

REPUTATION AND CHARACTER IN DEFAMATION ACTIONS

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I. INTRODUCTION

The constitutional limitations imposed upon state defamation laws have generally involved balancing the state's interest in having a defamed citizen receive compensation for his wrongfully damaged reputation¹ against the public's interest in being fully informed about public officials and public affairs. The first amendment protects the public's sources of information concerning government and governmental employees² and also protects the news media from self-censorship.³ Because false statements are inevitable in free debate, a defamed public official or public figure is required to plead and prove that the defendant acted with "actual" malice; i.e., the defendant published the statement knowing that it was false or with reckless disregard for the truth.⁴

Prior to the constitutionalization of defamation law in *New York Times Co. v. Sullivan*,⁵ it was generally accepted that under state law all libels and some slanders were actionable per se. The plaintiff could establish a cause of action without either pleading or proving that he had suffered any harm to his reputation. Because of the difficulty in establishing proof of actual damage, the existence of actual damage was presumed from the publication of the libel itself in cases where it was "all but certain that serious harm ha[d] resulted in fact."⁶ The jury was per-

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1. This characterization of the interest as a state interest first appeared in *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 348 (1974).

2. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2950 (1985) (White, J., concurring).

3. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

4. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964).

5. 376 U.S. 254 (1964).

6. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. at 2946 (1985).

mitted to award monetary damages for damage to the plaintiff's reputation, even though no evidence had been introduced to show the existence or the extent of that damage. These damages were called "presumed damages."⁷

The Supreme Court in *Gertz v. Robert Welch, Inc.*⁸ rejected the concept of presumed damages and recognized some first amendment protection for defamatory speech about persons who are not public officials or public figures, at least where the statement involves a matter of public concern. In view of the lessened constitutional interests at stake, the plaintiff in *Gertz* was required to prove some minimal fault on the part of the defendant, such as negligence, and to prove actual damage or injury to the plaintiff resulting from the defamation. *Gertz* also restricted punitive damages to cases in which the *New York Times* actual malice standard was met.⁹

The recent decision of the Supreme Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*¹⁰ limited the application of prior decisions, and held that both presumed damages and punitive damages can be recovered even though there has been no showing of "actual malice" when false statements do not involve a matter of public concern. Because matters of public concern were not being discussed,¹¹ the plurality opinion found that the state's interest in compensating private individuals for damage to their reputations was more important than the constitutional value of speech that did not involve matters of public concern.¹²

Although these Supreme Court decisions have established a number of constitutional guidelines for balancing the competing interests, they leave unsettled a variety of issues that frequently arise in the trial of defamation suits. This Article will focus on a number of evidentiary issues relating to the plaintiff's reputation and character which arise in light of *Gertz* and *Dun & Bradstreet*. Although a public-issue plaintiff must show

7. PROSSER & KEETON, THE LAW OF TORTS, § 112, at 795-96 (5th ed. 1984) [hereinafter cited as PROSSER].

8. 418 U.S. 323 (1974).

9. *Id.* at 349.

10. 105 S. Ct. 2939 (1984) (*Dun & Bradstreet*, a credit reporting agency, erroneously informed five regular subscribers that Greenmoss Builders, a construction contractor, had filed a voluntary bankruptcy petition; eight days later the recipients were informed of the error).

11. The opinion did not set forth a test to determine whether the publication involved a matter of public or private interest. The plurality suggested that the courts should examine "the content, form and context" of the statement; it observed that the fact the credit report was confidential and circulated to a limited readership supported the conclusion that the matter was private. *Id.* at 2947.

12. *Id.* at 2944-46.

actual injury, there has been little attention given to modern evidentiary techniques available to either party to accurately show whether any injury occurred. In addition to discussing these methods, this Article recommends the use of public opinion surveys as a technique for determining the fact, and measuring the extent, of any reputational damage. Although damages for emotional suffering are recoverable under *Gertz*, this Article considers whether a plaintiff should recover under state defamation law for emotional injury without accompanying proof of injury to reputation. Asserting that proof of injury to reputation should be a predicate requirement, the Article analyzes the policies underlying the limitations generally imposed upon recovery for emotional damages in negligence and other tort actions and recommends their general application in defamation actions. With the resurrection of presumed damages, reputation and character evidence may be offered by both parties. This Article explores whether the plaintiff may offer evidence of his actual injury while at the same time relying upon the presumption and considers the types of evidence that may be employed.

Recently in *Philadelphia Newspapers, Inc. v. Hepps*,¹³ the Supreme Court interpreted the first amendment as requiring a private person to prove the falsity of a defamatory publication when the statement involved a matter of public concern and the plaintiff sought to recover damages from a news organization. The truthfulness of the defamatory statement is likely to be in dispute in most defamatory cases whether the plaintiff is a public official or a private person. The Article concludes with a discussion of when reputation and other character evidence is admissible to prove truth or falsity.

II. ACTUAL DAMAGE TO REPUTATION

A. Generally

When a defamatory statement involves a matter of public concern, a private-person plaintiff, unless he proves actual malice, must introduce competent evidence to establish actual damage to his reputation, and the extent of the damage, if he is to recover for that injury.¹⁴ The jury may

13. *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986).

14. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). The private-person plaintiff may recover presumed damages in this situation if he can prove actual malice. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

The possibility of a constitutionally permissible cause of action to declare a defamatory statement false without the plaintiff seeking to recover damages was suggested in *Philadelphia Newspapers*,

not presume either the fact or the amount of the damage.¹⁵ Although *Gertz* deferred to the trial courts to frame appropriate jury instructions defining the elements of compensable damage, the Court specifically included within its definition of actual injury "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."¹⁶

The *Gertz* actual injury requirement clearly makes evidence of the damages caused by the defamation relevant during the plaintiff's case-in-chief. Thus, when a plaintiff seeks to recover for injury to his reputation, competent evidence of that damage is admissible during the initial presentation of his case to the jury. In fact, his failure to offer evidence of a damaged reputation will probably result in the removal of that issue from the jury, even before the defendant presents his case. Earlier cases that prohibited the plaintiff from offering such evidence unless his reputation was attacked are no longer persuasive.¹⁷

The defendant may also offer evidence relating to the plaintiff's reputation, usually to mitigate the plaintiff's damages. The evidence could show that the plaintiff's reputation was poor prior to the defamation, and therefore he did not suffer as much damage as a person with a good reputation.¹⁸ The defendant's evidence might also show that there was a limited publication of the defamation or that the defamation did not

Inc. v. Hepps, 106 S. Ct. 1558 (1986). Footnote four in that case carefully limited the Court's holding that a private-person plaintiff must prove falsity in order to recover damages from a newspaper concerning a statement of public concern: "Nor need we consider what standards would apply if . . . a State were to provide a plaintiff with the opportunity to obtain a judgment that declared the speech at issue to be false but did not give rise to liability for damages." *Id.* at 1565 n.4.

15. See *infra* text accompanying notes 79-98.

16. *Gertz*, 418 U.S. at 350. The recovery can include damages for the loss of reputation that endures beyond the end of the lawsuit. See *Dixson v. Newsweek, Inc.*, 562 F.2d 626, 631-32 (10th Cir. 1977).

17. Some early cases prohibited the plaintiff from introducing evidence of his good character, unless his character was attacked, on the basis that a person should not be able to prove what the law presumes. See, e.g., *Blakeslee v. Hughes*, 50 Ohio St. 490, 34 N.E. 793 (1893); *Cooper v. Phipps*, 24 Ore. 357, 33 P. 985 (1893). Others permitted the plaintiff to introduce evidence of his good character during his case-in-chief if the defendant's answer denied an assertion of good character or pleaded justification. See, e.g., *Sloneker v. Van Ausdall*, 106 Ohio St. 320, 140 N.E. 121 (1922). Still other jurisdictions permitted the plaintiff to introduce evidence of his good character regardless of what actions the defendant had taken. See, e.g., *Deitchman v. Bowles*, 166 Ky. 285 (1915). Professor Anderson terms these decisions "obsolete." Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747, 753 (1984).

18. See 1 J. WIGMORE, EVIDENCE § 70 (3d ed. 1940) ("[A] person should not be paid for the loss of that which he never had.") [hereinafter cited as 1 WIGMORE]; PROSSER, *supra* note 7, at § 116A, at 847.

cause any injury to reputation because the community did not believe that the statement was true.

When a plaintiff seeks to recover the actual injury to his reputation, he is attempting to recover for damage to an element that is based on “the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct”¹⁹ and on the general discussions and comment concerning a person in the community.²⁰ The evidence offered by the plaintiff must reflect this composite description of what the people in a community have said and are saying about the plaintiff.²¹ The personal knowledge and belief of a single person do not reflect the community’s evaluation of reputation,²² nor does the occurrence of particular events in the life of an individual.²³

Generally only evidence of the plaintiff’s actual reputation is admissible. The concern is with what the plaintiff’s reputation is, not what it

19. *Michelson v. United States*, 335 U.S. 469, 477 (1948), (quoting *Badger v. Badger*, 88 N.Y. 546, 552 (1882)). Many of the opinions discussing reputation testimony arise either in the context of proving the character of a victim, a criminal defendant, or a witness. Reputation may be a permissible method of proving these issues. There are fewer opinions dealing with the method of proving reputation in defamation cases. However, there is no reason to distinguish many of the general principles that have been established; they are applicable whenever evidence of a person’s reputation is relevant.

20. *Michelson v. United States*, 335 U.S. 469 (1948).

21. C. MCCORMICK, EVIDENCE § 249 (3d ed. 1984) [hereinafter cited as MCCORMICK]. Although it seems clear under *Gertz* that injury to a broad-based reputation is a recoverable element of damage, the Court’s subsequent decision in *Dun & Bradstreet*, arguably indicates that the damage need not be among so diverse a group. In that case, the false statement was privately distributed to five customers of *Dun & Bradstreet* and there was no indication that any other persons were aware of it. If only one individual reviewed each report that was mailed, the personal opinion of those five persons would not be sufficient to establish an individual’s reputation because the group holding the belief would be too narrow. However, without discussion the Court assumed that the damage to the plaintiff was sufficient. The Court in *Dun & Bradstreet* may have been approving the continued vitality of the common-law position that even though harm to reputation did not result, the cause of action was present if the publication deterred third persons from associating or dealing with the plaintiff. See RESTATEMENT (SECOND) OF TORTS § 559 (1977) [hereinafter cited as RESTATEMENT]. On the other hand, it could be argued that *Dun & Bradstreet* addresses only a defamatory statement that involves a matter of private concern, and that it is inappropriate to draw an inference about the type of injury that is compensable under *Gertz* from its holding that presumed damages can be recovered in these actions.

The perceived reaction of third persons may also be relevant to the plaintiff’s claim for emotional damage. See *Behrendt v. Times-Mirror Co.*, 85 P.2d 949 (Cal. App. 1938); *Lancour v. Herald & Globe Ass’n*, 112 Vt. 471, 477, 28 A.2d 396, 401 (1942), *rev’d on other grounds*, *Lent v. Huntoon*, 143 Vt. 539, 549, 470 A.2d 1162, 1170 (1983).

22. *Michelson v. United States*, 335 U.S. 475, 477 (1948).

