



NORTH CAROLINA LAW REVIEW

Volume 31 | Number 3

Article 1

4-1-1953

Some Observations on Pleading Damages in North Carolina

Henry Brandis Jr.

James R. Trotter

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>

 Part of the [Law Commons](#)

Recommended Citation

Henry Brandis Jr. & James R. Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N.C. L. REV. 249 (1953).

Available at: <http://scholarship.law.unc.edu/nclr/vol31/iss3/1>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

SOME OBSERVATIONS ON PLEADING DAMAGES IN NORTH CAROLINA

HENRY BRANDIS, JR.* AND JAMES R. TROTTER†

KINDS OF DAMAGES—COMPENSATORY AND PUNITIVE, ACTUAL AND NOMINAL, GENERAL AND SPECIAL

For purposes of classification, damages may be either compensatory or punitive, to distinguish between those with which the law attempts to make the injured plaintiff whole and those with which it punishes wrongdoing.¹ Compensatory damages are awarded in an effort to place the injured person as nearly as possible in the same condition in which he would have been had the injury not occurred.² The right to recover them is property which vests in the person wronged immediately upon the commission of the wrong.³

Punitive or exemplary damages are not property and are not awarded to plaintiff as a matter of right.⁴ Some aggravating circumstance, such as fraud,⁵ oppression, malice, wilfulness, wantonness, or reckless disregard of plaintiff's rights, must accompany defendant's wrong to permit their award;⁶ and they are allowed, as a matter of public policy, to punish the defendant and to deter others from like behavior.⁷ Earlier North Carolina cases referred to these damages as vindictive damages or

* Dean of the School of Law of the University of North Carolina.

† Member of the Staff of THE NORTH CAROLINA LAW REVIEW.

¹ For a more general discussion of punitive damages see McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N. C. L. REV. 129 (1929).

² *Bowen v. Fidelity Bank*, 209 N. C. 140, 183 S. E. 266 (1935).

³ *Osborn v. Leach*, 135 N. C. 627, 47 S. E. 811 (1904).

⁴ *Ibid.*

⁵ In *Swinton v. Savory Realty Co.*, 236 N. C. 723, 73 S. E. 2d 785 (1952), the court held that allegation and proof of a cause of action for fraud did not, without more, permit the jury to award punitive damages. At page 727 it said: "There was no evidence of insult, indignity, malice, oppression or bad motive other than the same false representations for which they have received the amount demanded. Here fraud is not an accompanying element of an independent tort but the particular tort alleged."

⁶ For illustrative cases, see *Ward v. Western Union Tel. Co.*, 226 N. C. 175, 37 S. E. 2d 123 (1946) (not allowed where interstate message involved); *Lay v. Gazette Publishing Co.*, 209 N. C. 134, 183 S. E. 416 (1935) (not allowed in libel action where no evidence defendant was malicious, wanton or reckless); *Bonaparte v. Fraternal Funeral Home*, 206 N. C. 652, 175 S. E. 137 (1934) (allowed in action against undertaker for arbitrarily withholding deceased's body from his widow). See also *Steffan v. Meiselman*, 223 N. C. 154, 25 S. E. 2d 626 (1943) ("Gross negligence or malicious wrongdoing"); *Binder v. General Motors Acceptance Corp.*, 222 N. C. 512, 23 S. E. 2d 894 (1942) (several slightly varying statements as to when allowable).

⁷ *Robinson v. McAlhanev*, 214 N. C. 180, 198 S. E. 647 (1938); *Carmichael v. Southern Bell Telephone Co.*, 157 N. C. 21, 72 S. E. 619 (1911).

smart money.⁸ In cases in which their award is permissible, punitive damages are within the sole discretion of the jury and the jury is not compelled to allow them. The judge may set them aside if he feels that they are out of proportion to "the circumstances of contumely and indignity" of the act.⁹ They may not be awarded unless some compensatory damages, actual or nominal, are awarded.¹⁰ Further, when an award of compensatory damages is set aside, any award of punitive damages which accompanied it must likewise be set aside.¹¹

Ordinarily, the assessment of punitive damages is confined to actions proceeding upon a tort theory, and it has been held that such damages are not allowed in contract actions with the sole exception of the action for breach of promise to marry.¹²

Corporations as well as other principals may be held liable for such damages for the acts of their agents.¹³ However, no punitive damages may be awarded against an insane defendant.¹⁴

Prayers for punitive damages must be supported by allegations showing the aggravating circumstances which justify the award. The malice required is actual malice, rather than that implied by law from the intentional doing of that which is inherently dangerous.¹⁵ It is proper in seeking such damages to prove the financial condition of the defendant,¹⁶ but not of the plaintiff.¹⁷ In view of this, the court will not reverse a judge who refuses to strike allegations describing defendant's financial condition or reputed wealth;¹⁸ though there is a strong argument that such allegations constitute a pleading of evidence.

Nominal damages are those recoverable where some legal right has been invaded but no actual loss or injury has been demonstrated.¹⁹ The award is some trifling sum and is given in recognition of the technical injury. All that plaintiff need allege and prove is the violation of the

⁸ *Smithwick v. Ward*, 52 N. C. 64 (1859) (defendant was allowed to prove his criminal conviction and punishment by the state to mitigate punitive damages).

⁹ *Worthy v. Knight*, 210 N. C. 498, 187 S. E. 771 (1936); *Tripp v. American Co.*, 193 N. C. 614, 137 S. E. 871 (1927).

¹⁰ See cases cited, *infra* note 21. See also, however, *Walker v. L. B. Price Mercantile Co.*, 203 N. C. 511, 166 S. E. 391 (1932) (in assault case, jury apparently labeled all damages punitive, but, under the circumstances, judgment on verdict affirmed), and *Ferrell v. Siegle*, 195 N. C. 102, 141 S. E. 474 (1927).

¹¹ *Gaskins v. Cidbury*, 227 N. C. 468, 42 S. E. 2d 513 (1947).

¹² *Richardson v. Wilmington & Weldon R. R.*, 126 N. C. 100, 35 S. E. 235 (1900); Note, 11 N. C. L. REV. 160 (1933).

¹³ *Hairston v. Greyhound Corp.*, 220 N. C. 642, 18 S. E. 2d 166 (1941).

¹⁴ *Bryant v. Carrier*, 214 N. C. 191, 198 S. E. 619 (1938).

¹⁵ *Baker v. Winslow*, 184 N. C. 1, 113 S. E. 570 (1922).

¹⁶ *Taylor v. Jones Brothers Bakery, Inc.*, 234 N. C. 660, 68 S. E. 2d 313 (1951); *Reeves v. Winn*, 97 N. C. 246, 1 S. E. 448 (1887); *Adcock v. Marsh*, 30 N. C. 360 (1848).

¹⁷ *Reeves v. Winn*, 97 N. C. 246, 1 S. E. 448 (1887).

¹⁸ *Taylor v. Jones Brothers Bakery, Inc.*, 234 N. C. 660, 68 S. E. 2d 213 (1951).

¹⁹ *Hairston v. Greyhound Corp.*, 220 N. C. 642, 18 S. E. 2d 166 (1941).

right, and the damages follow as a matter of course.²⁰ The importance of nominal damages may go beyond the mere vindication of the right, for without them there may be no punitive damages²¹ and there is no "peg on which to hang the costs."²²

Nominal damages are distinguished from actual damages—the latter being awarded in situations in which substantial physical, mental or pecuniary injury to the plaintiff is demonstrated. Often "compensatory" and "actual" are used interchangeably, with the inference that "nominal" damages are neither; but, logically, "actual" and "nominal" are both "compensatory."

Actual damages are subdivided into general and special damages and, for pleading purposes, these labels distinguish between those that may be proved under general allegations indicating substantial damage and those that require particular pleading as a basis for proof.²³ General damages have been characterized variously as those which "naturally," "necessarily," "ordinarily," "logically," or "proximately" arise from the facts established; or as the damages that would accrue to any person suffering a similar injury without reference to some special character, condition, or circumstance of the plaintiff.²⁴ To lay the basis for proof of general damages, all that is supposedly required of the pleader is the allegation of facts giving rise to the damages and a simple statement such as "plaintiff has suffered damage to the amount of \$1,000.00."²⁵

Special damages are those which, though actually resulting from the wrongful act, are not considered as a common consequence, normally resulting from such an act. They are extraordinary and unusual, or peculiar to the particular plaintiff or case. Departure from the norm is logically the important clue for distinguishing special from general damage. The reason for requiring that special damages be pleaded with particularity in order to lay the basis for proof is, of course, to prevent surprise.²⁶

Our court has been, on the whole, rather liberal in permitting proof

²⁰ *Sineath v. Katzis*, 218 N. C. 740, 12 S. E. 2d 671 (1940).

²¹ *Worthy v. Knight*, 210 N. C. 498, 187 S. E. 771 (1936); *Saunders v. Gilbert*, 156 N. C. 463, 72 S. E. 610 (1911).

²² *Hairston v. Greyhound Corp.*, 220 N. C. 642, 18 S. E. 2d 166 (1941).

²³ There are at least two classes of cases in which "special damages" is a particularized phrase of art. These are public nuisance and defamation cases. Both are subsequently discussed.

