MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 40 | Issue 4 Article 9

2014

Presumed Damages in Defamation Law

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PRESUMED DAMAGES IN DEFAMATION LAW

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I. INTRODUCTION

Where it applies, defamation law's presumed damages rule permits a defamed plaintiff to recover damages for injury to reputation and attendant mental suffering without proof of actual harm. Despite heavy criticism, the presumed damages rule has had remarkable staying power in American law. The rule is subject to First Amendment limitations in cases involving public officials,[1] figures,[2] and issues,[3] but in the vast number of cases where there are no limiting First Amendment interests, the presumed damages rule continues to apply in many jurisdictions.

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1. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80, 283–84 (1964).
2. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154–55 (1967).
3. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

The rule has been criticized for a variety of reasons.[4] Rejections or limitations of the rule turn on the inconsistent and generally unconstrained damages awards fostered by the rule, the unjustified distinctions in the categories of defamation claims that support presumed damages awards and those that do not, and the incompatibility of presumed damages with a tort regime that generally awards damages only for actual harm.[5]

The continued acceptance of the rule, on the other hand, turns on judicial perceptions of the importance of vindicating reputational interests, the difficulty in proving actual injury to reputation, and concerns that reputational interests will be insufficiently protected by an actual damages rule.[6]

The rule was tested to its limits in *Longbehn v. City of Moose Lake*[7] and *Longbehn v. Schoenrock*.[8] The four trials and three appeals to the court of appeals spanning eleven years in a case that arose out of a single defamatory phone call to one person highlight the problems created by the presumed damages rule in defamation cases. The purpose of this article is to evaluate the presumed damages rule as it has functioned, ultimately using *Longbehn* as a laboratory for evaluating the criticisms of the rule.

The article proceeds in seven parts. The first part frames the ongoing debate over the viability of the presumed damages rule through a brief examination of three recent state supreme court decisions: *Smith v. Durden*,[9] a New Mexico Supreme Court decision rejecting the rule of presumed damages in favor of one requiring proof of actual harm to reputation in all defamation cases; *W.J.A. v. D.A.*,[10] a New Jersey Supreme Court case in which the court

4. For a comprehensive criticism of the rule see David A. Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747 (1983). *See also* Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 12–13 (1996) (arguing harm cannot be based on "language used alone"); Julie C. Sipe, *"Old Stinking, Old Nasty, Old Itchy Old Toad": Defamation Law, Warts and All (A Call for Reform)*, 41 IND. L. REV. 137, 152–59 (2008).

5. *See* discussion *infra* Part I.

6. *See* discussion *infra* Part III.

7. Longbehn v. City of Moose Lake, No. A04-1214, 2005 WL 1153625, at *10–11 (Minn. Ct. App. May 17, 2005).

8. Longbehn v. Schoenrock, No. A09-2141, 2010 WL 3000283, at *3–4 (Minn. Ct. App. Aug. 3, 2010); Longbehn v. Schoenrock, 727 N.W.2d 153, 161 (Minn. Ct. App. 2007).

9. 276 P.3d 943 (N.M. 2012).

10. 43 A.3d 1148 (N.J. 2012).

retained the rule but limited it to nominal damages; and *Bierman v. Weier*,[11] an Iowa Supreme Court case in which the court retained the presumed damages rule. Together, the cases highlight the considerations courts have typically deemed relevant in determining whether the rule should be rejected, retained, or modified.

Because some of the criticisms of the rule focus on the lack of guidelines for juries to follow in awarding damages, part two surveys pattern jury instructions on presumed damages in order to garner a sense of how presumed damages issues are actually submitted to juries. Part three focuses on Minnesota's experience with the presumed damages rule in light of the concerns with the rule that were raised in *Bierman*, *W.J.A.*, and *Durden*. It includes a basic discussion of Minnesota defamation law involving presumed damages, a short survey of Minnesota defamation cases over the past twenty years, and Minnesota's treatment of excessive damages claims in defamation cases in order to provide a more detailed perspective on the argument that presumed damages awards are not subject to reasonable judicial restraints. Part four summarizes the discussion of presumed damages law. Part five focuses on the *Longbehn* series of cases against the backdrop of Minnesota presumed damages case law. Part six discusses the lessons learned from the *Longbehn* series of cases. Part seven is the conclusion.

II. FRAMING THE DEBATE

The Supreme Court of the United States has limited the right to recover presumed damages in defamation suits by public officials, public figures, and private persons involved in public issues to cases where they prove actual malice.[12] While that leaves the states substantial latitude in deciding whether to retain, modify, or eliminate the presumed damages rule in cases where there are no First Amendment limitations, the Supreme Court's discussions of the presumed damages rule in defamation decisions bookend state supreme court discussions of the criticisms and attributes of the rule.

11. 826 N.W.2d 436 (Iowa 2013).

12. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154–55 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 283–84 (1964).

In *Gertz v. Robert Welch, Inc.*, the Court saw common law defamation as an "oddity of tort law" because of its presumed damages rule, which leads to "[t]he largely uncontrolled discretion of juries to award damages where there is no loss," and "invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact," consequences that "inhibit the vigorous exercise of First Amendment freedoms."[13] And "[m]ore to the point," the Court added, "the States have no substantial interest in securing for plaintiffs such as [Gertz] gratuitous awards of money damages far in excess of any actual injury."[14]

In a private plaintiff case, a plurality of the Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, noted 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,'" and that as a consequence, "courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications."[15]

Gertz and *Dun & Bradstreet* highlight two of the important factors in the policy debate over presumed damages. There are others, including the purpose of defamation law, and whether it should encompass more than just protection of reputational interests; the inconsistent outcomes the presumed damages rule promotes; and the inability of courts to impose meaningful limits on jury awards of presumed damages because of the inherent lack of guidelines in the rule.

The next three recent cases illustrate three different approaches to the rule by courts considering the same basic policy issues.

13. *Gertz*, 418 U.S. at 349.

14. *Id.*

15. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985) (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112, at 765 (4th ed. 1971)).

A. Smith v. Durden

Smith v. Durden,[16] a recent New Mexico Supreme Court decision rejecting the presumed damages rule in defamation cases, caps a significant reworking of New Mexico defamation law over the past few years. *Durden* is one of the more detailed judicial examinations of the presumed damages rule.

The plaintiff, an Episcopal priest, brought suit against various defendants following the publication of certain documents accusing him of sexual misconduct with minor parishioners.[17] The key issue in the case was whether proof of actual injury to reputation should be required in all New Mexico defamation cases. The New Mexico Supreme Court concluded that actual injury to reputation is a predicate to recovery in a defamation case.[18]

In prior decisions the court had simplified New Mexico defamation law and made the rules governing defamation more uniform. In *Marchiondo v. Brown*, a post-*Gertz* case involving a private defamation plaintiff, the court held that strict liability no longer applies in defamation cases; that the "ordinary common law negligence standard of proof" applies to private defamation plaintiffs, and recovery is limited to actual damages; that private defamation plaintiffs seeking special damages must plead and prove them; and that a private defamation plaintiff seeking punitive damages has to prove actual malice.[19] Later, in *Newberry v. Allied Stores, Inc.*,[20] the supreme court eliminated the distinctions between defamation per se and defamation per quod.[21]

16. 276 P.3d 943 (N.M. 2012).
17. *Id.* at 944.
18. *Id.* at 951.
19. Marchiondo v. Brown, 649 P.2d 462, 470–71 (N.M. 1982).
20. 773 P.2d 1231 (N.M. 1989).
21. *Id.* at 1236. Previously, under New Mexico law:

> A statement is deemed to be defamatory per se, if, without reference to extrinsic evidence and viewed in its plain and obvious meaning, the statement imputes to plaintiff: the commission of some criminal offense involving moral turpitude; affliction with some loathesome [sic] disease, which would tend to exclude the person from society; unfitness to perform duties of office or employment for profit, or the want of integrity in discharge of the duties of such office or employment; some falsity which prejudices plaintiff in his or her profession or trade; or unchastity of a woman. Any other communication, though not defamatory on its face, but which

Once a court removes the distinctions between libel per se and libel per quod and jettisons the rule permitting recovery for presumed damages on a showing of slander per se or special damages, the choice is simple. Either presumed damages will be awarded in all defamation cases or plaintiffs will have to prove actual injury to reputation in all cases. There is no middle ground. That was the situation in *Durden*.

The court concluded that because the essential purpose of defamation law is to provide redress for injury to reputation, no recovery should be allowed absent actual injury to reputation.[22] The court acknowledged that there will be costs because of its decision, primarily because proof of actual damage will be impossible in a great number of cases.[23] Because the interest of defamation law is providing compensation to individuals for injury to reputation, however, allowing "[r]ecovery for a mere tendency to injure reputation, or only upon a showing of mental anguish," is both too speculative and an inappropriate blend of "defamation, a tort properly limited by constitutional protections, with other causes of action."[24]

> becomes defamatory when its meaning is illuminated by proof of extrinsic facts is actionable per quod.

Id. (citation omitted).

22. *Durden*, 276 P.3d at 948–49. Recovery for emotional harm is disallowed, absent injury to reputation, a result reached by the Minnesota Supreme Court in *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 27 (Minn. 1996), but the Minnesota Supreme Court's holding is limited to cases involving private persons involved in public issues who sue media defendants. *See infra* notes 77–84 and accompanying text.

23. *Durden*, 276 P.3d at 952 (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985)). The full quote from *Dun & Bradstreet* reads as follows:

> The 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."

Dun & Bradstreet, 472 U.S. at 760 (quoting PROSSER, *supra* note 15, § 112, at 765).

24. *Durden*, 276 P.3d at 952.

B. W.J.A. v. D.A.

W.J.A. v. D.A.,[25] is a New Jersey Supreme Court defamation case arising out of an Internet posting on the defendant's website claiming that the plaintiff had sexually assaulted him when he was a minor.[26] One of the issues in the case was whether the doctrine of presumed damages had continued vitality in a defamation case involving a private citizen and a matter of private concern. The court initially noted the scholarly criticisms of the rule, and that some jurisdictions have abolished presumed damages in favor of a rule that requires proof of actual damages in all cases, but that a majority of the states retain the doctrine in some form.[27] The court saw the retention of the rule in those jurisdictions as a reflection of the underlying rationale for the presumed damages rule, which is "the belief that damage to reputation logically flows from defamation."[28]

The court perceived two primary criticisms of the rule. The first is "that the emphasis of modern tort law is injury and that where there is no injury, tort law should not provide a remedy," and the second, "that there is no uniform way for a jury to value presumed damages."[29]

The court disagreed with the first criticism. Aside from compensation, the court viewed deterrence as an important part of tort law and vindication of reputation as an important interest advanced by defamation law. A trial, the court thought, establishes the falsity of the defamatory statement even if only nominal damages are awarded.[30] The court cited Justice O'Hern's dissent in *Rocci v. Ecole Secondaire Macdonald-Cartier*[31] to emphasize its point that "out-of-pocket losses are not the only damages a private plaintiff in a defamation act suffers."[32] Those "damages include the

25. 43 A.3d 1148 (N.J. 2012).

26. *Id.* at 1151.

27. *Id.* at 1154–55, 1159.

28. *Id.* at 1158.

29. *Id.* at 1158–59 (citing Anderson, *supra* note 4, at 747–50).

30. *W.J.A.*, 43 A.3d at 1159. The court saw presumed damages operating "as a procedural device which relieves a plaintiff from proving specific damages," rather than a conclusion that no damages occurred. *Id.*

31. 755 A.2d 583 (N.J. 2000).

