(1).
V. THE STATUS OF THE LAW SINCE GERTZ AND DUN & BRADSTREET

As the Gertz and Dun & Bradstreet decisions approach their twentieth and tenth birthdays, respectively, it is both puzzling and disappointing that the judiciary has continued to apply the traditional ordinary slander/slander per se dichotomy, and has failed to apply the rules set forth in these landmark decisions. Perhaps judges feel reticent to overturn the weight of history and the conventional rules of slander and slander per se without a more specific directive from the United States Supreme Court. After all, Gertz was a libel case and perhaps the Court did, in fact, only mean “libel” when it said “defamation.”

For the most part, the slander cases decided since Gertz and Dun & Bradstreet have been consistent. If the slander at issue is actionable per se, the courts have not specifically addressed the question of whether the slander is in re publica or in re privata. Instead, the courts have permitted presumed damages without requiring the plaintiff to either plead or prove actual harm. In Maheu v. Hughes Tool Co., the United States District Court for the Central District of California attempted to follow Gertz. The

144. See, e.g., Sherman v. Prudential-Bache Sec., Inc., 732 F. Supp. 541, 550-51 (E.D. Pa. 1989) ("[U]nder Pennsylvania law, statements imputing business misconduct are slander per se and actionable without proof of any special harm."); Springer v. Seaman, 658 F. Supp. 1502, 1508 (D. Me. 1987) (holding that no allegation of special damage was necessary where alleged slander was slanderous per se); Rowe v. Metz, 579 P.2d 85, 85 (Colo. 1978) (holding that where non-media defendant injured reputation of private plaintiff and statement was slanderous per se, common law rule allowing presumption of damages remains applicable); Branda v. Sanford, 637 P.2d 1223, 1225 (Nev. 1981) (holding that "a slanderous statement, no matter how insulting or defamatory," is not actionable unless it is slanderous per se or supported with proof of special damages); Benassi v. Georgia-Pacific, 662 P.2d 760, 764-65 (Or. Ct. App. 1983) (noting that general damages are presumed and recoverable without evidence of actual harm where defamatory statement is slanderous per se); Starobin v. Northridge Lakes Dev. Co., 287 N.W.2d 747, 752-53 (Wis. 1980) (holding that allegation of special damages is unnecessary where defendant's words accuse plaintiff of "crime involving 'moral turpitude' and crime subjecting party to 'infamous punishment.'" (quoting Early v. Winn, 109 N.W. 633, 640 (Wis. 1906))). Another court has rejected this line of cases. Tatum v. Liner, 749 S.W.2d 251 (Tex. Ct. App. 1988). In Tatum, the court articulated a narrower view for awarding exemplary damages stating:

Exemplary damages, by definition, are a form of punishment, and are not to be awarded unless it has been shown that there was malice. Appellant cannot be held "strictly liable" for exemplary damages where the jury has found that the appellant did not minimally possess a reckless disregard for the truth.

Id. at 263.

SLANDER DAMAGES

The district court interpreted Gertz to hold that awarding punitive damages in a public figure defamation case would contravene the First Amendment. The United States Court of Appeals for the Ninth Circuit, however, reversed and held that:

The language in Gertz suggests that punitive damages may be allowed in a case . . . where actual malice has been established. California has chosen to allow such recovery, and we find that the state's interest in deterring malicious defamation, for the purpose of protecting privacy and reputation, even when public figures are involved, is compelling.

Many courts have followed Gertz in one regard—they have interpreted Gertz to permit public figures to recover punitive damages provided that the defendant published the defamation with "actual malice."

VI. Flow Charts

A. Introduction

The foregoing discussion clearly demonstrates that quantifying the dollar amounts of damages in slander actions is a difficult task. The following "flow charts" do not attempt to aid juries in placing price tags on slander damages. Rather, the flow charts attempt to piece together, in a coherent fashion, the issues that juries need to resolve as antecedents to awarding certain types of damages. The flow charts do not consider matters such as retraction and mitigation. The first flow chart approaches slander