²⁴ *Binder v. General Motors Acceptance Corp.*, 222 N. C. 512, 23 S. E. 2d 894 (1942); *Ringgold v. Land*, 212 N. C. 369, 193 S. E. 267 (1937); *Conrad v. Shuford*, 174 N. C. 719, 94 S. E. 424 (1917); *McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES* 409 (1929); *BLACK'S LAW DICTIONARY* 468 (4th ed. 1951).

²⁵ *McINTOSH, op. cit. supra* note 24, at 409.

²⁶ *Oberholtzer v. Huffman*, 234 N. C. 399, 67 S. E. 2d 263 (1951); *Binder v. General Motors Acceptance Corp.*, 222 N. C. 512, 23 S. E. 2d 894 (1942); *Conrad v. Shuford*, 174 N. C. 719, 94 S. E. 424 (1917).

under fairly general allegations.²⁷ But the distinction between general and special damages is vague, at best, and is not always interpreted in a strictly logical manner.²⁸ Therefore, in case of doubt, the wise pleader will allege items of injury with some particularity. However, he will also include a general allegation of such character as to indicate that he does not intend to be limited by those particulars alleged. He can hope, at least, that this will induce the court not to invoke the rule that, if particulars alleged are "comprehensive and inclusive," they will confine the proof, excluding even evidence of other items normally classifiable as general damages.²⁹

ALLEGATION OF DAMAGES AND PRAYER FOR RELIEF

Factual allegations which clearly show that the plaintiff has suffered substantial damage should permit proof and recovery of general damages, even though no specific sum be named in the body of the complaint. However, it is both customary and proper to include a factual allegation (as distinguished from the prayer for relief) stating the amount of damages the plaintiff claims to have suffered. Particularly because of the North Carolina practice of reading pleadings to the jury, the plaintiff's attorney is likely to fix this amount at a figure adequately reflecting the inclinations of even the most liberal jurymen. Indeed, he is virtually compelled to take into consideration the psychological effect on the jury.³⁰ As already indicated, if there are abnormal factors in the particular case which tend to justify recovery of an unusual amount, they should be specially alleged as they are probably classifiable as special damages and the allegation is a necessary basis for proof. Even if aggravating factors are classifiable as general damages, it is perfectly proper to allege them and, again, the plaintiff's attorney is likely to consider the effect upon the jury.³¹

It is provided by statute that the complaint should contain a demand for the relief to which the plaintiff supposes himself entitled, and that,

²⁷ In *Conrad v. Shuford*, 174 N. C. 719, 94 S. E. 424 (1917), plaintiff alleged injury to his back, head, nose and ribs as the result of defendant's negligence. He was allowed to show that he had a wen on his back which had become bruised and inflamed. In *Davis v. Wall*, 142 N. C. 450, 55 S. E. 350 (1906), an allegation that defendant trespassed on plaintiff's land and removed timber trees "to his great damage" was sufficient to permit plaintiff to prove and recover the value of the timber removed, plus "any damage done to the land in removing it therefrom."

²⁸ See text *infra* at notes 51 and 52.

²⁹ See *Price v. Goodman*, 226 N. C. 223, 37 S. E. 2d 592 (1946); *cf.* *Conrad v. Shuford*, 174 N. C. 719, 94 S. E. 424 (1917).

³⁰ The authors of this article seriously question the desirability of reading pleadings to the jury. However, so long as the practice continues, a lawyer necessarily considers its effect upon his pleadings.

³¹ See *Barron v. Cain*, 216 N. C. 282, 4 S. E. 2d 618 (1939). When plaintiff was seeking recovery on quantum meruit for personal services, it was proper to allege that by reason of defendant's attitude and temperament her services were worth more than they would otherwise have been.

if recovery of money is sought, the amount should be stated.³² This is a clear direction to the careful pleader, but, at least in cases in which an answer is filed, it is not an absolute necessity. Except where there is no answer, the court may grant any relief consistent with the case made by the complaint and embraced within the issue.³³ The court will grant relief, either legal or equitable, according to the facts alleged and proved, even though there is no formal prayer for relief or the prayer asks for relief different from that actually granted.³⁴ "In numerous and repeated decisions of this Court we have held that neither a particular form of statement nor a special prayer for relief should be allowed as determinative or controlling, but rights are declared and justice administered on the facts which are alleged and properly established."³⁵

The prayer for relief becomes of greater significance when there is no answer, because in that situation, by statute, the relief granted cannot exceed that demanded in the complaint.³⁶ This limiting statute does not expressly mention relief different in kind from that demanded in the complaint; but if, for instance, a prayer for relief demanded only damages, it would seem clearly irregular for a default judgment to grant specific performance, even though the factual allegations in the complaint might justify the latter relief.³⁷ Literally interpreted, the statute means that if there is no prayer for relief there can be no recovery in default situations. Perhaps it will not always be so literally interpreted where the factual allegations of the complaint clearly show the kind and quantity of relief to which plaintiff is entitled;³⁸ but the cautious pleader will certainly not omit his prayer.

³² N. C. GEN. STAT. § 1-122 (3) (1943).

³³ N. C. GEN. STAT. § 1-226 (1943).

³⁴ *Lamb v. Staples*, 234 N. C. 166, 66 S. E. 2d 660 (1951); *Griggs v. York-ShIPLEY, Inc.*, 229 N. C. 572, 50 S. E. 2d 914 (1948); *Jones v. Atlantic & W. R. Co.*, 193 N. C. 590, 137 S. E. 706 (1927); *Bryant v. Canady*, 169 N. C. 579, 86 S. E. 584 (1915); *Bradburn v. Roberts*, 148 N. C. 214, 61 S. E. 617 (1908) (rule applied to relief to which defendant entitled); *Knight v. Houghtalling*, 85 N. C. 17 (1881). If necessary, the complaint may be amended, before or after judgment, to conform to the facts found. *Warrington v. Hardison*, 185 N. C. 76, 116 S. E. 166 (1923).

³⁵ *Stacey Cheese Co. v. Pipkin*, 155 N. C. 394, 400, 71 S. E. 442, 444 (1911). See also *Carolina Mortgage Co. v. Long*, 205 N. C. 533, 172 S. E. 209 (1933) (foreclosure may be decreed, though prayer asks only for money judgment and general relief); *Councill v. Bailey*, 154 N. C. 54, 69 S. E. 760 (1910) (order for specific performance included provisions not specifically requested in the prayer); *Wright v. Teutonia Insurance Co.*, 138 N. C. 488, 51 S. E. 55 (1905) (under peculiar circumstances, in suit on fire insurance policy, plaintiff recovered for loss of tobacco though he had demanded recovery for loss of machinery); *Oates, Williams & Co. v. Kendall*, 67 N. C. 241 (1872) (trover versus money had and received).

³⁶ N. C. GEN. STAT. § 1-226 (1943).

³⁷ See *Burrowes v. Burrowes*, 210 N. C. 788, 188 S. E. 648 (1936). In a divorce case, in which the existence of a minor son of the marriage was alleged, the prayer for relief sought only divorce. It was held improper for the court, on default judgment, to grant plaintiff custody of the son.

³⁸ See *Dunn v. Barnes*, 73 N. C. 273 (1875). Complaint on a note clearly

On the other hand, the pleader cannot lay the basis for an inflated default judgment merely by including an exaggerated prayer for relief. Where the factual allegations show clearly that plaintiff is not entitled to the kind or quantity of relief demanded, they are controlling.³⁹

Should a verdict be returned by the jury which the court does not feel conforms to the facts of the case, the judge has two courses of action. First, if he believes the verdict to be excessive, he may, with the consent of the party receiving the award, reduce it to a sum in keeping with the facts shown.⁴⁰ (He could also probably raise the amount of an inadequate verdict with the permission of the party assessed, but in the nature of things such permission will seldom be forthcoming.) Secondly, the judge may set aside the verdict and grant a new trial on the issue of damages alone.⁴¹ Such action is within his sole discretion and is not subject to review except for abuse of that discretion.⁴²

Under a statute which seems to have been little used, a defendant in a contract action may serve with his answer a written offer that, if he fails in his defense, the damages be assessed at a specified sum. If the plaintiff consents and wins a verdict the damages must be assessed accordingly. If the plaintiff refuses the offer and fails to win a verdict exceeding its amount, the defendant is entitled to recover his expenses incurred in preparing for the issue of damages.⁴³

PERSONAL INJURY AND WRONGFUL DEATH ACTIONS

The basic rule in personal injury actions is that the plaintiff is entitled to recover all damages, past, present and prospective, which are the natural and probable consequences of defendant's wrongdoing.⁴⁴ In the case of "pure torts," such as assault, the law infers that some damages will naturally arise from the commission of the tort and no damage allegation is necessary in order to state a cause of action. Nominal

alleged the amount due, but prayer left the amount blank. Defendant's demurrer was held frivolous, his request for leave to answer was denied, and judgment was entered for the amount of the note and interest. This differs from the ordinary default situation in that defendant had appeared and demurred. While G. S. 1-226 literally applies wherever there is no answer, it is doubtful if it is intended to cover a case in which, after demurring unsuccessfully, defendant attempts to limit plaintiff's recovery by failure to file answer.