32. *W.J.A.*, 43 A.3d at 1159 (citing Rocci v. Ecole Secondaire Macdonald-Cartier, 755 A.2d 583, 591 (N.J. 2000) (O'Hern, J., dissenting) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974))).

loss of one's good name inflicted by the defamatory publication to third parties, and the anguish and humiliation that flows from a communication that, history and experience teach, will diminish one's good name."[33]

The New Jersey Supreme Court concluded that the presumed damages rule has continuing validity:

> In today's world, one's good name can too easily be harmed through publication of false and defaming statements on the Internet. Indeed, for a private person defamed through the modern means of the Internet, proof of compensatory damages respecting loss of reputation can be difficult if not well-nigh insurmountable. We question why New Jersey's longstanding common law tradition of presumed damages—for defamation claims by private citizens on matters that do not involve public concern—should be altered now to force an average citizen to ferret out proof of loss of reputation from any of the world-wide potential viewers of the defamatory Internet transmission about that otherwise private person. We are not persuaded that the common law of this state need change to require such victims to demonstrate compensatory losses in order to proceed with a cause of action.[34]

Given the importance of presumed damages in vindicating "the dignitary and peace-of-mind interest in one's reputation that may be impaired through the misuse of the Internet," the court concluded that presumed damages for injury to reputation "serves a legitimate interest, one that ought not be jettisoned from our common law."[35]

The court retained the rule of presumed damages, but also concluded that the second criticism, the lack of guidelines for jury evaluation of presumed damages, was a fair criticism of the rule. This criticism did not require rejection of the presumed damages rule, but did justify limiting the presumed damages rule to nominal damages at trial, a result that avoids the problem of unprincipled damages awards. The court held that a plaintiff seeking to recover compensatory damages for reputational loss has "to prove actual

33. *Id.*
34. *Id.* at 1159–60.
35. *Id.* at 1160.

harm, pecuniary or otherwise, to his reputation through the production of evidence."[36]

C. Bierman v. Weier

In *Bierman v. Weier*, the Iowa Supreme Court held that its settled rule of libel per se remained, as a matter of policy, "a useful rule in an area where it is often difficult . . . to prove actual damages," particularly in cases involving a private plaintiff and non-media defendant where no issue of public concern is involved.[37] The court cited the Supreme Court's decision in *Dun & Bradstreet* in support:

> The 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. . . . As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications.[38]

The Iowa Supreme Court perceived the difficulties in proving injury to reputation as due in part to the "subtle differences in the conduct of the recipients toward the plaintiff" and in part "because the recipients, the only witnesses able to establish the necessary causal connection, may be reluctant to testify that the publication affected their relationships with the plaintiff."[39] The court saw the proof problems as necessitating certain presumptions to ensure that the plaintiff receives adequate compensation, one of which is presumed damages.[40]

36. *Id.*

37. Bierman v. Weier, 826 N.W.2d 436, 454–55 (Iowa 2013).

38. *Id.* at 454 (alteration in original) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760–61 (1985)).

39. *Id.* (quoting Note, *Developments in the Law: Defamation*, 69 HARV. L. REV. 875, 891–92 (1956)).

40. *Id.* The court's authority for that proposition is an extensive 1956 law review note on defamation that further qualifies the presumed damages concept:

> The present distinction between libel and slander, and that between actions per se and per quod, do not, however, provide a sound basis for applying presumptions of harm. The application of such presumptions should depend upon the potentiality of harm to the particular plaintiff from the publication in question rather than upon the form in which

The defendants in the case argued that the Internet has made libel per se obsolete because of the ability of targets of defamation to quickly respond to defamatory statements at a minimal cost.[41] But the court was not persuaded "that the Internet's ability to restore reputations matches its ability to destroy them,"[42] noting the concerns voiced by the New Jersey Supreme Court in *W.J.A. v. D.A.* over the ease of Internet defamation and the virtual impossibility of proving actual damages in those cases.[43] The Iowa Supreme Court thought that the Internet, rather than a means of ready vindication of reputation, actually facilitates the publication of defamatory publications, and that "[p]resumed damages vindicate the dignitary and peace-of-mind interest in one's reputation that may be

> the idea is communicated or upon the classification of certain ideas as inherently more harmful than others. Thus where there was no pre-existing relationship between the recipients and the plaintiff which might be affected by an injury to the plaintiff's reputation, nor any likelihood of such a future relationship, it is doubtful that any harm will result from the injury to reputation and none should be presumed. For example, if the only recipient was the defendant's stenographer who had no likelihood of contact with the plaintiff, there should be no recovery unless the defamation was intentional. When, however, the plaintiff can show an existing or prospective relationship with recipients in whose eyes he has been injured, resulting harm is likely and should be presumed.
>
> It may at times be appropriate to presume the necessary relationships as well as to presume that resulting harm has occurred. Where an idea which would injure the plaintiff's reputation in the eyes of most of the community is widely disseminated in the area in which the plaintiff is known, it may be impossible for him to produce evidence of specific relationships which he claims have been injured. In this case, the existence of such relationships should itself be presumed, since it is likely that there will be publications to many of those who have or will have contacts with the plaintiff. But where the idea, although widely communicated, would injure the plaintiff in the eyes of only a few recipients, the plaintiff should be required to prove that the necessary relationships existed between those recipients and himself. The presumption that harm has resulted to the plaintiff from the injury to his reputation should be rebuttable, but only when the harm is attributable to specific relationships. If the publication of a generally defamatory idea has been widespread it would be impossible to prove that there has been no resulting harm.

Note, *supra* note 39, at 892 (citations omitted).

41. *Bierman*, 826 N.W.2d at 454.

42. *Id.* (quoting W.J.A. v. D.A., 43 A.3d 1148, 1159–60 (N.J. 2012)).

43. *Id.* (quoting *W.J.A.*, 43 A.3d at 1159–60).

impaired through the misuse of the Internet."[44] The court held that the presumption of damages in a defamation action arising in the Internet context should not be excised from Iowa common law,[45] but deviated from *W.J.A.* in allowing the presumed damages rule to operate in full, rather than confining it to nominal damages.[46]

Courts do not disagree about the importance of protecting reputational interests, but they do disagree about the degree to which countervailing interests should limit the right to recover for injury to reputation. Rejection of the presumed damages rule carries with it certain costs, as the New Mexico Supreme Court noted in *Durden*, but it is impossible to measure those costs, aside from pointing to the obvious results in cases where plaintiffs are unable to establish actual injury to reputation, including in *Durden* itself.

Other factors, including concern over the lack of guidelines for juries in assessing damages under the presumed damages rule, and, arguably, the resultant lack of uniformity in jury awards and judicial review of those awards, may be easier to evaluate. The next section surveys pattern presumed damages jury instructions to determine the degree of guidance they provide.

III. PRESUMED DAMAGES JURY INSTRUCTIONS

Presumed damages jury instructions explain the rule in various ways. The most common approach is to state the basic rule without amplification. The instruction may state that "the law presumes damage to the plaintiff's reputation, without special proof, and you may award the plaintiff such sum of compensatory damages as would in your discretion reasonably compensate the plaintiff for damage to the plaintiff's reputation,"[47] or that "damages are

44. *Id.* On the ease of transmitting harmful information and the difficulty in rebutting it, see Cass R. Sunstein, *Believing False Rumors*, *in* THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION 91–106 (Saul Levmore & Martha C. Nussbaum eds., 2010).

45. *Bierman*, 826 N.W.2d at 454.

46. *See id.* at 454 n.7.

47. 1 ALABAMA PATTERN JURY INSTRUCTIONS: CIVIL § 23.18 (3d ed. 2013), *available at* Westlaw APJI (Compensatory Damages: Presumed (Slander Per Se)). The use note states that the instruction should be given only when the district court has determined "as a matter of law, (1) that the plaintiff is a private figure for purposes of the statement that is complained of, (2) that the publication that is complained of was a matter of purely private concern, and (3) that the statement

presumed and" the plaintiff "is not required to prove any damages,"[48] but the instructions are clear in leaving damages to a jury's discretion without requiring proof of actual damages.

Other jury instructions are broader in including damages for mental suffering in the presumed damages charge. The California Judicial Council jury instruction covers harm to reputation in addition to mental suffering. Titled "Assumed Damages," it states that even if the plaintiff "has not proved any actual damages for harm to reputation or shame, mortification or hurt feelings, the law assumes that [the plaintiff] has suffered this harm," and that the plaintiff "is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable," "[w]ithout presenting evidence of damage."[49]

complained of is slanderous per se." Section 23.17 is to the same effect. *Id.* § 23.17 (Compensatory Damages: Presumed (Libel Per Se)). The use note explains, probably unnecessarily, the legal reasons for the presumed damages rule:

> Because the plaintiff is a private figure for purposes of this libel action, and the publication that is complained of was a matter of purely private concern, you may award presumed damages to the plaintiff if you are reasonably satisfied from the evidence that the defendant negligently or intentionally published false and defamatory matter concerning the plaintiff.

Id.

48. REVISED ARIZONA JURY INSTRUCTIONS (CIVIL), Defamation 8 (5th ed. 2013), *available at* http://www.azbar.org/media/700258/defamation_2013.pdf. Idaho's pattern instruction provides that "[t]he plaintiff is deemed to have been injured by the defamation in this case, and the plaintiff need not prove actual injury in order to recover damages." IDAHO CIVIL JURY INSTRUCTIONS § 4.84 (2003), *available at* http://www.isc.idaho.gov/problem-solving/civil-jury-instructions (Libel or Slander Per Se—Presumed Damages). Similarly, Maryland's pattern instruction provides that "[w]hen a person is the subject of a defamatory statement that was made with actual malice there is a presumption that the statement causes that person harm, and relief may be awarded even in the absence of any evidence of actual damages." MARYLAND CIVIL PATTERN JURY INSTRUCTIONS 12:7 (2013 ed.), *available at* Westlaw MPJI.

49. JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTION 1704 (2013), *available at* Westlaw CACI. The last bracketed paragraph of the instructions states that "[y]ou may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar." *Id.* California's bar association jury instructions on presumed general damages provides that:

> Presumed damages are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include, but are not limited to, reasonable compensation for loss of personal [or professional] reputation, shame, mortification, and hurt

Virginia's instruction is to the same effect in stating that the words the defendant published "were defamatory as a matter of law, that is, they were defamatory from their very nature without further proof thereof," and that if the jury should find "from the evidence and the other instructions of the court" in favor of the plaintiff, "then damages for injury to the plaintiff's reputation, and for humiliation and embarrassment are presumed without further proof thereof."[50]

Sometimes the jury instructions include a causation requirement. Ohio's pattern instruction states that on a finding in favor of the plaintiff, the jury "may award the plaintiff an amount of money that you decide is reasonable and fair for the plaintiff's (injury) (injuries) directly caused by (*describe defamatory statement*)."[51] New York's pattern instruction tells the jury that it may award an amount that, in the jury's exercise of its "good judgment and common sense," it decides "is fair and just compensation for the injury to plaintiff's reputation and the humiliation and mental anguish in (his, her) public and private life which you decide was caused by defendant's statement."[52]

The jury instructions may provide guidelines for a jury to consider in awarding presumed damages. The New York pattern instruction states that in determining the amount of damages, the jury "should consider the plaintiff's standing in the community, the nature of defendant's statement made about the plaintiff, the extent to which the statement was circulated, the tendency of the statement to injure a person such as the plaintiff, and all of the other facts and circumstances in the case."[53]

There are a few points to be made about the jury instructions. The obvious one is that instructions on presumed damages cannot

> feelings. No definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable.

CALIFORNIA CIVIL JURY INSTRUCTIONS § 7.10.1 (2013), *available at* Westlaw BAJI.

50. RONALD J. BACIGAL & JOSEPH S. TATE, VIRGINIA PRACTICE JURY INSTRUCTIONS § 48:13 (2013–2014 ed.).

51. 1 OHIO JURY INSTRUCTIONS § 431.07(1)(A) (2014).

52. NEW YORK PATTERN JURY INSTRUCTIONS, Civil 3:29 (2013).

53. *Id.*

be framed in terms of actual damages, and they should not include a requirement of a causal connection between the defamatory statement or statements and the plaintiff's injuries. If injury to reputation and emotional harm is presumed, causation also has to be presumed. It also seems obvious that cluttering a jury instruction with unnecessary explanations of the law should be avoided in the interests of streamlining the instructions and making them more comprehensible to a jury.

Instructing a jury on factors it may consider may be a reasonable way of providing context for a jury's consideration of presumed damages. Providing general guidelines to assist a jury in assessing damages may also respond to the criticism that lack of guidelines creates the likelihood that a jury will take advantage of the occasion to punish a defendant, rather than award damages for presumed injury to reputation or emotional suffering. Ultimately, however, jury instructions that are faithful to the presumed damages rule can do no more than explain to the jury that damages may be awarded without proof of actual damages and provide general guidelines in confining the jury's inquiry to the damages that would be presumed to arise from the specific defamatory statement or statements in issue in the case.

IV. PRESUMED DAMAGES IN MINNESOTA

The first part of this section provides a brief background of Minnesota's view of presumed damages. The second part reviews defamation cases from the past twenty years to develop a broader picture of how defamation claims fare in Minnesota. The third part surveys Minnesota defamation cases involving claims that damages were excessive.

