"Old Stinking, Old Nasty, Old Itchy Old Toad"*: Defamation Law, Warts and All (A Call for Reform)

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On May 2, 2007, the Indiana Supreme Court handed down its latest exposition on Indiana's defamation law, *Kelley v. Tanoos*.[1] *Kelley* illustrates the difficulty courts face in deciding defamation cases—the push to provide an overview of defamation as a setting for the outcome of a particular case, and the pull to limit an opinion to its facts, the legal issues raised and developed by the parties, and the narrowest possible ground on which to decide the case. *Kelley*'s overview is a bit too broad because it lists malice as an element of defamation. The opinion is appropriately narrow because it does not tackle the intricacies of actual malice, the fuzzy logic of libel versus slander (and what lies in between), the distinction between defamation per se and defamation per quod, and the issue of presumed damages.

The purpose of this Article is to highlight five ambiguities or conundrums in Indiana defamation law, so that Indiana lawyers can identify the issues as they arise, craft effective arguments promoting clarification of the law, and present them to Indiana's trial and appellate benches. The Author is convinced that intelligent litigation will lead to reform in an area of law that has been called "odd,"[2] "senseless,"[3] and "utterly confusing,"[4] a "hodgepodge,"[5] an "historical accident,"[6] and a "rustic relic[] of ancient asininity"[7] "for which no court and no writer has had a kind word for upwards of a century and a half."[8] "Neither judicial nor academic fatigue can long serve to avoid coming to grips with . . . the chaos that is the modern American law of defamation."[9] This Article will discuss

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* In *Villers v. Monsley*, 95 Eng. Rep. 886, 886 (K.B. 1769), this poem was held to be defamatory because it "render[ed] [the plaintiff] ridiculous."

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The Author thanks the Honorable E. Michael Hoff, Judge of the Monroe Circuit Court in Bloomington, Indiana, along with all the members of the Indiana Judges Association Civil Instructions Committee for their thoughtful comments. The Author also thanks Terri Ross and the staff of the Indiana Supreme Court Library for their assistance in obtaining research materials.

In memory of Jacob Corpenny Sipe, III.

1. 865 N.E.2d 593 (Ind. 2007).
2. William L. Prosser, *Libel Per Quod*, 46 Va. L. Rev. 839, 839 (1960).
3. *Id.*
4. *Id.* at 840.
5. Grein v. La Poma, 340 P.2d 766, 768 (Wash. 1959).
6. *Id.*
7. Sauerhoff v. Hearst Corp., 538 F.2d 588, 590 n.1 (4th Cir. 1976) (quoting Judge Armstead Dobie).
8. Prosser, *supra* note 2, at 839.
9. Sheldon W. Halpern, *Values & Value: An Essay on Libel Reform*, 47 Wash. & Lee L. Rev. 227, 229 (1990).

the following topics: (1) malice as an element; (2) actual malice; (3) the libel/slander distinction; (4) the per se/per quod distinction; and (5) presumed damages, the abolition of which would bring some much-needed order to the chaos that is Indiana defamation law.

I. MALICE AS AN ELEMENT

The facts of *Kelley* sound "ripped from the headlines": Paul Kelley had a "known animosity toward [Daniel] Tanoos."[10] When a shotgun pellet grazed Tanoos's head, Tanoos believed Kelley was the assailant.[11] The police identified Kelley as a suspect, and Kelley's boss sent Tanoos a letter suggesting they meet to discuss the shooting.[12] The police outfitted Tanoos with a wire and questions to ask Kelley's boss.[13] During the course of the conversation, Tanoos said he was "as convinced as the police . . . that Kelley did it," that Kelley failed a polygraph three times, that "everything just started pointing to" Kelley, and that "it all leads back to" Kelley.[14] Kelley was never charged with the shooting.[15] Kelley sued Tanoos for defamation.[16] The trial court granted Tanoos's motion for summary judgment.[17] The Indiana Court of Appeals reversed.[18] The Indiana Supreme Court granted transfer, vacated the Indiana Court of Appeals's opinion, and affirmed the trial court's grant of summary judgment, holding that Tanoos's statements were qualifiedly privileged because they were made to help law enforcement investigate criminal activity.[19]

Kelley states, "[t]o maintain an action for . . . defamation the plaintiff must demonstrate (1) a communication with defamatory imputation; (2) malice; (3) publication; and (4) damages."[20] *Kelley* is not decided on any of the listed elements, but rather on the defense of qualified privilege.[21] In fact, other Indiana cases asserting that malice is an element of a defamation claim have routinely been decided on other grounds, for example, publication, damages, privilege, or truth.[22] What does it mean, then, that courts routinely list malice among the

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10. Kelley v. Tanoos, 865 N.E.2d 593, 595 (Ind. 2007).
11. *Id.*
12. *Id.* at 596.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 602.
20. *Id.* at 596-97 (citing Schrader v. Eli Lilly & Co., 639 N.E.2d 258, 261 (1994)).
21. *Id.* at 597.
22. *See, e.g.*, Lovings v. Thomas, 805 N.E.2d 442 (Ind. Ct. App. 2004) (decided on special damages); Eitler v. St. Joseph Reg'l Med. Ctr., 789 N.E.2d 497 (Ind. Ct. App. 2003) (decided on the defense of absolute privilege); Poyser v. Peerless, 775 N.E.2d 1101 (Ind. Ct. App. 2002) (decided on publication); Gatto v. St. Richard Sch., Inc., 774 N.E.2d 914 (Ind. Ct. App. 2002)

defamation elements, but rarely discuss it?

Kelley's inclusion of malice as an element is based on solid precedent; *Kelley* cites a 1994 Indiana Supreme Court case,[23] which cites a 1992 Indiana Court of Appeals case,[24] which cites a 1982 Indiana Court of Appeals case,[25] and so on, tracing back to the Indiana Legal Encyclopedia published in 1959.[26] Malice as an element is not an invention of the 1950s; in the Middle Ages, *animus* (intent to do wrong) of Roman law, and *malitia* (bad intent) of English ecclesiastical law, were early elements of defamation.[27]

At the start of the nineteenth century, however, the legal community on both sides of the pond began to perceive that malice was not an essential element of defamation.[28] In an 1825 decision, the Court of King's Bench in England said, "'But in an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice.'"[29] In the United States, the Kansas Supreme Court said in 1908, "'it is said that malice is the gist of the action for libel. This is pure fiction. It is not true.'"[30] The Kansas court elaborated that defamatory statements are frequently "published with the best of motives," or "mistakenly or inadvertently," but the "plaintiff recovers just the same."[31]

In 1978, Laurence H. Eldredge agreed with these statements in his treatise *The Law of Defamation*:

> There are cases which say that malice is the "gist" of an action for defamation. . . . Such statements are not only misleading but positively false and they reflect the thoughtless tendency of some courts to keep on repeating a statement which was once the law long after it has ceased to be the law. Malice has not been an element of a cause of action for defamation for more than one hundred years. When courts continue to pay lip service to a long dead rule and to charge juries that "a libel is a malicious publication," and then try to explain it away, all they do is create confusion. The confusion is not limited to jurors. It affects the thinking of the less discriminating lawyers and judges, too.[32]

(decided on the defense of common privilege and truth).

23. *Schrader*, 639 N.E.2d at 261.

24. Rambo v. Cohen, 587 N.E.2d 140, 145 (Ind. Ct. App. 1992).

25. Shallenberger v. Scoggins-Tomlinson, Inc., 439 N.E.2d 699, 704 (Ind. Ct. App. 1982).

26. INDIANA LAW ENCYCLOPEDIA LIBEL AND SLANDER §§ 21-51 (1959).

27. *See* LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION 26 (1978) (citing Nicholas St. John Green, *Slander and Libel*, 6 AM. L. REV. 593, 609 (1872)).