³⁹ Federal Land Bank v. Davis, 215 N. C. 100, 1 S. E. 2d 350 (1939); Currie v. Golconda Mining and Milling Co., 157 N. C. 209, 72 S. E. 980 (1911); Junge v. MacKnight, 137 N. C. 285, 49 S. E. 474 (1904). See also Simms v. Sampson, 221 N. C. 379, 20 S. E. 2d 554 (1942).

⁴⁰ Hyatt v. McCoy, 194 N. C. 760, 140 S. E. 807 (1927).

⁴¹ Rushing v. Seaboard Airline R. R., 149 N. C. 158, 62 S. E. 890 (1908). The judge may also grant a complete new trial.

⁴² Harvey v. Atlantic Coast Line R. R., 153 N. C. 567, 69 S. E. 627 (1910). An earlier case, Benton v. Collins, 125 N. C. 83, 34 S. E. 242 (1899), held that there could be no review, but the rule was soon modified to conform to the present view.

⁴³ N. C. GEN. STAT. § 1-542 (1943).

⁴⁴ Lane v. Southern Railway Co., 192 N. C. 287, 134 S. E. 885 (1926); Ledford v. Valley River Lumber Co., 183 N. C. 614, 112 S. E. 421 (1922).

damages may be recovered, though there is no allegation or proof of actual damage.⁴⁵ There are some torts, such as negligence and fraud, which are not "pure torts," and in these situations injury or damage is a necessary element of the cause of action.⁴⁶ In such cases, a complaint which fails to allege facts demonstrating injury or damage will be subject to demurrer.

In all personal injury cases, whether the tort be "pure or not, it seems probable that all normal physical consequences may be proved under a simple allegation that plaintiff suffered "serious bodily injury."⁴⁷ In practice North Carolina pleaders seem to have included considerably more detail; but too much detail may raise questions as to whether the allegations confine the proof—as where, for example, some further consequence of the injury develops between the time the pleading is drawn and the time the trial is reached.

In one case, our court permitted proof that the plaintiff's injuries were aggravated because of a pre-existing wen on his back, though it had not been specifically pleaded.⁴⁸ However, faced with a situation in which plaintiff's injuries have been seriously aggravated by a pre-existing disease, the wise plaintiff's attorney will probably wish to plead it specifically on the theory that it may well be held to be special damages. If it is contended that the injury has deprived the plaintiff of normal mental capacity, that should almost certainly be specially alleged.⁴⁹ In cases in which the defendant is liable for aggravation of the plaintiff's injuries caused by the act of a third party, it is probably better to allege the facts specifically, though whether our court regards this as general or special damage is none too clear.⁵⁰

Medical and hospital expenses, loss of time from work, loss of earning capacity and loss of profits are all traditionally considered

⁴⁵ *Wolfe v. Montgomery Ward & Co.*, 211 N. C. 295, 189 S. E. 772 (1937) (slander *per se*); *Lowry v. Barker*, 211 N. C. 613, 190 S. E. 341 (1937) (false imprisonment); *Walker v. L. B. Price Mercantile Co.*, 203 N. C. 511, 166 S. E. 391 (1932) (assault); *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811 (1904) (libel). See, however, N. C. GEN. STAT. § 6-18(4) (1943): "In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, if the plaintiff recovers less than \$50 damages, he shall recover no more costs than damages."

⁴⁶ *Hill v. Snider*, 217 N. C. 437, 8 S. E. 2d 202 (1940).

⁴⁷ "The pleader is not required by the rule to go into an account of minute details and to specify every muscle that ached and every nerve that throbbled, every contusion or fracture, and every racking pain." *Conrad v. Shuford*, 174 N. C. 719, 721, 94 S. E. 424, 425 (1917). See also *Watkins v. Kaolin Mfg. Co.*, 131 N. C. 536, 46 S. E. 983 (1902) (allegation that plaintiff "became nervous and frightened . . . and was greatly disturbed in body and mind," at least in absence of showing of surprise, supported proof that plaintiff was rendered almost helpless, could not attend to daily duties, and had female trouble out of its regular course).

⁴⁸ *Conrad v. Shuford*, 174 N. C. 719, 94 S. E. 424 (1917).

⁴⁹ *McCORMICK, DAMAGES* § 8 (1935).

⁵⁰ See *Bost v. Metcalf*, 219 N. C. 607, 14 S. E. 2d 648 (1941) (involving liability of original tort-feasor for negligent treatment of injured person by a physician); *Lane v. Southern Railway Co.*, 192 N. C. 287, 134 S. E. 855 (1926).

special damages which should be alleged.⁵¹ However, with the possible exception of loss of profits, all of these seem to be perfectly normal consequences of physical injury. In one case our court has intimated that all of them, except loss of profits, may be proved under a general allegation of bodily injury, with the defendant being left to protect himself against surprise by a motion to make more definite and certain.⁵² Unfortunately, the only point actually before the court was whether it was permissible for the plaintiff to prove a ten or fifteen dollar hospital bill without having alleged hospital expense. The court held that it was permissible, but since the verdict was for \$1,500.00 and the hospital bill was comparatively inconsequential, there may be some question as to the extent to which the case will be followed when more substantial sums are involved. On principle, the case announces an enlightened rule which should receive general application.

Where accompanied by physical injury (even if the physical injury be itself a product of fright), mental anguish may be a proper element of recovery.⁵³ Where there is adequate basis for claiming it, the plaintiff's attorney will ordinarily wish to prove it because it may increase the size of the verdict and render it less likely that the verdict will be set aside as excessive.⁵⁴ Though the matter is not free from doubt, it is possible that in North Carolina evidence of mental anguish may be introduced despite the fact that it is not specifically alleged in the complaint.⁵⁵

If the plaintiff was operating a business from which he derived earnings or profits, loss of such earnings or profits is an appropriate element of damages to be considered by the jury in a personal injury case,⁵⁶ at

⁵¹ McCORMICK, DAMAGES § 8 (1935). Compare Federal Forms 9, 10, 14 and 15.

⁵² Sparks v. Holland, 209 N. C. 705, 184 S. E. 552 (1936).

⁵³ Kirby v. Jules Chain Stores Corp., 210 N. C. 808, 188 S. E. 625 (1936). For a discussion of mental anguish in North Carolina see Notes, 28 N. C. L. REV. 318 (1950), 18 N. C. L. REV. 71 (1939).

⁵⁴ Though the monetary equivalent of such intangibles as pain, suffering, and humiliation is concededly not subject to any precise measurement, it is improper to instruct that such damages are discretionary with the jury. Only punitive damages are discretionary. Mooney v. Mull, 216 N. C. 410, 5 S. E. 2d 122 (1939). However, compare the charge disapproved in this case with the one approved in Lowry v. Barker, 211 N. C. 613, 190 S. E. 341 (1937).

⁵⁵ Hargis v. Knoxville Power Co., 175 N. C. 31, 94 S. E. 702 (1918). There was no express allegation of mental anguish, though there was an allegation that plaintiff suffered great bodily injury "from which injuries he continues to be sick, sore, maimed, and disordered, and still suffers great pain and distress." The court said: "As all pain is mental and centers in the brain, it follows that as an element of damage for personal injury the injured party is allowed to recover for actual suffering of mind and body when they are the immediate and necessary consequences of the negligent injury." The doubt as to the meaning of the case arises because of uncertainty as to whether the court intended its opinion to apply to mental anguish in its ordinary meaning.

⁵⁶ Pascal v. Burke Transit Co., 229 N. C. 435, 50 S. E. 2d 534 (1948); Ledford v. Valley River Lumber Co., 183 N. C. 614, 112 S. E. 421 (1922).

least to the extent that they were predicated upon his personal services as distinguished from investment of capital. Whether such loss is classifiable as special damage presents much the same problem as loss of time from work on a salary or wages; though, since loss of profits from a business may be more uncertain or more unusual, perhaps the case for requiring special pleading is stronger. Certainly any claim for loss of profits based on plaintiff's inability to carry out some particular contract should be regarded as special damage and expressly pleaded. Whether such profits may be recovered at all depends upon whether, under all the circumstances, the court regards them as too remote and speculative.⁵⁷ However, in general, in tort actions, recovery of special damages is not limited by any requirement that the circumstances giving rise to such damages be known to the defendant at the time of the commission of the tort.⁵⁸

A plaintiff suffering personal injuries has but a single cause of action and he may not bring successive actions if he fails to recover all of his damages on the first try. Indeed, if in the same occurrence he suffers property damage as well as personal injury, he still has but a single cause of action and can litigate but once.⁵⁹ In a personal injury action there is a lump sum recovery of all damages, past, present and prospective, and these must be reduced to their present worth.⁶⁰ The jury is not bound by any rule of thumb, save the present worth rule, in determining the monetary value of plaintiff's damages. Subject to the discretionary power of the court to set aside the verdict, the sum to be awarded is left to the jury's sound judgment.⁶¹

Recovery by one spouse for injury to the other has undergone considerable change since the passage of the Married Woman's Act in

⁵⁷ See *Kitchen Lumber Co. v. Tallassee Power Co.*, 206 N. C. 515, 174 S. E. 427 (1934) (whether lost profits in hauling lumber recoverable in action for negligent destruction of bridge); *Bullard v. Ross*, 205 N. C. 495, 171 S. E. 789 (1933) (where defendant negligently drove truck into plaintiff's mules, killing one and injuring other, damage to plaintiff's crops too remote and speculative). These are not personal injury cases, but they seem applicable to tort situations in general.