23. See *Schieffelin v. Hylan*, 178 N.Y.S. 652, 659 (N.Y. App. Div. 1919), *aff’d*, 190 A.D. 903, 179 N.Y.S. 949 (1919); *Pfister v. Milwaukee Free Press Co.* 139 Wis. 627, 121 N.W. 938 (1909).

should be.²⁴ Therefore, evidence of specific acts that the plaintiff has committed is inadmissible when offered by the defendant to mitigate damages and prove that the plaintiff's reputation was poor before the defamatory statements were made.²⁵ Unless these actions are known and discussed by the community they cannot affect reputation.²⁶ One individual's opinion or knowledge is irrelevant; unless it is shared by other members of the community, it is not reflective of reputation.²⁷

Reputation, the shared view of a substantial segment of the community, is based on hearsay statements which may or may not be true; gossip and rumor may form a part of an individual's reputation. In general, however, testimony that a certain rumor is being spread throughout a community will not be admitted²⁸ without additional foundation because

24. See *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 649 P.2d 1239 (1982) (trial court did not err in excluding evidence of plaintiff's involvement in criminal proceeding when offered to establish the plaintiff's reputation; however the evidence would be admissible to establish the effect of such actions upon plaintiff's reputation). In *Stone v. Varney*, 48 Mass. (7 Met.) 86, 89 (1843) the court held that a defendant may offer evidence of a plaintiff's bad character on the issue of damages:

[P]ublic reports of the facts stated in the libel were inadmissible as evidence in mitigation of damages, where a plea in justification had been filed, alleging the truth of the matter stated in the libel; but they also held that the general character of the plaintiff was put in issue in an action of slander, without regard to the pleading or notice of defence [sic] on the part of the defendant. Chief Justice Savage says, "under any circumstances, the defendant may show that the plaintiff's reputation has sustained no injury, because he had no reputation to lose."

A few cases, although not addressing the issue directly, apparently admit evidence of the plaintiff's prior conduct without proof that it affected his reputation; these involve particularly egregious situations. See, e.g., *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 294, 297 (C.D. Cal. 1982) ("Wynberg's past conduct and criminal convictions establish a bad reputation . . .").

25. See *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916, 921 (N.D. Ga. 1964), 351 F.2d 702 (5th Cir. 1965) *aff'd*, 388 U.S. 130, *reh'g denied*, 389 U.S. 889 (1967); *Boyles v. Mid-Florida Television Corp.*, 431 So. 2d 627, 640 (Fla. Dist. Ct. App. 1983); *Yager v. Bruce*, 116 Mo. App. 473, 493 S.W. 307, 313 (1906); *Towle v. St. Albans Publishing Co.*, 122 Vt. 134, 137, 165 A.2d 363, 366 (1960).

Evidence of specific misdeeds may be offered to show that the plaintiff does not care much about his reputation and was not humiliated by the publication. Professor Dobbs suggests that the evidence generally should not be admitted for this purpose because of its potential for prejudice and lack of probative value. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 516-17 (1973).

26. When a witness testifies to a person's reputation, he may be asked during cross-examination if he has heard discussion in the community of factual occurrences such as arrests and rumors that would not otherwise be admissible. This examination tests the accuracy of the witness' interpretation of the community's views. See, e.g., *Michelson v. United States*, 335 U.S. 469, 477 (1948); *Fine v. State*, 70 Fla. 412, 70 So. 379 (1915).

27. *Sickra v. Small*, 87 Me. 493, 496, 33 A. 9, 10 (1895) (no error in sustaining objection to question on cross-examination of character witnesses concerning whether they ever saw the plaintiff commit an immoral act); *Crandall v. Greeves*, 181 Mo. App. 235, 242, 168 S.W. 264, 267 (1914).

28. *Yager v. Bruce*, 116 Mo. App. 473, 493, 93 S.W. 307, 313 (1906).

it does not establish that the community believes the rumor or that the plaintiff's reputation has been adversely affected. With such a predicate, however, direct or cross examination concerning these rumors is appropriate.²⁹ A minority of jurisdictions have even admitted evidence of rumors concerning the plaintiff's character when the evidence is offered to mitigate damages. The courts in these jurisdictions have reasoned that the evidence was probative to show the nature of plaintiff's reputation prior to the publication; i.e., because these reports were already circulating in the community, the injury to plaintiff's reputation was not as great.³⁰

Evidence establishing injury to reputation may relate to one of two forms of damage—general or special. Under *Gertz*, either type of damage is sufficient to state a cause of action. Special damages, those that do not generally flow from the publication, usually are readily quantifiable and economic or pecuniary in nature. For example, loss of customers or employment³¹ as a result of the publication is special damage sufficient to support a cause of action.³² General damages, on the other hand, are those damages that normally flow from the publication and are anticipated when a person's reputation is damaged. Although they seek to compensate for actual loss, such as loss of a person's good name, general damages are not easily quantifiable in monetary terms.³³

General damages are more frequently alleged. In proving general

29. [C]haracter witnesses are persons who portend to know what is said of another, what one's reputation is among his friends, neighbors, and associates. Such persons could be expected to know of one's brushes with the law and the effect, if any, of such instances upon one's reputation. We conclude that Gobin's conduct on the occasion of his arrests, and the fact of his trials, the extent of knowledge thereof, and their effect, if any, upon his reputation, is admissible either in direct or cross-examination of character witnesses.

Golan v. Globe Publishing Co., 620 P.2d 1163, 1166-67 (1980).

30. See *Republican Publishing Co. v. Mosman*, 15 Colo. 399, 412, 24 P. 1051, 1055-56 (1890) (current and common report admissible to mitigate; "We must not be understood as indicating that mere rumor, mere disparaging remarks, or discommendatory statements, sometimes called 'gossip,' should be considered as mitigating circumstances. . . ."); *Naylor v. Ponder*, 15 Del. 408, 41 A. 88 (1895) ("general rumor" admissible in mitigation); See also *Morgan v. Lexington Herald Co.*, 138 Ky. 637, 128 S.W. 1064 (1910) (evidence of rumors admissible in mitigation, but not to show truth of the defamation); but see 1 J. WIGMORE, *supra* note 18, at § 74 ("The better arguments seem to require the exclusion of such evidence; and this is the result in the great majority of jurisdictions.").

31. PROSSER, *supra* note 7, at § 112, at 794.

32. See *McCormick, Measure of Damages for Reputation*, 12 N.C.L. REV. 120, 124-26 (1934), (emotional distress was not sufficient to result in special damages). See also RESTATEMENT, *supra* note 21, at § 575, comment c (unless there are presumed damages or special damages, emotional injuries are not compensable).

33. PROSSER, *supra* note 7, at § 116A; RESTATEMENT, *supra* note 21, at § 575.

damages, the testimony on reputation relating to either of two time periods will be probative. Because the evidence is being offered to prove that the plaintiff's reputation was damaged, the evidence must either relate 1) to the period of time prior to publication of the defamation so that it can be inferred that the same reputation existed immediately before the publication,³⁴ or 2) to the time period after the publication so that it can be established that there was damage in fact to the plaintiff's reputation. There also must be evidence of causation—that the publication of the defamation was a legal cause of the damage to reputation.³⁵

When there is proof that the plaintiff's reputation is damaged throughout the entire community, the damage element of the cause of action has been met. However, if the proof establishes only that there has been damage to the reputation in some discrete portion of the community but not in the eyes of the community as a whole, the issue arises as to whether that proof is sufficient to maintain the action. At common law, if the plaintiff's stature was lowered in the eyes of a "substantial and respectable minority" of the community, the damage was adequate and there is no reason to believe that the first amendment cases change this view.³⁶

Rather than offering direct evidence of the damage to his reputation in the community, the plaintiff may rely upon testimony regarding the reaction of a small number of people. For example, the plaintiff may testify that after the defamation his friends started looking at him in a strange way or the frequency of his social invitations declined. This evidence is probative of the reaction of a few individuals. Plaintiff could rely upon an inference that the reactions of his friends are the result of their knowledge of the defamatory statement, which lessened their opinion of the plaintiff. The argument then is that the plaintiff's reputation in the community may be inferred from the conduct and reaction of these few. Although there is some authority that supports this argument,³⁷ other courts have generally rejected the ultimate inference of a person's reputa-

34. See *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1079 (3d Cir.), *cert. denied*, 106 S. Ct. 182 (1985) (court considered evidence relating to diminished reputation prior to November 1978, when the statement was published); *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899 (1971) (record revealed that "prior to the date of the publication involved," the plaintiff's reputation was "substantially tarnished").

35. RESTATEMENT, *supra* note 21, at §§ 621-623.

36. *Id.* at § 559.

37. See *id.* at § 559 (defines defamatory communication as one which "tends to harm the reputation of another as to . . . deter third persons from associating or dealing with him").

tion in the absence of evidence that those feelings are shared by a broad cross-section of the community.³⁸ In these cases, the reliability of the conclusion that the feelings of a few represent the views of the community has not been established. Consequently, testimony concerning the reaction of a few has been rejected as not accurately reflecting the view of the larger group.³⁹

Some disagree whether reputation testimony should be excluded as hearsay. It has been argued that reputation testimony is hearsay only when it is offered to prove the truth of the fact reputed such as when reputation of ownership is offered to prove ownership.⁴⁰ When injury to reputation is an element of damage, testimony regarding reputation may not be hearsay because its value does not rest on the truth of the out-of-court statements. Rather, out-of-court statements are relevant to the issue of reputation simply because members of the community are making them. Even if the trial judge finds that this testimony regarding damage to reputation is hearsay, however, Federal Rule of Evidence 803(21) creates an exception for reputation evidence about a person's character. A defamatory statement almost always involves an attack on the plaintiff's character. Thus, whether or not a judge characterizes the evidence as hearsay, the hearsay rule will not exclude it.

B. *Methods of Proof*

In *Gertz*, the Supreme Court recognized that while all damage awards must be supported by competent evidence, there need not be evidence which assigns an actual dollar figure to the injury.⁴¹ The Federal Rules of Evidence do not contain a specific provision that establishes a method for proving reputation or injury thereto. However, the Notes of the Advisory Committee for the Federal Rules indicate that the Committee relied upon the existing case law to define the appropriate method of proof.⁴²

38. Note, *Reputation*, 46 IOWA L. REV. 426, 426 (1961). See 5 J. WIGMORE, EVIDENCE §§ 1584-85 (3d ed. 1940).

39. Modern survey techniques make it possible to measure the views of a large number of persons by studying the views of a small, representative sample. See *infra* notes 49-76.

40. McCORMICK, *supra* note 21, at § 249, n.32.

41. *Gertz*, 418 U.S. at 350.

42. FED. R. EVID. 405, 608(a) advisory committee notes. Occasionally, suggestions have been made regarding methods of proving damage to reputation, the acceptability of which today seems doubtful. See McCormick, *Measure of Damages for Reputation*, 12 N.C.L. REV. 120, 133 (1934) (testimony of witnesses who "have heard or read the defamation, as to the impression made on them" and "testimony as to the change in manner and conduct of the plaintiff's family, friends and acquaintances toward him"); *Gertz v. Robert Welch, Inc.*, 627 F.2d 527, 540 (7th Cir. 1982) (testi-

1. *Testimony by a Member of the Community*

The traditional method of proving reputation has been to call a witness who can testify that he is aware of the person's reputation in the community and can testify whether the reputation is good or bad.⁴³ The witness may not testify to his personal opinion of, or knowledge about the individual. He may only testify about what the community feels or is discussing. Because reputation is based on what is discussed in the community, incidents that could not otherwise be considered may be admitted into evidence because the community may have relied upon them. For example, arrests or untrue rumors, which are generally inadmissible under the laws of evidence, can obviously be considered in establishing a person's reputation.⁴⁴ On direct examination, the witness may only testify concerning his opinion of the reputation; however, particular matters being discussed in the community may be inquired into on cross-examination.⁴⁵

This method of proving reputation is flawed because it is largely "opinion in disguise."⁴⁶ The testimony of the witness, although framed in terms of reputation, actually reflects the personal beliefs of the witness rather than the community's assessment of the individual.

