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The Oddity and Odyssey of "Presumed Damages" in Defamation Actions Under Pennsylvania Law

Kevin P. Allen*

I. INTRODUCTION

In 1974, the United States Supreme Court described defamation as an "oddity of tort law" because of the concept of "presumed damages," which permitted defamation plaintiffs to recover damages even if they could not prove that they actually suffered any harm.¹ In that landmark decision, Gertz v. Robert Welch, Inc., the Supreme Court decided that, at least in certain circumstances, the oddity of presumed damages could no longer co-exist with First Amendment freedom of speech rights.²

Nearly thirty years later, Pennsylvania law's treatment of "presumed damages" in defamation actions is still unsettled. This article traces the odyssey in Pennsylvania of this oddity of tort law from a nineteenth century statute, to the early twentieth century when presumed damages were available whenever a plaintiff could prove the publication of a libelous or slanderous per se statement, to the 1960's and 1970's when the United States Supreme Court, in Gertz and other decisions, limited, on constitutional grounds, the availability of presumed damages, to today which finds the continued availability of presumed damages to be in serious doubt under Pennsylvania law.

II. BEFORE GERTZ, PRESUMED DAMAGES WERE AVAILABLE

For decades prior to Gertz, presumed damages were unquestionably available to libel and slander per se plaintiffs under Pennsylvania law.³ As its name suggests, the concept of presumed

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² Gertz, 418 U.S. at 350.
damages permitted a defamation plaintiff to recover compensatory damages without having to prove that the libelous or slanderous per se statement caused the plaintiff any actual harm. The rationale for presuming damages in certain defamation actions was that 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." In Corabi v. Curtis Publishing Co., the Pennsylvania Supreme Court stated that the "damages to be given for libel are not susceptible of precise measurement . . . . General damages are given to compensate the plaintiff for harm for which the defamatory statement is assumed to have caused his or her reputation." Thus, at common law, once a defamation plaintiff proved that the defendant published a libelous or slanderous per se statement, the plaintiff could recover "for the harm which normally results from such a defamation." The availability of such presumed damages in defamation actions under Pennsylvania law was not in dispute until the United States Supreme Court and the First Amendment intervened.

III. GERTZ AND THE SUPREME COURT'S APPARENT HOSTILITY TO PRESUMED DAMAGES

The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled by reason and natural justice; since without these, it is

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4. "A libel is any malicious publication, written, printed or painted . . . which words or signs tends to expose a person to contempt, ridicule, hatred or degradation of character." Neeb v. Hope, 2 A. 568, 570 (Pa. 1886).
7. RESTATEMENT (FIRST) OF TORTS § 621 cmt. a (1938).
10. RESTATEMENT (FIRST) OF TORTS § 621 (1938). At common law, and today, if the defamatory statement is not libelous or slanderous per se, the plaintiff must prove a pecuniary loss ("special harm") from the defamation. See Brinich v. Jencka, 757 A.2d 388, 397 (Pa. Super. Ct. 2000).
impossible to have the perfect enjoyment of any other advantage or right. ¹¹

Congress shall make no law... abridging the freedom of speech... . ¹²

In Gertz, the United States Supreme Court limited the availability of presumed damages in defamation actions because of concerns that such awards violated the right of freedom of speech contained in the First Amendment to the federal Constitution. ¹³ Gertz was an attorney who represented a family in a civil action against the police officer who had shot and killed a young member of that family. ¹⁴ Welch published an anti-Communist magazine. ¹⁵ In the magazine, Welch portrayed Gertz as a Communist who had framed the officer. ¹⁶ Gertz sued Welch for defamation. ¹⁷

After the jury returned a verdict in Gertz's favor, the district court entered judgment n.o.v. in favor of Welch based on the New York Times privilege. ¹⁸ In its 1964 New York Times decision, the Supreme Court created a privilege that limited defamation actions in cases where the plaintiff is a public official. ¹⁹ Because of First Amendment concerns, the New York Times Court held that a public official could not succeed in a defamation action unless the official could prove that the publication was made with "actual malice," which the Court defined to be "with knowledge that [the defamatory statement] was false or with reckless disregard of whether it was false or not." ²⁰ In a later decision, the Court extended the New York Times privilege to cases involving "public figures." ²¹

Gertz appealed, arguing that he was a private person and, therefore, that Welch was not entitled to the New York Times privilege. ²² The Seventh Circuit Court of Appeals affirmed the judgment in Welch's favor, concluding that, because Gertz was