A. Minnesota Defamation Law—the Basics

Minnesota courts have consistently held that damages are presumed in libel cases and slander cases where the defamatory communication is slanderous per se or where the plaintiff proves special damages.[54] The courts also repeatedly use the term

54. Becker v. Alloy Hardfacing & Eng'g Co., 401 N.W.2d 655, 661 (Minn. 1987) (rejecting the argument that the court "should abolish the rule that where defendant commits libel per se, general and punitive damages are recoverable without proof of actual damages"); Advanced Training Sys., Inc. v. Caswell Equip. Co., 352 N.W.2d 1, 9 (Minn. 1984) ("Courts at common law presumed damages

"defamatory per se" to refer to cases where damages are presumed if they fall within one of the categories of slander per se, irrespective of whether the statement is slander or libel.[55] That may actually obscure the impact of the presumed damages rule by making it appear that presumed damages may be awarded only if the defamatory communication falls within one of the slander per se categories, irrespective of whether the claim is for libel or slander. The Minnesota Supreme Court could take that position, although it has not clearly done so. That leaves all libels subject to the presumed damages rule, along with slander that falls within one of the per se categories.

The right to recover presumed damages is also subject to the First Amendment limitations established by the U.S. Supreme Court in *New York Times Co. v. Sullivan*,[56] *Curtis Publishing Co. v. Butts*,[57] and *Gertz v. Robert Welch, Inc.*,[58] which preclude presumed damages in cases involving public officials, figures, and issues, unless the plaintiff is able to prove "actual malice."[59] If private plaintiffs involved in public issues are unable to prove actual

from any libel."); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 259 (Minn. 1980) (stating that general damages are presumed in cases involving slander per se where the defamation is of one's business reputation); West v. Hanrahan, 28 Minn. 385, 385–86, 10 N.W. 415, 415 (1881) (slander per se). In the *Advanced Training* case the court stated that:

> Perhaps the clearest statement of Minnesota's common law position is the statement of Justice Mitchell in Byram v. Aikin, 65 Minn. 87, 67 N.W. 807 (1896):
>
> > Written publications calculated to expose one to public contempt or ridicule, and thus induce an ill opinion of him, and impair him in the good opinion and respect of others, are libelous although they involve no imputation of crime, and are actionable without any allegation of special damages.

352 N.W.2d at 9.

55. For a more detailed examination of the "defamation per se" problem and how it arose, see Mike Steenson, *Defamation Per Se: Defamation by Mistake?*, 27 WM. MITCHELL L. REV. 779, 791–96 (2000).

56. 376 U.S. 254, 284 (1964).

57. 388 U.S. 130, 154–55 (1967).

58. 418 U.S. 323, 349–50 (1974).

59. "Actual malice" in this context means publishing with knowledge of the falsity or in reckless disregard of the truth. *Sullivan*, 376 U.S. at 279–80. In *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), the Court stated that the recklessness standard requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

malice, they are required to prove fault and actual damages,[60] but if no public issue is involved, states are free to apply the presumed damages rule.[61]

In *Richie v. Paramount Pictures Corp.*, the Minnesota Supreme Court imposed a requirement that *Gertz* did not in requiring actual injury to reputation as a predicate to recovery of damages for emotional harm in a case involving private defamation plaintiffs involved in a matter of public concern who brought suit against a media defendant.[62] *Richie* did not deal directly with the presumed damages rule in Minnesota, but it is an important case for the outer boundaries it imposed on defamation claims and because its analysis of the importance of vindicating reputational interests in defamation law would be a key in any argument that the presumed damages rule should be modified or eliminated in Minnesota.

The case arose in the context of a discussion of sexual abuse on a nationally syndicated television program.[63] During the program a photograph of the plaintiffs along with Denise Richie in a graduation gown was shown.[64] Denise Richie discussed sexual abuse by her father during the program, but the adults in the picture were not Denise Richie's parents.[65] Rather, the picture was of Denise Richie standing with James Richie and Karen Gerten, who were her godparents.[66] James Richie and Gerten brought suit against various defendants, alleging defamation and false light invasion of privacy.[67]

Gerten and Richie were not aware that their picture was on the show until a later time.[68] When they viewed the tape they were

60. *See Gertz*, 418 U.S. at 350.

61. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760–61 (1985).

62. Richie v. Paramount Pictures Corp., 544 N.W.2d 21, 26 (Minn. 1996).

63. *Id.* at 23.

64. *Id.* at 24.

65. *Id.*

66. *Id.*

67. *Id.* The Minnesota Supreme Court adopted three branches of the tort of invasion of privacy (intrusion upon seclusion, appropriation, and publication of private facts) in *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998). The court declined to recognize the tort of false light publicity. *Id.* Justice Tomljanovich, the author of the opinion in *Richie*, dissented. *Id.* at 236 (Tomljanovich, J., dissenting).

68. *Richie*, 544 N.W.2d at 24.

distressed,[69] but they both "testified that they will never know whether people saw the broadcast or think ill of them because of it."[70] The district court concluded that neither plaintiff lost income or incurred any special damage as a result of the broadcast and that the plaintiffs were unable as a matter of law to establish injury to their reputations.[71]

The district court granted summary judgment for the defendants on both claims.[72] The court of appeals reversed, based in part on its conclusion that the district court erred in concluding that the plaintiffs were unable to establish injury to their reputations as a matter of law.[73] The court of appeals recognized

69. *Id.* The supreme court's opinion highlighted the plaintiffs' claims for emotional distress:

> Richie stated that he was "shocked," "humiliated," "blown away," and felt "just crushed" and "very sick" about the broadcast. Richie also testified that:
>
> > I don't take this lightly. I put up with sexual abuse when I was a child in my home. My father sexually abused my sister . . . . The whole thing was so distasteful for me, you know, and—I don't want to go back and live my childhood over again for anything. When I left the house and I started doing my own life and being a different person, then, you know, that was a great thing to me. And now how many years later, all of a sudden now Denny commits these crimes and through someone's careless mistake or some bunch of people's careless mistake, you know, all of a sudden now I'm thrust back into a situation, you know. That has caused me a great deal of emotional pain since I was a child . . . it . . . affect[s] me a lot and I . . . think about it every day.
>
> Gerten also testified concerning how the broadcast affected her:
>
> > [I was] embarrassed by having that shown, that I was the mother of someone who was sexually molested by her dad and that I thought it was okay. When I thought about it, I would get sick to my stomach and—emotionally, it was very upsetting . . . .
> >
> > [W]hen people would look at you, you would wonder if they saw the show, you know, are they staring at me because they saw the show . . . . It was always on my mind. It was upsetting and embarrassing. You're already ashamed that it's even been involved in your family and then you're portrayed as the one who condoned it. I guess I have to say that emotionally I was really, I guess you would say, a basket case.

Id. (alteration in original).

70. *Id.*

71. *Id.*

72. *Id.*

73. Richie v. Paramount Pictures Corp., 532 N.W.2d 235, 239–40 (Minn. Ct.

that *Gertz* required proof of actual damages, but concluded that *Gertz* did not require proof of actual injury to reputation as a prerequisite to recovery in a defamation case.[74]

While recognizing that damages are presumed in cases involving accusations of incest, the court of appeals also concluded that under the circumstances, "[a]t least 'some' actual injury to their reputations can be assumed from the seriousness of this false statement seen on national TV, at least enough to survive a motion for summary judgment."[75] "Common sense," the court observed, "tells us that of the hundreds of thousands of possible viewers not all, as a matter of law, thought absolutely nothing ill of appellants, if only to a small degree."[76] The court realized that a jury could conclude that the reputations of the appellants were not damaged, and that the specific evidence of injury they offered in opposing the summary judgment motion was not overwhelming, but that it was sufficient to avoid summary judgment.[77]

The supreme court reversed, holding that:

> absent allegations of actual malice, in order to survive a summary judgment motion in a defamation action concerning statements made by the media and involving a matter of public concern, there must be a genuine issue of material fact as to whether Gerten and Richie suffered actual harm; damages cannot be presumed.[78]

Permitting recovery for presumed damages in those cases would violate the First Amendment. While the Supreme Court of the United States has permitted recovery of actual damages for emotional harm, even absent actual injury to reputation,[79] the Minnesota Supreme Court held that Minnesota law would not permit recovery for those damages absent proof of actual injury to reputation.[80] That part of the Minnesota Supreme Court's holding is not grounded in the First Amendment.[81] The court acknowledged that the Supreme Court's holding in *Gertz* did not

App. 1995), *rev'd*, 544 N.W.2d 21.

74. *Id.* at 239.
75. *Id.* at 240.
76. *Id.*
77. *Id.*
78. Richie v. Paramount Pictures Corp., 544 N.W.2d 21, 26 (Minn. 1996).
79. *Id.* at 27 (citing Time, Inc. v. Firestone, 424 U.S. 448, 460 (1976)).
80. *Id.* at 28.
81. *See id.* at 27–28.

mandate a rule requiring proof of actual injury to reputation as a predicate to the recovery of damages for emotional harm.[82] The court took that position as a matter of Minnesota common law.[83] The court's holding is confined to cases involving private figures involved in public issues who bring defamation suits against media defendants.[84]

Nonetheless, the rule could readily be used as a foundation for an argument that actual injury to reputation should be a requirement in all defamation cases, particularly if the basic premise of the holding is deemed to be dispositive. The Minnesota Supreme Court concluded in *Richie* that reputation is the principal interest protected by defamation law, with the interest in vindicating mental distress the function of a not-then adopted law of invasion of privacy. The fact that the supreme court adopted three branches of the tort of invasion of privacy in 1998[85] is obviously irrelevant to the court's conclusion that the purpose of defamation law is to vindicate reputational interests, but from *Hubbard Broadcasting v. United Press International*[86] in 1983 on, the supreme court's decisions illustrate a continuing skepticism of stand-alone emotional distress claims.[87] *Richie*, in emphasizing that protection of reputation is the principal purpose of defamation law, coupled with the supreme court's skepticism over damages claims for emotional distress, could be the basis for an argument that actual damages should be a requirement in all defamation cases.

On the other hand, in *State Farm Mutual Automobile Insurance Co. v. Village of Isle*, the supreme court concluded that damages for emotional harm are not compensable absent proof of physical injury "unless there has been some conduct on the part of defendant constituting a direct invasion of the plaintiff's rights

82. *Id.* at 27.

83. *See id.* at 27–28.

84. *Id.* at 26. The Minnesota Supreme Court has not confronted the issue of whether the media/nonmedia defendant distinction noted in *Richie* will be maintained. Some courts maintain that distinction. *See* Bierman v. Weier, 826 N.W.2d 436, 448 (Iowa 2013) (noting that the United States Supreme Court does not mandate the distinction, but that it is "a well-established component of Iowa's defamation law").

85. Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998).

86. 330 N.W.2d 428 (Minn. 1983).

87. *See, e.g.*, Langeslag v. KYMN Inc., 664 N.W.2d 860, 864 (Minn. 2003); K.A.C. v. Benson, 527 N.W.2d 553, 559 (Minn. 1995); *Hubbard*, 330 N.W.2d at 439.

such as that constituting *slander, libel*, malicious prosecution, seduction, or other like willful, wanton, or malicious misconduct."[88] That means that the plaintiff will not have to meet the more rigid requirements of a negligent infliction of emotional distress claim if the plaintiff establishes the underlying defamation claim.[89]

The court in *Richie* distinguished *State Farm* and the cases that have followed it because "[n]one of the cases in any way stated that emotional harm alone, unaccompanied by harm to reputation, could sustain a defamation claim."[90] But neither did those cases hold that emotional harm could *not* be recovered absent injury to reputation. Other Minnesota cases, including *Thorson v. Albert Lea Publishing Co.*,[91] take the position that mental damage is an element of the general damages that are recoverable in libel actions.[92]

There is also a deep history in Minnesota supporting the presumed damages rule. The early Minnesota cases took the position that libels were actionable per se, that is, without proof of special damage.[93] The presumed damages rule was directly challenged in 1987 in *Becker v. Alloy Hardfacing & Engineering Co.*, but the supreme court was unconvinced that it "should overrule long-established precedent in favor of a new rule."[94] The presumed

88. State Farm Mut. Auto. Ins. Co. v. Vill. of Isle, 265 Minn. 360, 367–68, 122 N.W.2d 36, 41 (1963) (emphasis added).

89. In *Covey v. Detroit Lakes Printing Co.*, 490 N.W.2d 138, 144 (Minn. Ct. App. 1992), a case involving emotional distress and defamation claims, the court of appeals, citing *State Farm*, noted that the evidence of physical manifestations of distress suffered by the plaintiff were minimal. One of the plaintiffs "complained that she developed compulsive scratching and was reluctant to venture out into local areas after the article appeared in the paper." *Id.* at 144. The other plaintiffs did not testify to any physical manifestations of distress, but the court of appeals held that "[d]espite this minimal showing," the district court should have permitted the negligent infliction of emotional distress claim to proceed to the jury insofar as it was supported by the underlying defamation claim. *Id.* Because the defamation claim failed, however, the court of appeals held that it was harmless error. *Id.*

90. Richie v. Paramount Pictures Corp., 544 N.W.2d 21, 28 (Minn. 1996).

91. 190 Minn. 200, 204–05, 251 N.W. 177, 179 (1933).