2. *Testimony of a Stranger*

Efforts have been made to measure reputation by sending a stranger into a community to attempt to ascertain a person's reputation. Subsequently, the stranger's testimony on the issue is offered. These attempts have generally been rejected by the courts.⁴⁷ Apparently, these attempts

mony "calling a lawyer a Communist would be highly injurious to professional reputation"; no testimony that the statement harmed plaintiff's professional reputation).

43. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 405[02] (1980) [hereinafter cited as WEINSTEIN].

44. The price a [party] must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. The [defendant] may pursue inquiry with contradictory witnesses to show that damaging rumors, whether or not well-grounded, were afloat—for it is not the man that he is, but the name that he has which is put in issue. Another hazard is that his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusion. It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate.

Michelson v. United States, 335 U.S. 469, 477 (1984).

45. See M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 405.1 (1981).

46. FED. R. EVID. 405 advisory committee note. See WEINSTEIN, *supra* note 43, at § 405[02].

47. See, e.g., *Stripling v. State*, 349 So. 2d 187, 192 (Fla. Dist. Ct. App.), *cert. denied*, 359 So.

have failed because there has been no showing that the stranger has taken steps to accurately discover the reputation.⁴⁸ If the trial court can be assured that the stranger accurately measured the reputation and accurately related it to the jury, the testimony should be admitted. A member of the community, who testifies that she is aware of a person's reputation and has heard it discussed in the community, is no more qualified as an observer than is a stranger who has accurately gauged the community's sentiments.

3. *Public Opinion Surveys*

Advancements in the ability to measure accurately the views and attitudes of large numbers of persons have been made through the development of polls or public opinion surveys, which are commonly used in commerce and politics.⁴⁹ A survey (or poll) is designed to study a limited number of persons, the sample, with respect to a particular matter in order to obtain a result applicable to the entire population. A survey records the thoughts and beliefs of the interviewees and the reasons for those thoughts and beliefs.⁵⁰ Although the Federal Rules of Evidence recognize the admissibility of several types of reputation evidence, they do not specifically set forth the accepted methods for proving reputation. However, the Advisory Committee has recognized the weakness in the traditional method of proof—calling a member of the community to testify about the person's reputation.⁵¹ There is a significant probability

2d 1220 (1978) (court rejected testimony of investigator who went into community and interviewed five persons to determine the complainant's reputation); *Commonwealth v. Baxter*, 267 Mass. 591, 166 N.E. 742 (1929) (no error to exclude testimony of investigators sent into community to determine reputation of witness for truth and veracity).

48. *Parker v. State*, 458 So. 2d 750, 754 (Fla. 1984), *cert. denied*, 105 S. Ct. 1855 (1985). In *Parker*, the court refused to allow an investigator to testify to the defendant's reputation in the criminal justice system. "[W]e do not agree that the criminal justice system is either neutral enough or generalized enough to be classed as a community or that an officer in that system is equipped to provide an unbiased and reliable evaluation of an inmate's general reputation for truth-telling." *Id.* See also *Commonwealth v. Baxter*, 267 Mass. 591, 592-93, 166 N.E. 742, 743 (1929) (testimony of investigator may have relied on conversations with persons who were few in number and insignificant); *State v. Miller*, 72 Wash. 174, 175, 130 P. 356, 357 (1913) (testimony as to reputation was inadmissible; inquiries by investigator in community did "not show such an acquaintance with Butler's reputation as to qualify Kelly to testify relative thereto. . . . 'All he could testify on the subject of his reputation was what some persons . . . whom he did not know, told him it was.'").

49. See generally 2 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION §§ 32.46-32.55 (2d ed. 1984); MCCORMICK, *supra* note 21, at § 208.

50. MANUAL FOR COMPLEX LITIGATION § 2.712 (5th ed. 1981).

51. FED. R. EVID. 405 advisory committee note.

that a reputation witness will testify based on his own perception, which may not accurately reflect the community's view. Properly administered surveys more accurately measure the existence and extent of any actual injury to the plaintiff's reputation as a result of the publication.⁵²

The decisions dealing with the admission of public opinion survey results in unfair competition⁵³ and trademark cases,⁵⁴ as well as the provisions of the Federal Rules of Evidence, set forth the rationale for the admissibility of surveys in defamation actions. In *Zippo Manufacturing Co. v. Rogers Imports, Inc.*,⁵⁵ a suit was brought alleging that the defendant engaged in trademark infringement and unfair competition when he marketed copies of plaintiff's cigarette lighters. The plaintiff proffered the results of three surveys of smokers. The surveys tended to show that the smokers had trouble distinguishing between the plaintiff's lighters and the defendant's copies. The trial judge established two criteria in ruling on the question of admissibility. The first criterion was necessity, which required a comparison between the survey's probative value and the probative value of the evidence which could be admitted if the survey were excluded. If the survey was more valuable, necessity was established.⁵⁶ The second criterion was reliability. Circumstantial guarantees of trustworthiness had to surround the survey. Finding both necessity and reliability, the *Zippo* court admitted the survey.

Although an objection can be made that survey results are inadmissible hearsay, surveys usually have not been excluded on that basis. Some courts have refused to exclude surveys as inadmissible hearsay because they are not being offered to prove the truth of what the survey participants asserted.⁵⁷ Noting that surveys frequently are offered to prove the

52. It has also been suggested that public opinion surveys can be used to show whether the public interpreted the language in question in a defamatory manner. Haller, *Using Public Opinion Surveys*, 8 LITIGATION Wtr. 1982, at 17.

53. See, e.g., *Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 533 F. Supp. 75 (S.D. Fla. 1981), *aff'd*, 716 F.2d 854 (11th Cir. 1983).

54. See, e.g., *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976).

55. 216 F. Supp. 670 (S.D.N.Y. 1963).

56. *Id.* at 683.

57. See *Standard Oil Co. v. Standard Oil Co.*, 252 F.2d 65, 75 (10th Cir. 1958), holding that survey results were admissible over a hearsay objection. The court said, "the persons who did the interviewing testified as to the results of their surveys. Their testimony was offered solely to show what they found. Only the credibility of the persons who took the statements was involved and they were before the court." The court commented that if the "author" of the survey had testified as to what the interviewers had told him, it would be hearsay. See also *Scholle v. Cuban-Venezuelan Oil*

truth of the survey participants' statements, other courts have held that the admissibility of a survey depends on the sincerity of the participants' response.⁵⁸ However, even if the court labels the survey hearsay, the court could admit the survey results under Federal Rule of Evidence 803(3) or 803(17), which provide hearsay exceptions for statements of the declarant's then existing state of mind and emotion. The participant's statements to the interviewer reflect the participant's then existing state of mind or belief.⁵⁹ Thus, even if the court determines that the survey results are hearsay, the hearsay rule will not operate to exclude the evidence.⁶⁰

Although the "necessity" requirement set forth in *Zippo* has occasionally been repeated without any analysis,⁶¹ the Federal Rules of Evidence do not require a showing of necessity as a separate prerequisite for admissibility. *Zippo* involved the question of whether the survey was inadmis-

Voting Trust, 285 F.2d 318, 321-22 (2d Cir. 1960); *United States v. 88 Cases Bireley's Orange Beverage*, 187 F.2d 967, 975 (3rd Cir.), *cert. denied*, 342 U.S. 861 (1951).

58. See *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670, 683 (1963); *MANUAL FOR COMPLEX LITIGATION* § 2.172 (5th ed. 1981).

59. *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 931 (7th Cir. 1984); *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 520 (10th Cir. 1976) (questionnaires completed by customers regarding the quality of dealership service were admissible to "reflect the then existing state of mind of the customers as to the quality of Randy's service generally"); *Holiday Inns, Inc. v. Holiday Out in America*, 481 F.2d 445, 447 (5th Cir. 1973) (in trademark infringement action, "[t]he results of the survey conducted for Holiday Inn were admitted to show the state of mind of people when shown a placard bearing the words 'Holiday Out' "). See generally Zeisel, *The Uniqueness of Survey Evidence*, 45 CORNELL L.Q. 322, 333-37 (1960).

At least one court has indicated that the results of a survey would be admissible under Federal Rule of Evidence 803 (24), the so-called catch-all exception. See *Pittsburgh Press Club v. United States*, 579 F.2d 751, 758 (3d Cir. 1978), *on remand*, 462 F. Supp. 322 (W.D. Pa.) *rev'd*, 615 F.2d 600 (3d Cir. 1980). To be admitted under the exception, the survey must provide evidence of a material fact, be more probative on the issue than any other evidence and have the same circumstantial guarantees of trustworthiness as the other twenty-three exceptions specifically enumerated in Rule 803.

60. See *Prudential Ins. Co. v. Gibraltar Fin. Corp.*, 694 F.2d 1150, 1156 (9th Cir. 1982), *cert. denied*, 463 U.S. 1208 (1983).

61. See *Toys "R" US, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983). Although the second recommendation set forth in the *Manual for Complex Litigation* § 2.712 includes the requirement of necessity in the language of the "black-letter" recommendation, it should be noted that in the commentary and footnotes accompanying the recommendation there is no mention of that requirement. The 1960 edition clearly indicated that the requirement of necessity was included so as to admit the survey under a "recognized exception to the hearsay rule." 25 F.R.D. 351, 428 (1960). The two paragraphs incorporating that discussion of the necessity requirement, which were included in the 1978 edition, have been omitted from the most recent 1981 edition. Presumably, the omission by the *Manual's* Board of Editors was intentional. The continuing mention of necessity in the *Manual* appears to be a drafting oversight.

sible hearsay. The trial judge ruled that the surveys were admissible because they were needed and reliable.⁶² Subsequently, the Federal Rules of Evidence were adopted. While necessity was a factor the drafters considered in determining whether particular exceptions would be included in the Federal Rules,⁶³ most of the enumerated hearsay exceptions, such as the state of mind exception, do not require counsel to lay a foundation of necessity. Only the catch-all provisions of Rules 803(24) and 804(b)(5) are grounded upon a predicate showing of necessity.⁶⁴

All evidence, whether or not it is admissible hearsay, is subject to the weighing process of Rule 403,⁶⁵ which requires the trial judge to determine whether the probative value of the survey evidence is substantially outweighed by the danger of unfair prejudice or confusion of the issues. Although the necessity for admitting certain evidence is a factor in favor of admissibility that the trial judge may consider in applying Rule 403,⁶⁶ it is not a prerequisite to admission of the evidence. In short, the Federal Rules have not retained the necessity requirement of *Zippo* as a prerequisite to the admissibility of survey evidence, but they do not preclude consideration of necessity as a factor bearing upon admissibility.

Under the Federal Rules of Evidence, the question of whether the survey is admissible hearsay is not the determinative issue. The offering party must call expert witnesses to establish the necessary foundation and to interpret the survey results.⁶⁷ Under Rule 703, an expert witness may rely upon facts or data to support his opinion so long as they "are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The underlying facts or data

62. Judicial efficiency is increased and the costs of the parties decreased if the survey results are admitted rather than calling as a witness each person interviewed. Moreover, a survey is the only practical method of proving the views and beliefs of a large population.

63. See 4 WEINSTEIN, *supra* note 43, at § 803(17)[01].

64. The five exceptions included within Federal Rule 804(b) require that the declarant be "unavailable" as a condition precedent for the admission of the hearsay statements. The unavailability of the declarant creates a necessity for the statements.