¹¹ 1 WILLIAM BLACKSTONE, COMMENTARIES 134.
¹³ Gertz, 418 U.S. at 348-50.
¹⁴ Id. at 325.
¹⁵ Id.
¹⁶ Id. at 326.
¹⁷ Id. at 327.
²⁰ Id.
²² Gertz, 418 U.S. at 330.
involved in a matter of public interest, Welch was entitled to the protection of the *New York Times* privilege.\(^\text{23}\)

The United States Supreme Court reversed the Seventh Circuit's decision because the Supreme Court concluded that, in cases involving private individuals, First Amendment freedom of speech concerns do not outweigh the state interest in protecting an individual's reputation.\(^\text{24}\) The Court reasoned that public officials and public figures, because of their greater access to effective channels of communication, were better able to refute defamatory comments than private individuals, to whom effective communication channels are not so readily available.\(^\text{25}\) The Court concluded that, because of their greater vulnerability, private individuals should not be required to overcome the *New York Times* hurdle.\(^\text{26}\)

However, the Court did not remove First Amendment concerns from the equation entirely. The Court found that the concept of awarding presumed damages, and punitive damages, was in conflict with the First Amendment and was not justified sufficiently by the state interest in protecting private individuals' reputations.\(^\text{27}\) According to the Court:

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.

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. . . . The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. . . . More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

. . . It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. . . .

\(^{23}\) *Id.* at 331-32.

\(^{24}\) *Id.* at 339-48.

\(^{25}\) *Id.* at 344-45.

\(^{26}\) *Id.* at 346-47.

\(^{27}\) *Gertz*, at 348-50.
In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.\(^2\)

*Gertz* and *New York Times* became the posts and rails of a fence that established constitutional boundaries beyond which state defamation law could not wander. Under *New York Times*, states cannot allow public officials or public figures to succeed in defamation cases without proof of actual malice. Under *Gertz*, the Court signaled that, because of First Amendment concerns, states could not award presumed damages to plaintiffs without proof of actual malice.

*Gertz*, however, is proscriptive, not prescriptive. *Gertz* restricted the ability of a state to award presumed damages to a plaintiff who could not prove actual malice.\(^2\) *Gertz* does not, however, impose any corresponding affirmative requirement on a state to award presumed damages if a plaintiff is able to prove that the defendant acted with actual malice.\(^3\)

**IV. AGRISS AND THE IMMEDIATE AFTERMATH OF GERTZ IN PENNSYLVANIA**

*Gertz*’s impact on presumed damages appeared initially to have ramifications for all defamation plaintiffs. According to the *Gertz* Court, presumed damages were an “oddity” that left juries with “uncontrolled discretion,” which resulted in an unnecessary inhibition of the cherished right of freedom of speech.\(^3\) The Supreme Court’s apparent hostility to presumed damages pointed to the conclusion that, based on the limits imposed by the First Amendment, presumed damages were no longer available to any type of defamation plaintiff—be that plaintiff a public official, a public figure, or, like *Gertz* himself, a private figure—unless that plaintiff could prove actual malice.\(^3\)

*Agriiss v. Roadway Express, Inc.*\(^3\) presented the Pennsylvania Superior Court with the opportunity to apply that understanding

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\(^{28}\) *Id.* at 349-50.

\(^{29}\) *Id.*


\(^{31}\) *Gertz*, 418 U.S. at 349.

\(^{32}\) *Id.* at 348-50.

of *Gertz* to Pennsylvania defamation law. Agriss was a trucker who filed a defamation claim against his employer because his supervisors accused him of opening company mail without permission.\(^{34}\) The trial court granted the defendant's motion for a non-suit because, among other reasons, the court concluded that Agriss was obligated under *Gertz* to prove "actual harm" and failed to so do.\(^{35}\)

Although Agriss was not a public official or a public figure, and although the case did not involve any issue of public concern, the Superior Court agreed with the trial court that *Gertz* required Agriss to prove that he had sustained actual harm.\(^{36}\) According to the Superior Court:

> [t]he requirement that a plaintiff in a defamation case prove "actual harm" derives from the landmark case of *Gertz v. Robert Welch, Inc.* . . . in which the United States Supreme Court delineated certain significant limitations the First Amendment imposes on defamation actions by private individuals.\(^{37}\)