⁵⁸ *Steffan v. Meiselman*, 223 N. C. 154, 25 S. E. 2d 626 (1943). However, when the action, though brought on a tort theory, is in reality grounded on a contract relationship, it must appear that the special circumstances were known or should have been known to the defendant when the tort was committed, if not when the contract was made. *Causey v. Davis*, 185 N. C. 155, 116 S. E. 401 (1923); *Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. R.*, 155 N. C. 148, 71 S. E. 71 (1911).

⁵⁹ *Eller v. Railroad*, 140 N. C. 140, 52 S. E. 305 (1905). For an exception to this rule see *Underwood v. Dooley*, 197 N. C. 100, 147 S. E. 686 (1929).

⁶⁰ *Mintz v. Atlantic Coast Line R. R.*, 233 N. C. 607, 65 S. E. 2d 120 (1951); *Ledford v. Valley River Lumber Co.*, 183 N. C. 614, 112 S. E. 421 (1922). The mortuary tables, N. C. GEN. STAT. § 8-46 (1943), may be used in determining plaintiff's life expectancy, as may his health, constitution and habits. *Starnes v. Tyson*, 226 N. C. 393, 38 S. E. 2d 211 (1946).

⁶¹ See *Gasque v. Asheville*, 207 N. C. 821, 178 S. E. 848 (1935). But see also note 22 *supra*.

1913.⁶² At common law when the wife was injured she could sue in her husband's name for personal injuries and losses, and the husband could sue for loss of consortium or damage to his marital interest and for expenses incurred as the result of his wife's injuries. Now our court holds that either of the spouses may recover for his or her own injuries but neither may recover for the injuries of the other.⁶³ Further, there may be no recovery for loss of consortium, with attendant mental anguish, for injuries negligently inflicted, though there may be such recovery when the wrong is willful or malicious.⁶⁴ Either spouse may recover money expended because of the injuries to the other, but in order to do so the expenditure should be specially pleaded and proved.⁶⁵

As a general rule an unemancipated minor cannot, in a personal injury action, recover loss of time or diminished earning capacity for the period of his minority.⁶⁶ In the absence of emancipation, the father alone has the right to the child's earnings and he alone may recover for their loss.⁶⁷ However, the father may waive his right to such recovery, and he is deemed to have done so when he sues as the minor's next friend and recovers such elements of damage on behalf of the child.⁶⁸

Recovery in an action for wrongful death exists solely by statute⁶⁹ and strict compliance with the conditions of the statute is required.⁷⁰ The right of action rests in the executor, administrator or collector of decedent, and he alone, and in his representative capacity alone, may bring the suit.⁷¹ By the terms of the statute, the recovery is not an asset of the estate, except to the extent of being liable for burial expenses, but goes to the next of kin. The estate representative may also bring an action for damages, growing out of the same occurrence, sustained by the injured person during his lifetime; and any recovery in the action becomes an asset of the estate.⁷² There should be no overlap between

⁶² N. C. GEN. STAT. §52-10 (1943, recompiled 1950).

⁶³ *Helmstetler v. Duke Power Co.*, 224 N. C. 821, 32 S. E. 2d 611 (1944).

⁶⁴ *Helmstetler v. Duke Power Co.*, 224 N. C. 821, 32 S. E. 2d 611 (1944); *Hinnant v. Tidewater Power Co.*, 189 N. C. 120, 126 S. E. 307 (1924). For a discussion of consortium and related problems see Note, 29 N. C. L. REV. 178 (1950).

⁶⁵ *Helmstetler v. Duke Power Co.*, 224 N. C. 821, 32 S. E. 2d 611 (1944); *McDaniel v. Trent Mills*, 197 N. C. 342, 148 S. E. 440 (1929).

⁶⁶ *Shipp v. United Stage Lines*, 192 N. C. 475, 135 S. E. 339 (1926); *Hayes v. Southern Railway*, 141 N. C. 195, 53 S. E. 847 (1906).

⁶⁷ *Hayes v. Southern Railway*, 141 N. C. 195, 53 S. E. 847 (1906).

⁶⁸ *Pascal v. Burke Transit Co.*, 229 N. C. 435, 50 S. E. 2d 534 (1948).

⁶⁹ N. C. GEN. STAT. §§ 28-173, 28-174 (1943, recompiled 1950).

⁷⁰ *Monfils v. Hazelwood*, 218 N. C. 215, 10 S. E. 2d 673 (1940).

⁷¹ *McCoy v. Atlantic Coast Line R. R.*, 229 N. C. 57, 47 S. E. 2d 532 (1948); *Harrison v. Carter*, 226 N. C. 36, 36 S. E. 2d 700 (1945).

⁷² *Hoke v. Greyhound Corp.*, 226 N. C. 332, 38 S. E. 2d 105 (1946). This recovery may include pain and suffering, mental anguish, hospital and medical expenses, loss of time, etc., from the time of injury to the time of death. In the

the two recoveries.⁷³

In North Carolina the court has repeatedly held that the measure of recovery in a wrongful death action is the present value of the net worth of that part of decedent's life which is cut off by the defendant's wrong.⁷⁴ Simply stated, the figure is arrived at by deducting decedent's probable living expenses from his probable earnings and reducing the remainder to its present worth. Despite the fact that the next of kin are the recipients of the award, it has been considered error to permit the jury to compute the award on the basis of the value of decedent's life to them. In *Hanks v. Norfolk & Western R. R.*,⁷⁵ the court sanctioned the introduction of evidence which certainly had some tendency to prove that the next of kin had not suffered any loss because of decedent's death.⁷⁶ The court itself seemed to be thinking in terms of that tendency when it referred to providing help to the jury in arriving at "pecuniary worth to the recipients or disposeses of the recovery." Nevertheless, the court did not purport to abandon the previously announced North Carolina rule, and subsequent cases have reiterated that rule.⁷⁷

Because pecuniary loss to the next of kin furnishes a rational and perhaps less nebulous measure of recovery than the net worth of decedent's lost life, it is possible that future decisions, building upon the *Hanks* case, may yet modify the net worth rule.⁷⁸

Regardless of the manner in which compensatory damages are computed, it seems clear that punitive damages are not recoverable in an action for wrongful death.⁷⁹ The purpose of the statute is to compensate for loss and not to punish the defendant.

Hoke case, without objection and therefore without decision as to the propriety of joinder, the two causes of action were joined in the same suit.

⁷³ For further discussion of this see Note, 25 N. C. L. Rev. 84 (1946).

⁷⁴ *Rea v. Simonwitz*, 226 N. C. 379, 38 S. E. 2d 194 (1946); *Carpenter v. Asheville Power and Light Co.*, 191 N. C. 130, 131 S. E. 400 (1925).

⁷⁵ 230 N. C. 179, 52 S. E. 2d 717 (1949), commented on in Note, 28 N. C. L. Rev. 106 (1949).

⁷⁶ The evidence admitted showed that decedent had been convicted for non-support of his family; that the day before his death he had filed a divorce action, alleging an agreement regarding custody and support of his children, and that the inventory of his estate showed no assets other than the wrongful death action and \$110 in wages due.

⁷⁷ *Lamm v. Lorbacher*, 235 N. C. 728, 71 S. E. 2d 49 (1952); *Journigan v. Little River Ice Co.*, 233 N. C. 180, 63 S. E. 2d 183 (1950).

⁷⁸ Critics of the present North Carolina rule assert: (1) The real reason for the award is to compensate decedent's family and this can more nearly be done by using loss suffered by the family as a measure of damages, rather than a hypothetical pecuniary worth. (2) The factors entering into determination of a man's future "net worth" are so variable and multitudinous that it is virtually impossible for a jury to arrive at a sum which may be said to be accurate. (3) If decedent has no next of kin, the award escheats to the University of North Carolina; and the critics have difficulty perceiving that the University has suffered a loss. The authors of this article do not undertake to evaluate these criticisms.

⁷⁹ *Martin v. Currie*, 230 N. C. 511, 53 S. E. 2d 447 (1949).

INJURY TO INTERESTS IN PERSONAL PROPERTY

When the complaint alleges facts showing that the defendant has wrongfully converted, detained, damaged or destroyed specified personal property of the plaintiff, this is sufficient to establish plaintiff's right to recover damages and to permit proof of substantial pecuniary loss. Even in negligence cases, in which damage is a necessary element of the cause of action, a general allegation of damage to or destruction of specific property, without details and without specific allegation of the dollar amount of the loss, would seem sufficient for both purposes. However, in all cases, it is better pleading to include at least a general allegation of damage and a statement of the amount claimed.

When plaintiff seeks to recover possession of specific property, the ancillary remedy of claim and delivery⁸⁰ is available. Claim and delivery is not itself an action, but is merely a writ or order issued in a pending action to enable a plaintiff to get possession of the property and hold it until the final judgment determines who is to have it by right.⁸¹

Where a defendant has converted the plaintiff's property, the plaintiff has the unquestionable right to determine whether to demand the property or damages. If he chooses to seek damages alone, the defendant may not force him to take back the converted property, even though it is tendered with its value undiminished.⁸² If the principal relief sought is possession, the plaintiff is additionally entitled to damages resulting from deterioration and detention.⁸³ Factual allegations showing detention would ordinarily seem sufficient to support proof of damages flowing from such detention, but clarity is promoted if some allegation of damage and a prayer seeking damages are included. And, if unusual damage is claimed, such as loss of use of the property in the plaintiff's business,⁸⁴ or loss of profits from a contract,⁸⁵ it may well be classified as special damage which must be expressly alleged.