28. *Id.* at 27.

29. *Id.* at 28 (quoting Bromage v. Prosser, 107 Eng. Rep. 1051, 1055 (K.B. 1825)).

30. *Id.* at 29 (quoting Coleman v. MacLennan, 98 P. 281, 291 (Kan. 1908)).

31. *Id.* (quoting *Coleman*, 98 P. at 291).

32. *Id.* at 25. Eldredge explains that the origin of the notion that malice is not an element of defamation is an 1825 decision of the Court of the King's Bench. *Id.* at 27-28.

Indiana Court of Appeals Judge Russell Smith expressed similar sentiments nearly forty years ago: "Malice is not an element of a cause of action for defamation."[33] He explained that there are circumstances in which the law of defamation does not require any intent at all.[34] Judge Smith was right—after the nineteenth century (and until *New York Times Co. v. Sullivan*[35] in 1964), defamation was a "curious compound of [] strict liability imposed upon innocent defendants."[36]

In his treatise, Eldredge asks in exasperation:

> Why, in the name of truth, why, in the name of accurate statement, do presumably learned judges who are handing down from on high the tables of the law to guide their bretheren in the courts below in charging juries and deciding cases, and to guide members of the Bar and all others who seek enlightenment—why do such judges keep on writing "a libel is a malicious publication"?[37]

The Author encourages lawyers and judges to do otherwise.[38]

II. ACTUAL MALICE: WHAT DOES IT MEAN, WHEN DOES IT APPLY, AND WHO DECIDES IT?

A. What Does Actual Malice Mean?

The garden-variety malice discussed above should not be confused with "actual malice," the constitutional privilege that was created and applied by the U.S. Supreme Court in *New York Times Co. v. Sullivan*.[39] Before *New York Times*, defamation was a strict liability tort,[40] the parameters of which were

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33. Hotel & Rest. Employees & Bartenders Int'l Union v. Zurzolo, 233 N.E.2d 784, 791 (Ind. App. 1968). Judge Smith also mentioned that "both parties to th[e] appeal debated [the issue of malice] enthusiastically and with passion, but without regard to reason." *Id.*

34. *Id.* ("The defendant may be held strictly liable for an innocent or negligent defamation without proof that he intended the consequences." (citing RESTATEMENT (FIRST) OF TORTS §§ 579, 580 (1938))).

35. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

36. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984).

37. ELDREDGE, *supra* note 27, at 29.

38. *Id.* at 25.

39. *N.Y. Times*, 376 U.S. at 283-84. Although defamation has traditionally been a matter for state governments, the U.S. Supreme Court in *New York Times* and its progeny has held that the First Amendment today requires most plaintiffs to establish some kind of fault to recover for defamation. *See id.* U.S. Supreme Court cases since *New York Times* have added complexities to the federal constitutional overlay on state defamation law that bind the states' formulations of defamation.

40. *See id.*; *see also* Diane Leenheer Zimmerman, *Musings on a Famous Law Review Article:*

decided by the states. In *New York Times*, an Alabama police chief sued a newspaper for publishing a paid advertisement that alleged that the chief maltreated African-American students who were protesting segregation.[41] The trial court instructed the jury that malice was implied, and the Alabama Supreme Court upheld judgment for the plaintiff.[42] The U.S. Supreme Court reversed, holding that, although defamation is a matter traditionally left to the states, the free speech rights guaranteed by the First Amendment to the U.S. Constitution required a federally imposed minimum fault standard.[43] Writing for the majority, Justice Brennan said, "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[44] The Court concluded that the plaintiff had to prove "actual malice."[45]

So, what is actual malice? Some lawyers might assume that actual malice means real malice, or what Black's Law Dictionary calls "express malice," that is, "ill will or wrongful motive."[46] *New York Times*, however, defined actual malice in terms of knowledge: "with knowledge that [a statement] was false or with reckless disregard of whether it was false or not."[47]

What does "reckless disregard" mean? Reckless disregard is difficult to define, even in areas of law less murky than defamation. It can mean indifference to the consequences, wantonness, or willfulness.[48] The Restatement (Second) of Torts says that recklessness in the general tort context involves two types of conduct: (1) the actor knows or has reason to know of facts that create a high probability of harm to another and deliberately acts (or fails to act) in

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The Shadow of Substance, 41 CASE W. RES. L. REV. 823, 824 n.9 (1991).

41. *See N.Y. Times*, 376 U.S. at 256.

42. *Id.* at 262-63.

43. *Id.* at 279-80.

44. *Id.* at 270 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

45. *Id.* at 279-80.

46. BLACK'S LAW DICTIONARY 957 (6th ed. 1990).

47. *N.Y. Times*, 376 U.S. at 280. There is reason to think, however, that ill will evidence may be admissible to prove actual malice. In *Indianapolis Newspapers, Inc. v. Fields*, 259 N.E.2d 651 (Ind. 1970), a sheriff sued a newspaper for publishing articles alleging brutality in jail. *Id.* at 656-57. The trial court entered judgment for the sheriff. *Id.* at 656. On appeal, then-Justice Given recused himself. *Id.* at 655. The remaining four justices split equally about whether to reverse or affirm the trial court. *Id.* at 655-56. Pursuant to appellate rule, the trial court was affirmed. *Id.* at 656. In his opinion to affirm, Justice DeBruler wrote:

> Appellant's argument is that ill will evidence is not *admissible* on the issue of whether appellant published with reckless disregard for the truth. We believe that it is relevant and admissible on that issue. It is true that ill will evidence does not tend to prove that appellant had *knowledge* of the falsity of its publications. However, actual malice may consist in a "high degree of awareness of their probable falsity."

Id. at 664 (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

48. *See* BLACK'S LAW DICTIONARY, *supra* note 46, at 1270-71.

conscious disregard of, or indifference to, the risk; and (2) the actor knows or has reason to know of the facts, but does not realize or appreciate the risk, although a reasonable person would do so.[49]

The U.S. Supreme Court "explained" the defamation-specific meaning of "reckless disregard" in *St. Amant v. Thompson*,[50] stating that the touchstone of actual malice is "an awareness . . . of the probable falsity of [the] statement."[51] The Court went on to say that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[52] Reckless disregard, according to the U.S. Supreme Court, requires proof of actual, subjective doubts.

In the legal construct of defamation, then, "actual malice" does not mean ill will, and "reckless disregard" does not mean unreasonable inattention to potential consequences. So why use these terms at all? The evolution of modern U.S. and Indiana defamation jurisprudence has been shaped by terms of art borrowed from other areas and redefined. This appropriation and redefinition was an attempt to strike a balance between freedom of speech guaranteed by our state and federal constitutions and the right to recovery for harm enshrined in American common law (which are in turn borrowed in large part from England). A persuasive argument can be made for abandoning these terms of art for straightforward definitions of what a plaintiff must prove.

B. When Does Actual Malice Apply? (And What Is the Standard When Actual Malice Does Not *Apply?)*

To further confuse things, the actual malice standard does not apply in all cases. The U.S. Supreme Court's line of defamation cases sets the standard of fault based on the type of plaintiff (public or private), defendant (media or non-media), and concern at issue (public or private). In *New York Times*, the Court held that a public official (the police chief) suing a member of the media (the newspaper) for publishing a matter of public concern (the chief's alleged civil rights abuses) had to prove actual malice.[53]

In *Gertz v. Robert Welch, Inc.*,[54] the U.S. Supreme Court decided that each state should choose its own fault standard for cases involving private plaintiffs because First Amendment concerns are reduced in comparison to cases involving plaintiffs who are public officials or public figures.[55] The Indiana Court of

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49. RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (1965); *but see* Bowman *ex rel.* Bowman v. McNary, 853 N.E.2d 984, 994-95 (Ind. Ct. App. 2006) (criticizing § 500 cmt. a).