Although the Superior Court concluded that *Gertz* required proof of "actual harm," the Superior Court reversed the trial court because it decided that Agriss had presented sufficient evidence of actual harm.\(^{38}\) The Court specifically left open the issue of whether presumed damages were still available under *Gertz* even if a plaintiff were able to prove "actual malice."\(^{39}\)

**V. DUN & BRADSTREET – RETREATING FROM GERTZ**

Less than a year after *Agriss*, the United States Supreme Court clarified and limited the applicability of *Gertz* by holding that the First Amendment does not restrict the ability of a state to award presumed damages to a private plaintiff in a matter that does not involve any issue of public concern.\(^{40}\) *Dun & Bradstreet* did not involve a public official or public figure or, in contrast to *Gertz*, any matter of public concern.\(^{41}\) Instead, the alleged defamation at

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34. *Agriss*, 483 A.2d at 460.
35. *Id*.
36. *Id.* at 467.
37. *Id.* (citation omitted).
38. *Id*.
39. *Agriss*, 483 A.2d at 468 n.5.
issue in *Dun & Bradstreet* involved a purely private plaintiff and a purely private matter.\textsuperscript{42} The Supreme Court concluded that the absence of any issue of public concern rendered the speech at issue largely ineligible for any First Amendment protection.\textsuperscript{43} Without significant First Amendment concerns, the state interest in protecting an individual's reputation predominates.\textsuperscript{44} In contrast to *Gertz*'s hostility to presumed damages, the *Dun & Bradstreet* plurality rather heartily endorsed the use of presumed damages as a means of furthering the legitimate state interest in protecting an individual's reputation.\textsuperscript{45} According to Justice Powell's opinion:

> Courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. . . . This rule furthers the state's interest in providing remedies for defamation by insuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages - even absent a showing of actual malice.\textsuperscript{46}

**VI. WALKER - ANOTHER REJECTION OF PRESUMED DAMAGES**

In 1993, in *Walker v. Grand Central Sanitation, Inc.*\textsuperscript{47} the Pennsylvania Superior Court retrod some of the ground covered by *Agriss* but did so with the benefit of *Dun & Bradstreet*'s clarification of *Gertz*.\textsuperscript{48} *Walker* involved a private plaintiff and no matter of public concern.\textsuperscript{49} The plaintiff, Walker, did not provide sufficient evidence that the statements at issue caused her any actual harm.\textsuperscript{50} Therefore, Walker's ability to succeed in her claim depended on the availability of presumed damages.\textsuperscript{51}

The Superior Court recognized that it had decided *Agriss* under the false belief that *Gertz* and the First Amendment required all defamation plaintiffs, private or public, to prove actual harm, ab-

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 763
\item Id. at 760-61.
\item Id.
\item Id. (footnote omitted).
\item *Walker*, 634 A.2d at 242-43.
\item Id. at 238-40.
\item Id. at 239-40.
\item Id. at 244-45.
\end{enumerate}
\end{footnotesize}
sent proof of actual malice. Based on Dun & Bradstreet, the Walker Court acknowledged that, contrary to the holding in Agriss, the First Amendment does not prohibit Pennsylvania from awarding presumed damages to purely private plaintiffs.

Although, pursuant to Gertz and Dun & Bradstreet, the First Amendment does not prohibit states from awarding presumed damages in a purely private plaintiff case, the First Amendment does not mandate conversely that states provide the benefit of presumed damages to private plaintiffs. In purely private plaintiff cases, the New York Times/Gertz constitutional fence is not present and states are free to decide for themselves whether to award presumed damages or not. Thus, following Gertz and Dun & Bradstreet, the Walker Court was left to decide, purely as a matter of Pennsylvania law, whether such damages are available to defamation plaintiffs.

Relying on the Restatement (Second) of Torts ("Second Restatement") and general tort law principles, the Walker Court held that presumed damages are not available and that, under Pennsylvania law, "a defendant who publishes a statement which can be slander per se is liable for the proven actual harm the publication causes." The Second Restatement abandons the First Restatement’s endorsement of presumed damages. Section 621 of the Second Restatement provides that "[o]ne who is liable for a defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed." The Walker Court held that the Second Restatement’s position was consistent with Pennsylvania’s general policy in tort actions of providing complete redress to an injured party without being unfair to the liable party.

Under Walker, all defamation plaintiffs in Pennsylvania are subject to section 621 of the Second Restatement, must prove actual damages, and cannot rely on a presumption of damages.