147. Maheu, 569 F.2d 459, 480 (9th Cir. 1977).
148. See, e.g., Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1029-30 (4th Cir. 1976) (asserting that Gertz does not preclude recovery of punitive damages by public official/public figure where New York Times standard of actual malice is met); Buckley v. Littell, 559 F.2d 882, 897 (2d Cir. 1976) (holding that Gertz does not preclude award of punitive damages to public figures); Carson v. Allied News Co., 529 F.2d 206, 214 (7th Cir. 1976) (holding that where actual malice is shown, public figure may recover presumed and punitive damages); Davis v. Schuchat, 510 F.2d 731, 737-38 (D.C. Cir. 1975) (noting that even where plaintiff is public figure, "[s]o long as the punitive damages award . . . is based upon a finding of actual malice . . . such an award is proper"); Fopay v. Noveroske, 334 N.E.2d 79, 92 (Ill. App. Ct. 1975) (holding that First Amendment does not preclude awarding punitive damages to public official if based on finding of actual malice).
149. For a discussion of mitigation and retraction and their effects on slander damages, see generally 50 AM. JUR. 2d Libel and Slander §§ 372-382 (1970) and ELDREDGE, supra note 1, at 543-83.
damages from a traditional—i.e., pre-Gertz and Dun & Bradstreet—
perspective. The second flow chart formulates an evaluation of
slander damages based on a strict reading of Gertz and Dun &
Bradstreet.

B. Traditional Model

1. Introduction

Under the traditional theories of slander damages, the
threshold question is whether the alleged defamatory statement is
ordinary slander or slander per se. Precedent is clear that the dis-
tinction between ordinary slander and slander per se is a question
of law for the court, not a question of fact for the jury. 150

2. Ordinary Slander

If the court instructs the jury that the alleged defamatory
statement is ordinary slander, the jury should consider the follow-
ing factors when calculating slander damages.

a. Nominal Damages

Obviously, if the plaintiff has claimed only nominal damages,
the jury may limit the award to nominal damages. Additionally,
nominal damages should be awarded if the jury concludes that:
1) the plaintiff has not incurred a substantial loss of reputation; 2)
the slander was insignificant—e.g., the defendant called the plain-
tiff a "jaywalker;" or 3) the plaintiff's reputation was so poor prior
to the defendant's statement that the slander caused little harm.

b. Special Damages

If the jury determines that the plaintiff produced sufficient
evidence to prove that the defendant's slander was a substantial
factor in causing some financial harm to the plaintiff's reputa-
tion—i.e., a material loss capable of monetary measurement—the
jury may award special damages for that pecuniary loss.

150. The Restatement notes that the court generally "determines whether a
crime, a disease or a type of sexual misconduct imputed by spoken language is of
such character as to make the slander actionable per se." RESTATEMENT (SECOND)
of Torts § 615(1) (1977). The Restatement further notes that the jury de-
termines "whether spoken language imputes to another conduct, characteristics
or a condition incompatible with the proper conduct of his business, trade pro-
fession or office." Id. § 615(2).
c. Emotional Distress

The jury may address the issue of emotional distress and resulting bodily harm damages only after the jury determines that the plaintiff is entitled to special damages. In such a case, the judge should instruct the jury that it may only compensate the plaintiff for the emotional distress or resulting bodily harm caused by the loss of reputation. Emotional distress resulting from the loss of reputation must be distinguished from the type of emotional distress commonly alleged in actions for intentional infliction of emotional distress.  

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d. Punitive Damages

The jury may award punitive damages if, and only if, the jury determines that the plaintiff is entitled to special damages. If the jury has determined that special damages are warranted, and if it also determines that the defendant's conduct was sufficiently outrageous, it may award punitive damages. It should be noted that a minority of jurisdictions allows juries to award punitive damages without proof of special harm, provided the jury awards nominal damages.

3. Slander Per Se

If the court instructs the jury that the alleged slander is actionable per se, the jury should consider the following factors when calculating damages.

a. Nominal Damages

The jury may decide to award only nominal damages. How-

151. For a discussion of the distinction between the type of emotional distress recoverable in a defamation action and the emotional distress recoverable in an action for intentional infliction of emotional distress, see supra notes 135-40 and accompanying text.

152. For a discussion of the “malice” standards used in various jurisdictions to assess the defendant's conduct, see supra notes 76-78 and accompanying text.

153. Some jurisdictions hold that punitive damages can be recovered only when the plaintiff has suffered actual damages. See, e.g., Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53, 66 (1966) ("[A] defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages."); Kinney v. Cady, 4 N.W.2d 225, 229 (Iowa 1942) ("It is the general rule that there must be actual damages awarded before exemplary damages may be allowed.").