50. 390 U.S. 727, 730-31 (1968).

51. *Id.* at 732-33.

52. *Id.* at 731.

53. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

54. 418 U.S. 323 (1974).

55. *Id.* at 347-48.

Appeals chose its standard in *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*,[56] in which it applied the actual malice standard in a case involving a private figure plaintiff (a heating company), a media defendant (a newspaper), and a matter of public concern (an alleged failure to install properly a furnace that killed two children).[57] The Indiana Supreme Court also applied the actual malice standard in *Journal-Gazette Co. v. Bandido's, Inc.*,[58] a case involving a public figure plaintiff (a restaurant), a media defendant (a newspaper), and a matter of public or general concern (rodent droppings were allegedly found in the restaurant).[59]

It is unclear what standard Indiana courts will apply to cases involving private figure plaintiffs, non-media defendants, and/or private concerns. In *Beeching v. Levee*,[60] a case involving a private plaintiff (an elementary school principal), a non-media defendant (a teacher's bargaining unit representative), and a matter of private concern (calling the principal a liar in a meeting with teachers), the Indiana Court of Appeals held that the "higher defamation standard in *Bandido[']s*" (i.e., actual malice) does not apply.[61] The Indiana Court of Appeals did not, however, specify what standard of fault *would* apply because it did not need to reach that issue.[62]

Clues may be found in the dissenting opinions in *Bandido's* written by Chief Justice Shepard and Justice Dickson. In his *Bandido's* dissent, Justice Dickson stated (and Chief Justice Shepard agreed) that, in a private figure plaintiff, media defendant, private concern case, he would make negligence the standard: "I respectfully dissent from the majority opinion as to its disapproval of Indiana's traditional common law standard . . . 'negligence' . . . in private defamation cases against media defendants."[63] In his concurring opinion, Justice Boehm appears to agree that negligence would be the standard: "[R]estricting the actual malice requirement to publications on subjects of public concern will leave the vast majority of the six million Hoosiers for whom Chief Justice Shepard expresses concern subject to a simple negligence standard for defamation."[64]

In his *Bandido's* dissent, Chief Justice Shepard implied (and Justice Dickson concurred) that, in the case of a private figure plaintiff, a non-media defendant, and a private concern, he would set the standard very low: "If somebody posts scandalous and defamatory material about a Hoosier on the internet, sending it

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56. 321 N.E.2d 580 (Ind. App. 1974).

57. *Id.* at 582-83, 586.

58. 712 N.E.2d 446 (Ind. 1999).

59. *Id.* at 449-50. The *Bandido's* court held that the restaurant was a limited purpose public figure, or a public figure for the purpose of issues concerning a report on rodent droppings in the restaurant and the subsequent closing of the restaurant, because the restaurant did not challenge that classification at trial. *Id.* at 454.

60. Beeching v. Levee, 764 N.E.2d 669 (Ind. Ct. App. 2002).

61. *Id.* at 680.

62. *See id.*

63. *Bandido's*, 712 N.E.2d at 473 (Dickson, J., dissenting).

64. *Id.* at 471 (Boehm, J., concurring).

all over the world, the victim may gain redress simply by showing that the defamation occurred (and, most likely, by responding effectively to the defense of truth)."[65] This sounds like strict liability (or liability without scienter), but *Gertz* says the U.S. Constitution requires more: "We hold that, *so long as they do not impose liability without fault*, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[66]

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,[67] however, decided after *Gertz*, may leave the door open for strict liability in private figure cases involving matters that are of private concern.[68] In *Dun & Bradstreet*, the private figure plaintiff (a construction contractor) sued a non-media defendant (a credit reporting agency) on a matter of private concern (a report that the contractor filed for bankruptcy).[69] Because the plaintiff proved fault, but not actual malice, the question of whether states may permit defamation recovery without proof of fault, i.e., strict liability, was not at issue, and has not yet been resolved by the U.S. Supreme Court.[70]

To summarize, there are at least four different kinds of defamation cases: (1) those involving a public official or public figure; (2) those involving a private figure and a matter of public concern; (3) those involving a private figure, a media defendant, and a matter of private concern; and (4) those involving a private figure, a non-media defendant, and a matter of private concern. The applicable standards in some of these cases remain unknown because lawyers have not litigated all of these circumstances in Indiana appellate courts. Nonetheless, it is clear that actual malice applies in the first two cases.[71] An educated guess puts the fault standard at negligence for the third scenario and it could be as low as strict liability for the fourth.

C. Who Decides Actual Malice?

Although the U.S. Supreme Court has never said so, a number of federal appeals court cases have expressly stated that actual malice is a question of fact at trial.[72] On appeal, however, whether the evidence supports a finding of actual

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65. *Id.* at 471-72 (Shepard, C.J., dissenting).

66. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (emphasis added).

67. 472 U.S. 749 (1985).

68. *Id.* at 756.

69. *Id.* at 751.

70. *See, e.g.*, Rodney A. Smolla, Dun & Bradstreet, Hepps, & Liberty Lobby*: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1545-46 (1987).

71. Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Journal-Gazette Co. v. Bandido's, Inc., 712 N.E.2d 446 (Ind. 1999); Aafco Heating & Air Conditioning Co. v. Nw. Publ'ns Inc., 321 N.E.2d 580 (Ind. App. 1974).

72. *See, e.g.*, Bichler v. Union Bank & Trust Co., 745 F.2d 1006, 1010-11 (6th Cir. 1984); Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982); Dombey v. Phoenix Newspapers, Inc., 724 P.2d 562, 572 (Ariz. 1986); Knudsen v. Kan. Gas & Elec. Co., 807 P.2d 71,

malice is a question of law.[73] The reason for this distinction is that "[j]udges, as expositors of the Constitution," have a duty to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'"[74] So actual malice is neither a question of fact nor a question of law; it is both.

III. LIBEL VS. SLANDER (AND WHAT LIES IN BETWEEN)

As with "malice is an element of defamation," the distinction between libel and slander has been repeated (and repeated) without thoughtful analysis: "slander is oral, libel is written." That distinction has never been adequate to distinguish the two types of defamation under all sets of facts. What about the nod of a head? Or a speech that will be transcribed or recorded?

The problem with the distinction is in the very nature of the definitions. In Venn Diagrammatic[75] terms, the most precise, complete definition of the defamation universe would be to divide the universe in half. The first subset would be oral communications, and its complement would be all communications that are *not* oral. Alternatively, the first subset could be written communications, and its complement would be all communications that are *not* written. Using two descriptors, both written and oral, to demarcate the defamation universe utterly fails to define communications that are neither written nor oral, and it fails to define precisely communications that are both.

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81 (Kan. 1991); Tucci v. Guy Gannett Publ'g Co., 464 A.2d 161, 170 (Me. 1983); Lyons v. New Mass Media, Inc., 453 N.E.2d 451, 456 (Mass. 1983).

73. Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 685 (1989) (citing Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510-11 (1984)).

74. *Bose*, 466 U.S. at 511.

75. A Venn Diagram is "a diagram that uses circles to represent sets and their relationships." DICTIONARY.COM UNABRIDGED (v.1.1), http://dictionary.reference.com/browse/venn diagram (last visited June 27, 2007).