65. See *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1055 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981) ("Any minimal relevancy was outweighed by the likelihood that some statements in the poll would prejudicially overemphasize Mercury's role of the 'bad guy,' a status bearing on relationship to the sum of lost profits. We hold that the trial judge did not commit reversible error in excluding the customer survey.").

66. See *United States v. King*, 713 F.2d 627, 631 (11th Cir. 1983), *cert. denied*, 466 U.S. 942 (1984).

67. *Toys "R" US, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189 (E.D.N.Y. 1983); 2 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 32:53 (2d ed. 1984).

need not be admissible.⁶⁸ Thus, the focus under the Federal Rules is not whether the survey is hearsay, but whether the necessary foundation has been laid—is the survey in question of a type upon which other experts in the field would reasonably rely. In fact the drafters of the Federal Rules of Evidence considered survey evidence specifically when they drafted Rule 703. They commented: “The rule . . . offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved.”⁶⁹

To establish the requirement of trustworthiness and reliability the proponent of the evidence must show that the survey was conducted in accordance with the accepted standards of survey research, and that the results are being used in a statistically correct manner.⁷⁰ In determining whether the survey or poll was taken in accordance with accepted principles of survey research, the *Manual for Complex Litigation* suggests that the offering party must demonstrate that the survey examined the proper universe, drew a representative sample from that universe and employed a correct mode of questioning with the interviewees.⁷¹ The court also must determine whether the techniques employed in conducting the survey are scientifically reliable.⁷² The scientific validity of standard survey

68. *Baumholser v. Amax Coal Co.*, 630 F.2d 550, 553 (7th Cir. 1980).

69. FED. R. EVID. 703 advisory committee note. *See Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 931 (7th Cir. 1984).

70. *See Baumholser v. Amax Coal Co.*, 630 F.2d 550 (7th Cir. 1980); *Pittsburgh Press Club v. United States*, 579 F.2d 751 (3d Cir. 1978). *See also* MANUAL FOR COMPLEX LITIGATION § 2.712 (5th ed. 1981).

71. MANUAL FOR COMPLEX LITIGATION § 2.712 (5th ed. 1981). *See also* *Toys “R” US v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983). Section 2.712 of the *Manual for Complex Litigation* also suggests that the offeror “should be required to show that the persons conducting the survey were recognized experts; the data gathered were accurately reported; and the sample design, the questionnaire, and the interviewing were in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys. Normally this showing will be made through the testimony of the persons responsible for the various parts of the survey.”

72. *See United States v. Downing*, 753 F.2d 1224, 1240 (3d Cir. 1985). Professor Imwinkelried argues that, as presently drafted, the Federal Rules of Evidence require only a prima facie showing of reliability. Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence*, 25 WM. & MARY L. REV. 577 (1984).

The existing decisions are of little help in dealing with the manner in which alleged defects in the survey should be handled when there is an objection to the admissibility of evidence relating to it. Many of the decisions involve trademark and unfair competition allegations which are tried to the court without a jury. *See, e.g., United States v. J.I. Case Co.*, 101 F. Supp. 856, 868 (D. Minn. 1951) (Trial judge sitting as the fact-finder tends to admit the evidence despite a valid objection). *See* 5 J. MOORE, J. LUCAS & J. WICKER, *MOORE’S FEDERAL PRACTICE* § 38.26 (2d ed. 1985) (“It is doubtful that [the survey] has any relevancy of materiality, . . . but the Court concludes that there is no

technique probably has been sufficiently established to permit courts to take judicial notice of this factor.⁷³ Evidence of the survey should be admitted even if the parties raise a factual issue about the manner in which the technique was applied in a particular case. For example, the parties may dispute whether the persons interviewed constituted a representative sample.⁷⁴ If the jury finds that the sample was not representative it can disregard the evidence. The opposing party can offer evidence of technical defects in the survey which will go to the weight of the evidence.⁷⁵

In order to eliminate mechanical flaws in the survey as well as to avoid unneeded expense to the parties, the trial court may be asked to make two pretrial determinations.⁷⁶ First, before the survey is conducted, the offering party should submit the survey methodology to the court for its consideration. Second, once the survey is completed, the underlying data and conclusions should be disclosed to the court for a possible ruling on

need to strike the exhibit. It may remain in evidence for what it may be worth."'). See also Zeisel, *The Uniqueness of Survey Evidence*, 45 CORNELL L.Q. 322, 339-40 (1960) ("A court sitting without a jury will seldom hesitate to admit a survey in evidence. The Supreme Court has never either reversed or criticized a trial court for admitting survey evidence in a civil case tried without a jury."). See *Toys "R" US, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1202 (E.D.N.Y. 1983). Thus, in determining the admissibility of surveys during a jury trial, caution should be employed in interpreting appellate decisions suggesting that because a party failed to follow the accepted methods of conducting a survey (e.g., not selecting and examining a proper survey universe), the survey should be "discounted," see *Amstar Corp. v. Domino's Pizza, Inc.* 615 F.2d 252, 264 (5th Cir.), cert. denied, 449 U.S. 899 (1980); *Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 533 F. Supp. 75, 80 (S.D. Fla. 1981), *aff'd*, 716 F.2d 854 (11th Cir. 1983), or that the defect goes to weight rather than admissibility, see *United States v. National Homes Corp.*, 196 F. Supp. 370 (N.D. Ind. 1961). Many of these statements were made by trial judges sitting as factfinders. The same procedures should be followed in determining the admissibility of surveys as is followed in determining the admissibility of any other evidence relating to scientific techniques.

In deciding whether the survey techniques utilized have sufficient scientific reliability, the court will apply the standard that has been adopted in that jurisdiction. See generally Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980); *Symposium on Science and the Rules of Evidence*, 99 F.R.D. 187, 188 (1983). The validity of the basic polling techniques seems sufficiently established so that under any of the standards presently being discussed, the necessary reliability could be established.

73. 5 WEINSTEIN, *supra* note 43, at § 901(b)(9)[03].

74. *Id.* at §§ 901-18. Section 2.172 of the *Manual for Complex Litigation* appears to suggest that if there is a dispute, the trial judge should make the factual determination that the survey technique has been properly accomplished. That suggestion treats the admissibility of surveys differently from the admissibility of other types of scientific evidence and should not be followed.

75. See *Prudential Ins. Co. v. Gibraltar Financial Corp.*, 694 F.2d 1150, 1156 (9th Cir.), cert. denied, 463 U.S. 12-08 (1983).

76. See *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366 (7th Cir.), cert. denied, 429 U.S. 830 (1976).

admissibility.⁷⁷ Because of the complexities involved in determining the admissibility of both the survey and the expert testimony interpreting it, the court should make the admissibility determination prior to trial.

In defamation actions the use of public opinion surveys can help both parties prove more precisely a number of material issues, such as the number of persons who were aware of the publication and the plaintiff's reputation before and after the publication. In addition, the use of surveys or polls that accurately assess the plaintiff's pre-and post-publication reputation may alleviate the concern that large damage awards punish defendants rather than compensate plaintiffs for their injuries.⁷⁸

III. PRESUMED DAMAGES

The common law permitted the jury, in an action for libel or certain slanders, to award damages sufficient to compensate the plaintiff for his loss even though there had been no proof of the existence or the extent of the damage suffered.⁷⁹ *Gertz* imposed a constitutional limitation on this doctrine of presumed damages by requiring a plaintiff to prove actual injury. However, *Dun & Bradstreet* subsequently reaffirmed the validity of state defamation laws that permit recovery of presumed damages when the defamatory statement does not involve matters of public concern.⁸⁰

State laws permitting the recovery of presumed damages usually limit the types of defamatory statements for which such damage are available. In most states, plaintiffs in slander actions can recover presumed damages for four types of statements that are thought to be particularly likely to cause actual injury.⁸¹ Although many jurisdictions have found every libel per se actionable, and therefore presumptively damaging, some have

77. See MANUAL FOR COMPLEX LITIGATION § 2.713, recommendation 3 (5th ed. 1981) ("The underlying data, method of interpretation employed, and conclusions reached in polls and samples should be made available to the opposing party far in advance of trial, and, if possible, prior to the taking of the poll or sample."); 5 WEINSTEIN, *supra* note 43, at § 901(b)(9)[03].

78. See RESTATEMENT, *supra* note 21, at § 623.

79. See PROSSER, *supra* note 7, at § 112.

80. In *Dun & Bradstreet*, the publication was limited. Only five customers received the communication that was damaging to Greenman's credit. Nothing in the opinion limits the application of the opinion to those facts. On the other hand, the Court has not ruled in a case involving a publication which is wide-spread.

81. RESTATEMENT, *supra* note 21, at § 570. Professor Anderson has called for an end to presumed damages. See Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747 (1984).

limited presumed damages to intrinsically defamatory statements.⁸² The reaffirmance of the propriety of presumed damages will undoubtedly result in more defamation actions being brought because a limited class of plaintiffs will no longer have to demonstrate actual injury, regardless of whether a negligence or strict liability standard is ultimately applied.⁸³ In addition, even when matters of public concern are involved, presumed damages continue to be appropriate if actual malice is demonstrated.⁸⁴

A plaintiff who relies upon presumed damages asks the jury to return a substantial verdict even though he has not introduced any evidence to prove the existence or the extent of any damage. Juries, acting without any real guidelines, generally determine the size of verdicts based on presumed damages.⁸⁵ Although the concept of presumed damages provides compensation for a plaintiff when his injury is difficult to prove,⁸⁶ the defendant may argue that the plaintiff has not actually been injured by the publication, and the jury should not compensate the plaintiff for damages that have not been suffered. In anticipation or rebuttal of this argument, a plaintiff who is entitled to rely upon presumed damages may nevertheless decide to introduce evidence showing damage to his reputation and the extent of his injury.⁸⁷ In other words, a plaintiff is not

82. RESTATEMENT, *supra* note 21, at § 569, comment b.

83. In actions where actual malice need not be demonstrated, it will be much easier for a defamed plaintiff to recover those damages regardless of whether a negligence or strict liability standard is ultimately applied. Apparently five present members of the Supreme Court would approve state defamation laws applying a strict liability test in matters of private concern. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2953 (1985) (White, J. concurring) ("It must be that the Gertz requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this.").

84. *Id.* at 2946 (1985).

85. C. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 120 (1935).

86. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2946 (1985).

87. *See Augusta Chronicle Publishing Co. v. Arrington*, 42 Ga. App. 746, 157 S.E. 394, 396 (1931) (evidence that a person enjoyed a good reputation was admissible in charge that was actionable *per se*); *Johnson v. Featherstone*, 141 Ky. 793, 133 S.W. 753 (1911); *Tennant v. F.C. Whitney & Sons*, 133 Wash. 581, 584, 234 P. 666, 671 (1925); (in action based on slander *per se*, plaintiff could introduce evidence of his good reputation in community); McCormick, *Measure of Damages for Reputation*, 12 N.C.L. REV. 120, 133 (1934) (categorizes this as the "better view"). *But see Conrad v. Roberts*, 95 Kan. 180, 147 P. 795 (1915) (plaintiff who had been charged with being a whore could not offer evidence of her good reputation as part of her case-in-chief; one cannot prove what the law presumes); 1 WIGMORE, *supra* note 18, at §§ 70-76 (3d ed. 1940).