92. *See also* Bradley v. Hubbard Broad., Inc., 471 N.W.2d 670, 677 (Minn. Ct. App. 1991).

93. *E.g.*, Byram v. Aikin, 65 Minn. 87, 87, 67 N.W. 807, 808 (1896); Holston v. Boyle, 46 Minn. 432, 433, 49 N.W. 203, 204 (1891); Newell v. How, 31 Minn. 235, 236, 17 N.W. 383, 383 (1883).

94. Becker v. Alloy Hardfacing & Eng'g Co., 401 N.W.2d 655, 661 (Minn. 1987).

damages rule remains the law for slander per se and libel cases in Minnesota, except for *Richie*'s modification.

The supreme court has consistently taken the position that vindication of reputation is the primary purpose of defamation,[95] but it is not the only interest. In *Yencho v. Kruly*, the Minnesota Supreme Court, commenting on the insidious nature of a slanderous statement concerning a married woman, realized the difficulty in determining the exact damages in such a case, but noted that "[t]he primary object in a case of this character is: (1) to obtain a verdict that will compensate the plaintiff for the injury done her, (2) to operate as an example or deterrent to others, and (3) to serve as a punishment to defendant."[96]

B. A Survey of Minnesota Defamation Cases

A survey of Minnesota defamation cases over the past twenty years reveals that many of the cases arise in the context of employment claims where there are no First Amendment considerations.[97] Most of the defamation claims fit within the

95. Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 491 (Minn. 1985) ("Throughout history, personal reputation has been cherished as important and highly worthy of protection."); Bauer v. Gannett Co. (Kare 11), 557 N.W.2d 608, 610 (Minn. Ct. App. 1997) ("[O]f great importance to a just and fair society is the right of individuals to protect and defend their reputations."), *overruled by* Weinberger v. Maplewood Review, 668 N.W.2d 667, 675 n.9 (Minn. 2003) (overruling statutory disclosure requirements).

96. Yencho v. Kruly, 158 Minn. 408, 410, 197 N.W. 752, 753 (1924). The RESTATEMENT (SECOND) OF TORTS, division 5, chapter 27, Special Note on Remedies for Defamation Other Than Damages (1977) is to the same effect:

> The tort law of libel and slander has been conceived as of serving three separate functions: (1) to compensate the plaintiff for the injury to his reputation, for his pecuniary losses and for his emotional distress, (2) to vindicate him and aid in restoring his reputation and (3) to punish the defendant and dissuade him and others from publishing defamatory statements.

97. *See, e.g.*, Bolton v. Dep't of Human Servs., 540 N.W.2d 523 (Minn. 1995) (a former government employee who was escorted out of his office after termination); Huonder v. Specialty Mfg. Co., No. A10-47, 2010 WL 2733454 (Minn. Ct. App. July 13, 2010) (an employer's decision to terminate a former employee based on the employee's alleged forging of a check); Groeneweg v. Interstate Enters., No. A04-1290, 2005 WL 894768 (Minn. Ct. App. Apr. 19, 2005) (activities that occurred at a former employee's termination meeting); Mercure v. W. Publ'g Corp., No. A03-823, 2003 WL 23024519 (Minn. Ct. App. Dec. 30, 2003) (a former employee's claim of defamation based on the employer's description of

"defamation per se" categories alleging either criminal misconduct or conduct that relates to the plaintiff's profession or trade.[98] And

her performance); Petrovic v. Ridgeview Country Club, No. C6-01-1474, 2002 WL 765490 (Minn. Ct. App. Apr. 24, 2002) (a former employee's claim that her employer made disparaging remarks about her after she ended her employment); Lundell v. Maranatha Baptist Care Ctr., Inc., No. C7-99-87, 1999 WL 540186 (Minn. Ct. App. July 27, 1999) (a former employee's claim that documents detailing the employee's poor performance were defamatory); Strandquist v. Medtronic, Inc., No. C4-97-995, 1997 WL 714742 (Minn. Ct. App. Nov. 18, 1997) (employer who told customers the reasons for an employee's termination); Jeambey v. Synod of Lakes & Prairies, Presbyterian Church, No. CX-95-902, 1995 WL 619814 (Minn. Ct. App. Oct. 24, 1995) (pastor fired after being involved in an affair sought to recover for internal communications and publication in church paper); Yoos v. State, No. CX-94-2574, 1995 WL 479560 (Minn. Ct. App. Aug. 15, 1995) (an employer who made comments to the press regarding an employee's termination); Willis v. Cnty. of Sherburne, Nos. C5-95-371, -363, 1995 WL 479640 (Minn. Ct. App. Aug. 15, 1995) (employer released a letter critical of a former employee to the local press), *aff'd and remanded*, 555 N.W.2d 277 (Minn. 1996); Bichsel v. State, No. C1-95-240, 1995 WL 434444 (Minn. Ct. App. July 25, 1995) (a former employee who claimed to be terminated due to her involvement in whistleblowing); Meyer v. Electro Static Finishing, Inc., No. C8-94-2637, 1995 WL 366093 (Minn. Ct. App. June 20, 1995) (a former employee who was terminated after appearing to be "on drugs" and failing to submit timely reports to the EPA); Olson v. Whittier Alliance, No. C7-94-1088, 1994 WL 637786 (Minn. Ct. App. Nov. 15, 1994) (a former employee claiming to be terminated based on age and gender); Kesller v. Willmar Cookie & Nut Co., No. C5-93-2309, 1994 WL 411667 (Minn. Ct. App. Aug. 9, 1994) (a former employee who was terminated after refusing to date a supervisor); Daig Corp. v. Reich, No. C1-94-258, 1994 WL 284966 (Minn. Ct. App. June 28, 1994) (a former employee who was terminated after an employer received complaints about the employee's performance); Olchefski v. St. Paul Pioneer Press, No. C9-93-417, 1993 WL 302116 (Minn. Ct. App. Aug. 10, 1993) (an employment dispute arising from an open letter published by an employee to other employees).

98. *See, e.g.,* McKee v. Laurion, 825 N.W.2d 725 (Minn. 2013) (physician plaintiff's defamation per se claim against a patient's son's potentially defamatory statements made online); State v. Crawley, 819 N.W.2d 94 (Minn. 2012) (finding defamation per se based on making knowingly false police reports); Bahr v. Boise Cascade Corp., 766 N.W.2d 910 (Minn. 2009) (defamation in the workplace between coworkers); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980) (false statements made by an employer during an employee recommendation); Diversified Water Diversion, Inc. v. Standard Water Control Sys., Inc., No. A07-1828, 2008 WL 4300258 (Minn. Ct. App. Sept. 23, 2008) (defamation during negotiations with a third party attempting to select a contractor); Prinzing v. Schwab, No. A05-398, 2006 WL 538926 (Minn. Ct. App. Mar. 7, 2006) (the posting of signs falsely accusing a state senator of being a thief); Schlieman v. Gannett Minn. Broad., Inc., 637 N.W.2d 297 (Minn. Ct. App. 2001) (a police officer alleging defamation by a television station based on a published

most defamation claims are disposed of on summary judgment, on various grounds, before the presumed damages issue becomes a factor.[99]

investigative report into a police shooting); Jerdee v. Guenther, No. CX-01-473, 2001 WL 1568837 (Minn. Ct. App. Dec. 11, 2001) (defamation in statements made to police officers); Fieno v. State, 567 N.W.2d 739 (Minn. Ct. App. 1997) (false statements on a written reprimand and performance evaluation following an employee's filing of complaints with the Minnesota Department of Human Rights); Benigni v. Cnty. of St. Louis, No. C0-94-2549, 1995 WL 146822 (Minn. Ct. App. Apr. 4, 1995) (a claim that the defendant accused the plaintiff of committing assault); Steele v. Tell, No. C2-94-981, 1994 WL 593924 (Minn. Ct. App. Nov. 1, 1994) (a report that plaintiff potentially committed criminal sexual conduct).

99. *See, e.g.*, *Bahr*, 766 N.W.2d at 910 (dismissed on motion for judgment as a matter of law due to a lack of evidence of actual malice); *Bolton*, 540 N.W.2d at 523 (dismissed on summary judgment as the act of walking a plaintiff to the door was not considered defamation); Schimming v. Equity Servs. of St. Paul, Inc., No. A11-1573, 2012 WL 1380395, at *4 (Minn. Ct. App. Apr. 23, 2012) (dismissed on summary judgment based on a qualified privilege); Desmonde v. Nystrom & Assocs., No. A09-0221, 2009 WL 2596059, at *1 (Minn. Ct. App. Aug. 25, 2009) (dismissed on summary judgment based on the qualified privilege of office manager); Lewis v. St. Cloud State Univ., 693 N.W.2d 466 (Minn. Ct. App. 2005) (dismissed on summary judgment as defendants who lacked editorial control of a student newspaper could not be liable for defamatory statements published in the newspaper); Iverson v. Shogren, No. A03-1299, 2004 WL 885769, at *4 (Minn. Ct. App. Apr. 27, 2004) (dismissed on summary judgment based on a qualified privilege in communications with a 911 operator); Davisson v. Engelke, No. C0-97-265, 1997 WL 585818, at *1 (Minn. Ct. App. Sept. 23, 1997) (dismissed on summary judgment because statements made to police were protected under a qualified privilege); *Jeambey*, 1995 WL 619814, at *1 (dismissed on summary judgment because a review of church policies involves excessive entanglement); *Bichsel*, 1995 WL 434444, at *8 (dismissed on summary judgment because there was no statement of actual facts to sustain the defamation claim); Freed v. First Am. Bank of Willmar, No. C6-94-2314, 1995 WL 146836, at *1 (Minn. Ct. App. Apr. 4, 1995) (dismissed on summary judgment because the defamation claim was based on truthful statements); Sundae v. Scot, 529 N.W.2d 362, 363 (Minn. Ct. App. 1995) (dismissed on summary judgment based on appellant's lack of standing to assert defamation claim that was part of bankruptcy estate); Heiling v. State, No. C0-94-493, 1994 WL 396331 (Minn. Ct. App. Aug. 2, 1994) (deferring to the district court's grant of summary judgment based on an absolute privilege); Bd. of Regents of the Univ. of Minn. v. Reid, 522 N.W.2d 344, 346 (Minn. Ct. App. 1994) (dismissed on summary judgment based on absolute immunity); Adams v. Hayne, Miller, & Farni, Inc., No. C5-94-165, 1994 WL 425189, at *1 (Minn. Ct. App. Aug. 16, 1994) (dismissed on summary judgment because the case was barred by the statute of limitations); Dillavou v. Schaffner, No. C7-94-362, 1994 WL 373324, at *3 (Minn. Ct. App. July 19, 1994) (dismissed on summary judgment because the plaintiff failed to present sufficient evidence to create a jury question regarding malice); Dorn v. Peterson, 512 N.W.2d 902, 907 (Minn. Ct. App. 1994)

C. *Excessive Damages Claims*

Presumed damages are difficult to quantify and difficult to constrain because by definition they do not have to be supported by proof of actual harm. All district courts have to do is instruct the jury that the plaintiff is entitled to recover damages for harm to reputation, but that "[n]o evidence of actual harm is required."[100] In cases involving the award of substantial damages that seem to be out of tune with the facts, a dilemma arises for courts in reviewing the damages awards. If the damages award does not have to be supported by proof of actual damages, courts have difficulty in limiting the awards.

Challenges to damages awards in defamation cases, as in other torts cases, may be based on a motion for a new trial or remittitur.[101] The Minnesota Rules of Civil Procedure provide that

(dismissed on summary judgment based on absolute privilege in quasi-judicial proceeding); Thompto v. Abbott-Nw. Hosp., No. C4-93-213, 1993 WL 328780 (Minn. Ct. App. Aug. 31, 1993) (dismissed on summary judgment due to plaintiff's failure to specifically plead the defamatory statements; defamatory statements by employees were not in the scope of their authority; and supervisor had a qualified privilege).

100. 4 MINN. DIST. JUDGES ASS'N, MINNESOTA PRACTICE: JURY INSTRUCTION GUIDES—CIVIL 50.50 (5th ed. 2006).