154. For a general discussion of the prevailing rules governing recovery of punitive damages in various jurisdictions, see 50 AM. JUR. 2d Libel and Slander § 352 (1970).
ever, such an award is unlikely because, by definition, slander *per se* is considered more serious than ordinary slander.

b. General Damages

In an action for slander *per se*, the jury may award substantial sums as general damages even if the plaintiff fails to prove that he or she suffered financial harm. Because the slander is actionable *per se*, financial harm is presumed. Loss of reputation is also presumed and may be compensated without actual proof of harm.

c. Special Damages

If the jury determines that the plaintiff has produced credible evidence that the defendant’s slander caused the financial harm to the plaintiff, the jury may award special damages. However, to award special damages, the jury must conclude that the slander was a substantial factor in bringing about the pecuniary loss.

d. Emotional Distress

If the jury concludes that the plaintiff has suffered emotional distress and/or resulting bodily harm caused by the plaintiff’s loss of reputation, the jury may award damages for that emotional distress. Unlike the plaintiff in an action for ordinary slander, the plaintiff in a slander *per se* action is not required to prove special harm as an antecedent to recovery for emotional distress damages when the alleged slander is actionable *per se*.

e. Punitive Damages

The jury may award punitive damages in a slander *per se* action if the jury concludes that the defendant’s conduct was sufficiently outrageous to warrant punitive damages. The plaintiff need not prove any special damages to recover punitive damages in a slander *per se* action.

C. *The Gertz and Dun & Bradstreet Model*

1. Introduction

There are two threshold questions in slander actions under the rules of defamation articulated in *Gertz* and *Dun & Bradstreet*: 1) Is the alleged slander *cum malevolentia* or *sine malevolentia*?; and 2) Is the alleged slander *in re publica* or *in re privata*? The threshold question employed under the traditional rules—whether the defamatory statement was ordinary slander or slander *per se*—was
a question of law for the court. Conversely, under the *Gertz* and *Dun & Bradstreet* model, the question of whether the alleged slander is *cum malevolentia* or *sine malevolentia* is a question of fact for the jury, not a question of law for the court. Thus, much of the success or failure of the plaintiff’s case rests on whether the plaintiff can prove that the defendant acted *cum malevolentia*. Clearly, this question is more difficult to resolve than the question of whether the slander should be characterized as ordinary or *per se*. Whether a statement should be characterized as *in re publica* or *in re privata* is probably a question of law.155

2. *In re Privata*

If the court determines that the slander is *in re privata* and that the defendant published the slander negligently, the traditional damages model will apply and the corresponding flow chart of traditional common law rules will govern the award of damages.

3. *In re Publica*

If the court determines that the slander is *in re publica*, the jury must decide whether the slander is *cum malevolentia* or *sine malevolentia*.

a. *Sine Malevolentia*

If the jury determines that the alleged slander is *sine malevolentia*, it may award a maximum of two types of damages.

i. Nominal Damages

It may be argued that juries may not award nominal damages for slander *sine malevolentia* under the rules articulated in *Gertz*. However, the better reasoned view is that *Gertz* permits juries to award nominal damages for slander *sine malevolentia*. Although the Court in *Gertz* stated that a plaintiff must prove malice or else be limited to actual damages, the Court created this rule to prevent juries from awarding damages “far in excess of any actual injury.”156 Because nominal damages are trivial by definition, it is reasonable that a jury would award nominal damages if it were to determine that: 1) the plaintiff did not incur a substantial loss of reputation; 2) the plaintiff only claimed nominal damages; 3) the

155. For a discussion of the court’s role in characterizing statements as *in re publica* or *in re privata*, see supra text accompanying note 119.
slander was insignificant; or 4) the plaintiff's reputation was so poor prior to the defendant's slander that the slander had little or no impact. In fact, awarding nominal damages in a case of slander *sine malevolentia* is very sensible. If the defendant acted without malice, a jury could reasonably determine that a sum of damages that will vindicate the plaintiff's character without punishing the defendant is the most appropriate award. Nominal damages have traditionally served precisely this function in slander actions.

ii. Actual Damages

If the jury determines that the defendant's slander was a substantial factor in causing pecuniary injury, emotional distress or bodily harm, or any other type of loss resulting from impairment to the plaintiff's reputation, the jury may award actual damages for those injuries. As the *Gertz* court stated: "[A]ctual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." 157 Furthermore, "all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." 158 Clearly, in order to grant damages for actual injury under *Gertz*, evidence of actual injury does not require the same rigorous "pecuniary" aspect prescribed under the traditional notions of special damages.

b. *Cum Malevolentia*

If the jury concludes that the defendant published the slanderous statement *cum malevolentia*, the jury may properly award as many as four different types of damages.

i. Nominal Damages

The jury may decide to award nominal damages for slander *cum malevolentia*—although this seems unlikely—for the same reasons that a jury might award nominal damages in slander *per se* actions under the traditional rules. 159

157. *Id.* at 350.