Some jurisdictions distinguished between evidence offered to show plaintiff's good reputation and evidence offered to show damage to reputation. One rule prohibited the plaintiff from introducing evidence of his good reputation before it was attacked. A second rule forbade a plaintiff relying on presumed damages from proving actual damages. *See McCormick, Measure of Damages for Reputa-*

required to rely upon presumed damages; he may ignore them entirely and plead and prove his actual damage.

A plaintiff may affirmatively rely upon both the theory of presumed damages and the theory of actual damages to establish the extent of his injury. If he chooses to rely upon both theories, he can offer evidence during his case-in-chief establishing actual injury to his reputation resulting from the defamation as well as the amount of damage.⁸⁸ This evidence could be probative under at least two theories. First, proof of the extent of actual injury can be offered as a guide for the jury's determination of the amount of presumed damages. While it is very difficult to prove the dollar amount of damage to reputation, the plaintiff could argue that the proffered evidence establishes a floor for the presumed damages; at least this much damage, and probably more, has been suffered. On a slightly different ground, the plaintiff should be permitted to demonstrate to the jury the extent of the actual injury in order to show that the damages actually suffered were larger than those that the jury might reasonably expect to flow from the publication.

The plaintiff could also ask the jury to award damages on whichever of the two theories it deems appropriate—presumed damages or actual damages.⁸⁹ The proof of actual injury would not be introduced to establish a floor. Instead, such proof would be an alternate method of establishing the amount of damage.

The defendant may attempt to mitigate damages by showing that the persons who heard the publication did not believe it, or that the plaintiff's reputation in the community was poor before the publication.⁹⁰ Therefore, the defendant would argue, the plaintiff sustained less damage than an ordinary citizen of good pre-publication reputation would have

tion, 12 N.C.L. REV. 120, 130-33 (1934); Anderson, *Reputation Compensation and Proof*, 25 WM. & MARY L. REV. 747, 753 (1984).

88. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 516 (1973).

89. Apparently, the doctrine of election of remedies does not prohibit these alternative theories of recovery. *Id.* at § 1.5.

90. See *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1079 (3d Cir.), *cert. denied*, 106 S. Ct. 182 (1985), *reh'g denied*, 106 S. Ct. 548 (1986) ("Evidence of a tarnished reputation is admissible and should be considered as a factor to mitigate the level of compensatory damages."); *Amick v. Montross*, 206 Iowa 51, 62, 220 N.W. 51, 56 (1928); *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 473, 273 A.2d 899, 920 (1971); *Weatherford v. Birchett*, 158 Va. 741, 747, 164 S.E. 535, 537 (1932).

Other types of evidence may be admissible to mitigate damages. For example, some jurisdictions admit evidence that the defendant was repeating what others in the community had already said. See *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899 (1971).

suffered. Although some courts allow the defendant to offer evidence of the plaintiff's general reputation,⁹¹ other courts may limit the defendant's proof to evidence of the plaintiff's reputation for the specific trait involved in the defamation.⁹² Some courts assume that statements which adversely affect one character trait have little adverse influence on other character traits. Under this view, the reputation evidence offered by either the plaintiff or the defendant has to relate to the specific trait involved in the defamation;⁹³ evidence relating to other character traits lacks sufficient probative value to be admitted.⁹⁴ Frequently, however, a statement relating to a single trait seems to "spill over" and affect the individual's general reputation. Thus, a defendant could persuasively argue that evidence relating to the plaintiff's general reputation should be received.⁹⁵

Occasionally, a defendant may go beyond offering evidence of the plaintiff's poor reputation to mitigate the amount of damage suffered by the plaintiff by electing to offer evidence to prove that a plaintiff is "libel proof." A plaintiff is libel proof if his reputation is so poor that it is not possible to do further damage to it. A plaintiff whose reputation is beyond damage will be able to recover only nominal damages for defamatory statements, unless the constitutional limitations prohibit even that

91. See *Snively v. Record Publishing Co.* 185 Cal. 565, 581, 198 P. 1, 7 (1921). *Amick v. Montross*, 206 Iowa 51, 62, 220 N.W. 51, 56 (1928).

92. 1 WIGMORE, *supra* note 18, at § 73 ("As to the *kind of* repute receivable, the exclusive admissibility of general character is no longer the law anywhere; the exclusive admissibility of the *particular trait* is maintained in perhaps half of the jurisdictions, and in the others the admissibility of both is recognized.").

93. See *Snively v. Record Publishing Co.*, 185 Cal. 565, 198 P. 1 (1921) (defendant could prove reputation for any character trait put in issue by the pleadings); *Boyles v. Mid-Florida Television Corp.*, 431 So.2d 627, 640 (Fla. Dist. Ct. App. 1983), *aff'd*, 467 So.2d 282 (Fla. 1985).

94. When character evidence is offered to show that a person acted in conformity with his character, the evidence must relate to a pertinent trait and evidence of general character is usually excluded. See *Huff v. State*, 437 So. 2d 1087, 1089 (Fla. 1983); *McCORMICK*, *supra* note 21, at § 191.

95. See *Dunagan v. Upham*, 214 Ark. 66, 68, 214 S.W.2d 786, 787 (1948); *Sickra v. Small*, 87 Me. 493, 494, 33 A. 9, 10 (1895) (to mitigate damages defendant may introduce evidence either of plaintiff's poor reputation as a man of moral worth or of his poor reputation with respect to that feature of character referred to in the defamation); *Yager v. Bruce*, 116 Mo. App. 473, 493, 93 S.W. 307, 313 (1906) (court discusses both views and finds evidence of plaintiff's general bad reputation for moral worth admissible, rather than limiting the evidence to the specific trait involved). *Yager* also suggests that reputation for intemperance would not be admissible where statement alleged that plaintiff was a thief. 1 WIGMORE, *supra* note 18, at § 72 (noting that most jurisdictions, rather than allowing evidence of both specific and general reputation, "prefer to make the use of one sort exclusive.").

recovery.⁹⁶ When courts have recognized the libel-proof defense the evidence admitted to establish that the plaintiff's reputation is beyond further damage has been of the same nature as the specific conduct referred to in the defamation. For example, if a defamatory statement suggested that the defendant committed a criminal act, evidence that the plaintiff had been involved in a multitude of other criminal activities would be admissible.⁹⁷ Apparently, the nature of the plaintiff's past actions, coupled with the surrounding publicity, may be such that the plaintiff's gen-

96. For example, if a plaintiff is required by *Gertz* to show actual injury, he cannot recover nominal damages.

97. See *Cardillo v. Doubleday & Co.*, 518 F.2d 638, 640 (2d Cir. 1975). In holding the lower court did not err in granting the defendant's motion to dismiss and motion for summary judgment in a libel suit over a book that mentions plaintiff's participation in certain criminal acts the *Cardillo* court said:

With Cardillo himself having a record and relationships or associations like these, [which were previously listed by court] we cannot envisage any jury awarding, or court sustaining, an award under any circumstances for more than a few cents' damages, even if Cardillo were to prevail on the difficult legal issues with which he would be faced.

Id. See also *Sharon v. Time, Inc.*, 575 F. Supp. 1162 (S.D.N.Y. 1983) (court recognized that a plaintiff could be libel proof, but found that under the facts involved with the publication, the plaintiff Sharon was not libel proof). In *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924 (C.D. Cal. 1982), the plaintiff, who had a "close personal relationship" with Elizabeth Taylor sued over an article that appeared in the defendant's publication. The trial court granted summary judgment partially on the basis that plaintiff was libel proof and therefore entitled to no more than nominal damages. The court said:

Wynberg's past conduct and criminal convictions establish a bad reputation which, for purposes of this case, render him 'libel proof' as a matter of law. . . . When, for example, an individual engages in conspicuously anti-social or even criminal behavior, which is widely reported to the public, his reputation diminishes proportionately. Depending upon the nature of the conduct, the number of offenses, and the degree and range of publicity received, there comes a time when the individual's reputation [for specific conduct, or his general reputation for honesty] and fair dealing is sufficiently low in the public's estimation that he can recover only nominal damages for subsequent defamatory statements.

Id. at 927.

In *Ray v. Time, Inc.*, 452 F. Supp. 618 (W.D. Tenn. 1976), *aff'd*, 582 F.2d 1280 (6th Cir. 1978), the convicted assassin of Martin Luther King, Jr. brought suit for averments that he was a "narcotics addict and peddler" as well as a "robber." The court said:

The court is persuaded, in the light of all the circumstances in this cause and in the public record involved in the other cases mentioned, that plaintiff, James E. Ray is libel proof. . . . Ray, . . . is a convicted habitual criminal and is so unlikely to be able to recover damages to his reputation as to warrant dismissal of his libel claim in the light of first amendment considerations attendant to publication of material dealing with his background and his criminal activities.

Id. at 622 See also *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1078 (3d Cir.), *cert denied*, 106 S. Ct. 182 (1985) (dicta). *But see* *Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *cert denied in part*, 105 S. Ct. 2672 (1985), *vacated*, 106 S. Ct. 2505 (1986) ("Libel proof" doctrine not recognized at summary judgment stage; "The law . . . proceeds upon the optimistic premise that there is a little bit of good in all of us or perhaps upon the pessimistic theory that no matter how bad someone is, he can always be worse.").

eral reputation is so low in the public's estimation that it is beyond damage.⁹⁸

IV. EMOTIONAL DAMAGE

Many defamation actions are the result of a person's emotional reaction to having his "good name" attacked. At common law, damages for this emotional distress were recoverable only if other special damages were shown to have been caused by the defamation or if the statement was actionable per se.⁹⁹ If the plaintiff did not meet these predicate requirements, damages for emotional distress were not recoverable even though the defamation had caused demonstrable emotional distress.¹⁰⁰ *Dun & Bradstreet* may provide that constitutional limitations on state defamation laws are inapplicable when a defamatory statement involves a matter of private concern. Under this interpretation of the case, state restrictions on the recovery of emotional damages remain intact in private-matter cases. If these state restrictions can be overcome, a cause of action seeking nominal damages may be available to clear the plaintiff's name.¹⁰¹

If presumed damages are appropriate, the trier of fact may presume damages for emotional distress as well as injury to reputation.¹⁰² The plaintiff does not have to introduce any evidence to support the injury award for either element.

When the defamation involves a matter of public concern, *Gertz* firmly indicates that, absent actual malice, the first amendment prohibits any recovery unless an individual has suffered actual injury as a result of the falsehood. Thus, in such an action, the plaintiff must plead and prove

98. See *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924, 928 (C.D. Cal. 1982) ("An individual who engages in certain anti-social or criminal behavior and suffers a diminished reputation may be 'libel proof' as a matter of law, as it relates to that specific behavior. . . . By extension, if an individual's general reputation is bad, he is libel proof on all matters.")

99. RESTATEMENT, *supra* note 21, at § 623.

100. PROSSER, *supra* note 7, at 794.

101. RESTATEMENT, *supra* note 21, at § 620. *Dun & Bradstreet* permits the states to generally define the cause of action for defamation, including permitting recovery for presumed damages. Thus, it appears that when a statement involves a matter of private concern, a state could permit a cause of action for recovery of nominal damages. Justice White's concurring opinion in *Dun & Bradstreet* suggests that a public official or public figure should have a cause of action to clear his name when he seeks no damages. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2953 (1985).