101. For example, in *Johnson v. Washington County*, 518 N.W.2d 594 (Minn. 1994), the supreme court sustained a wrongful death damages award of $1,007,857.84 against a school district that arose out of a drowning accident. The school district argued that the damages award was excessive and that it was entitled either to a new trial or remittitur. The supreme court noted the Minnesota Rule of Civil Procedure 59.01(e) standard, which permits a district court to grant a new trial if the damages award was influenced by "passion or prejudice," and that the district court's denial of the motion for a new trial would not be reversed absent a clear abuse of discretion. The same standard applies to a denial of a motion for remittitur. *Id.* at 601. The court has "stated that a verdict should be set aside if it 'shocks the conscience.'" *Id.* at 602 (citing Verhel v. Indep. Sch. Dist. No. 709, 359 N.W.2d 579, 591 (Minn. 1984)).

The court in *Johnson* reasoned that the district court properly denied the motions for a new trial and remittitur:

> The trial court compared the $1,007,857.84 verdict in this case with a list of wrongful death verdicts from throughout the country, including a Michigan case where a $1,145,000 verdict for the death of a thirteen-year-old boy was held to not be excessive. The trial court in this case concluded that the verdict of over $1,000,000 "does not shock the conscience of this Court" and therefore denied the motion of a new trial based on excessive damages. Similarly, the trial court denied the motion for remittitur. We note, as did the court of appeals, that the

"[a] new trial may be granted to all or any of the parties" because of "[e]xcessive or insufficient damages, appearing to have been given under the influence of passion or prejudice."[102] The test for determining the excessiveness of a damages award is whether it shocks the conscience[103] or is the result of passion and prejudice.[104] A district court's denial of a motion for a new trial on grounds of excessiveness will not be reversed unless there is an abuse of discretion.[105] Because the standards for awarding presumed damages in defamation cases are somewhat elusive, appellate courts have difficulty in evaluating claims that damages awards are excessive. The consequence is that the courts are generally liberal in evaluating the awards. There are several examples of how this plays out in Minnesota defamation cases.

In *Stuempges v. Parke, Davis & Co.*, the jury awarded the plaintiff $17,250 for actual pecuniary loss, $10,500 in compensatory damages, and $10,000 in punitive damages in a slander per se case that involved defamation of the plaintiff's business reputation.[106] In reviewing the award, the supreme court noted that the publication of the defamatory remarks was limited, but that "their devastating quality satisfies us that the jury award of compensatory damages was justified."[107]

In *Bauer v. State*, the plaintiff, a state employee, was awarded $120,000 by a jury on her defamation claim against her supervisor based upon various statements he made, including that she was

> jury received proper instructions, that a precise formula for calculating the loss suffered in this case does not exist, and that evidence demonstrated the close relationship Brandon had with his parents and sister. We hold that the trial court did not abuse its discretion by denying the motion for a new trial or remittitur because the damage award was excessive even though we would have affirmed had the trial court granted the motion for remittitur.

Id. at 602 (citations omitted).

102. MINN. R. CIV. P. 59.01(e).

103. *E.g.*, *Verhel*, 359 N.W.2d at 591; DeWitt v. Schuhbauer, 287 Minn. 279, 286, 177 N.W.2d 790, 795 (1970).

104. *E.g.*, Kinikin v. Heupel, 305 N.W.2d 589, 596 (Minn. 1981); *DeWitt*, 287 Minn. at 286, 177 N.W.2d at 795.

105. *E.g.*, Advanced Training Sys., Inc. v. Caswell Equip. Co., Inc., 352 N.W.2d 1, 11 (Minn. 1984); Stenzel v. Bach, 295 Minn. 257, 260, 203 N.W.2d 819, 822 (1973).

106. Stuempges v. Parke, 297 N.W.2d 252, 254 (Minn. 1980).

107. *Id.* at 259.

"seductive."[108] The supervisor argued that the damages award "was excessive, based on jury passion or bias, and unsupported by the record."[109] The court of appeals sustained the damages award, noting simply that "[w]hen a 'defendant commits libel per se, general and punitive damages are recoverable without proof of actual damages,'"[110] and that "[i]n defamation actions general damages are imposed for the purpose of compensating the plaintiff for the harm that the publication has caused to his reputation."[111]

The jury also awarded the plaintiff $40,000 for "[m]ental distress, embarrassment or physical disability," and $40,000 for "[e]conomic loss caused by the defamatory statement."[112] The court held that "[u]nlike her damages for loss of reputation, which do not require proof of actual damages, Bauer's damages for mental distress and economic loss must be supported by proof of actual damages," and that there was insufficient evidence at trial to prove that the defamatory statements caused Bauer any mental distress or economic loss.[113]

The court relied on the *Restatement (Second) of Torts* section 622 in concluding that the evidence was insufficient to justify the damages award for mental distress.[114] While a physician testified that the plaintiff suffered from depression and was unable to work, he was only able to testify that the symptoms were proximately caused by unfair treatment in the workplace, and aggravated by the legal maneuvering of the defendants, and not that the symptoms were caused by the defamatory statements.[115] Section 622 provides that "[o]ne who is liable for either a slander actionable per se or a libel is also liable for any special harm legally caused by the defamatory publication."[116] Section 623 provides that "[o]ne who is liable to another for a libel or slander is liable also for emotional distress and bodily harm that is proved to have been caused by the

108. Bauer v. State, Nos. C2-95-1090, C6-95-1335, 1996 WL 601647, at *1, *5 (Minn. Ct. App. Oct. 22, 1996).

109. *Id.* at *7.

110. *Id.* (citing Becker v. Alloy Hardfacing & Eng'g Co., 401 N.W.2d 655, 661 (Minn. 1987)).

111. *Bauer*, 1996 WL 601647, at *7.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. RESTATEMENT (SECOND) OF TORTS § 622 (1977).

defamatory publication."[117] It is an actual damages requirement. While the *Restatement* supports the court's conclusion on the emotional distress issue, it is inconsistent with other Minnesota decisions in which damages for emotional harm are presumed in defamation cases.

In *Prinzing v. Schwab*, the plaintiff, a state senator, was sued by a citizen claiming that the senator committed conversion in removing some letters from a mobile sign the citizen posted accusing the senator of theft.[118] The senator counterclaimed, alleging that the plaintiff defamed her by accusing her of theft through the placement of signs in her district in the weeks leading up to the election, which the senator lost.[119] The jury awarded her $150,000 in damages.[120] The court noted that damages are presumed in cases involving accusations of criminal wrongdoing,[121] but it proceeded to hold that the evidence justified the damages award, notwithstanding that presumption:

> Prinzing's signs were placed around Schwab's senate district during the weeks before the election. There was extensive publicity in both print and television media regarding Prinzing's signs. Schwab testified that she experienced severe stress, manifested by headaches and sleeplessness, from the signs and accompanying publicity. And the signs put stress on her children and marriage. Because of the signs, she was personally humiliated, and one of her children was taunted in school. Not only did Schwab lose her reelection bid, but she also has lost interest in seeking elected office because the experience was so difficult for her. The evidence establishes that Schwab accepted a job in St. Paul, in part, to work in a community that was unaware of Prinzing's actions. As a result, Schwab's time with her family has been reduced because she now lives in St. Paul during the week while her family remains in Albert Lea. On this record, the jury's damages award is not manifestly contrary to the

117. *Id.* § 623.

118. Prinzing v. Schwab, No. A05–398, 2006 WL 538926, at *1 (Minn. Ct. App. Mar. 7, 2006).

119. *Id.*

120. *Id.*

121. *Id.* at *5. Schwab was a public official, of course, but she established that the defamatory statements were made with actual malice. *Id.* at *3.

> evidence, nor is its amount indicative of partiality or prejudice.[122]

Prinzing argued that the damages award was inconsistent with precedent from other jurisdictions, suggesting that the award would be excessive, but the court concluded that the award was consistent with Minnesota precedent.[123]

In *Thorson v. Albert Lea Publishing Co.*, the supreme court noted that "[w]hat may be presumed may be proved" in a defamation case.[124] In many cases plaintiffs will introduce evidence of actual damages, and courts reviewing a jury's award of presumed damages will review that evidence in determining whether or not a damages award is excessive. That has led at least one commentator to suggest that courts are really applying actual damages rules to determine whether a presumed damages award will stand.[125] In the alternative, of course, a court reviewing a damages award cannot very well ignore the evidence of actual damages in deciding if an award is excessive.

LeDoux v. Northwest Publishing, Inc.,[126] is a good example. The jury in that case awarded the plaintiff, a city street maintenance supervisor, $676,000 in damages in his defamation suit against Northwest Publishing for newspaper articles questioning his job performance.[127] The court of appeals held that the jury award was supported by the evidence:

> The evidence . . . demonstrates that LeDoux: (1) felt "devastated" after reading the editorials published by appellants; (2) has difficulty sleeping, digestive problems, headaches, nausea, vomiting, and chest pains; (3) contemplated committing suicide and sought counseling because the "newspaper articles kept coming and coming"; (4) withdrew from his sons and became more moody; and (5) attempts to avoid being identified in public or at work, for fear of embarrassment. We conclude a reasonable jury could find that LeDoux was

122. *Id.* at *5.

123. *Id.* (citing LeDoux v. Nw. Publ'g, Inc., 521 N.W.2d 59, 69 (Minn. Ct. App. 1994)).

124. Thorson v. Albert Lea Publ'g Co., 190 Minn. 200, 204, 251 N.W. 177, 179 (1933).

125. T. Michael Mather, *Experience with* Gertz *'Actual Injury' in Defamation Cases*, 38 BAYLOR L. REV. 917, 955–56 (1986).

126. 521 N.W.2d 59.

127. *Id.* at 64.

> harmed and that the published statements were a direct cause of LeDoux's damages. Accordingly, the trial court did not err in refusing to disturb the jury's damage award.[128]

Because the news article implied improper conduct by LeDoux, the court held that a jury reasonably could conclude that the articles harmed LeDoux's reputation. Also, because the evidence indicated that after the publication of the news articles some individuals called LeDoux a thief and refused to speak with him, the court held that "a jury reasonably could conclude that the false statements in the news articles were defamatory."[129]

In *Frankson v. Design Space International*, a case arising out of the plaintiff's termination of employment with the defendant, the jury awarded the plaintiff $70,000 on his defamation claim.[130] The court of appeals sustained the award:

> Because the statements made by [Design Space International (DSI)] were defamatory per se as defamations of Frankson's business reputation, general damages are presumed. The appellate courts tend to leave the amount to be awarded to the jury's discretion. In this case, Frankson chose not to pursue sales employment elsewhere, but instead opened his own business. He testified that he knew he would not be hired by any company because DSI's stated reason for terminating him was his failure to increase business. It was for the jury to assess the weight and credibility of this testimony. Moreover, the jury received an instruction on Frankson's duty to mitigate damages, which would operate to lessen their award to Frankson because he in fact did not seek other employment. The jury nevertheless chose to believe Frankson's assessment of his earning prospects and awarded $70,000.[131]

DSI argued that smaller damages awards in other cases involving more extensive publication or evidence of more substantial pecuniary loss supported its argument of excessiveness.[132] In rejecting the argument, the court of appeals

128. *Id.* at 69.

129. *Id.* at 68.

130. Frankson v. Design Space Int'l, 380 N.W.2d 560, 563 (Minn. Ct. App. 1986), *aff'd in part and rev'd in part on other grounds*, 394 N.W.2d 140 (Minn. 1986).

131. *Id.* at 567–68 (citations omitted).

132. *Id.* at 568.

summed up the problem of reviewing damages awards for excessiveness, noting simply that "[a] wide range of damage awards is inevitable in varying fact situations considered by different juries."[133]

These cases illustrate the difficulties in reviewing damages awards in defamation cases. They also demonstrate that plaintiffs will typically try to prove actual harm, whether to reputation or emotional harm. The presumed damages rule is a sort of safety net, but it also seems to be the case that reviewing courts will seize upon the actual evidence in the case to justify sustaining damages awards that may otherwise appear to be nebulous.

V. SUMMARY

The justifications advanced for the presumed damages rule in defamation cases point to the overriding state interest in protecting reputation and the difficulty—if not impossibility—of proving actual injury to reputation. That interest and the interest in being free from the emotional harm caused by defamation are vindicated in the Minnesota cases, as a matter of law and as a matter of practice. Minnesota decisions recognize the primacy of the reputational interest in defamation law, but it is not the only interest vindicated by the tort. The presumed damages rule covers not only presumed harm to reputation, but also emotional suffering.