When return of the property is not possible or is not sought, the minimum amount recoverable is the value of the property at the time of the conversion.⁸⁶ If any additional sum is sought, it is the policy

⁸⁰ N. C. GEN. STAT. §§ 1-472 through 1-484 (1943).

⁸¹ McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 829, p. 958 (1929).

⁸² Waller v. Bowling, 108 N. C. 290, 12 S. E. 990 (1891); Stephens v. Koonce, 103 N. C. 266, 9 S. E. 315 (1889).

⁸³ N. C. GEN. STAT. §1-230 (1943); Waller v. Bowling, 108 N. C. 290, 12 S. E. 990 (1891). For defendant's rights when plaintiff, after having employed claim and delivery, fails to prove the right to possession, see Boylston Insurance Co. v. Davis, 70 N. C. 485 (1874); Holmes v. Godwin, 69 N. C. 467 (1873).

⁸⁴ Binder v. General Motors Acceptance Corp., 222 N. C. 512, 23 S. E. 2d 894 (1942). The court found it unnecessary to decide whether loss of use was general or special damage, since in fact it was expressly pleaded; but there is some indication that it could be regarded as general damage.

⁸⁵ See cases cited *infra* notes 95 and 96. Those cases are not grounded on conversion, but it is believed that they would apply in conversion situations.

⁸⁶ Cases cited *supra* note 82.

of wisdom to include factual allegations supporting such a demand. If the issue is properly framed, the jury may, in its discretion, allow interest from the date of conversion.⁸⁷ No factual allegation of loss of such interest would seem to be necessary or even appropriate. However, it would be wise, though probably not necessary, to request the interest in the prayer for relief.

In other cases involving damage to or destruction of personal property by the negligence or intentional conduct of the defendant, a single notion as to the measure of minimum general damages has been adhered to by our court. The plaintiff may recover the difference between the market value of the property immediately before the injury and the market value immediately after the injury.⁸⁸ It makes no difference whether the property involved is a cow⁸⁹ or an automobile⁹⁰ or something else. The valuation should be made as of the time and place of the injury, though evidence of the value may be as of a reasonable time before or after the injury.⁹¹

Damages, other than the diminished value of the property, which are in fact proximately caused by the defendant's wrongful act may also be recovered. These include loss of use and loss of profits. Dependent upon the type of property involved, either may be regarded as a normal consequence of damage or destruction; but if either is at all unusual under the particular circumstances it may rationally be classified as special damage, and loss of profits is generally so classified.⁹² Our court has referred to both loss of use and loss of profits as "special damages."⁹³ It follows that, as a precaution, they should be expressly alleged.

Earlier North Carolina cases tended to deny recovery for loss of profits in tort cases as too remote, uncertain and speculative.⁹⁴ Since

⁸⁷ *White v. Riddle*, 198 N. C. 511, 152 S. E. 501 (1930); *Lance v. Butler*, 135 N. C. 419, 47 S. E. 488 (1904); *Stephens v. Koonce*, 103 N. C. 266, 9 S. E. 315 (1889). A judge may not add the interest where the jury has not done so. *Patapsco Guano Co. v. Magee*, 86 N. C. 350 (1882).

⁸⁸ *United States Fidelity and Guaranty Co. v. P. & F. Motor Express*, 220 N. C. 721, 18 S. E. 2d 116 (1941). Occasionally there is a reference to "the reasonable worth" of the property, but it is not believed that this is intended to indicate any departure from the market value rule. See *Hart v. Atlantic Coast Line R. R.*, 144 N. C. 91, 56 S. E. 559 (1907).

⁸⁹ *Godwin v. Wilmington and Weldon R. R.*, 104 N. C. 146, 10 S. E. 136 (1889); *Boing v. Raleigh & Gaston R. R.*, 91 N. C. 199 (1884); *Roberts v. Richmond & Danville R. R.*, 88 N. C. 560 (1883).

⁹⁰ *United States Fidelity and Guaranty Co. v. P. & F. Motor Express*, 220 N. C. 721, 18 S. E. 2d 116 (1941); *DeLaney v. Henderson-Gilmer Co.*, 192 N. C. 647, 135 S. E. 791 (1926); *West Construction Co. v. Atlantic Coast Line R. R.*, 185 N. C. 43, 116 S. E. 3 (1923).

⁹¹ *Newsom v. Cothrane*, 185 N. C. 161, 116 S. E. 415 (1923). Cf. *Boylston Insurance Co. v. Davis*, 70 N. C. 485 (1874).

⁹² *McCORMICK, DAMAGES* § 8 (1935).

⁹³ *Reliable Trucking Co. v. Payne*, 233 N. C. 637, 65 S. E. 2d 132 (1951).

⁹⁴ *Sledge v. Reid*, 73 N. C. 440 (1875).

that time the rule has become more liberal, first allowing recovery for loss of profits from contracts which the plaintiff had at the time of the injury,⁹⁵ and now permitting recovery where the profits are "capable of being shown with a reasonable degree of certainty."⁹⁶ Further, allegations of loss of use and profits should survive a motion to strike if evidence of such loss can be considered by the jury in assessing damages, even though they do not in themselves furnish a proper measure of damages.⁹⁷

INJURIES TO INTERESTS OF LANDOWNERS

Any allegations which show a trespass to land state a cause of action, but to justify recovery of more than nominal damages the facts alleged should show actual damage.⁹⁸ Where the allegations show a trespass which normally results in substantial damages, probably nothing further is necessary to permit proof of general damages; but here, as always, it is better to include at least a general allegation that damage was suffered and a statement of the amount.⁹⁹

Loss of profits¹⁰⁰ and mental anguish¹⁰¹ may be proper elements of recovery, but they probably should be specially alleged on the assumption that they may be classified as special damages.¹⁰²

Punitive damages may be recovered in trespass cases, provided there are allegations showing the circumstances of aggravation.¹⁰³

⁹⁵ *Wilson v. Horton Motor Lines*, 207 N. C. 263, 176 S. E. 750 (1934); *Jones v. Call*, 96 N. C. 337, 2 S. E. 647 (1887).

⁹⁶ *Reliable Trucking Co. v. Payne*, 233 N. C. 637, 65 S. E. 2d 132 (1951); *Steffan v. Meiselman*, 223 N. C. 154, 25 S. E. 2d 626 (1943).

⁹⁷ *Reliable Trucking Co. v. Payne*, 233 N. C. 637, 65 S. E. 2d 132 (1951). See also *Pemberton v. Greensboro*, 205 N. C. 599, 172 S. E. 196 (1933), *same case*, 208 N. C. 466, 181 S. E. 258 (1935). (Refusal to strike specific damage allegations does not constitute a final decision that evidence to prove them will be relevant and admissible under the measure of damages applicable to the state of facts developed by the other evidence.)

⁹⁸ *Matthews v. Forrest*, 235 N. C. 281, 69 S. E. 2d 553 (1952). Physical injury to the land is not essential.

⁹⁹ *Davis v. Wall*, 142 N. C. 450, 55 S. E. 350 (1906). In this case the complaint alleged trespass in cutting and removing timber from plaintiff's land "to his great damage." Substantial recovery was allowed, and it was not limited by the other allegations of damages. However, as to the measure of damages approved in the case, see note 109 *infra*.

¹⁰⁰ *Steffan v. Meiselman*, 223 N. C. 154, 25 S. E. 2d 626 (1943); *Johnson v. Atlantic Coast Line R. R.*, 140 N. C. 574, 53 S. E. 362 (1906).

¹⁰¹ *Matthews v. Forrest*, 235 N. C. 281, 69 S. E. 2d 553 (1952). See Note, 31 N. C. L. Rev. 122 (1952).

¹⁰² In one case, plaintiff attempted to recover as special damages for the wrongful death of his wife, alleging that defendant's trespass was the immediate cause. The court remanded the case for repleading, holding the claim improper because there could be no recovery for the death except in a proper wrongful death action. *Hood v. American Telephone and Telegraph Co.*, 162 N. C. 70, 77 S. E. 1096 (1913).

¹⁰³ *Matthews v. Forrest*, 235 N. C. 281, 69 S. E. 2d 553 (1952) (removing flowers from grave); *Brame v. Clark*, 148 N. C. 364, 62 S. E. 418 (1908) (trespass with an intent to seduce plaintiff's wife); *Remington v. Kirby*, 120 N. C. 320, 26 S. E. 917 (1897).