102. SACK, LIBEL, SLANDER & RELATED PROBLEMS 347 (1980).

actual emotional damage in order to recover for the injury.¹⁰³ A court probably would not recognize a cause of action seeking nominal damages, at least when public figures or public officials are involved.¹⁰⁴

Although the Court in *Gertz* said that damages for both harm to reputation and mental suffering were recoverable upon a showing of the defendant's fault or negligence, the Court did not discuss whether proof of harm to reputation was required before a plaintiff could recover for mental anguish caused by the defamation. Subsequently, in *Time, Inc. v. Firestone*,¹⁰⁵ the Supreme Court affirmed a \$100,000 libel judgment for emotional damage where the plaintiff had withdrawn her claim for damage to reputation before her case had been submitted to the jury. The *Firestone* decision was based on a state defamation law that permitted the recovery. The decision should not be read as a constitutional requirement mandating compensation for emotional injury without accompanying proof of damage to reputation. Rather *Firestone* establishes that a state law is not constitutionally infirm if it permits recovery of damages for emotional distress even though no evidence of harm to reputation has been introduced. There is nothing in the language of *Gertz* or *Firestone* to indicate that the Court intended to convert a constitutionally protected defamation action into a constitutionally protected action for mental distress.

In other areas of tort law, recovery for mental disturbance alone is rare because it "is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence."¹⁰⁶ Courts will, however, award damages for mental distress that flows from a physical injury. These "parasitic dam-

103. In a recent article Elmer Gertz suggested:

Especially in those situations where loss of income or loss of reputation cannot be shown easily, counsel must make certain that the other elements of actual injury ('personal humiliation and mental anguish and suffering') are proved. No one is in a better position to establish this than the plaintiff, as *Gertz* shows, where I testified at great length about my 'personal humiliation and mental anguish and suffering.' The plaintiff must be prepared to respond to sharp cross-examination, which will try to minimize his injury by showing that he consulted no physician or therapist, took no medication, lost no time at work, etc. Counsel must not be content with general testimony in this area. If possible, the plaintiff's testimony should be supplemented by the testimony of his family and friends. This is a highly personalized aspect of the case. The more outrageous the defamatory statements, the easier it will be to demonstrate, suffering, humiliation, and the like.

Gertz, *Gertz on Gertz*, TRIAL, Nov. 1985, at 74-75.

104. RESTATEMENT, *supra* note 21, at § 620.

105. 424 U.S. 448 (1976).

106. PROSSER, *supra* note 7, at 361.

ages" are available when the defendant's negligence manifests itself in an immediate physical illness or injury, such as a fractured arm.¹⁰⁷ The fact that physical injury has resulted is thought to be sufficient to ensure that the mental distress is real and the interference with the plaintiff's interests is significant. Often the physical harm is not immediate but flows from the mental disturbance to the plaintiff. For example, a plaintiff may suffer a heart attack as a result of the stress and emotional disturbance caused by the defendant's negligence. Historically, many courts confronted with such a situation required some "impact" with the person of the plaintiff in order to ensure that the mental distress was genuine and significant.¹⁰⁸ Although most jurisdictions have abandoned the impact requirement,¹⁰⁹ they continue to deny recovery unless the emotional injury has manifested itself in a physical injury capable of objective determination.¹¹⁰ Thus, a plaintiff who has suffered a heart attack as a result of emotional distress will be able to state a cause of action based upon negligence. However, emotional injury that is allegedly caused by the defendant's negligence but not accompanied by a physical injury or consequence generally does not give rise to a cause of action.¹¹¹

Even when the culpability of the defendant is greater than negligence, such as when the defendant acts intentionally,¹¹² recovery for emotional

107. PROSSER, *supra* note 7, at § 54.

108. See *Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1974), *overruled*, *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985); *Niederman v. Brodsky*, 436 Pa. 401, 413, 261 A.2d 84, 90 (1970) (Bell, C.J., dissenting). PROSSER, *supra* note 7, at § 54.

109. For an interesting attack on the policies underlying the impact rule, see *Bosley v. Andrews*, 393 Pa. 161, 169, 142 A.2d 263, 267 (dissent), *overruled*, *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970).

110. *Johnson v. State*, 37 N.Y.2d 378, 383, 372 N.Y.S.2d 638, 643, 334 N.E.2d 590, 592 (1975). See Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 605 (1982) ("[T]he physical injury requirement [can be viewed] primarily as a safeguard against fraudulent claims, but that requirement could also be used to screen claims to avoid a flood of litigation and unlimited liability."); PROSSER, *supra* note 7, at 362-63.

In *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985), *on reh'g*, 478 So. 2d 22 (Fla. 1985), the Florida Supreme Court rejected the impact rule and permitted recovery for emotional distress against a drunken driver who, by running his car off the road had killed the plaintiff's daughter. Plaintiff heard the impact, ran to the scene, saw the body and, as a result of her emotional distress, collapsed and died on the spot. However, in *Brown v. Cadillac Motor Car Div.*, 468 So. 2d 903 (Fla. 1985), a plaintiff was denied recovery for his emotional damage when an allegedly defectively designed accelerator stuck on an automobile driven by plaintiff, causing the automobile to strike and kill plaintiff's mother. The court reasoned that, in the absence of outrageous conduct, there could be no recovery for mental distress or psychic injury unless the plaintiff was physically injured as the result of the defendant's negligence.

111. See *Daley v. LaCroix*, 384 Mich. 4, 179 N.W.2d 390 (1970); PROSSER, *supra* note 7, at § 54.

112. RESTATEMENT, *supra* note 21, at § 46, comment i:

distress is limited. Unless there is actual or threatened physical injury and the damages are parasitic to the tort cause of action (e.g., battery), they are not recoverable.¹¹³ To recover in an independent cause of action for intentional infliction of emotional distress, the plaintiff must demonstrate that the situation involved "extreme outrage" and that the mental injury was "severe."¹¹⁴ Even if the plaintiff's mental reaction to the defendant's actions is "highly unpleasant," the necessary intrusion is lacking.¹¹⁵

When emotional distress flows from the negligent publication of a defamation, the courts must deal with the same concerns that are present in ordinary personal injury actions based upon negligence. Fleeting distress should not be compensated; one of the burdens of living in our society is to suffer humiliation and shame as well as hurt feelings.¹¹⁶ To ensure that there has been a genuine and substantial interference with the plaintiff's emotions, a court should require a predicate showing of damage to reputation.¹¹⁷ This requirement is similar to the other artificial predi-

The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain from his conduct. It applies also where he acts recklessly, . . . in deliberate disregard of a high degree of probability that the emotional distress will follow.

113. PROSSER, *supra* note 7, at §§ 9-12.

114. *Id.* at § 12.

115. RESTATEMENT, *supra* note 21, at § 46, comment j:

The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.

116. See Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936) ("[A] certain toughening of the mental hide is a better protection than the law could ever be.").

117. The jurisdictions that have addressed the issue have disagreed whether damage to reputation is essential before the plaintiff can recover for emotional damages. Compare *Gobin v. Globe Publishing Co.*, 233 Kan. 1, 6, 649 P.2d 1239, 1243 (1982) ("[I]n this state, damage to one's reputation is the essence and gravamen of the action for defamation. Unless injury to reputation is shown, plaintiff has not established a valid claim for defamation, by either libel or slander. . . . It is reputation which is defamed . . . injured, [and] protected under the laws of libel and slander."); *France v. St. Clare's Hospital & Health Center*, 82 App. Div. 2d 1, 441 N.Y.S.2d 79 (1981) (damage to reputation is a prerequisite to recovery of emotional damages, unless malice is present); *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1293 (D.D.C. 1981) (injury to reputation must be proven to recover for defamation; in invasion of privacy, emotional damage is recoverable without regard to injury to reputation) *with* *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (Florida permits recovery of

cates generally required for the recovery of emotional damage. The *Gertz* opinion places a limitation upon the common law and should not be interpreted as creating a cause of action in situations in which there is neither malice nor actual injury to the plaintiff's reputation. In cases where presumed damages are appropriate, the common-law rule, which does not require a predicate showing of harm, should be retained and the jury should include emotional damage within its award of presumed damages.¹¹⁸ Neither policy considerations nor logic suggests that in cases involving first amendment considerations a plaintiff should recover for emotional distress alone while the plaintiff in a personal injury action arising out of an automobile accident is unable to recover such damages.

V. MALICE

The state of mind of the publisher of a defamatory statement is frequently the crucial question in determining whether there is liability for the defamatory statement. The first amendment requires a public figure¹¹⁹ or public official¹²⁰ to prove, with clear and convincing evidence, that the defendant published the defamatory statement with knowledge of its falsity or with a reckless disregard for its truth. This mandate has sometimes been referred to as a requirement that the plaintiff show "ac-

emotional damages without a showing of damage to reputation); *Hearst Corp. v. Hughes*, 297 Md. 112, 130, 466 A.2d 486, 495 (1983) ("If such persons can convince a trier of fact that their emotional distress is genuine and can prove the other common law and constitutionally required elements of a negligent defamation case, we see no social purpose to be served by requiring the plaintiff additionally to prove actual impairment of reputation."). See generally *Anderson, Reputation Compensation and Proof*, 25 WM. & MARY L. REV. 747 (1984); *Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); PROSSER, *supra* note 7, at § 112 at 797.

Whether and when emotional damages are recoverable in a false light privacy claim is beyond the scope of this article. See Van Alstyne, *First Amendment Limitations of Recovery from the Press—an Extended Comment on the Anderson Solution*, 25 WM. & MARY L. REV. 793, 810-14 (1984).

118. The common law limited the recovery of emotional damages to cases in which special damages or presumed damages were appropriate. If the plaintiff did not meet these predicate requirements, emotional damages were not recoverable even though the plaintiff could show that the defamation caused emotional distress. See RESTATEMENT, *supra* note 21, at § 623, comment b. Today in most cases where actual injury was required to be proven, emotional damages are not recoverable because the predicate of special damage is absent. *Gertz* should not be interpreted as permitting the recovery of emotional damages without any predicate showing of other damages. Such an interpretation would permit a recovery for emotional distress when the defamation involves a matter of public concern, even though, under *Dun & Bradstreet*, such recovery is not allowed when the matter is of private concern. Then the state law of defamation controls.

119. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, *reh'g denied*, 389 U.S. 889 (1967).

120. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

tual malice.”¹²¹ Apparently, the Supreme Court has extended the same constitutional requirement to a plaintiff seeking to recover punitive damages.¹²²

When actual malice is alleged, the factual issue to be decided is the defendant’s knowledge of the truth or falsity of the statement at the time of publication. The defendant is not judged by an objective, reasonable man standard. Instead, the plaintiff must prove that the defendant had serious doubts concerning the truth of the publication.¹²³ The Supreme Court has not set forth a precise standard for determining the admissibility of evidence offered to prove actual malice; however, the appellate decisions have relied upon a wide variety of circumstantial evidence that is probative of the issue. Usually, the plaintiff must establish malice by the aggregate of available proof rather than by a single item of evidence.¹²⁴ Any evidence which is sufficiently probative of the critical element, the defendant’s state of mind, should be admissible.¹²⁵ An extensive discus-

121. RESTATEMENT, *supra* note 21, at § 580A, comment d.

122. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2944 (1985) (“[W]e held that a State could not allow recovery of presumed and punitive damages absent a showing of ‘actual malice.’”).

123. *See Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), *overruled*, *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 134 (1967), *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777, 779 (9th Cir.), *cert. denied*, 423 U.S. 930 (1975).