The Minnesota appellate courts have not directly addressed the inequity in permitting recovery for presumed damages for libel, and slander, where the defamatory statement falls in one of the slander per se categories. Perhaps this is because the inconsistency is obscured by the continuing use of the term "defamation per se," which injects the categories of words that are slanderous per se into libel law, in which damages are presumed even if the libelous words do not fit those categories. If the slander per se categories are imported into defamation law, however, the inequity in allowing presumed damages only for certain types of defamatory words is apparent, even while the justification for the distinction is explainable in terms of defamation history. Nonetheless, the Minnesota Supreme Court has not been receptive to attempts to

133. *Id.*

limit the presumed damages rule, rejecting a direct attack on the rule in *Becker v. Alloy Hardfacing & Engineering Co.*[134]

Richie v. Paramount Pictures Corp. does not directly address the presumed damages rule, but the supreme court's requirement of proof of actual harm to reputation as a predicate to recovery for actual damages for emotional harm at least suggests that there are nonconstitutional justifications for limiting recovery in defamation actions to actual damages.[135] *Richie* leaves the presumed damages rule intact, however.

The district courts do not have an easy time in instructing a jury on presumed damages.[136] Giving more detailed guidance in defining the scope of damages is problematic, of course, given that damages are *presumed* in the first place. If the instructions edge toward some sort of causal link between the defamatory statement and injury to the plaintiff's reputation, or constrain the jury's discretion by unduly emphasizing one aspect of the defamatory statement, including limited publication, they may run afoul of the presumed damages rule.

The defamation decisions in the supreme court and court of appeals could be used to support a claim that the presumed damages rule is difficult to limit. Appellate decisions in Minnesota illustrate that the courts are somewhat constrained from closely examining damages awards as against claims that they were excessive, and with good reason. Presumed damages are just that. Nonetheless, if courts consider as an outside boundary the kinds of damages that normally flow from the defamatory communications, they have at least one basic tool to limit excessive damages awards. The appellate reviews tend to focus on the evidence of actual injury to reputation or mental stress suffered by the plaintiff, which provides a more concrete basis for evaluating a damages award. In the end, however, courts reviewing the damages awards are limited in the depth of their review of damages awards.

On the other hand, plaintiffs do attempt to prove actual damages even where damages are presumed. As *Thorson* pointed out, what is presumed can be proved.[137] The evidence may be of the breadth of publication. That was evidence the court of appeals

134. 401 N.W.2d 655, 661 (Minn. 1987).
135. *See supra* notes 62–87 and accompanying text.
136. *See infra* Part V.
137. *See supra* note 124 and accompanying text.

thought sufficient in the *Richie* case.[138] It may be of actual mental distress sustained by the plaintiff. In some cases, the claim for mental suffering may outstrip any claim for injury to reputation.

Defamation cases are difficult to win in Minnesota, even in presumed damages cases. Most of the defamation claims that are asserted are dismissed on motions for summary judgment, for various reasons, whether because the plaintiff has not alleged a false statement of fact, or because the defendant has either a qualified or absolute immunity in making the allegedly defamatory statement.[139] Many of the defamation claims that are asserted are "defamation per se" claims that trigger the presumed damages rule, but plaintiffs also attempt to prove actual damages in the cases that go to trial. That proof could support recovery under an actual damages rule.

VI. *LONGBEHN V. SCHOENROCK*

The first in the *Longbehn* series of decisions arose out of claims against several defendants by a city police officer who was discharged from his position and allegedly defamed by statements made by the police chief, and in unrelated incidents, by two other individuals.[140] The case ultimately spanned eleven years, from the filing of the complaint to the fourth and final trial in the case.

Patrick Longbehn was discharged from his position as a Moose Lake police officer.[141] He brought suit against Moose Lake and the Moose Lake police chief alleging various employment related claims and separate defamation claims against Robin Schoenrock and Thomas Michael Cich.[142]

Three separate groups of claims were involved in the suit.[143] The first involved claims arising out of Longbehn's discharge from employment.[144] The second claim was for defamation against Cich,

138. *See supra* notes 73–77 and accompanying text.

139. *See supra* text accompanying note 99.

140. *See* Plaintiff's Complaint, Longbehn v. City of Moose Lake, No. C5-01-681, 2001 WL 36209854 (Minn. Dist. Ct. May 30, 2001). See Trial Order, Longbehn v. City of Moose Lake, No. C5-01-681, 2002 WL 34438284 (Minn. Dist. Ct. Feb. 6, 2002) for the district court's order.

141. Longbehn v. City of Moose Lake, No. A04-1214, 2005 WL 1153625, at *1 (Minn. Ct. App. May 17, 2005).

142. *Id.*

143. *Id.* at *2.

144. *Id.* at *1.

a retired Duluth Police Department police officer who allegedly made defamatory statements about Longbehn in a background check that was being conducted by the St. Paul Police Department.[145] The third was a claim for defamation, along with claims for the negligent and intentional infliction of emotional distress, against Schoenrock.[146] Those claims arose out of a phone conversation Robin Schoenrock had with Charles Wilson, a friend of Longbehn's, who was at a party also attended by Schoenrock's daughter.[147] There were several phone calls between Schoenrock and Wilson to secure arrangements for providing Schoenrock's daughter and another girl home from the party.[148] Wilson stated that during one of the calls, Schoenrock referred to Longbehn as "Pat the Pedophile."[149]

The claims against the City and police chief were dismissed on summary judgment by the district court.[150] The claims against Cich and Longbehn were consolidated for trial, but were dismissed with prejudice.[151] Longbehn appealed.[152]

The court of appeals affirmed the district court on all claims except for Longbehn's claims for defamation and negligent infliction of emotional distress against Schoenrock. The court of appeals reversed the district court's dismissal of the defamation claim, concluding that when Schoenrock referred to Longbehn as "Pat the Pedophile," it suggested "a propensity toward committing, if not the commission of, a sex crime," and that the statement was defamatory per se because it alleged sexual misconduct.[153] The negligent infliction of emotional distress claim survived because it rode in on the coattails of the defamation claim.[154]

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *See id.*
152. *Id.*
153. *Id.* at *11.
154. *Id.* at *12 (taking the position that it is unnecessary for a plaintiff seeking to recover for negligent infliction of emotional distress to prove physical harm arising out of the emotional distress where the plaintiff proceeds under a defamation theory). There are problems in concluding that negligent infliction of emotional distress may be asserted in cases where the plaintiff alleges a defamation claim. *See* Michael K. Steenson, *The Anatomy of Emotional Distress Claims in*

> At trial after remand, the jury found that:
>
> (1) respondent called appellant "Pat the Pedophile" but did not accuse appellant of actually being a pedophile; (2) respondent's defamatory publication was made under circumstances that made it negligent; (3) respondent's publication caused appellant emotional distress so severe that no reasonable person could be expected to endure it; and (4) clear and convincing evidence established that respondent acted in deliberate disregard for appellant's rights and safety.[155]

The jury awarded Longbehn:

- $230,000 for past and future harm to reputation, mental distress, humiliation, and embarrassment;
- $3000 for future health-care expenses;
- $90,000 for past and future wage loss; and
- $250,000 for punitive damages.[156]

The district court granted Schoenrock's motion for judgment as a matter of law (JMOL) and directed entry of judgment in Schoenrock's favor. The district court found that the statement was not defamatory per se, that there was no evidentiary basis for the jury's finding of a causal link between Schoenrock's statement and Longbehn's general or special damages, and that the evidence was insufficient to justify the punitive damages award and the award of general damages.[157]

On appeal to the court of appeals, the appellant's brief was devoted primarily to disputing the trial court's findings on the

Minnesota, 19 WM. MITCHELL L. REV. 1, 84–86 (1993). Emotional distress is a recoverable element of damage in defamation, which raises the issue of why a separate claim of negligent infliction of emotional distress is necessary in those cases. The real issue is whether the plaintiff, asserting the negligent infliction of emotional distress claim, should be entitled to recover if the defamation claim fails. If not, it is meaningless to permit the assertion of the negligent infliction of emotional distress claim as a defamation adjunct. If it is allowed when the defamation claim fails, the issue is why it should be subjected to a lesser standard than a free-standing claim for negligent infliction of emotional distress. In *Covey v. Detroit Lakes Printing Co.*, 490 N.W.2d 138, 144 (Minn. Ct. App. 1992), the court of appeals held that failure of the defamation claim precluded assertion of a claim for negligent infliction of emotional distress, absent proof of physical symptoms. *See supra* note 89 and accompanying text.

155. Longbehn v. Schoenrock, 727 N.W.2d 153, 158 (Minn. Ct. App. 2007).

156. *Id.*

157. *Id.*

JMOL issue, but the short statement of facts reveals the broad theory of the case against Schoenrock:

> This case was an action for defamation. The Appellant was a police officer with the City of Moose Lake. On January 1, 2001, Respondent Schoenrock published to a third person the name 'Pat the Pedophile' in describing Appellant. As a result of that name, Appellant lost his job, his relationship, and suffered severe emotional distress.[158]

The claim is that the nickname was published to a third person, and then, "[a]s *a result of that name*," the "Appellant lost his job, his relationship, and suffered emotional distress."[159] The link between Schoenrock's use of the nickname and Longbehn's damages is not argued in the statement of facts.

The trial court concluded that "[t]here was no evidence offered to establish that outside of his single telephone call with Mr. Wilson[,] Defendant, Mr. Wilson, or anyone associated with either Mr. Wilson or Defendant used that telephone call to promote the nickname of 'Pat the Pedophile' to anyone else."[160] The argument in the appellant's brief is that he did provide circumstantial evidence of Schoenrock's "coining of that name."[161] The brief argued that Longbehn's testimony in response to questioning by Schoenrock's attorney to the effect that one person, Schoenrock's stepdaughter, told Longbehn that Schoenrock had "coined and circulated the name."[162] Longbehn argued that the evidence was sufficient to establish the "coining" allegation.[163] Even if it was not sufficient, the brief argued, "why would anyone say such a thing about another person without knowing its truth or falsity, and knowing the serious consequences that attach to such a label[?]"[164] Later, in challenging the district court's conclusion that Longbehn's termination from employment and subsequent emotional problems arose after he left his job, the brief argues that

158. Appellant's Brief and Appendix at 3, *Longbehn*, 727 N.W.2d 153, 2006 WL 4091706; *see also Longbehn*, 727 N.W.2d at 157.

159. Appellant's Brief and Appendix, *supra* note 158, at 3 (emphasis added).

160. *Id.* at 10.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 10–11.

the main reason for his termination "was the name he had been saddled with by the Respondent."[165]

The court of appeals affirmed the district court in part and reversed in part (*Longbehn II*).[166] The court of appeals affirmed the district court's conclusions on the special damages issues, holding that the evidence was insufficient to justify that award.[167] The court of appeals concluded that the defendant used the offensive nickname on a single isolated occasion and that there was no evidence in the record to support the claim that the defendant either originated the name or participated in its dissemination so as to make him responsible for repetition by others, thereby rejecting Longbehn's "coining" argument.[168] The court of appeals noted that the plaintiff was commonly known in the Moose Lake community by the nickname, and that there was no evidence that linked the defendant's use of the nickname on one isolated occasion to the plaintiff's termination or to any loss of prospective employment.[169]

The court of appeals held that Schoenrock's reference to Longbehn was defamatory per se, however.[170] The district court held that the evidence was legally insufficient to establish a causal connection between the defamatory statement and the general damages awarded by the jury. The court of appeals, mindful that this was a defamation per se case where general damages are presumed and no proof of actual harm is required, held that the

165. *Id.* at 11. The general rule is that a person who makes a defamatory statement is subject to liability for subsequent repetitions of that statement. *See, e.g.*, Barnette v. Wilson, 706 So. 2d 1164, 1166 (Ala. 1997); Geraci v. Probst, 938 N.E.2d 917, 921 (N.Y. 2010). The RESTATEMENT (SECOND) OF TORTS § 576 (1977), provides that damages for special harm may be recovered under limited circumstances:

> The publication of a libel or slander is a legal cause of any special harm resulting from its repetition by a third person if, but only if,
>
> (a) the third person was privileged to repeat it, or
>
> (b) the repetition was authorized or intended by the original defamer, or
>
> (c) the repetition was reasonably to be expected.

166. Longbehn v. Schoenrock, 727 N.W.2d 153 (Minn. Ct. App. 2007).

167. *Id.* at 163.

168. *Id.* at 160–61.