The measure of general damages to real property can vary with the circumstances, but generally it is held to be the reduction in the market value of the land as determined before and after the trespass, plus any further damages incidental to the tort.¹⁰⁴ If a crop is destroyed, the extent to which the crop has matured at the time of its destruction can vary the measure of damages. Where the crop was near harvest the damages were held to be the highest price at which the crop might have been sold.¹⁰⁵ Where the crop was still in the process of cultivation the measure was the reasonable value of the crop destroyed,¹⁰⁶ and where seed failed to grow the damages were the cost of the seed and sowing, plus a reasonable rent for the land, less the amount which the plaintiff could have obtained by renting out the land for some other crop.¹⁰⁷

One of the most common actions for trespass in North Carolina is that based upon wrongful entry plus the cutting and removing of timber. In such cases the plaintiff may have a choice between a theory of trespass and a theory of conversion. If the action is brought on the trespass theory, it is local¹⁰⁸ and the measure of damages is the difference in the value of the land immediately before and after the trespass.¹⁰⁹ If conversion of the timber is the theory of the action, it is transitory and the damages are the value of the trees as timber at the place of severance where they were converted into personal property.¹¹⁰ While a complaint may withstand demurrer when it is not clear upon which of these theories the plaintiff intends to proceed, it may be subject to a motion to make more definite and certain; and where such a complaint reached the supreme court on a question of venue, the case was remanded so that the plaintiff could amend or replead.¹¹¹ By statute, if a defendant knowingly cuts timber on the land of another, the plaintiff may recover double the value of the timber.¹¹²

¹⁰⁴ *West Construction Co. v. Atlantic Coast Line R. R.*, 185 N. C. 43, 116 S. E. 3 (1923); *Jeffress v. Norfolk & Southern R. R.*, 158 N. C. 216, 73 S. E. 1013 (1912).

¹⁰⁵ *Denby v. Hairston*, 8 N. C. 315 (1821).

¹⁰⁶ *Dixon v. District Grand Lodge of Odd Fellows*, 174 N. C. 139, 93 S. E. 461 (1917).

¹⁰⁷ *Reiger v. Worth*, 127 N. C. 230, 37 S. E. 217 (1900). While this case was based on contract rather than tort, it is presumed a similar measure of damages would apply if a crop was ruined by a trespass occurring at the planting stage.

¹⁰⁸ *Brady v. Brady*, 161 N. C. 325, 77 S. E. 235 (1913).

¹⁰⁹ *Owens v. Blackwood Lumber Co.*, 212 N. C. 133, 193 S. E. 2d 219 (1937); *Williams v. Elm City Lumber Co.*, 154 N. C. 306, 70 S. E. 631 (1911). This latter case, in effect, overruled *Whitfield v. Rowland Lumber Co.*, 152 N. C. 211, 67 S. E. 512 (1910) and *Davis v. Wall*, 142 N. C. 450, 55 S. E. 350 (1906), which held the measure of damages to be the value of the trees on the land after they had been severed, with incidental damage caused in their removal.

¹¹⁰ *Brady v. Brady*, 161 N. C. 325, 77 S. E. 235 (1913); *Wall v. Holloman*, 156 N. C. 275, 72 S. E. 369 (1911); *Bennett v. Thompson*, 35 N. C. 146 (1851).

¹¹¹ *Richard Cedar Works v. Roper Lumber Co.*, 161 N. C. 604, 77 S. E. 770 (1913).

¹¹² N. C. GEN. STAT. § 1-539.1 (Cum. Supp. 1951). N. C. GEN. STAT. § 74-32 (1943, recompiled 1950), provides for a similar recovery where there is a willful

Having some similarity to the action of trespass on land is the action for nuisance. At present, by statute, there may be a judgment for damages, for removal of the nuisance, or for both.¹¹³ If the nuisance is public rather than private, there must be an allegation showing special damages in order to make a good cause of action.¹¹⁴ Here, however, the term "special damages" has a different meaning than when used in its ordinary sense, for it implies only that the plaintiff must allege damages peculiar to him as distinguished from those suffered by the public at large. Occupants of land who do not have an interest in the freehold may recover for their own injuries but not for damage to the freehold.¹¹⁵ Damages may be recovered for a nuisance even after it has been abated,¹¹⁶ provided actual damage has been previously suffered¹¹⁷ and the action is not barred by the statute of limitations.¹¹⁸

Where a trespass to land is a continuing trespass the damages awarded may be either temporary or permanent. If temporary, they are recoverable up to the time of trial and successive suits may be maintained until the trespass ceases.¹¹⁹ The theory is, apparently, that after several suits the tort-feasor is likely to remove the source of trouble. The measure of damages where successive suits are brought may vary with the use of plaintiff's property. For agricultural land, the measure is the difference in the productivity of the land before and after the trespass.¹²⁰ In other situations, it may be the diminished rental value,

trespass upon mining property accompanied by a mining or conversion of minerals. It specifically allows punitive damages in addition to the double recovery. Whether punitive damages could be awarded under § 1-539.1, *quaere*.

¹¹³ N. C. GEN. STAT. § 1-539 (1943).

¹¹⁴ *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. 2d 923 (1949); *Elliott v. Tallasse Power Co.*, 190 N. C. 62, 128 S. E. 730 (1925).

¹¹⁵ See *Arthur v. Henry*, 157 N. C. 393, 73 S. E. 206 (1911) and *Arthur v. Henry*, 157 N. C. 438, 73 S. E. 211 (1911), where in the first action the owner of the property recovered for damages to the freehold plus punitive damages and in the second his sister, who lived on the property, recovered for damages to her health caused by the nuisance. Whether the sister could likewise have recovered punitive damages, *quaere*. See also *Taylor v. Seaboard Air Line Ry.*, 145 N. C. 400, 59 S. E. 129 (1907).

¹¹⁶ *Pernell v. City of Henderson*, 220 N. C. 79, 16 S. E. 2d 449 (1941).

¹¹⁷ *Burris v. Creech*, 220 N. C. 302, 17 S. E. 2d 123 (1941). Suit brought to recover actual and punitive damages for the erection of a "spite fence," and for abatement. The court held that any loss in value of plaintiff's land would be restored by the abatement, and no other damages was proved. Punitive damages could not be recovered in the absence of some other damage, despite the aggravated circumstances.

¹¹⁸ N. C. GEN. STAT. §1-52 (1943). Action for continuing trespass must be brought within three years from the original trespass and not thereafter. *Morrow v. Florence Mills*, 181 N. C. 423, 107 S. E. 445 (1921) held that evidence of acts for which recovery would be barred by the statute of limitations may nevertheless be admitted on the sole issue of liability.

¹¹⁹ *Phillips v. Chesson*, 231 N. C. 566, 58 S. E. 2d 343 (1950).

¹²⁰ *Oates v. Algodon Mfg. Co.*, 217 N. C. 488, 8 S. E. 2d 605 (1940); *Jones v. Kramer*, 133 N. C. 446, 45 S. E. 827 (1903); *Spilman v. Roanoke Navigation Co.*, 74 N. C. 675 (1876). The important element of damage in these cases is the loss of crops. Cf. notes 105, 106 and 107 pertaining to the measure of crop damages.

the reasonable cost of replacement or repair, or the cost of restoring the property to its original condition, with added damages for other incidental items of loss.¹²¹ In any event, the damages are not the same as in the case of a permanent award.¹²² There, under the theory that defendant is, in effect, purchasing an easement over plaintiff's land on which to maintain his trespass, the damages are the diminished pecuniary value of the land before and after the original offense.

If permanent damages are sought, in every case except where the defendant is a railroad, they should be alleged and requested. An allegation that plaintiff's land "has been rendered sour and sobbed, and its fertility destroyed and rendered unfit for agricultural purposes," was construed as a demand for permanent damages.¹²³ Of course, it is preferable to state the matter clearly and avoid problems of interpretation. By statute, a suit against a railroad for damages arising from construction or repair of the road must necessarily seek permanent damages.¹²⁴ No such statute exists where the suit is (1) between private parties or (2) between a private party and a public or quasi-public utility, or an agency having a right of eminent domain or power of condemnation.¹²⁵ As between private parties, permanent damages may not be recovered except by consent of both,¹²⁶ and if the defendant consents, whether permanent damages were alleged in the complaint would seem to be of little consequence. In the other cases mentioned permanent damages may be assessed upon demand of either party,¹²⁷ and the plaintiff seeking them should make that clear in the complaint. In neither situation may a counterclaim be pleaded for the condemnation of an easement. Such relief may be had only through the request for permanent damages or by a special proceeding.¹²⁸

ACTIONS FOR BREACH OF CONTRACT

Upon allegation and proof of breach of a valid contract the plaintiff is entitled to recover at least nominal damages,¹²⁹ and it follows that

¹²¹ *Phillips v. Chesson*, 231 N. C. 566, 58 S. E. 2d 343 (1950).

¹²² *Oates v. Algodon Mfg. Co.*, 217 N. C. 488, 8 S. E. 2d 605 (1940).

¹²³ *Parker v. Norfolk & Carolina R. R.*, 119 N. C. 677, 25 S. E. 722 (1896). This case arose before passage of N. C. GEN. STAT. § 1-51(2) (1943).

¹²⁴ N. C. GEN. STAT. § 1-51(2) (1943), as interpreted by *Nichols v. Norfolk & Carolina R. R.*, 120 N. C. 495, 26 S. E. 643 (1897).

¹²⁵ A fertilizer plant is not of such nature as to fall within this latter group. *Webb v. Virginia-Carolina Chemical Co.*, 170 N. C. 662, 87 S. E. 663 (1915).