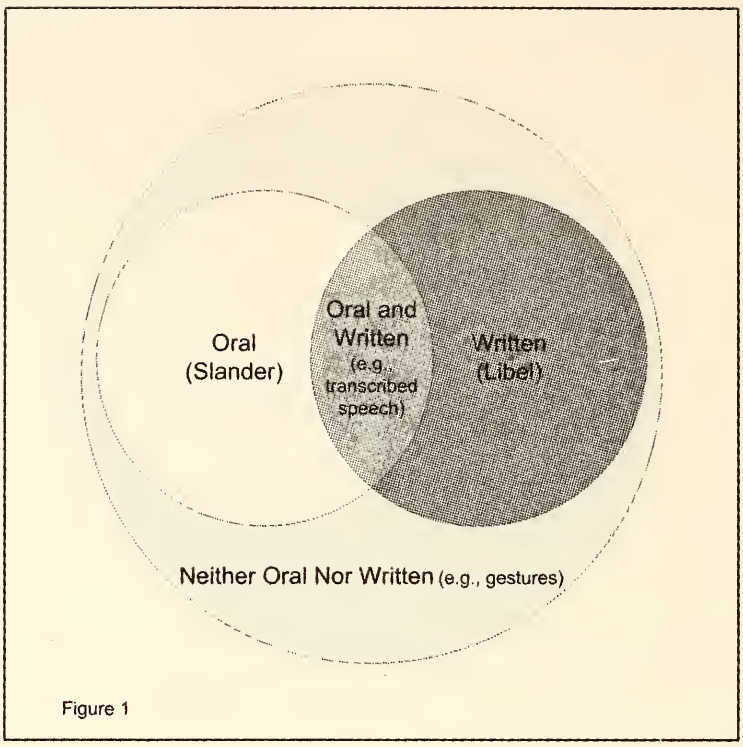

Figure 1

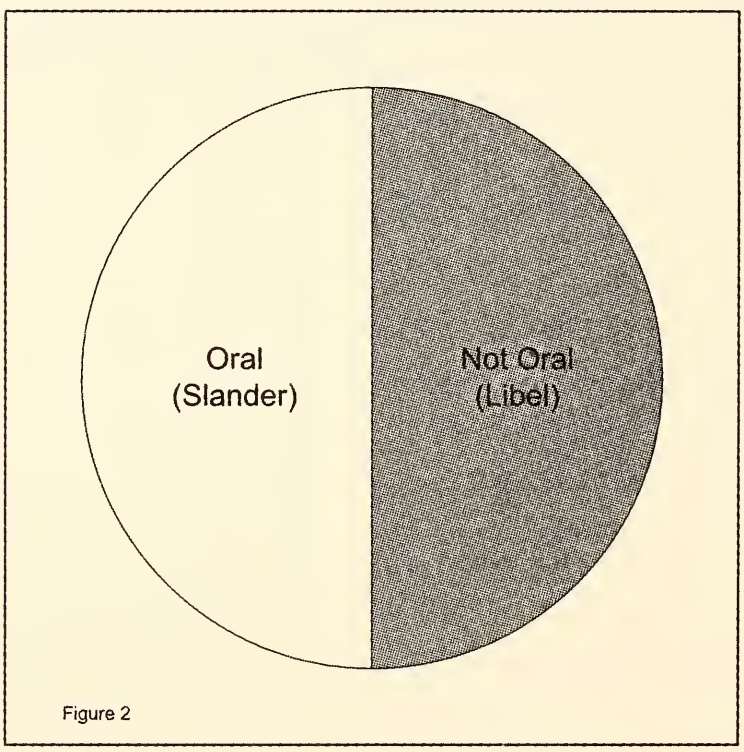

Figure 2

Figure 1 illustrates the current inexact definitions of libel and slander, while Figure 2 depicts precise definitions of those terms.

"For two centuries and a half the common law has treated the tort of defamation in two different ways on a basis of mere form."[76] In libel cases,

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76. RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977).

harm is presumed; therefore, no proof of actual harm is required.[77] In most slander cases,[78] on the other hand, the plaintiff's case fails without proof of pecuniary harm, even if a real loss of reputation occurred.[79] "This anomalous and unique distinction is in fact a survival of historical exigencies in the development of the common law jurisdiction over defamation."[80] In the Middle Ages and thereafter, different types of English courts (ecclesiastical, common law, Roman, royal Star Chamber) had jurisdiction over different parts of what we now call defamation.[81] The common law courts absorbed much of the defamation jurisdiction of the other courts and absorbed many of the rules created by those different courts for different purposes, despite the fact that those rules were complicated and contradictory.[82] Among those rules was the distinction between libel and slander, which, like "malice is an element of defamation," was repeated over the years.[83] The distinction then became settled law on the ground that "although indefensible in principle, [it] was too well established to be repudiated."[84]

William Prosser has said of the distinction:

> Of all the odd pieces of bric-a-brac upon exhibition in the old curiosity shop of the common law, surely one of the oddest is the distinction between the twin torts of libel and slander. . . . Arising out of old and long forgotten jurisdictional conflicts, and frozen into its present form in the seventeenth century by the rising tide of sentiment in favor of freedom of speech and of the press, it remains a senseless thing, for which no court and no writer has had a kind word for upwards of a century and a half.[85]

The Restatement goes a bit further, stating that "no respectable authority has ever attempted to justify the distinction on principle,"[86] yet there are theories for why the distinction was originally developed. One is that "written defamation has a more extended circulation than spoken words."[87] More than a century ago, however, it was argued that defamation "within the narrow circle of one's associates" is far more damaging than defamation to unknown others,[88] and that "more harm is done to character by whispered than by

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77. *See* DAN B. DOBBS, THE LAW OF TORTS § 409, at 1144 (2000).
78. There is a distinction between slander and slander per se. *See infra* Part IV.
79. DOBBS, *supra* note 77, § 408, at 1143.
80. RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977).
81. *See id.*
82. *See id.*
83. *Id.*
84. *Id.*
85. Prosser, *supra* note 2, at 839.
86. RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977).
87. *Slander and Libel*, 6 AM. L. REV. 593, 594 (1872).
88. *Id.*

outspoken malice."[89] Another supposed reason for the distinction: libel is more likely to cause a breach of the peace than slander.[90] But again, in words over a century old, "[t]he tongue . . . has caused more bloodshed than the pen ever did."[91]

If anything, the distinction between libel and slander has become more indefensible over the past centuries, with the development of new methods of communication and publication, from the photograph and the telegraph to MySpace[92] and YouTube.[93] In 1966, for example, the Indiana Court of Appeals declined to determine whether a radio broadcast of a conversation was slander or libel, and decided the case on other grounds.[94] Other "courts have condemned the distinction as harsh and unjust,"[95] perhaps because a plaintiff suing for a written statement on a letter sent to a single person is entitled to presumed damages, while a plaintiff suing for a spoken statement to thousands may not be so entitled. Some courts have even abolished the distinction.[96] Writing for the Washington Supreme Court, Justice Weaver said:

> It is . . . apparent that the hodgepodge of the law of slander is the result of historical accident for which no reason can be ascribed. It is time that the matter be righted. There ought not to be any distinction between oral and written defamation. It is entirely a matter of judge-made law, and English judges at that.[97]

Research reveals no Indiana cases since the turn of the millennium that were decided on the distinction between libel and slander. In fact, Indiana cases have begun discussing slander and libel in more general terms. For example, in *Branham v. Celadon Trucking Services, Inc.*,[98] the plaintiff sued for libel, and the Indiana Court of Appeals began its discussion by saying, "Libel is a species of defamation under Indiana law. Defamation is that which

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89. *Id.*

90. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977) (discussing the origin of the breach of the peace theory).