158. *Id.*

159. For a discussion of the reasons why a jury may decide to award only nominal damages under the traditional rules, see *supra* notes 45-51 and accompanying text.
ii. General Damages

If the jury determines that the slander is *cum malevolentia*, the holding in *Gertz* strongly suggests that the jury may award general, presumed damages. The court must decide, as a matter of law, whether to instruct the jury in this manner. If the court determines that *Gertz* does sanction an award of general, presumed damages—i.e., damages that do not require proof of actual injury—for slander *cum malevolentia*, the jury apparently would be free to award such general damages in the same manner that juries traditionally have been allowed to award general damages in cases involving slander *per se*. However, there would be one difference. In cases involving slander *per se*, a plaintiff is allowed to recover general, presumed damages without proof of special damages. In cases involving slander *cum malevolentia*, a plaintiff would be able to recover general, presumed damages without proof of actual damages.

iii. Actual Damages

In a case involving slander *cum malevolentia*, the jury may award actual damages by applying the same standards used in actions for slander *sine malevolentia*. It should be noted that emotional distress and resulting bodily harm are considered actual damages, and therefore do not constitute a separate damages category.

iv. Punitive Damages

The jury may award punitive damages in precisely the same manner as punitive damages have traditionally been awarded in actions for slander *per se*.

VII. Conclusion

The United States Supreme Court’s decisions in *Gertz* and *Dun & Bradstreet* appear to have changed the law of slander and slander damages significantly. Perhaps the *Gertz* court should have limited its language to a discussion of damages for *libel* rather than broadly speaking in terms of defamation (and thereby including slander within the scope of its decision). If *Gertz* and

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160. For a discussion of the standards used to award actual damages in actions for slander *sine malevolentia*, see *supra* text accompanying notes 157-58.

161. For a discussion of standards used to award punitive damages in actions for slander *per se* under the traditional rules, see *supra* notes 73-79 and accompanying text.
Dun & Bradstreet do, in fact, affect the law of slander damages, the traditional common law distinction between slander *per se* and ordinary slander is meaningful within a constitutional framework only in cases in which the slander concerns a private matter, rather than a public matter. Furthermore, the Court has created four new categories of slander: 1) slander *in re publica*; 2) slander *in re privata*; 3) slander *cum malevolentia*; and 4) slander *sine malevolentia*. It remains to be seen whether courts will embrace the teachings of Gertz and Dun & Bradstreet and apply these new concepts to slander actions as well as libel cases.

**Epilogue**

In closing, it is worthwhile to note the work of the Libel Reform Project of the Annenberg Washington Program. The Annenberg Libel Reform Project was composed of legal scholars, practitioners, judges, and representatives of the media and insurance industries who worked together to create "The Libel Reform Act." This Act is a proposal designed "to provide an efficient and speedy remedy for defamation, emphasizing the compelling public interest in the dissemination of truth in the marketplace." The Act proposes significant changes in defamation damages including: 1) abolishing distinctions between slander and libel; 2) limiting recovery to actual injury; and 3) abolishing punitive damages for defamation.

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163. Libel Reform Act § 9. Specifically, the Act provides as follows:

Libel and Slander Distinctions Abolished. All distinctions among slander, libel per se, libel per quod, slander per se and slander per quod are abolished.

Recovery Limited to Actual Injury. In any action for damages, recovery shall be limited to reasonable compensation based on proof of actual injury. Presumed damages are abolished. Proof of special damages (specific pecuniary, out-of-pocket damages) shall not, however, be required. Proof of damage to reputation is a prerequisite to any recovery of damages. If proof of reputational injury is established, the plaintiff may additionally recover damages for personal humiliation, anguish and emotional distress.

All Factors Considered. In awarding compensatory damages for actual injury the trier-of-fact may take into account all factors relevant to the impact of the defamatory statement, including whether it was in a written or oral form.

No Punitive Damages. No punitive damages shall be permitted in any action for defamation.

*Id.*
Clearly, if courts were to adopt these recommendations, much of the confusion that currently permeates the law of slander and slander damages would no longer be present.