¹²⁶ *Phillips v. Chesson*, 231 N. C. 566, 58 S. E. 2d 343 (1950); *Adylett v. Carolina By-Products Co.*, 215 N. C. 700, 2 S. E. 2d 881 (1939). See also *Brown v. Virginia-Carolina Chemical Co.*, 165 N. C. 421, 81 S. E. 463 (1914) (extent to which election to try the issue of permanent damage is binding).

¹²⁷ *Phillips v. Chesson*, 231 N. C. 566, 58 S. E. 2d 343 (1950); *Clinard v. Kernersville*, 215 N. C. 745, 3 S. E. 2d 267 (1939); *Webb v. Virginia-Carolina Chemical Co.*, 170 N. C. 662, 87 S. E. 663 (1915); *Rhodes v. City of Durham*, 165 N. C. 679, 81 S. E. 938 (1914).

¹²⁸ *Leigh v. Garysburg Mfg. Co.*, 132 N. C. 167, 43 S. E. 632 (1903).

¹²⁹ *Kirby v. Stokes County Board of Education*, 230 N. C. 619, 55 S. E. 2d 322

such minimal allegations will survive a demurrer for failure to state a cause of action and such proof will withstand a motion for nonsuit. However, the important question is what must be pleaded to justify substantial recovery. This requires a brief examination of the measure of substantial damages in contract cases.

"The general rule is that a party who is injured by breach of contract is entitled to compensation for the injury sustained and is entitled to be placed, as near as this can be done in money, in the same position he would have occupied if the contract had been performed. Stated generally, the measure of damages for the breach of a contract is the amount which would have been received if the contract had been performed as made, which means the value of the contract, including the profits and advantages which are its direct results and fruits."¹³⁰ Or, as stated in the leading English case of *Hadley v. Baxendale*,¹³¹ which has been consistently followed in North Carolina:¹³² "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

To the extent that the damages sought normally flow from the kind of breach of the kind of contract alleged, they are presumed to be within the contemplation of the parties at the time of the making of the contract.¹³³ These should be classified as general damages and proof of them should require no more basis in the pleading than a general statement to the effect that, by reason of the defendant's breach, plaintiff has been damaged in a specified amount. Any requirement of greater particularity in the pleading would seem to abandon the distinction between general and special damages. Nevertheless, there is in our cases some indication that greater particularity is desirable if not necessary.¹³⁴ Consequently, if any question can be raised as to

(1949); *Sineath v. Katzis*, 218 N. C. 740, 12 S. E. 2d 671 (1940); *Bowen v. Fidelity Bank*, 209 N. C. 140, 183 S. E. 266 (1935).

¹³⁰ *Perkins v. Langdon*, 237 N. C. 159, 169, 74 S. E. 2d 634, (1953).

¹³¹ 9 Ex. 341, 156 Eng. Rep. 151 (1854).

¹³² *Perkins v. Langdon*, 237 N. C. 159, 74 S. E. 2d 634 (1953); *Price v. Goodman*, 226 N. C. 223, 37 S. E. 2d 592 (1946); *Troitino v. Goodman*, 225 N. C. 406, 35 S. E. 2d 277 (1945); *Sineath v. Katzis*, 218 N. C. 740, 12 S. E. 2d 671 (1940); *Builders Supply & Equipment Corp. v. Gadd*, 183 N. C. 447, 111 S. E. 771 (1922). See also *Monger v. Lutterloh*, 195 N. C. 274, 142 S. E. 12 (1928); *White v. Pleasants*, 225 N. C. 760, 36 S. E. 2d 227 (1945) (measure of damages in real estate brokerage cases).

¹³³ *Chesson v. Keickheffer Container Co.*, 216 N. C. 337, 4 S. E. 2d 886 (1939).

¹³⁴ See *Bowen v. Fidelity Bank*, 209 N. C. 140, 183 S. E. 266 (1935), where the

whether the allegations of contract and breach clearly imply substantial damage to the plaintiff, the wise pleader will include specific damage allegations.

Regardless of how direct and demonstrable the chain of causation between defendant's breach and plaintiff's damage may be, it is special damage if it is regarded as arising from the circumstances of the particular case rather than as a normal and usual consequence of the kind of breach of the kind of contract alleged. Such special damage is not recoverable at all unless it was within the contemplation of the parties at the time the contract was made.¹³⁵ Consequently, a complaint should not only expressly allege the special damage, but it should also allege that the circumstances giving rise to such damage were known or reasonably should have been known to the defendant when he entered into the contract.¹³⁶ Where the plaintiff claims that defendant's breach prevented him from carrying on a profitable business, or prevented the

court used language which could be construed as meaning that to recover more than nominal damages in a contract case the complaint must specifically allege the substantial damages suffered. See also *Yonge v. New York Life Insurance Co.*, 199 N. C. 16, 153 S. E. 630 (1930). Plaintiff alleged "that she is unable at this time to specify her damages and losses in detail, but will produce proof thereof at the trial of this cause; that she estimates her damages . . . at \$5,000 and hereby alleges and avers that she has been damaged to that extent, by reason of the matters and things set forth herein." The court called this allegation "incorrect" and stated that plaintiff could apply to amend. It also mentioned a motion to make more definite and certain. It is not clear whether general or special damages were involved. The true import of this opinion is made even more problematical by the fact that three of the five judges concurred only in result. It would seem that the allegation, while unusual and not to be recommended, is sufficient to support proof of general damages.

¹³⁵ "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them." *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 151 (1854), as quoted in *Perkins v. Langdon*, 237 N. C. 159, 170, 74 S. E. 2d 634 (1953). See also *Troitino v. Goodman*, 225 N. C. 406, 35 S. E. 2d 277 (1945); *Lewark v. Norfolk and S. R. R.*, 137 N. C. 383, 49 S. E. 882 (1905) (defendant, failing to ship ice, not liable for damage to plaintiff's fish); *Neal v. Pender-Hyman Hardware Co.*, 122 N. C. 104, 29 S. E. 96 (1898) (defendant liable because it was common knowledge in vicinity that failure to ship tobacco flues would result in damage to plaintiff's tobacco); *Mace v. Ramsey*, 74 N. C. 11 (1876) (where defendant knew plaintiff was hiring his boat to transport excursion passengers, he was liable for damages in the light of such special circumstances).

¹³⁶ *Perkins v. Langdon*, 237 N. C. 159, 74 S. E. 2d 634 (1953); *Price v. Goodman*, 226 N. C. 223, 37 S. E. 2d 592 (1946); *Huyett & Smith Mfg. Co. v. Gray*, 111 N. C. 87, 15 S. E. 939 (1892). *Sloan v. Hart*, 150 N. C. 269, 63 S. E. 1037

profitable consummation of specific transactions with third parties, it falls within this special damage category. Such profits may be recovered if the pleading and proof satisfy the stated requirements, provided they may be ascertained with reasonable certainty or, in other words, are not too remote or speculative.¹³⁷

In some cases there may be recovery for mental anguish,¹³⁸ and it should probably be expressly alleged. Punitive damages may not be awarded in contract cases except in actions for breach of promise to marry.¹³⁹

When a plaintiff successfully sues to rescind a contract, he may not additionally recover the damages he would have recovered had he sued for breach. However, if the plaintiff cannot be placed *in statu quo* by the rescission, he may recover such damages as are consistent with the theory of rescission. These damages have been referred to by our court as "special damages" and it is wise, if not necessary to plead them expressly.¹⁴⁰

Many contracts contain a clause providing that a stipulated sum will be awarded as damages in the event of a breach. These sums have been called "liquidated," "stipulated," or "stated" damages,¹⁴¹ but regardless of the terminology used, whether they are considered as providing an enforceable measure of damages or an unenforceable penalty will depend upon the circumstances of each case.¹⁴² If no damages have in fact been suffered, then no liquidated damages may be recovered.¹⁴³ If substantial damages have been suffered, then the liquidated damage clause should be pleaded and the other allegations should clearly indicate the actual existence of the substantial damage. Plead-

(1909) may be interpreted as meaning that, in a case involving failure of defendant lessor to put plaintiff lessee into possession, the damage claimed beyond the difference between rental value and the lease figure is special damage to be pleaded and proved.

¹³⁷ Perkins v. Langdon, 237 N. C. 159, 74 S. E. 2d 634 (1953); Builders Supply & Equipment Corp. v. Gadd, 183 N. C. 447, 111 S. E. 771 (1922); Nance v. Western Union Telegraph Co., 177 N. C. 313, 98 S. E. 838 (1919).

¹³⁸ Lamm v. Shingleton, 231 N. C. 10, 55 S. E. 2d 810 (1949) (breach of undertaker's contract to bury plaintiff's dead husband).

¹³⁹ Richardson v. Wilmington & Weldon R. R., 126 N. C. 100, 35 S. E. 235 (1900).

¹⁴⁰ Kee v. Dillingham, 229 N. C. 262, 49 S. E. 2d 510 (1948) (in action to rescind contract for purchase of land, plaintiff may recover the purchase money paid, the value of improvements made in good faith—that is, before discovery of the fraud—taxes paid, and interest, less rental value).

¹⁴¹ Thoroughgood v. Walker, 47 N. C. 15 (1854).

¹⁴² Horn v. Poindexter, 176 N. C. 620, 97 S. E. 653 (1918); Wheedon v. American Bonding & Trust Co., 128 N. C. 69, 38 S. E. 255 (1901); Thoroughgood v. Walker, 47 N. C. 15 (1854). Where defendant agrees not to enter a certain business or profession within a stated time, a stipulated damage clause will probably be construed as liquidated damages rather than a penalty. Bradshaw v. Millikin, 173 N. C. 432, 92 S. E. 161 (1917).