91. *Slander and Libel*, *supra* note 87, at 594.

92. MySpace describes itself as "an online community that lets you meet your friends' friends." MySpace.com, About Us, http://www.myspace.com/Modules/Common/Pages/AboutUs.aspx (last visited July 2, 2007). Members can post messages and multimedia content, including copyrighted photos and videos, on webpages visible to other members and the public. *See Old Mogul, New Media*, ECONOMIST, Jan. 21, 2006, at 68.

93. YouTube is a website that allows people "to watch and share original videos worldwide through a Web experience." YouTube, About YouTube, http://www.youtube.com/t/about (last visited July 2, 2007).

94. Gibson v. Kincaid, 221 N.E.2d 834, 841-42 (Ind. App. 1966) (Faulconer, J, concurring).

95. RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977).

96. Grein v. La Poma, 340 P.2d 766, 768 (Wash. 1959).

97. *Id.*

98. 744 N.E.2d 514 (Ind. Ct. App. 2001).

tends to injure reputation or to diminish esteem, respect, goodwill or confidence in the plaintiff, or to excite derogatory feelings or opinions about the plaintiff."[99] The court did not use the term libel again in the opinion. Likewise in *Kelley*, the Indiana Supreme Court spoke only of defamation, and Justice Sullivan used the terms "slander" and "libel" only once, in a citation.[100]

If Indiana courts are moving away from the indefensible distinction between slander and libel, it is in part because Indiana lawyers are not framing their cases in those terms. Logical jurisprudence demands that lawyers move a step further and advocate the repudiation of the distinction.

IV. Per Se vs. Per Quod

The defendant in *Kelley* did advocate the repudiation of an ancient, illogical distinction in defamation law—the distinction between defamation per se and defamation per quod.[101] His able counsel[102] argued that Indiana should join three states (Missouri, Kansas, and Arkansas) that have abolished the per se/per quod distinction, and a fourth state (New Jersey) that would do so under the right circumstances, "because the historical considerations underlying the [distinction] are no longer valid."[103] The Indiana Supreme Court decided the case on other grounds.[104]

As the defendant in *Kelley* explained, the per se/per quod distinction relates to damages. "In cases of defamation *per se*, the jury may presume damages because 'the law presumes the plaintiff's reputation has been damaged, and the jury may award a substantial sum for this presumed harm, even without proof of actual harm.'"[105]

So what is the distinction, exactly? The Indiana Court of Appeals explained that generally, "'[p]er se' is used to designate words whose defamatory nature appears without consideration of extrinsic facts."[106] In *Kelley*, the Indiana Supreme Court stated its own definition of "per se": "A communication is defamatory *per se* if it imputes: (1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person's trade, profession, office, or occupation; or (4) sexual misconduct."[107] The roots of this definition lie in the

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99. *Id.* at 522 (citations omitted).

100. Kelley v. Tanoos, 865 N.E.2d 593, 598 (Ind. 2007).

101. Appellee's Petition for Transfer at 9, *Kelley*, 865 N.E.2d 593 (No. 84S01-0605-CV-195).

102. Bryan H. Babb, George T. Patton, and Robert B. Clemens of Indianapolis, Indiana.

103. Appellee's Petition for Transfer, *supra* note 101, at 9.

104. *Kelley*, 865 N.E.2d at 597.

105. Glasscock v. Corliss, 823 N.E.2d 748, 757 (Ind. Ct. App. 2005) (quoting Rambo v. Cohen, 587 N.E.2d 140, 145 (Ind. Ct. App. 1992)).

106. Hotel & Rest. Employees & Bartenders Int'l Union v. Zurzolo, 233 N.E.2d 784, 790 (Ind. App. 1968).

107. *Kelley*, 865 N.E.2d at 596 (citing *Rambo*, 587 N.E.2d at 145). *Trail v. Boys & Girls Clubs of Northwest Indiana*, 845 N.E.2d 130, 137 (Ind. 2006), uses this same definition.

Restatement (Second) of Torts § 570, which lists those elements, more or less: "(a) a criminal *offense* . . . , (2) a loathsome disease . . . , (c) matter *incompatible* with [the plaintiff's] business, trade, profession, or office . . . , or (d) *serious* sexual misconduct."[108] The Restatement does not speak of defamation per se, but rather *slander* actionable without proof of special harm, despite its acknowledgment that the libel/slander distinction is indefensible.[109] The Restatement has a separate section for libel that says that *all libel* is actionable without proof of special harm.[110]

Older Indiana case law is even more complicated. In 1967, the Indiana Court of Appeals stated:

> It is generally agreed that words are actionable without allegation and proof of special damage when:
> (1) Words, whether they be in the form of libel or slander, which are defamatory *per se* or *per quod*, which (a) impute to another the commission of an indictable offense punishable by imprisonment; (b) impute to another a loathsome disease; (c) tend to injure another in his office, profession, trade, business or calling; or (d) impute unchastity to a woman.
> (2) Words in the form of libel which, on their face, without resort to extrinsic facts or circumstances, that is to say, "*per se*" tend to degrade another person, impeach his honesty, integrity, or reputation, or bring him into contempt, hatred, ridicule, or causes him to be shunned or avoided.[111]

In 1968, the Indiana Court of Appeals explained the distinction slightly differently:

> When we say that words are actionable only upon proof of "special" damage, we mean special in the sense that it must be supported by specific proof, as distinct from the damage assumed to follow in the case of libel per se, or libel per quod which falls into one of the four special categories of slander per se. In other words, special damages must be proved in the case of slander or libel per quod that does not involve the imputation of a crime, a loathsome disease, unchasity, or injury to the plaintiff's business, profession, trade or office.[112]

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108. RESTATEMENT (SECOND) OF TORTS § 570 (1977) (emphases added). The court determines whether spoken language imputing a crime, disease, or sexual misconduct is of such a character to be actionable per se. *Id.* § 615(1). "Subject to the control of the court," the jury determines whether spoken language imputes business misconduct, so that the slander would be actionable per se. *Id.* § 615(2).

109. *Id.* § 570.

110. *Id.* § 569.

111. Gibson v. Kincaid, 221 N.E.2d 834, 843 (Ind. App. 1966) (Faulconer, J., concurring).

112. Hotel & Rest. Employees & Bartenders Int'l Union v. Zurzolo, 233 N.E.2d 784, 790 (Ind. App. 1968) (quoting CHARLES TILFORD MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 44

Unraveling the meaning of these varied definitions is, to quote Prosser, "a trifle sticky."[113] One commentator stated, "[N]o concept in the law of defamation has created more confusion."[114] Another said that "it contributes 'an additional complexity to a subject already overburdened with rules holding over long after the judicial rivalries which have produced them have been forgotten,' and . . . it has proved to be utterly confusing to some generations of courts and lawyers, to say nothing of the bewildered law student."[115] The Fourth Circuit has even apologized for the distinctions: "Throughout this opinion the terms per se and per quod will be employed . . . even though they may be . . . 'rustic relics of ancient asininity.'"[116] Should we maintain a distinction for which we must apologize?

What does "per se" mean today in Indiana, anyway? Does it mean the method by which defamation is proved (without reference to extrinsic evidence), or does it mean a communication that falls within four categories (crime, disease, business misconduct, or sexual misconduct)? Does it mean words that subject others to contempt, hatred, ridicule, or shunning? If Indiana courts retain the libel/slander distinction, does it matter whether libel is per se or per quod?