169. *Id.*

170. *Id.* at 158.

trial court erred in requiring a causal connection between the statement and general damages.[171]

Troubled by the *amount* of the award, however, the court of appeals held that it was excessive. The court commented on the difficulty in establishing guidelines for evaluating presumed damages awards,[172] and then quoted from the Supreme Court's opinion in *Gertz v. Robert Welch, Inc.*:

> The common law of defamation is an oddity of tort law, for it allows recovery of . . . damages without evidence of actual loss. . . . Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms . . . . [T]he States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury.[173]

The court of appeals recognized that in *Richie v. Paramount Pictures Corp.*,[174] the Minnesota Supreme Court held that the First Amendment limitations in *Gertz* are inapplicable in cases where a private plaintiff sues a private defendant on an issue that is not of public concern but, notwithstanding that holding, the court stated that "we find *Gertz*'s proposition that states have no interest in securing gratuitous awards far exceeding actual injury to be persuasive."[175] The court's statement appears to question the validity of the presumed damages rule, but the court went no further in its consideration of the rule. The court's conclusion, given the record in the case, was that the "$233,000 in general damages far exceeds the amount of past and future harm to appellant's reputation, mental distress, humiliation, and embarrassment that would normally flow from a publication of this kind."[176]

171. *Id.* at 161.

172. *Id.*

173. *Id.* at 162–63 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974)).

174. 544 N.W.2d 21, 28 (Minn. 1996).

175. *Longbehn*, 727 N.W.2d at 163.

176. *Id.*

The district court's instructions on presumed damages and the court of appeals' criticism of the instructions highlight the problems involved in conveying the presumed damages concept to a jury without requiring either a causal connection between the defamatory statement or proof of actual damages. Appellate courts face the same problem in reviewing those awards, as *Longbehn II* illustrated.

A remand for a retrial on the general damages issue, with a nod to *Gertz* as a potential limitation on damages,[177] did not provide the district court with guidelines for the retrial, other than suggesting that the damages awarded by the jury exceeded what would normally be expected from the defamatory communication by Schoenrock. The court of appeals did provide an apparent clue, however, when it stated that the record showed that Schoenrock "used the offensive nickname on one isolated occasion," that there was no evidence that Schoenrock was responsible for initiating the use of the name, and that Longbehn was commonly known in the Moose Lake community by the derogatory nickname.[178]

The district court, trying to limit presumed damages, and, not surprisingly, picking up on the court of appeals comments on the record, gave instructions tinged with actual damages requirements and special verdict questions that directed the jury to consider the damages caused by the statement "on the one isolated occasion."[179]

At trial after remand, the district court gave the following jury instructions on the defamation per se and damages issues:

> *Defamation*
>
> The use of the term "Pat the pedophile," is defamation per se. A person is liable for the general harm *which results from* the defamatory statement. Your duty as a jury is to determine the amount of damages, if any, that the Plaintiff sustained by the Defendant's use of that nickname.
>
> In making your decision the Court has determined as a matter of law that:
>
> 1. The Defendant used the offensive nickname on one isolated occasion.

177. The court of appeals had no authority to overrule *Richie*, of course.
178. *Longbehn*, 727 N.W.2d at 160.
179. *Id.*

2. At the time he did so the Plaintiff was commonly known in the Moose Lake community by this derogatory nickname.
3. The Defendant's use of the nickname was not a substantial factor in bringing about the Plaintiff's termination by the Moose Lake Police Department.
4. The Defendant's use of the nickname did not cause the Plaintiff any loss of perspective [sic] employment and cannot be viewed as the legal cause of any difficulty the Plaintiff may encounter in trying to obtain future employment.

Presumed Damages

Deciding harm for defamation

The only question for you to decide is the amount of money the Plaintiff is entitled to receive for:

1. Harm to his reputation and standing in the community
2. Mental distress
3. Humiliation
4. Embarrassment

No evidence of actual harm is required.

In your assessment of general damages you may consider: (1) the character of the Plaintiff; (2) the Plaintiff's general standing and reputation in the community; (3) the character of the defamatory publication; (4) the extent of dissemination by the Defendant; and (5) the extent and duration of the circulation of the Defendant's publication.

Damages—Burden of Proof

Definition of "burden of proof"

A party asking for damages must prove the nature, extent, duration, and consequences of his harm. You must not decide damages based on speculation or guess.[180]

180. Jury Instructions at 6, Longbehn v. Schoenrock, No. 09-C5-01-681, 2009 WL 2912575 (Minn. Dist. Ct. May 27, 2009) (emphasis added). An additional issue not raised by the court of appeals concerns the burden of proof instruction, which also seems to be inconsistent with a presumed damages rule that in fact invites speculation on the part of a jury that is permitted to award damages without proof of those damages.

The district court instructed the jury that the term "Pat the Pedophile" was defamation per se followed by specific instructions built on the court of appeals' observations that were intended to temper the jury's discretion with respect to damages. The court told the jury that the defamatory term was used on only one isolated occasion; that the plaintiff was known by the name in the community; that the defendant's use of the name was not a factor in his termination by the police department; and that the defendant's use of the term did not cause the plaintiff any loss of prospective employment, nor was it the cause of any problems the plaintiff may have had in attempting to obtain future employment. The court also listed factors for the jury to consider in determining general damages.

The court did state in its instructions that the plaintiff was entitled to recover for harm to reputation, mental distress, humiliation, and embarrassment, and that the plaintiff did not have to prove actual harm in order to recover. In constraining the recoverable damages, the instructions required a finding of a causal link between the defamatory statement and the damages. The special verdict form did the same:

> 1. Did the Plaintiff suffer harm to his reputation and standing in the community from the Defendant's use of the defamatory nickname on the one isolated occasion?
>
> Answer: Yes No X
>
> 2. Did the Plaintiff suffer mental distress from the Defendant's use of the defamatory nickname on the one isolated occasion?
>
> Answer: Yes No X
>
> 3. Did the Plaintiff suffer humiliation from the Defendant's use of the defamatory nickname on the one isolated occasion?
>
> Answer: Yes No X
>
> 4. Did the Plaintiff suffer embarrassment from the Defendant's use of the defamatory nickname on the one isolated occasion?
>
> Answer: Yes No X
>
> [If your answers to any of the above were "Yes," then answer Question 5.]

> 5. What amount of money will fairly and adequately compensate the Plaintiff for damages caused by the Defendant's use of the defamatory nickname on the one isolated occasion:
>
> i) Harm to his reputation and standing in the community?
> ii) Mental distress
> iii) Humiliation
> iv) Embarrassment[181]

The jury found that Longbehn did not suffer damages "from" the defendant's use of the defamatory term. On appeal to the court of appeals for the third time, Longbehn argued, and the court of appeals agreed (*Longbehn III*), that the instructions and special verdict questions required proof of actual damages and a causal connection between those damages and the defamatory statement:

> The district court's jury instructions are erroneous because . . . they required Longbehn to prove that he actually suffered harm because of Schoenrock's defamatory statement. The interrogatories of the special-verdict form are erroneous because they asked the jury whether Longbehn "suffer[ed]" harm "from the Defendant's use of the defamatory nickname." Accordingly, the district court erred by denying Longbehn's motion for a new trial on this ground. On remand, the district court shall revise its instructions. The district court also shall not include the first, second, third, and fourth interrogatories in its special-verdict form; rather, the special-verdict form shall include only interrogatory number 5 and its subparts.[182]

That avoids the problems created by the first four interrogatories, but interrogatory number five asks what amount of damages will compensate the plaintiff for damages *caused* by the use of the defamatory term. The causal connection problem remains. It confines the inquiry by limiting it to the damages "caused" by the defendant's use of the defamatory statement "on one isolated occasion." The court of appeals, while criticizing the repeated use of the term "on one isolated occasion" in the first four

181. Special Verdict Form at 1–2, Longbehn v. Schoenrock, No. 09-C5-01-681, 2009 WL 2912622 (Minn. Dist. Ct. May 27, 2009).

182. Longbehn v. Schoenrock, No. A09–2141, 2010 WL 3000283, at *4 (Minn. Ct. App. Aug. 3, 2010).

interrogatories, appeared to sanction its use in the single interrogatory that would be submitted on the damages issue.

There were additional issues concerning the instructions that the court of appeals thought necessary to resolve because the case was being remanded for a new trial in the hopes of bringing the case to a conclusion. Longbehn argued that the district court erred in incorporating the following factual statements in its instructions to the jury:

> Your duty as a jury is to determine the amount of damages, if any, that the plaintiff sustained by the defendant's use of that nickname. In making your decisions, the court has determined as a matter of law that, number one, *the defendant used the offensive nickname on one isolated occasion.*
>
> Number two, *at the time he did so the plaintiff was commonly known in the Moose Lake community by this derogatory name.*
>
> Number three, *the defendant's use of the nickname was not a substantial factor in bringing about the plaintiff's termination by the Moose Lake Police Department.*
>
> And number four, that *the defendant's use of the nickname did not cause the plaintiff any loss of prospective employment and cannot be viewed as a legal cause of any difficulty the plaintiff may encounter in trying to obtain future employment.*[183]

The factual statements were drawn from the court of appeals' opinion in *Longbehn II*.

Longbehn objected to the instructions, but the district court concluded that the instructions were appropriate as the law of the case. The court of appeals rejected that argument, concluding that the law of the case doctrine applies only to questions of law and not fact.[184] The court explained that the factual statements in *Longbehn II* were intended to provide context for the court's discussion of the legal issues that followed and "were not intended to reflect the resolution of legal issues."[185] The court of appeals held that "the

183. *Id.* at *3 (emphasis by the court of appeals omitted and emphasis added by the author).

184. *Id.* at *4.

185. *Id.* at *5.

district court should not have relied on the law-of-the-case doctrine to constrain the jury's factfinding role."[186]

The court also concluded that the district court erred in including the phrase, "on the one isolated occasion," in the first four special verdict questions.[187] While noting that district courts have discretion in drafting forms, the court of appeals saw no justification for including the phrase in the special verdict form. The court held that it was argumentative and tended to unfairly minimize Schoenrock's conduct and its consequences.[188]

The court in *Longbehn III* did not consider the *Gertz* issue raised in *Longbehn II*. Notwithstanding the concerns over the presumed damages rule expressed in the second court of appeals decision, the rule appears intact after *Longbehn III*. While the court's opinion in *Longbehn III* was unpublished, the court of appeals did not limit the scope of the presumed damages rule to actual damages, which leaves the court of appeals' published opinion in *Longbehn II* as raising a question about presumed damages, but nothing more.

The evidentiary rulings by the court of appeals in *Longbehn III* indicate that the jury was not completely without guidance in evaluating Longbehn's reputation in the case. The defendant introduced adverse evidence concerning the plaintiff's reputation in the community.[189] The plaintiff objected to the evidence, but the court of appeals held that the district court correctly allowed the evidence, finding that evidence of the plaintiff's own existing reputation is highly relevant and central to the damages estimate.[190]

186. *Id.*

187. *Id.*

188. *Id.*

189. There were three witnesses who testified to that effect: Sandy Schoenrock, Robin Schoenrock (the defendant), and Dale Heaton (the Moose Lake Chief of Police). Longbehn argued that the district court should have excluded the evidence because it was hearsay, lacked foundation, and was irrelevant. *Id.*

190. *Id.* at *6 (citing DAN B. DOBBS, THE LAW OF TORTS § 422, at 1190 (2000) ("'The bad character of a plaintiff in a libel action may be shown in mitigation of damages' by presenting evidence of the plaintiff's 'general reputation in that respect in the community in which he lives.'" (quoting Lydiard v. Daily News Co., 110 Minn. 140, 145, 124 N.W. 985, 987 (1910))). The court also cited *Krulic v. Petcoff*, 122 Minn. 517, 520, 142 N.W. 897, 898 (1913) ("In actions for libel or slander, the term 'character' is used as meaning reputation; and in such an action the character of a plaintiff is determined by ascertaining the common repute of such plaintiff in the local community."). As the court noted, Rule 405 of the Minnesota Rules of Evidence provided that if "evidence of character or a trait of

There is a distinction between the admissible evidence and the district court's latitude in instructing the jury, however. In the fourth and final trial, the district court's instructions on defamation read as follows:

> *Defamation*
>
> The use of the term "Pat the pedophile" is defamation per se. A person is liable for the general harm which results from the defamatory statement. Your duty as a jury is to determine the amount of money Plaintiff may receive for Defendant's statement.
>
> *Presumed General Damages*
>
> *Deciding harm for defamation*
>
> The only question for you to decide is the amount of money the Plaintiff is entitled to receive for
>
> 1. Harm to his reputation and standing in the community;
> 2. Mental distress;
> 3. Humiliation; and
> 4. Embarrassment
>
> No evidence of actual harm is required.
>
> You may base the amount of money Plaintiff if entitled to receive on your assessment of the harm that would

character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion." *Id.* (quoting MINN. R. EVID. 405(a)). There was sufficient foundation for the testimony because the witnesses had personal knowledge of the facts to which they were testifying, that is, Longbehn's preexisting reputation in the community. *Id.* Citing Rule 602, the court of appeals concluded that it was unnecessary for the witnesses to "possess personal knowledge of the facts or reasons underlying that reputation." *Id.* (citing MINN. R. EVID. 602). The court also held that the testimony was not hearsay. *Id.* Rule 803(21) includes an exception for hearsay evidence that concerns the "[r]eputation of a person's character among associates or in the community." MINN. R. EVID. 803(21).