52. Id. at 243.
53. Walker, 634 A.2d at 243.
54. See supra note 30.
55. Walker, 634 A.2d at 243.
56. Id. at 243-44.
57. Id. at 244.
59. Id.
60. Id.
61. Id. at 243-44.
Many courts, based on Walker, have held flatly that presumed damages are no longer available in Pennsylvania.\(^6^2\)

**VII. DESPITE WALKER, THE UNCERTAINTY CONTINUES**

Although Walker appears to eliminate entirely presumed damages from Pennsylvania defamation law, Walker did not address itself specifically to the issue that Agriss left unresolved: Are presumed damages available under Pennsylvania law to a defamation plaintiff who is able to prove that the defendant acted with actual malice? Walker’s silence on that issue\(^6^3\) has been the primary source of the confusion that persists over presumed damages under Pennsylvania law.

The Second Restatement contributes to the uncertainty, particularly because of Walker’s heavy reliance upon it. Although section 621 of the Second Restatement states that liability is predicated on proof of actual harm, a caveat to section 621 clouds the issue.\(^6^4\) In the caveat, the authors of section 621 leave the door open to the recovery of presumed damages if a plaintiff can prove actual malice.\(^6^5\) The caveat provides:

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63. This is the same question that Agriss expressly left unresolved. See 483 A.2d at 468 n.5.

64. *RESTATEMENT (SECOND) OF TORTS* § 621 caveat.

65. *Id.*
The Institute takes no position on whether the traditional common law rule allowing recovery in the absence of proof of actual harm, for the harm that normally results from such a defamation, may constitutionally be applied if the defendants knew of the falsity of the communication or acted in reckless disregard of its truth or falsity.\textsuperscript{66}

With that door left open, some authorities, despite \textit{Walker}, continue to indicate that presumed damages remain available under Pennsylvania law to plaintiffs who prove actual malice.\textsuperscript{67} In \textit{Beverly Enterprises}, the Third Circuit, in a footnote and without any acknowledgement of \textit{Walker}, stated that "[u]nder Pennsylvania law, where a defendant acts with actual malice, there is no need to prove actual damages."\textsuperscript{68} Pennsylvania's Suggested Standard Civil Jury Instructions, relying still on the First Restatement and \textit{Corabi}, also provide for an award of presumed damages if the plaintiff proves actual malice.\textsuperscript{69} A panel of the United States Court of Appeals for the Third Circuit, in an unreported opinion, has questioned, based on \textit{Walker}, whether that instruction is still appropriate.\textsuperscript{70}

\section*{VIII. FORGOTTEN STATUTE}

A seldom invoked, but still-existent statute, 42 PA. CONS. STAT. § 8344 (2003),\textsuperscript{71} and the history of that statute, also complicate the

\textsuperscript{66} Id.


\textsuperscript{68} \textit{Beverly}, 182 F.3d at 189 n.2; see also Sprague v. American Bar Ass'n, No. Civ. A. 01-382, 2001 WL 1450606, at *2 n. 6 (E.D. Pa. Nov. 14, 2001) ("Damages are assumed when there is injury to one's professional reputation . . .").

\textsuperscript{69} 2 Pa. SSJI (Civ) § 13.10 ("If you find that the defendant acted [with actual malice], you may presume that the plaintiff suffered" damages) (2d ed. 2003); see also Frisk v. News Co., 523 A.2d 347, 353-54 (Pa. Super. Ct. 1986). In \textit{Beverly}, the Third Circuit relied on \textit{Frisk}, which predates \textit{Walker}, to support the proposition that presumed damages are available to plaintiffs able to prove actual malice. \textit{Beverly}, 182 F.3d at 189 n.2.

\textsuperscript{70} See Paul v. Hearst Corp., No. 00-2351, slip op. (3d Cir. Dec. 27, 2001) (\textit{per curiam}) ("There is some reason to believe that this instruction may no longer reflect the law of Pennsylvania. \textit{See Walker . . . .}"); accord Hansel v. Shell Oil Corp., 169 F.R.D. 303, 308 (E.D. Pa. 1996) ("There is considerable doubt as to whether such a theory [presumed damages] is viable.").

\textsuperscript{71} Section 8344 provides:

In all civil actions for libel, no damages shall be recovered unless it is established to the satisfaction of the jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears such damages may be awarded as the jury shall deem proper."
status of presumed damages in Pennsylvania. An examination of the history of section 8344 requires a return to the late nineteenth century, when the Pennsylvania Legislature, decades prior to Gertz, mounted its own attack against presumed damages.