The issue is not whether a statement is defamatory per se or per quod; these are merely terms that have been imprecisely and inconsistently defined. The real issue is when damages may be presumed. Four decades ago, Indiana cases drew a bright line regarding proof of damages: "If the subject matter of an alleged defamation is not defamatory per se, special damages must be alleged in the complaint."[117] In 2005, however, the Indiana Court of Appeals smudged the line when it rejected the forty-year-old precedent and permitted a plaintiff to recover more than $100,000 without proof of special damages.[118] The Indiana Court of Appeals's rationale for allowing recovery: the jury *could* have believed that the statements in question were defamatory per se.[119] If modern decisions make it easier to presume damages, then why have the per se/per quod distinction at all? Why even use the terms? More advocacy is needed to press the issue.

(1935); WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 788 (3d ed. 1964)).

113. Prosser, *supra* note 2, at 840.

114. ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 94 (1980).

115. Prosser, *supra* note 2, at 840 (quoting MCCORMICK, *supra* note 112, at 418).

116. Sauerhoff v. Hearst Corp., 538 F.2d 588, 590 n.1 (4th Cir. 1976) (quoting Judge Armstead Dobie).

117. Gibson v. Kincaid, 221 N.E.2d 834, 836 (Ind. App. 1966) (citing Patton v. Jacobs, 78 N.E.2d 789 (Ind. App. 1948); *see also Zurzolo*, 233 N.E.2d at 790 ("[I]n the absence of words actionable per se, special damages must be alleged in the complaint.")

118. Glasscock v. Corliss, 823 N.E.2d 748, 757-58 (Ind. Ct. App. 2005).

119. *Id.* at 758.

V. PRESUMED DAMAGES: WHEN AND WHY?

A. When?

Whether a case involves libel or slander, per se or per quod, there is at least one more conundrum in defamation law: when may damages be presumed?

Defamation damages traditionally involve five subparts: (1) nominal damages ("'a trivial sum of money awarded'" when a plaintiff "'has not established that he is entitled to compensatory damages'"), (2) general damages for harm to reputation (called "general," because they are generally anticipated, and hence do not need to be alleged), (3) damages for special harm (the "'loss of something having economic or pecuniary value,'" such as loss of business), (4) damages for emotional distress (and bodily harm resulting therefrom), and (5) punitive damages (to punish a defendant's outrageous conduct).[120]

Before the U.S. Supreme Court decided *Gertz* and *Dun & Bradstreet*, the threshold damages questions were: (1) whether the allegedly defamatory communication was libel or slander, and, if slander, (2) whether the communication was slander or slander per se. If a court[121] determined that the communication was slander, the jury could limit its award to nominal damages (usually if there was no substantial loss to reputation),[122] or the jury could award "special damages" for pecuniary loss (if the plaintiff produced sufficient evidence of that financial harm).[123] If, and only if, the jury determined that the plaintiff was entitled to special damages, could the jury also award damages for general loss of reputation,[124] emotional distress resulting from the loss of reputation,[125] and punitive damages, if the defendant's conduct was sufficiently outrageous.[126] If, on the other hand, the communication was libel or slander per se, the jury could limit its award to

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120. Russ VerSteeg, *Slander & Slander Damages After* Gertz *and* Dun & Bradstreet, 38 VILL. L. REV. 655, 663-69 (1993) (footnotes omitted). As to the potential absurdity of proving special damages, one case even held that a plaintiff who proved that his wife left him because of an allegedly defamatory statement about his "girlfriend" not only failed to show special damages, but actually proved his opponent's argument for summary judgment. Sauerhoff v. Hearst Corp., 388 F. Supp. 117, 122-25 (D. Md. 1974), *vacated on other grounds*, 538 F.2d 588 (4th Cir. 1976). The court held as a matter of law that the plaintiff suffered no special harm because the plaintiff's evidence showed that his wife was a net financial burden! *Id.*

121. Whether a statement is slander or slander per se is generally a question for the court. RESTATEMENT (SECOND) OF TORTS § 615 (1977).

122. *Id.* § 620.

123. *Id.* § 575 cmt. a.

124. *Id.*

125. *Id.* § 575 cmt. c.

126. KEETON ET AL., *supra* note 36, § 116A, at 845.

nominal damages as well.[127] The jury could also award substantial sums for general damages,[128] emotional distress,[129] and punitive damages,[130] even if the plaintiff did not prove that he or she suffered actual, financial harm. Moreover, even if the plaintiff did not prove general damages or emotional distress damages, juries awarded these damages for harm to reputation and emotion that would normally be assumed to flow from a defamatory publication of the nature involved.[131] If the plaintiff did prove that the defamation legally caused actual, financial harm, the jury could also award special damages for that harm.[132]

Indiana courts still adhere to these traditional rules to a large extent. The Indiana Supreme Court said in *Kelley*, "[i]n an action for defamation *per se* the plaintiff 'is entitled to presumed damages "as a natural and probable consequence" of the *per se* defamation.' In an action for defamation *per quod*, the plaintiff must demonstrate special damages."[133] "[A] plaintiff in a *per quod* defamation action can recover for emotional and physical harm only upon a showing of special damages. Emotional and physical harms are not special damages unto themselves, but rather are parasitic damages, viable only when attached to normal (i.e., pecuniary) special damages."[134] "The parasitic damages ride along with special damages; if special damages are alleged and proved, recovery for parasitic damages is possible; if special damages are not alleged and proved, there can be no recovery for parasitic damages."[135] It is unclear whether a plaintiff must prove these "parasitic" damages to recover for them. It is likewise unclear whether general damages and punitive damages are "parasitic," and whether the plaintiff must prove them.

Decided more than thirty years before *Kelley*, however, U.S. Supreme Court precedent draws these traditional damages rules into question. In *Gertz*, the U.S. Supreme Court said, "[T]he States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth,"[136] in other words, actual malice. A decade after *Gertz*, the U.S. Supreme Court limited that statement in *Dun & Bradstreet*: "[In *Gertz*] we held that a State could not

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127. RESTATEMENT (SECOND) OF TORTS § 620 (1977). Usually in libel or slander per se cases, juries award nominal damages when the defamation was insignificant, no substantial harm was done to the plaintiff, or they are the only damages claimed. *Id.*

128. *Id.* § 621.

129. *Id.* § 623.

130. KEETON ET AL., *supra* note 36, § 116A, at 845.

131. RESTATEMENT (SECOND) OF TORTS §§ 621, 623 (1977).

132. *Id.* § 622.

133. Kelley v. Tanoos, 865 N.E.2d 593, 597 (Ind. 2007) (citations omitted).

134. Rambo v. Cohen, 587 N.E.2d 140, 146 (Ind. Ct. App. 1992) (citations omitted).

135. *Id.*; *see also* Cortez v. Jo-Ann Stores, Inc., 827 N.E.2d 1223, 1231 (Ind. Ct. App. 2005) ("If a plaintiff in a defamation per quod case cannot demonstrate pecuniary damages, then the plaintiff cannot recover for emotional and physical harm.").

136. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

allow recovery of presumed and punitive damages absent a showing of 'actual malice,'"[137] but "[i]n light of the reduced constitutional value of speech involving no matters of public concern, we hold [today] that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'"[138] To summarize, *Gertz* and *Dun & Bradstreet* appear to mean that, in cases involving matters of public concern, presumed and punitive damages are recoverable only if the plaintiff proves actual malice.[139] In cases involving matters that are not of public concern, presumed and punitive damages may be recoverable without proof of actual malice,[140] although it is not clear whether the plaintiff must prove fault or may recover under a strict liability theory.[141]

Applying these rules to the five categories of damages leads to an entirely different analysis of defamation damages. There should be two threshold questions: (1) whether the allegedly defamatory communication was a matter of public concern, and, if so, (2) whether the defendant acted with actual malice.[142] If the communication did not involve a matter of public concern, then traditional defamation damages rules apply.[143] If the communication involved a matter of public concern, then the jury must decide whether the defendant acted with actual malice.[144] If the defendant acted with actual malice, then the jury may be able to award nominal, general, special, emotional,[145] and punitive damages. If the defendant did *not* act with actual malice, the jury may award damages for "actual injury," but only if the plaintiff proves the injury and the damages.[146] This is an entirely new

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137. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756 (1985).

138. *Id.* at 761.

139. It is unclear whether the type of plaintiff has an impact on when and how a plaintiff may collect damages. The U.S. Supreme Court has required actual malice for public official or public figure plaintiffs to collect any type of damages, even actual damages. *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (public figure); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (public official). Those public plaintiff/actual malice cases, however, also involved matters of public concern.

140. *Dun & Bradstreet, Inc.*, 472 U.S. at 761.

141. To make matters even more complicated, the holding in *Gertz* may be limited to media defendants. *See Gertz*, 418 U.S. at 341-47. This means that there may be a third category of cases—matters of public concern published by non-media defendants—in which it remains unclear whether the actual malice standard would apply.

142. VerSteeg, *supra* note 120, at 686-87.

143. *Id.* at 687.

144. *Id.* "Whether a statement should be characterized as [a matter of public concern] is probably a question of law." *Id.*

145. Whether a plaintiff may recover damages for emotional distress in a defamation action in Indiana without proving the tort of infliction of emotional distress is beyond the scope of this Article.

146. *Gertz*, 418 U.S. at 349 ("[I]t is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.").

category of damages defined in *Gertz*: "Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[147]

Few Indiana cases involving First Amendment concerns even recognize the *Gertz* and *Dun & Bradstreet* overlays on the traditional defamation damages rules. One case that acknowledged the issue, *Elliott v. Roach*,[148] decided the case on other grounds.[149] Others merely recite the old damages rules without reference to *Gertz* or *Dun & Bradstreet* at all.[150] One commentator stated, "[I]t is both puzzling and disappointing that the judiciary has continued to apply the traditional ordinary slander/slander *per se* dichotomy, and has failed to apply the rules set forth in the[] landmark decisions" of *Gertz* and *Dun & Bradstreet*.[151] These rules must be brought to the attention of the Indiana bench.

B. Why?

There is an even more fundamental question. Why presume damages in any type of defamation case? As Justice Sullivan asked in the *Kelley* oral argument, "Is this a doctrine that has outlived its usefulness?"[152] Should the judicial system concern itself with disputes over reputations that have not suffered any real harm? Are the cases in which damages are presumed really more serious? As Prosser said:

> It has never made any sense whatever that it is actionable to write that the plaintiff is a damned liar on a postcard read by a single third person, or to say in a newspaper line that a woman wears a funny hat, but that it is not actionable to say the same things in a speech to a large audience . . . .[153]

"The genius of modern tort law is its emphasis on injury,"[154] and "[t]he rule of

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147. *Id.* at 350.

148. 409 N.E.2d 661, 685-86 (Ind. Ct. App. 1980).

149. *Id.* at 686 ("We similarly believe the facts of the instant case do not require us to decide this disputed question. Rather, our review of the record discloses that even assuming the 'presumed' damages prohibition of *Gertz* is applicable to the instant case, there is ample evidence of actual injury and recklessness to meet an appropriate constitutional standard.").

150. *See, e.g.*, Kelley v. Tanoos, 865 N.E.2d 593, 597 (Ind. 2007).

151. VerSteeg, *supra* note 120, at 682.

152. Online Video: *Kelley v. Tanoos*, Indiana Supreme Court Oral Argument (Sept. 6, 2006), http://realvideo.ind.net:8080/ramgen/real/SupremeCourt/09062006_0215pm.rm.

153. Prosser, *supra* note 2, at 851 (citing Liebel v. Montgomery Ward & Co., 62 P.2d 667 (Mont. 1936)).

154. David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 747 (1984).

presumed damages is directly contrary to modern tort law."[155] In other fault-based torts, damages are an essential element of the action. If damages cannot be proved, no cause exists.[156] Defamation's rule of presumed damages can be "traced to tort law's roots in criminal law, which concentrated on the defendant's wrongful conduct, rather than on any actual injury [the defendant] caused."[157] Modern tort law shifted its focus from wrongful conduct to injury,[158] but this shift "has largely bypassed [defamation] law."[159] The main justification is the idea that injury to reputation is difficult to prove.[160]

The first Restatement of Torts, published in 1938, permitted presumed damages and explained the rationale as follows: requiring proof of actual reputational harm would be unfair because "the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed."[161] Other sources agree that defamation damages can be hard to prove.[162]

But "the process of quantifying intangible harm when some injury has been demonstrated is a familiar component of the traditional tort system."[163] Determining damages in suits for intentional infliction of emotional distress or loss of consortium is not easy, but the law does not presume damages; it insists that the plaintiff prove damages.[164] Reputational harm is not so much more difficult to prove that it should require presumed damages.[165] "Once the injury is demonstrated, the [judicial] system, however inexactly, can cope with compensation as it does whenever tortious conduct causes harm."[166] "The judicial system's long experience with . . . psychic damage proximately caused by tortious conduct provides a reasoned, principled, and controllable approach to the assessment of these damages."[167]

In fact, assigning damages to proven, but intangible, injuries has been permitted in the defamation world for more than thirty years. In 1974, the

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155. James A. Hemphill, Note, *Libel-Proof Plaintiffs and the Question of Injury*, 71 TEX. L. REV. 401, 414 (1992) (citing Anderson, *supra* note 154, at 747).

156. KEETON ET AL., *supra* note 36, at 165.

157. Hemphill, *supra* note 155, at 414 (citing Anderson, *supra* note 154, at 747).

158. *Id.*

159. *Id.*

160. *See id.*

161. RESTATEMENT (FIRST) OF TORTS § 621 cmt. a (1938). The Restatement (Second) of Torts does not appear to justify presumed damages. Rather, it says that requiring proof of "special harm" in certain types of cases "goes back to the ancient conflict of jurisdiction between the royal and the ecclesiastical courts." RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (1977).

162. Hemphill, *supra* note 155, at 416 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 394 (1974) (White, J., dissenting)).

163. Halpern, *supra* note 9, at 245.

164. Hemphill, *supra* note 155, at 416.

165. *Id.*

166. Halpern, *supra* note 9, at 245.

167. *Id.*

U.S. Supreme Court in *Gertz* permitted recovery for "actual injury" absent proof of actual malice.[168] The Court explained that "there need be no evidence which assigns an actual dollar value to the injury"[169] and declined to define the nature of "actual injury" except to say that it includes "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[170] To say then, that damages are presumed because they are too difficult to prove is disingenuous.

In addition, the presumption of damages in defamation law is illogical because it is irrebuttable. If a plaintiff alleges slander per se, the fact that a defendant *proves* that a plaintiff suffered no damage is inconsequential.[171] A plaintiff can recover substantial damages even if she withdraws her claim of reputational damage and even if the defendant proves that no one believed the defamatory communication, because damages are "conclusively presumed."[172] The presumption of damages, therefore, does more than fill an "evidentiary vacuum,"[173] it allows juries to reward plaintiffs who have suffered no damage at all.