The court of appeals also held that the district court did not err in admitting a letter from the Department of Corrections to Longbehn stating why he was terminated from employment there. *Longbehn*, 2010 WL 3000283, at *6–7. The district court excluded Longbehn's medical records, but the court of appeals held that the exclusion was not error because they were inconsistent with the purpose of general damages, and, in any event, Longbehn's treating physician's deposition was admitted and Longbehn was also permitted to testify about the reasons for his hospitalization. *Id.*

> normally be assumed to flow from a defamatory publication of the nature involved here.
>
> In your assessment of presumed general damages you may consider: (1) the character of the Plaintiff; (2) the Plaintiff's general standing and his reputation in the community; (3) the character of the defamatory publication; (4) the extent of dissemination of the statement by the Defendant; and (5) the extent and duration of the circulation of the Defendant's publication.
>
> There is no claim for lost wages or medical expenses and the above issue of presumed general damages is the only question before you.[191]

This time the district court's instructions eliminated any reference to the "one isolated occasion" language the court of appeals found objectionable in *Longbehn III*.[192] There is no causation requirement in the instructions, other than the statement that the jury may award damages "for Defendant's statement."[193]

The district court submitted the following special verdict form to the jury and the jury returned the form as follows:

SPECIAL VERDICT FORM

> We, the Jury, having been duly impaneled and sworn, and having completed our deliberations, answer the Special Verdict interrogatories as follows:
>
> 1. What amount of money will fairly and adequately compensate the Plaintiff for Defendant's use of the defamatory nickname?
>
> a. Harm to Plaintiff's reputation and standing in the community $ 00.00
> b. Mental distress $ 00.00
> c. Humiliation $ 750.00
> d. Embarrassment $ 00.00[194]

The jury did not award damages for harm to the plaintiff's reputation, mental distress, or embarrassment, but solely for

191. Jury Instructions at 6, *Longbehn*, No. 09-C5-01-681.

192. *See id.*; *Longbehn*, 2010 WL 3000283, at *3.

193. *Longbehn*, 2010 WL 3000283, at *3.

194. Special Verdict Form at 1, Longbehn v. Schoenrock, No. 09-C5-01-681 (Minn. Dist. Ct. Oct. 9, 2012).

"humiliation."[195] Based upon the special verdict form, the district court entered judgment for the plaintiff in the amount of $750.[196]

The jury instructions in the fourth trial were informed by the restrictions imposed on the district court by the court of appeals in *Longbehn II and III*. The instructions told the jury that the use of the derogatory term was "defamation per se," making the person who utters the statement liable for general damages.[197] The jury was told that it could award damages for harm to reputation, mental distress, humiliation, and embarrassment, and that "no evidence of actual harm is required," although the jury was also admonished that it should not base its answers to the special verdict questions on damages on speculation or guess.[198]

The court used the same guidelines as in its previous set of instructions, instructing the jury that it could consider "the harm that would normally be assumed to flow from a defamatory publication of the nature involved here," taking into consideration the plaintiff's character, and general standing and reputation in the community, along with the character of the defamatory statement and the extent of the dissemination of the statement.[199] The reference to the "one isolated occasion" that was problematic for the court of appeals in the third appeal was excluded from the instructions.[200]

There is no causation requirement in either the jury instructions or special verdict form. The special verdict form asked only "[w]hat amount of money will fairly and adequately compensate the Plaintiff for Defendant's use of the defamatory nickname?"[201]

195. *Id.*

196. Order at 1–2, Longbehn v. Schoenrock, No. 09-C5-01-681 (Minn. Dist. Ct. Oct. 12, 2012).

197. Jury Instructions at 6, Longbehn v. Schoenrock, No. 09-C5-01-681 (Minn. Dist. Ct. Oct. 9, 2012).

198. *Id.*

199. *Id.*

200. *See* Longbehn v. Schoenrock, No. A09–2141, 2010 WL 3000283, at *5 (Minn. Ct. App. Aug. 3, 2010).

201. Special Verdict Form at 1, Longbehn v. Schoenrock, No. 09-C5-01-681 (Minn. Dist. Ct. Oct. 9, 2012).

VII. LESSONS FROM *LONGBEHN*?

The problems raised in the *Longbehn* trials and appeals may seem unusual, given the time span of the case and the four trials it took to achieve a final resolution of the case, but given the rule of presumed damages, the problems are certainly not unique. The plaintiff attempted to prove actual damages in the case by connecting his employment and health problems to the use of a nickname he alleged was triggered by the defendant. The defendant attempted to limit the scope of the damages by introducing evidence that the plaintiff's reputation suffered in the community. The district court in its instructions and special verdict forms tried to account for the presumed damages rule, but also to confine those damages within the boundaries of what damages might reasonably be expected to be arising out a single defamatory phone call. It was not an easy task. The district court inched toward the very general jury instructions and special verdict form given in the fourth trial, following two reviews by the court of appeals.

The jury instructions given by the district court in the fourth trial eliminate anything that hints of a causation requirement. They are general in nature and not tied to the specific facts of the case. There was no appeal, but the instructions are consistent with the admonition of the court of appeals in the third appeal.

The court of appeals decisions could be viewed as a vivid illustration of the problems associated with the presumed damages rule, or, perhaps, the case might be viewed as an aberration. It might be argued that any case that leads to three appeals, two of which involved the presumed damages issue, and four trials, demonstrates that the law simply cannot be applied fairly and consistently. A jury is told that it can award damages for injury to reputation and mental suffering, humiliation, and embarrassment, and that no actual proof of damages is required, but it cannot be told that the damages have to be *caused* by the defamatory statement.

The district court in *Longbehn* was presented with a sweeping theory that would have held the defendant liable for an array of damages that were allegedly the consequence of the defendant's use of the defamatory nickname because of the defendant's "coining" of the name, which, as the argument ran, made him responsible for subsequent repetitions of the claim. Even though the court of appeals rejected that theory in *Longbehn II*, which seemed to narrow the issue to the damages that might be expected

to flow from the use of the nickname on "one isolated occasion," attempting to confine the jury's subsequent consideration of damages too narrowly ran afoul of the presumed damages rule as pointed out in *Longbehn III*.

The district court's dilemma was in crafting jury instructions and a special verdict form limiting damages to those that would be presumed to flow from a single defamatory statement, but without requiring a finding of actual causation, as would have been the case with an actual damages rule. Allowing damages beyond the single defamatory phone call sets any award up for a claim of excessiveness. If the damages award is substantial, a court is left with few tools to reduce it, as *Longbehn II* points out.

On the other hand, it also seems clear that the plaintiff introduced evidence of actual damage and that the defendant introduced evidence that the plaintiff's reputation was already impaired in the community. In that respect, *Longbehn* is no different from other litigated defamation cases in which plaintiffs will most commonly introduce evidence of actual emotional distress and defendants will attempt to limit the impact of that evidence, perhaps by showing limited publication or diminished reputation.

Evaluating the series of trials and appeals in *Longbehn* can lead to different conclusions. The amount of time it took to resolve the case might be questioned, but the plaintiff was trying to establish a principle. And while the case did take time, the final set of jury instructions and special verdict form that were the product of the appeals in the case got the law right and should provide guidelines for submission of presumed damages issues to juries.

VIII. CONCLUSION

At some point, the presumed damages rule will be directly reconsidered in Minnesota. When it is, the argument against retention of the rule will likely focus on the difficulty of either defining or constraining presumed damages, particularly in the face of the Minnesota Supreme Court's repeated statements that the primary purpose of defamation law is to vindicate reputation. The argument might also have—as a minor premise—the problems in distinguishing between defamation per se and other defamatory statements by highlighting the inequities that result from allowing presumed damages in all categories of libel, but only certain categories of slander. Many of the defamation claims, including

libel claims, are based on the publication of defamatory statements that fall within the slander per se categories. Eliminating the distinctions, so that damages in either libel or slander cases would be presumed if one of the "per se" categories is established, would make it more difficult to recover because of the limitation.

The argument against retention might also emphasize the fact that plaintiffs typically introduce evidence of actual harm to reputation and evidence of actual emotional distress, humiliation, and embarrassment, while defendants will introduce evidence to the contrary. The argument then is that an actual damages rule would simply conform to the actual practice in defamation cases.

The argument in favor of retention of the rule might flip that argument and use the actual practice argument in favor of retention of the rule. If juries are given some factual guidance in most cases, the argument is that juries will have a factual basis for making a presumed damages award. In effect, the actual proof becomes an evidentiary constraint on the arbitrary application of the rule.

The argument in favor of retention would also underscore the difficulty of proof of actual injury to reputation. Cases such as *Richie* show that difficulty. While the court of appeals in *Richie* thought that the breadth of the publication was significant enough to justify an inference of injury to reputation, the supreme court saw the same evidence as inadequate to establish actual harm to reputation. A presumed damages rule gives the plaintiff a greater degree of latitude in cases where the intuitive sense is that there is injury to reputation, but it may fall short of proof of actual harm to reputation.

Given the ease of defaming another person through the social media, it is arguable that a remedy for defamation through presumed damages is more necessary now than ever, even if plaintiffs are not able to provide evidence of actual harm to reputation in a given case.

There are also other alternatives short of a rejection of the presumed damages rule for injury to reputation. While injury to reputation may be difficult to prove, emotional harm may not be as difficult to establish. Plaintiffs typically introduce evidence of actual emotional harm, although the evidence falls short of what would be required in cases involving intentional or negligent infliction of emotional distress claims. The *Village of Isle* case makes it clear that the physical injury requirement is inapplicable in cases involving

defamation claims.[202] Requiring proof of emotional harm in presumed damages cases would fall short of extending *Richie* to all defamation cases, but it would limit speculation on a key element of damages under the existing rule.

Minnesota practice and precedent will be critical in any determination of whether to retain, modify, or reject the rule. The experience of other jurisdictions could readily support arguments for retention or abolition.[203]

The Minnesota experience shows that defamation cases are difficult to win. Most defamation claims are disposed of on summary judgment, before presumed damages become an issue.[204] Minnesota's experience with the presumed damages rule does not seem to establish abuse of the rule in cases in which the issue is tried to a conclusion.

The cumulative experience of the *Longbehn* cases provides an insight into how defamation law works in the trenches. It was a case of slander per se. The use of the nickname that led to the lawsuit was injurious, but ultimately not proven to be connected to the special damages sustained by the plaintiff. The general, presumed damages for injury to reputation and emotional harm, properly constrained by the district court's instructions in the final case, were effectively constrained by the limited use of the nickname by the defendant. That is reflected in the jury's findings in the fourth trial that no damages should be awarded for injury to reputation and only limited damages for "humiliation" for the use of the nickname.

Longbehn is an example of the common law working itself out through the process of trial and appeal. The trials and appeals that preceded the fourth trial established the foundation for that result. The jury instructions and special verdict forms also provide guidelines for the trial of other "defamation per se" claims in Minnesota. The Minnesota presumed damages cases in general and the *Longbehn* series of decisions in particular show that the presumed damages rule is workable and can be properly

202. *See* State Farm Mut. Auto. Ins. Co. v. Vill. of Isle, 265 Minn. 360, 367–68, 122 N.W.2d 36, 41 (1963).

203. For a recent example, see *Daly v. McFarland*, 812 N.W.2d 113, 121–22 (Minn. 2012) (holding that primary assumption of risk did not apply to snowmobiling accident and relying on settled Minnesota precedent as well as cases from other jurisdictions taking that position).

204. *See supra* note 99.

constrained. The issue is whether other countervailing interests justify rejecting the rule, including a *Richie*-based assumption that there is no real interest in allowing anything other than damages for actual injury to reputation supported by defamation law.