124. *See Herbert v. Lando*, 73 F.R.D. 387, 395 (S.D.N.Y. 1977) (“In all cases, civil or criminal, turning upon the state of an individual’s mind, direct evidence may be rare; usually the trier of the facts is required to draw inferences of the state of mind at issue from surrounding acts, utterances, writing, or other indicia.”). In General Westmoreland’s suit against CBS, his memorandum of law in opposition to a motion to dismiss and for summary judgment filed by CBS cites legal authority for 27 different indicia of actual malice allegedly present under the facts in the record. Brief of General William Westmoreland in Opposition to Defendant CBS’s Motion to Dismiss and For Summary Judgment at 278-307, *Westmoreland v. CBS, Inc.*, 569 F. Supp. 1170 (S.D.N.Y. 1984).

125. *See Pep v. Newsweek, Inc.*, 553 F. Supp. 1000, 1002-03 (S.D.N.Y. 1983); *Snively v. Record Publishing Co.*, 185 Cal. 565, 577, 198 P. 1, 5 (1921); Bezanson, *Fault, Falsity and Reputation in Public Defamation Law: An Essay on Bose Corporation v. Consumers Union*, 8 HAMLIN L. REV. 105, 119 n.73 (1985).

Although the defendant’s belief in the truth is not a defense, evidence of the belief may be considered by the jury on the issue of malice. *See Gray v. Allison Division, General Motors Corp.*, 52 Ohio App. 2d 348, 356, 370 N.E.2d 747, 753 (1977).

Similar questions involving the mental condition of the defendant arise when the action involves express malice, which provides a basis of punitive or exemplary damages, or the type of malice which destroys one of the many common-law qualified privileges. Although some courts define the malice that defeats the claim of qualified privilege in terms of actual malice, *see Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 535 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983), many states have broadened the definition to include relevant circumstances that would support a conclusion that the defendant acted in “an ill-tempered manner or was motivated by ill-will” and other circumstances that would support a determination that the privilege was abused. *Sondorf v. Jacron Sales Co.*, 27 Md.

sion of the evidence that both parties may offer on the issue of actual malice is beyond the scope of this Article. However, the three types of evidence discussed elsewhere in this Article: reputation testimony, opinion testimony and evidence of a party's specific actions are among the types of evidence admissible to prove actual malice. Evidence of specific actions that is probative of the statement's truthfulness is relevant to prove the defendant's state of mind if it is shown that the defendant was aware of those acts before the publication of the statement.¹²⁶ Obviously, events that occurred after the publication and actions of which the defendant was unaware are not probative of the defendant's state of mind at the time of publication. The plaintiff also may offer evidence of the defendant's actions that are relevant in demonstrating the defendant's doubts concerning the truthfulness of the publication.¹²⁷

App. 53, 341 A.2d 856 (1975). See PROSSER, *supra* note 7, at § 115. Most states also require an additional showing for a plaintiff to recover punitive damages, regardless of the type of action involved; i.e., punitive damages can be recovered only if the defendant acted with ill will, evil motive or a conscious disregard of the interests of another; what has been termed "express malice." *Id.* at §§ 2, 34. Although cases dealing with express malice and qualified privilege are not controlling authority in determining actual malice in the constitutional sense, they are persuasive in determining the admissibility of evidence concerning the defendant's state-of-mind since all three types of cases involve that issue.

126. See *Cowman v. LaVine*, 234 N.W.2d 114, 121-22 (Iowa 1975); *cf.* *Swan v. Thompson*, 124 Cal. 193, 56 P. 878 (1899) (where qualified privilege is asserted, evidence is admissible to show that defendant's "mental state was one of good faith without malice or ill will."); *Jones, Varnum & Co. v. Townsend's Adm'rix*, 21 Fla. 431, 449 (1885) (evidence of statements made by third parties to defendant concerning the truth of the defamatory statement were admissible to show defendant's state of mind; claim for exemplary damage and defense of qualified privilege); *Holdaway Drugs, Inc. v. Braden*, 582 S.W.2d 646, 650 (Ky. 1979) (evidence received by defendant from Internal Revenue Service, even though erroneous, was relevant to whether the defendant believed defamatory statement was true; claim of qualified privilege).

When evidence is offered to prove the defendant's state of mind, it is not offered to prove the plaintiff's character or that the plaintiff acted in a particular manner. Thus, the restrictions on admissibility contained in Federal Rules of Evidence 404 and 405 do not apply. The only issue is whether the proffered evidence is sufficiently probative of the defendant's state of mind at the time of the publication. No specific provision in the Federal Rules of Evidence affects the analysis of admissibility for that purpose.

127. See *Green v. Northern Publishing Co., Inc.*, 655 P.2d 736 (Alaska 1982), *cert. denied*, 463 U.S. 1208 (1983) (the fact that the defendant disregarded certain evidence may be admissible to prove actual malice); *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 431, 211 S.E.2d 674, 680, *cert. denied*, 423 U.S. 882 (1975) (evidence that newspaper "joined with political partisans in an overall plan or scheme to discredit the character of a political candidate" admissible to prove actual malice). *Cf.* *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 374, 568 P.2d 1359, 1366 (1977) (evidence of specific actions of the defendant admitted to show express malice); *McBurney v. Times Publishing Co.*, 93 R.I. 331, 338, 175 A.2d 170, 174 (1961) (statements by defendant subsequent to publication admissible to show malice to defeat claim of privilege).

Evidence of the defendant's ill-will or bad feeling toward the plaintiff is relevant not only to show the appropriateness of punitive damages, but also to establish an inference of actual malice.¹²⁸ Similarly, evidence of the plaintiff's reputation in the community which is probative of the truth of the defamatory statement may help to prove the defendant's state of mind at the time of the publication if it is also shown that the defendant was aware of that reputation.¹²⁹ In addition, community members' opinions about the truth or falsity of the statement would be probative of the publisher's state of mind if he had knowledge of those opinions.

VI. TRUTH OR FALSITY

When a public official or a public figure alleges that he has been defamed, the first amendment requires that he prove that the defendant published the defamatory statement with knowledge of its falsity or with reckless disregard for the truth or falsity. Thus, such a plaintiff must offer evidence of the falsity of the statement as well as evidence of the state of mind of the defendant.¹³⁰ Apparently, the falsity of the statement is an element of the constitutionally defined cause of action.¹³¹ The plaintiff cannot wait to introduce evidence of falsity until after the defendant's case; such a failure will probably lead to the granting of the defendant's motion for a directed verdict.

In *Philadelphia Newspapers, Inc. v. Hepps*,¹³² the Supreme Court extended the first amendment requirement that placed the burden of proof for the issue of falsity upon the plaintiff to private persons seeking damages from media defendants for the publication of statements concerning public matters. The Court held that when the evidence of truth or falsity is ambiguous, a news organization should not be penalized for statements that may be true even though victims of false statements may be denied recovery.

128. *Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 372 N.E.2d 1211 (1978); see also RESTATEMENT, *supra* note 21, at § 580A, at 218.

129. *Cf. Coogler v. Rhodes*, 38 Fla. 240, 245, 21 So. 109, 111 (1897) (evidence of general reputation "tended to show good ground for suspicion of the truth of the matters alleged to be false"); *Van Derveer v. Sutphin*, 5 Ohio St. 294, 299 (1855).

130. See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1974); *Meiners v. Moriarity*, 563 F.2d 343, 351 (7th Cir. 1977) (defendant may offer evidence that the statement is true, "but such an offer does not cause the burden to shift to him").

131. *Herbert v. Lando*, 441 U.S. 153, 176 (1979).

132. 106 S. Ct. 1558 (1986).

When the plaintiff is a private person and the publication involves a matter of private concern, few of the constitutional limitations apply, and state defamation law controls.¹³³ The common law,¹³⁴ which was incorporated into the defamation law of most states,¹³⁵ presumed that defamatory statements were false¹³⁶ and required the defendant to plead and prove the truth of the statement.¹³⁷ Under this view, the truth or falsity of the statement was not in issue until the defendant raised it.¹³⁸ Because evidence offered to prove an inconsequential fact is generally inadmissible¹³⁹ a plaintiff could not offer evidence, during his case-in-chief, of his good character to prove the falsity of the statement.¹⁴⁰ The falsity of the statement simply was not a contested issue in the suit. However, some jurisdictions provided that if the defendant pled truth, otherwise known as justification, the plea placed the issue in controversy in the suit. In jurisdictions allowing the justification defense, the plaintiff could anticipate the defense and introduce evidence of the falsity of the statement during his case-in-chief.¹⁴¹

Whether a defendant could offer evidence in support of the published statement without pleading justification also proved a troublesome issue for the courts. In jurisdictions that restricted the defendant's proof of falsity to situations in which justification had been pleaded,¹⁴² courts up-

133. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

134. See Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 790-805 (1964); Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43 (1931).

135. See PROSSER, *supra* note 7 at 116. Compare *Denny v. Hertz*, 106 Wis.2d 636, 318 N.W.2d 141, *cert. denied*, 459 U.S. 883 (1983) (defendant must prove truth) with *Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476, 491 (Minn. 1985) (private plaintiff must prove that defendant knew or should have known that the statement was false).

136. *Vigil v. Rice*, 74 N.M. 693, 699, 397 P.2d 719, 723 (1964); PROSSER, *supra* note 7, at § 116, at 841.

137. *Gray v. Allison Division, General Motors Corp.*, 370 N.E.2d 747, 753 (Ohio Ct. App. 1977) (the defendant's belief in the truth is not a defense, it may be considered on the issue of the defendant's malice).

138. RESTATEMENT, *supra* note 21, at § 581A, comment b ("truth is an affirmative defense which must be raised by the defendant. . .").

139. 2 WEINSTEIN, *Evidence*, *supra* note 43, at § 401[03]. Cf. *Bauman v. Volkswagenwerk Aktiengesellschaft*, 621 F.2d 230 (6th Cir. 1980).

140. See *Dame v. Kenney*, 25 N.H. 318, 324 (1852) (Although evidence of plaintiff's good character is not admissible until attacked, plaintiff's evidence was admissible to disprove the charges imputed to her by the slander because the defendant had opened the door.); *Severance v. Hilton*, 24 N.H. 147, 148 (1851) ("Where the defendant has not attacked the plaintiff's general character in evidence, the plaintiff cannot introduce proof of his good character to rebut a justification. . .").

141. See *Harding v. Brooks*, 22 Mass. 244, 246-47 (1827).

142. See *Krulic v. Petcoff*, 122 Minn. 517, 519, 142 N.W. 897, 898 (1913).

held the restriction as a means of avoiding the plaintiff's objection of unfair surprise.¹⁴³

Two developments have diminished significantly the rationale for state defamation law restrictions on the proof of truth or falsity. First, the constitutional requirement that certain plaintiffs prove falsity as a part of their respective causes of action obviously mandates permitting each plaintiff to introduce evidence to prove the issue; all parties are alerted to the fact that falsity will be an issue during plaintiff's case-in-chief. A similar result is reached under the defamation law of those states that require every plaintiff to prove falsity as a part of his cause of action. In the majority of jurisdictions, which place the burden on the defendant, the availability of extensive pretrial discovery and the requirement of pre-trial disclosure of claims and defenses provide a means of making the parties aware that falsity will be a contested issue whether or not the defendant has asserted a separate defense of justification.