That attack was successful, but the success was short-lived. In 1897, the Pennsylvania Legislature decided to eliminate presumed damages from Pennsylvania law. In a succinct and complete repudiation of presumed damages, section 3 of Act No. 168 of 1897 provided that "[i]n no civil actions for libel shall damages be awarded beyond just restitution for injury actually sustained."\(^\text{72}\)

In *Goebeler v. Wilhelm*,\(^\text{73}\) a 1901 decision, the Pennsylvania Superior Court recognized that section 3 of the 1897 Act limited libel plaintiffs to compensation for actual injury.\(^\text{74}\)

However, just two days after *Goebeler*, and four years after it limited recovery in defamation cases to compensation "for injury actually sustained," the Pennsylvania Legislature amended the libel statute, and, in so doing, appears to have intended specifically to restore presumed damages to Pennsylvania law. Section 3 of Act No. 44 of 1901 provided that:

\[
\text{[i]n all civil actions for libel, no damages shall be recovered unless it is established to the satisfaction of the jury that the publication has been maliciously or negligently made, but where malice or negligence appears such damages may be awarded as the jury shall deem proper.}\]

\(^\text{75}\)

Thus, with section 3 of the 1901 Act, the Legislature decided to remove the "actual injury" requirement contained in section 3 of the 1897 Act and instead provided juries with the discretion to award whatever damages they deemed proper if a plaintiff proved a malicious or negligent publication – a formulation consistent with "presumed damages."\(^\text{76}\)

The provisions of section 3 of the 1901 Act, which manifested an apparent desire of the Legislature to make presumed damages again available to defamation plaintiffs, remain in force today. Section 8344 is a verbatim reenactment of section 3 of the 1901

\(^{72}\) 1897 Pa. Laws 168.

\(^{73}\) 17 Pa. Super. 432 (1901).

\(^{74}\) *Goebeler*, 17 Pa. Super. at 432; see also Stroud v. Smith, 45 A. 329 (Pa. 1900).

\(^{75}\) 1901 Pa. Laws 44.

\(^{76}\) See id.
Thus, in 1976, when it enacted section 8344, the Legislature, knowingly or unknowingly, chose to reaffirm the statute that made presumed damages available to Pennsylvania defamation plaintiffs.

IX. THE PROPER RESOLUTION

The ultimate fate of presumed damages in Pennsylvania requires an analytical resegregation of state defamation law from First Amendment constitutional principles. Prior to New York Times and Gertz, defamation was purely a matter of state law. The concept of "actual malice" is a principle that the United States Supreme Court introduced and developed in New York Times, Gertz, and other decisions, to set constitutional boundaries for state defamation law in order to protect freedom of speech. Inside those boundaries, or in cases where no constitutional limits apply, states remain free to operate as they see fit. Thus, if a state, on its own, decided to impose limitations on defamation plaintiffs more stringent than those required by New York Times and Gertz, and thereby broaden freedom of speech, that state is free to do so.

Inside the constitutional fence, or in cases where the fence is not in place, the First Amendment plays no role and, accordingly, the constitutional concept of "actual malice" is inapplicable.

When it decided Walker, a case involving a private plaintiff and no issue of public concern, the Pennsylvania Superior Court was operating free from any First Amendment limitations. Thus, Walker is purely a pronouncement of state defamation law. Walker makes no distinction between plaintiffs who are able to prove New York Times-style actual malice and those who cannot; nor does Walker make any distinction between plaintiffs who are public officials, public figures, private persons involved in matters of public concern, or purely private plaintiffs. Walker makes no material reference to those constitutional distinctions because the Walker Court had no reason to concern itself with constitutional

77. See 42 Pa. C.S. § 8344, Historical and Statutory Notes; see also 12 P.S. § 1583 (repealed) (Purdon's 1953).
79. See Dun & Bradstreet, 472 U.S. at 755; Agriss, 483 A.2d at 467.
80. See Walker, 634 A.2d at 243.
81. See id.
82. Id.
83. Id. at 244.
issues. The classification of plaintiffs and the presence or absence of actual malice are all constitutional concepts that come into play only when state law brushes up against the boundaries established under the First Amendment. The Superior Court decided *Walker* in a realm governed exclusively by state law.