The presumption of damages is also nonsensical in that it applies only in certain cases—those involving libel or slander per se, not slander. "Yet there is no reason to believe that in [slander] cases the difficulty in proving actual damage to reputation is in any degree diminished."[174] The difficulty of proving damages (such as it is) applies in every type of defamation case. The rationale for presuming damages in slander per se and libel cases seems to be that those types of cases are especially egregious. As previously discussed, however, there are few circumstances in which a postcard sent to a single person stating that a woman wore a funny hat is more heinous than the same content in a speech to thousands.[175]

Presumed damages are also immeasurable and uncontrollable. Writing for the majority in *Gertz,* Justice Powell stated, "the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact."[176] Justice Powell also said that states do not have a substantial interest in providing private individuals with "gratuitous awards . . . in excess of any actual injury."[177] In short, "the relation of presumed damages to compensation for

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168. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

169. *Id.* at 350.

170. *Id.*

171. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 697-98 (1986).

172. *Id.* at 698.

173. *Id.*

174. *Id.*

175. *See* Prosser, *supra* note 2, at 851 (citing Liebel v. Montgomery Ward & Co., 62 P.2d 667 (Mont. 1936)).

176. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

177. *Id.*

injury is [simply] too tenuous to support their inclusion in a reasoned and effective scheme for protecting the interest in reputation."[178]

Not only is the leading rationale for presumed damages unconvincing and the result of their application illogical, but presumed damages also offend the Indiana Constitution. Article I, section 12 of the Indiana Constitution states, "All courts shall be open; and every person, for injury done to him in his person, property, or *reputation* shall have remedy by due course of law."[179] Presumed damages give windfalls to some plaintiffs who are defamed in a certain manner (in writing) or about a certain topic (the per se categories), while leaving others (suing for oral statements that do not amount to slander per se) with a huge hurdle to clear—proof of special damages—before plaintiffs may have their remedy. Those plaintiffs who cannot prove loss of business, contracts, employment, or the like are utterly remediless.[180]

Presumed damages offend the First Amendment interest in free speech as well. "Even absent constitutional concerns, the existence of a purportedly compensatory scheme that operates independently of proof of harm would be disturbing. The first amendment implications flowing from such an unbounded assessment process make it intolerable."[181] In *Gertz*, Justice Powell explained, "[t]he largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms."[182] In other words, presumed damages can have a chilling effect on free speech. Where speech is not chilled, the cost of

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178. Halpern, *supra* note 9, at 244.

179. IND. CONST. art. I, § 12 (emphasis added).

180. The common law's disparate treatment of two similar groups of plaintiffs also arguably implicates article I, section 23 of the Indiana Constitution, which prohibits granting privileges or immunities that do "not equally belong to all citizens." IND. CONST. art. I, § 23. It is yet undecided whether section 23, which begins, "The General Assembly shall not," applies to common law, but there are cases applying section 23 to non-statutory actions. *See, e.g.*, Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247 (Ind. 2003) (holding Medicaid regulations and statutes violated section 23); Dvorak v. City of Bloomington, 796 N.E.2d 236 (Ind. 2003) (holding municipal zoning ordinance did not violate section 23); Ind. High Sch. Athletic Ass'n v. Carlberg, 694 N.E.2d 222 (Ind. 1997) (holding non-statutory IHSAA organizational rule did not violate section 23); *In re* Leach, 34 N.E. 641 (Ind. 1893) (holding circuit court's refusal to admit woman to practice law violated section 23).

181. Halpern, *supra* note 9, at 244; *see also Gertz*, 418 U.S. at 349 (Because presumed damages give juries "largely uncontrolled discretion . . . to award damages where there is no loss" and could be used "to punish unpopular opinion," the *Gertz* Court concluded that the presumption would almost always impermissibly restrict the exercise of the First Amendment freedoms.); Melinda J. Branscomb, *Liability and Damages in Libel and Slander Law*, 47 TENN. L. REV. 814, 838 (1980) (quoting *Gertz*, 418 U.S. at 349) (stating compensation for injury without proof of loss is "in derogation of the first amendment principle that state remedies must 'reach no farther than is necessary to protect the legitimate interest involved.'").

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

presumed damages may be passed on by the communications media to the consumer, inflating the cost of free speech in the press. Should the U.S. Constitution permit a plaintiff to recover for the exercise of free speech that does not result in provable harm? The convolutions of defamation damages are judicial attempts to strike a balance between free speech and reputational interest. But there is a logically cleaner way to strike that balance—the abolition of presumed damages.

Virtually all current reform proposals agree that the solution is to require all plaintiffs to prove injury.[183] A plaintiff should recover for damages he can prove: general damages (injury to reputation), special damages (pecuniary harm), and emotional damages (mental anguish and suffering). If the case involves a small injury, the jury should award nominal damages, which will vindicate the plaintiff's reputation without awarding unproved damages. On the other hand, if the defamation is particularly atrocious (perhaps involving ill will), the jury may consider punitive damages to punish the offensive act and deter similar acts in the future.[184]

It is true that changing the damages landscape in defamation actions will remove a threshold obstacle in slander cases, and more of those cases will reach juries. Whereas the plaintiff in a slander action now must plead and prove special damages to get to trial, under the solution presented, the plaintiff could try the case on allegation and proof of reputational injury, without alleging and proving special harm. But abolishing presumed damages will begin to give juries guidance as to how to compensate plaintiffs.[185] By restricting compensatory damages to those actually proved, the judge will have more control over the size of the verdict, and the parties will be able to value their claims accurately, which facilitates settlement.[186]

Courts can assure a remedy without the anachronistic rigamarole of presumed damages by selecting lower fault standards when the First Amendment does not require actual malice. Using the arguments found in the separate opinions of *Bandido's*, lawyers can advocate the adoption of negligence, and perhaps strict liability, in cases involving private figure plaintiffs suing on matters of private concern. If Indiana courts adopt them, the resulting lower fault standards would give all plaintiffs "remedy by due course of law" for injury to reputation, including vindication by nominal damages at the least, and money damages if proven. And the doctrine of presumed damages, which is irrebuttable, ineffective, and illogical, can be abolished.

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183. Halpern, *supra* note 9, at 245.

184. There are also persuasive arguments for abolishing punitive damages in defamation cases. *See, e.g.*, Anderson, *supra* note 154, at 747.

185. *See id.* at 747-48.

186. *Id.* Professor Anderson also advocates restricting the "actual injury" harm of *Gertz*. *See id.* at 756-58.

CONCLUSION

The real problem in defamation law is the doctrine of presumed harm itself, from which the absurd distinctions and rules that were created to support the doctrine proceed.

> The legitimacy of the libel per quod doctrine was the subject of the famous debate between Dean Prosser and Laurence Eldredge. Eldredge argued that harm was presumed in all libel cases. Prosser argued that harm was presumed only if the publication was libelous on its face or fell into one of the categories of slander per se. Francis Murnaghan's observation about the debate was correct: in the heat of battle, both Prosser and Eldredge failed to see that *the real problem was the presumed harm doctrine itself*, and that the controversy over the role of libel per quod was only a symptom of judicial hostility to the underlying presumption.[187]

Indiana should not adhere to these insupportable rules any longer. The elements of a defamation claim must be clarified. The libel/slander and per se/per quod distinctions should be abandoned. The doctrine of presumed damages should be abolished. In order for these changes to occur, Indiana lawyers must press the arguments and prompt the reform.

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187. *Id.* at 750-51 (emphasis added) (citing Laurence H. Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966); Francis D. Murnaghan, *From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions*, 22 CATH. U. L. REV. 1, 7 (1972); William L. Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629, 1630 (1966)).