Most defamatory statements involve derogatory assertions concerning the plaintiff's character.¹⁴⁴ Character is defined "as the kind of person that one is"¹⁴⁵ and includes not only whether a person is chaste or honest but also such matters as whether a person is a competent driver or a criminal. Although Federal Rule of Evidence 404 severely restricts the use of evidence of a person's character, the Rule's prohibition is limited to situations in which the evidence is offered as circumstantial evidence of the manner in which the person acted on a particular occasion. Rule 404 does not forbid the use character evidence for some other purpose. In a defamation case, when the truth or falsity of the statement is being established, Rule 404 usually does not apply because neither party is relying upon the existence of a particular trait to supply the basis of an inference that the plaintiff acted in accordance with that trait on a specific occasion. Rather, both parties are seeking to establish an element of the cause of action—whether the alleged defamatory statement asserting that the plaintiff has a particular character trait is true or false. The plaintiff's character itself is in issue. The Advisory Committee Note to Rule 404 recognizes the inapplicability of the Rule to situations in which character is an element of a claim or defense. When character is an issue, no question of the relevancy of the character evidence exists.¹⁴⁶

143. See I WIGMORE, *supra* note 18, at § 207.

144. MCCORMICK, *supra* note 21, at § 187, at 551.

145. FED. R. EVID. 404 advisory committee note.

146. *Id.*

Regardless of which party offers evidence to prove the truth or falsity of a defamatory statement or which party bears the burden of proof, the same considerations should apply in determining if the proffered evidence is admissible. The Federal Rules of Evidence do not draw any distinctions between the permissible methods for proving that the allegation is true.¹⁴⁷ In addition to permitting the use of evidence of specific instances of the plaintiff's conduct, Rule 405 permits the truthfulness to be proved or disproved by testimony concerning the plaintiff's relevant reputation and by testimony in the form of an opinion as to whether the statement is true. The application of Rules 401¹⁴⁸ and 403¹⁴⁹ limits the use of evidence which has a tendency to prove or disprove the truth of the statement; such evidence will not be considered by the finder of fact when its probative value is substantially outweighed by the danger of undue prejudice and confusion of the issues. Although the Federal Rules do not speak directly to the problem of proving truth or falsity, the foregoing provisions generally embody the principles of the common law relating to the proof of character, and there is little reason to believe that the application of these principles will produce a different result, except as otherwise noted.

When the defamatory statement alleges that the plaintiff has committed a specific act (e.g., "X robbed the First National Bank"), only evidence which shows that the plaintiff had or had not engaged in that specific activity is admissible. Evidence that the plaintiff had committed other similar acts (e.g., other bank robberies) does not have sufficient probative value to overcome the prejudice and confusion of issues that would result if such evidence were admitted.¹⁵⁰ Similarly, proof of a statement which alleges that the defendant committed a series of acts must be of the same scope as the acts mentioned in the statement.¹⁵¹ If the defamation is of a general character (e.g., "X, the bank robber. . ."), evidence that the plaintiff has committed similar acts (e.g., bank robber-

147. See McCORMICK, *supra* note 21, at § 187.

148. FED. R. EVID. 401 defines "relevant" evidence.

149. FED. R. EVID. 403 allows the exclusion of relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues and waste of time.

150. See *Crane v. New York World Telegram Corp.*, 308 N.Y. 470, 475, 126 N.E.2d 753, 756 (1955); *Vorhees v. Toney*, 32 Okl. 570, 573, 122 P. 552, 554 (1912); *Roper v. Mabry*, 15 Wash. App. 819, 823, 551 P.2d 1381, 1384 (1976); SACK, LIBEL, SLANDER AND RELATED PROBLEMS 38 (1980).

Evidence of specific acts of the plaintiff may be relevant to prove the motive for the defendant to do the act alleged. See *Holdaway Drugs, Inc. v. Braden*, 582 S.W.2d 646 (Ky. 1979).

151. F. HARPER & F. JAMES, LAW OF TORTS § 5.20 (1956).

ies) has sufficient probative value to be admitted to prove the truth of the charge.¹⁵² However, evidence that the plaintiff has committed criminal acts other than bank robberies is not admissible because such evidence does not have any significant tendency to prove the truth of the general allegation.¹⁵³ Wigmore suggested that the reason for limiting the evidence to the specific charges in the statement was to prevent the abuse and surprise that would occur if the plaintiff had to meet evidence "ranging over his entire life."¹⁵⁴

In order to prove the truth of the defamatory statement, a party may offer evidence of the plaintiff's character in the form of report, rumor or reputation. Rumors and suspicions concerning the truthfulness of the statement itself are excluded, probably because the probative value of rumors to prove truth or falsity may be slight while the danger of prejudice is high.¹⁵⁵ Although courts and commentators disagree about whether falsity can be proven by evidence of the plaintiff's reputation for good character,¹⁵⁶ Rule 405(a) generally permits the use of such evidence.¹⁵⁷ However, the reputation evidence must be probative of the specific defamatory matter published by the defendant. For example, if the actionable statement is that the plaintiff "robs banks," evidence that the plaintiff has a reputation for robbing banks would be admissible to show that the statement was true. However, evidence that the plaintiff has a reputation for being an untruthful person would lack sufficient probative value to be admissible. Courts should also exclude reputation evidence when it is too broad. Evidence that the plaintiff has a reputation in the community for being of "good character" does not have adequate probative value to prove that he did not "rob banks" as alleged in the statement. Although a plaintiff should not be allowed to introduce such

152 See *Krulich v. Petcoff*, 122 Minn. 517, 520, 142 N.W. 897, 898 (1913); *Croft v. Thurston*, 84 Mont. 510, 519, 276 P. 950, 953 (1929); *Lawson v. Morning Journal Ass'n*, 32 App. Div. 71, 73, 52 N.Y.S. 484, 485 (1898); 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 143, at 300 (1985).

Proof of specific acts subsequent to the publication may be admissible on the issue of truth. See *Moore v. Davis*, 16 S.W.2d 380, 383 (Tex. Civ. App. 1929), *aff'd*, 27 S.W.2d 153 (Tex. Com. App. 1930).

153. RESTATEMENT, *supra* note 21, at § 581A, comment f.

154. 1 WIGMORE, *supra* note 18, at § 207.

155. *Nicholson v. Rust*, 21 Ky. 645, 52 S.W. 933 (1899). See generally *Cooper, Libel and the Reporting of Rumor*, 92 YALE L.J. 85 (1982).

156. 1 WIGMORE, *supra* note 18, at § 66 (observing that while there are "plausible arguments" on both sides of the issue and it is natural that laws of the "various jurisdictions should differ," the defendant should not be entitled to offer evidence of the plaintiff's bad character to prove his guilt).

157. MCCORMICK, *supra* note 21, at § 187.

evidence to prove the falsity of the statement, a court could allow such evidence as proof that the plaintiff's reputation has been damaged by the defamation.

Limiting the scope of reputation testimony to the nature of the defamatory charge is not consistent with the treatment of specific acts offered to prove the truth of the defamatory statement or with the treatment of character evidence offered as circumstantial evidence. Character evidence is admitted only when it pertains to a pertinent character trait; general character evidence is excluded.¹⁵⁸ The limitation avoids prejudice and confusion of the issues.

Rule 405(a) also permits the use of relevant opinion testimony.¹⁵⁹ The defendant could offer testimony of an expert witness who had concluded, after adequate investigation, that in his opinion the plaintiff was a bank robber.¹⁶⁰ Opinion testimony is not objectionable simply because it goes to an ultimate issue. As is the case when character is proved by reputation or evidence of specific instances of conduct, the opinion testimony must be as specific as the charge in the defamatory statement. For example, if the publication concerns the commission of a specific act (e.g., that plaintiff robbed the First National Bank), the opinion would have to relate to that specific charge. Evidence that the plaintiff had committed other robberies or had a reputation as a bank robber should not be admitted.

VII. CONCLUSION

The recent affirmance of the constitutional validity of presumed damages, and possibly of the other elements of a common-law defamation action involving a private person and a statement concerning a private matter, calls for a reevaluation of each of those elements in light of modern evidentiary policy. Such cases, particularly those involving media defendants, are tried with increasing frequency to a jury because of the absence of the constitutional privileges.

The truthfulness of the publication is an important issue regardless of

158. See *United States v. Greer*, 643 F.2d 280, 283 (5th Cir.), *cert. denied*, 454 U.S. 854 (1981); *Huff v. State*, 437 So. 2d 1087, 1089 (Fla. 1983). See also *McCORMICK*, *supra* note 21, at § 191; *FED. R. EVID.* 404.

159. *McCORMICK*, *supra* note 21, at § 187.

160. Prior to the Federal Rules, many jurisdictions excluded opinion testimony which was offered to prove the truth of the defamatory statement. See *McDuff v. Detroit Evening Journal Co.*, 84 Mich. 1, 10, 47 N.W. 671, 673 (1890).

whether the plaintiff is a public official or a private person. The courts must be attentive to the techniques used to prove this issue to ensure that prejudice and confusion of the issues are not injected into the trial.

The concern that juries will use concepts such as presumed damages and emotional distress to punish the media or unjustly award damages because there is no method to assess accurately a monetary value for either element,¹⁶¹ is a concern that has been urged vigorously and loudly in other areas of tort law for a number of years. Defendants in both medical malpractice and product liability suits have been faced with the same problem, only more frequently and with much larger jury verdicts. The cries of outrage and the expensive campaigns mounted by manufacturers and doctors have gone largely unnoticed in the court system. There is little likelihood that defamation defendants will be more successful.

This Article makes two suggestions that should help insure that only actual losses are compensated. First, although properly conducted public opinion surveys cannot establish a precise dollar amount for the loss suffered by the plaintiff, they can provide persuasive and accurate evidence of both the fact and the extent of injury.

Second, to insure that the defamatory statement has significantly interfered with the plaintiff's emotions,¹⁶² state defamation law should treat emotional damages in the same way that it treats emotional damages in other tort causes of action. State law should require a predicate showing

161. See *New York Times Co. v. Sullivan*, 376 U.S. 262, 267, 277 (1964); Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747, 755-56 (1984); RESTATEMENT, *supra* note 21, at § 327; A. Lewis, *The Sullivan Case*, NEW YORKER, Nov. 5, 1984, at 94-95.

162. The year after the article defaming Elmer Gertz was published, his law practice earned more than it had in any previous year and he was elected a delegate to the Illinois Constitutional Convention. Although he suffered no physical symptoms or manifestations, lost no time from work and sought no medical or other professional help as a result of his outrage and distress, the jury awarded \$100,000 to compensate him for his emotional damage. *Gertz v. Robert Welch, Inc.*, 627 F.2d 527, 531 (7th Cir. 1982). The jury also awarded Gertz \$300,000 in punitive damages. Gertz used a portion of the proceeds to finance a lengthy cruise for himself and his wife.

No one testified that Gertz's reputation was damaged and Gertz failed to name any person who thought less of him as a result of the article. Gertz attempted to prove damage to his reputation during his second trial. "Several attorneys testified at trial that calling a lawyer a Communist would be highly injurious to professional reputation. One witness, Albert Jenner, testified that he had heard the defamatory statements about Gertz repeated." *Id.* at 540. Elmer Gertz's emotional distress might not have been sufficient by itself in any tort action other than defamation.

This information concerning the second Gertz trial was provided by Mr. Gertz. E. Gertz, Remarks to First Amendment Seminar, Florida State University College of Law (Oct. 23, 1984) (video-tape available in Florida State University College of Law Library).

to ensure that the emotional damage is substantial and genuine. In cases where presumed damages are not appropriate, the plaintiff should be required to demonstrate damage to reputation as a predicate for recovery of emotional damages. If both suggestions are adopted, questionable jury verdicts can be avoided.

In weighing the conflicting policies in defamation cases, emphasis is again being placed upon the state's interest in compensating its citizens for wrongful injury to their reputations. In today's environment, many important questions in defamation actions can be resolved properly only if courts recognize that the issues involved are a part of the general tort framework; it is unrealistic to believe that all questions relating to defamation can be solved solely within a constitutional structure.