*Walker*, which must therefore be understood as a pure pronouncement of state law, stands for the proposition that Pennsylvania law no longer provides any defamation plaintiffs with the potential windfall of presumed damages. Instead, according to *Walker*, defamation plaintiffs should be on par with all other tort plaintiffs in Pennsylvania. Recovery of damages should only be available to those plaintiffs who are able to prove that a defendant’s wrongful conduct actually caused some harm. *Walker* provides for no exception to that general rule of Pennsylvania state law, and there is no reason to muddy *Walker*’s waters with inapplicable constitutional standards like “actual malice.” Under *Walker*, all defamation plaintiffs, including those who can and those who cannot prove actual malice, must, as a matter of Pennsylvania law, prove that they have suffered actual harm from the defamatory publication.

That broad reading of *Walker* is sensible and appropriate, in addition to being accurate, because requiring proof of actual harm does not place an insurmountable obstacle in the path of defamation plaintiffs. “Actual harm” requires “proof that one’s reputation was actually affected by the slander, or that [the plaintiff] suffered personal humiliation, or both.” Based on that definition of actual harm, courts have permitted plaintiffs who presented only minimal evidence of actual harm to submit their claims to a jury and recover damages. For instance, in *Brinich*, the Pennsylvania Superior Court affirmed a verdict in favor of the plaintiff whose evidence of actual harm included only his testimony that he was “momentarily angered” by the defendant’s suggestion that the plaintiff used drugs, and the testimony of a witness who heard the accusation, did not believe the plaintiff used drugs, but merely “considered the possibility.” Thus, the underlying rationale for

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84. Id.
86. See id.
87. Id. at 242; accord *Brinich*, 757 A.2d at 397.
88. *Brinich*, 757 A.2d at 397-98; accord *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1080 (3d Cir. 1985) (holding that plaintiff's testimony that he was “frustrated, distraught, upset, and distressed” about the defamation, while not overwhelming,
the concept of presumed damages—that the harm generated by a
defamatory publication is not susceptible to proof and that requir-
ing such proof from defamation plaintiffs would be unreasonable—is not well-founded. The evidentiary bar for proving damages is
already sufficiently low for defamation plaintiffs; there is no need to remove it entirely by providing the further luxury of a pre-
sumption of damages. The Walker Court correctly concluded that
a defamation plaintiff, like all other tort plaintiffs, must produce
evidence that the defendant’s wrongful conduct actually caused
the plaintiff some harm.

Accordingly, Walker, as a pronouncement of state law, estab-
lishes that, in Pennsylvania, defamation plaintiffs—all defamation
plaintiffs—must produce evidence of actual harm in order to re-
cover damages. Consequently, pursuant to Walker, and in accor-
dance with the Second Restatement, the oddity of awarding pre-
sumed damages to a plaintiff who cannot prove any actual harm
should come to a conclusive end in Pennsylvania.

X. CONCLUSION

Presumed damages are resilient. The United States Supreme
Court, the Second Restatement, the Pennsylvania Legislature,
and the Pennsylvania Superior Court have all taken steps, at one
time or another, in the direction of eliminating presumed damages
from defamation law. Nevertheless, because the full breadth and
implications of Walker have yet to take firm hold, because of the
caveat to section 621 of the Second Restatement, and, potentially,
because of the provisions and history of section 8344, defamation
plaintiffs who are able to prove actual malice still have some bases
for claiming entitlement to a presumption of damages. Until the
Pennsylvania Supreme Court, the Pennsylvania Legislature, or,

was sufficient proof of actual harm); see also PPG, 52 Fed. Appx. at 578-80; Agriss, 483 A.2d at
467.

89. See Sprague, 276 F. Supp. at 374-75.
90. See Walker, 634 A.2d at 244.
91. Id.; accord Burcham v. Murphy, 961 S.W.2d 752, 755 (Ark. 1998) (citing Walker as abolishing the doctrine of presumed damages); but see Sprague, 276 F. Supp. 2d at 374
despite trend away from presumed damages and legitimate policy reasons for that trend,
“such damages are probably still available to defamation plaintiffs”).
92. The Pennsylvania Supreme Court has a “tendency to adopt the Second Restatement
of Torts in defamation matters.” Walker, 634 A.2d at 244; accord Agriss, 483 A.2d at 473;
see also Gilbert v. Korvette, Inc. 327 A.2d 94, 100 n.25 (Pa. 1974) (“In recent years, this
Court has not hesitated to adopt sections of the [Second Restatement] when our common-
law precedents varied from the Restatement or when the Pennsylvania common law pro-
vided no answer.”).
possibly, the United States Supreme Court removes this uncertainty, the odyssey of this oddity of defamation law will likely continue in Pennsylvania.