¹⁴³ Crawford v. Allen, 189 N. C. 434, 127 S. E. 521 (1925).

ing the facts which show such damage has a double advantage: (1) It aids in avoiding construction of the clause as an unenforceable penalty; and (2) it provides a basis for substantial recovery even if the liquidated damage clause is not enforced.¹⁴⁴

If the stipulated damages are allowed, interest may also be recovered on them from the time of the breach, but only if the contract so provides.¹⁴⁵ It would seem to follow that this term of the contract should be alleged either verbatim or by its legal effect.

ACTIONS FOR DEFAMATION

In defamation, an anomalous situation, affecting both the pleading and the right to recover, has arisen by virtue of the fact that two uses of the phrase "*per se*," originally much different in meaning, have come to be confused and in part welded. Historically, oral defamation was slander "*per se*" or "*per quod*" dependent upon the character of the charge. ". . . If the words falsely spoken charge him with an infamous offense, or with having an infectious disease, or impeach his trade or profession, these words are *per se* actionable, because these words do necessarily tend to his degradation and injury, and he may recover as a matter of course without showing that he has actually sustained a damage. But when the words spoken are such as do not on their face import such degradation as will of course be injurious, as to call a man a rascal or heretic, then the plaintiff must aver some special damage, which is called laying his action with a *per quod*."¹⁴⁶

To these three categories of slander *per se* developed by judicial decision a fourth has been added by statute—slander which amounts to a charge of incontinency against a woman.¹⁴⁷ If the alleged slander does not fall within one of these four categories, it is not actionable at all unless special damage is alleged and proved.¹⁴⁸ For this purpose,

¹⁴⁴ See *Disoway v. Edwards*, 134 N. C. 254, 46 S. E. 501 (1904).

¹⁴⁵ *Devereux v. Burgwin*, 33 N. C. 490 (1850).

¹⁴⁶ *Pegram v. Stoltz*, 76 N. C. 349, 351 (1877); *accord*, *Penner v. Elliott*, 225 N. C. 33, 33 S. E. 2d 124 (1945); *Ringgold v. Land*, 212 N. C. 369, 193 S. E. 267 (1937); *Jones v. Brinkley*, 174 N. C. 23, 93 S. E. 372 (1917). To the extent that the opinion in *Broadway v. Cope*, 208 N. C. 85, 179 S. E. 452 (1935) may imply that it is slander *per se* to charge plaintiff with something which merely subjects him to contempt, hatred, scorn, or ridicule, it is obviously in error, having confused slander with libel.

¹⁴⁷ N. C. GEN. STAT. § 99-4 (1943, recompiled 1950); *Parker v. Edwards*, 222 N. C. 75, 21 S. E. 2d 876 (1942); *Bryant v. Reedy*, 214 N. C. 748, 200 S. E. 896 (1938); *Bowden v. Bailes*, 101 N. C. 612, 8 S. E. 342 (1888); *Lucas v. Nichols*, 52 N. C. 32 (1859); *McBrayer v. Hill*, 26 N. C. 136 (1843).

¹⁴⁸ The following are examples of charges held not to be slander *per se*: *Penner v. Elliott*, 225 N. C. 33, 33 S. E. 2d 124 (1945) (won't pay honest debts, etc.); *Ringgold v. Land*, 212 N. C. 369, 193 S. E. 267 (1937) (dishonest man and damned son of a bitch); *Deese v. Collins*, 191 N. C. 749, 133 S. E. 92 (1926) (negro blood in veins); *Payne v. Thomas*, 176 N. C. 401, 97 S. E. 212 (1918) (father of bastard child).

"special damage" means pecuniary loss.¹⁴⁹ This, of course, is a meaning entirely different from that given to the same phrase when the law of defamation is not involved.

Historically, there was no such distinction made in the area of written defamation. Nevertheless, the phrase, "libel *per se*," came to be used to describe those libels defamatory on their face, as distinguished from those defamatory only by virtue of extrinsic evidence.¹⁵⁰ The pleading consequence of holding that written matter is not defamatory *per se* would thus seem to be only that the circumstances rendering the words defamatory on the particular occasion should be alleged and proved.¹⁵¹ However, use of the "*per se*" has led to importation from the law of slander of the "special damage" concept; and it has been held that when a libel is not defamatory on its face, special damage must be alleged and proved.¹⁵² But probably the two concepts have not been completely welded, because, so long as extrinsic evidence is not needed to show that the words used are defamatory, it is libel *per se*, though the same words, if spoken, would not be slander *per se* be-

¹⁴⁹ *Scott v. Harrison*, 215 N. C. 427, 2 S. E. 2d 1 (1939); *Payne v. Thomas*, 176 N. C. 401, 97 S. E. 212 (1918); *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811 (1904). The cases of *Ringgold v. Land*, 212 N. C. 369, 193 S. E. 267 (1937) and *Penner v. Elliott*, 225 N. C. 33, 33 S. E. 2d 124 (1945) quote a more general definition of special damages, but the *Ringgold* case also quotes *Osborn v. Leach*, *supra*, with approval. In *Jones v. Brinkley*, 174 N. C. 23, 93 S. E. 372 (1917) it is stated that humiliation is special damage; but this is inconsistent with the language and results of the other cases cited. In *Crawford v. Barnes*, 118 N. C. 912, 24 S. E. 670 (1896) a question was raised, but not decided, as to whether loss of an election to Congress would be special damage.

¹⁵⁰ In *Simmons v. Morse*, 51 N. C. 6 (1858), the court considered the question of whether a letter was libel *per se*. It is obvious from the opinion that the discussion had no reference to the necessity of pleading and proving special damages, but referred only to the question of whether the writing, standing alone, charged a libel.

¹⁵¹ See *Wright v. Commercial Credit Co.*, 212 N. C. 87, 192 S. E. 844 (1937) (judgment for plaintiff reversed for failure to allege and prove defamatory meaning understood); *Hurley v. Lovett*, 199 N. C. 793, 155 S. E. 875 (1930); *Sowers v. Sowers*, 87 N. C. 303 (1882); *McCurry v. McCurry*, 82 N. C. 296 (1880); *Briggs v. Byrd*, 33 N. C. 353 (1850); *McBrayer v. Hill*, 26 N. C. 136 (1843); *Watts v. Greenlee*, 13 N. C. 115 (1829). Compare *Vincent v. Pace*, 178 N. C. 421, 100 S. E. 581 (1919) with *Wright v. Commercial Credit Co.*, *supra*.

¹⁵² *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S. E. 55 (1937). The court said: "In publications which are libelous *per quod* the innuendo and special damages must be alleged and proved." The only North Carolina authority relied upon for this was *Oates v. Wachovia Bank and Trust Co.*, 205 N. C. 14, 169 S. E. 869 (1933), a slander case concerned with the question of whether the words amounted to such a charge of crime as to be slander *per se*. It is clear from the opinion in the *Oates* case that extrinsic evidence is admissible on the meaning of the charge, and that, in the light of such evidence, the words may be held to be slander *per se*, which would eliminate the necessity for special damages. It is thus apparent that the *Flake* case misinterpreted the *Oates* case.

The *Flake* case divides libels into three types: (1) Those obviously defamatory (*per se*); (2) those susceptible of two interpretations, one defamatory and the other not; and (3) those not defamatory except with the aid of other circumstances (*per quod*). The opinion holds that special damages need not be alleged with (1) and must be alleged with (3). The status of (2) is left some-

cause not falling within one of the four categories outlined above.¹⁵³ It remains to be seen whether the law of slander will now borrow from the law of libel and require allegation and proof of special damages when the words spoken are not actionable, standing alone, even though, when interpreted in the light of extrinsic evidence, they amount to a charge falling within one of the four categories of slander *per se*.¹⁵⁴

It seems very doubtful that whether extrinsic evidence must be resorted to is a justifiable criterion for determining whether special damages must be shown; but it must be assumed to be the North Carolina criterion, at least as to libel, until there is further judicial consideration of the matter.

The general rule is frequently stated that, when the charge is defamatory *per se*, malice is presumed, while otherwise malice must be alleged and proved.¹⁵⁵ Which meaning is to be attributed to "*per se*" in this connection is none too clear, but as the rule has been enunciated

what uncertain, but the opinion seems to indicate that special damages need not be alleged if the complaint alleges that the defamatory meaning was intended and understood. Under the *Oates* case, if a defamation falls under (2) the jury decides the meaning intended and understood. To the same effect is *Castellou v. Phelps*, 198 N. C. 454, 152 S. E. 163 (1930).

¹⁵³ The statute, N. C. GEN. STAT. § 99-4 (1943, recompiled 1950), dealing with charges of incontinency against a woman, applies to both libel and slander. *Flake v. Greensboro News Co.*, 212 N. C. 780, 786, 195 S. E. 55, 60 (1937) defines as a libel *per se* everything defined as slander *per se* in *Pegram v. Stolz*, 76 N. C. 349, 351 (1877) (see text at note 146), and adds to that definition a charge which "tends to subject one to ridicule, contempt, or disgrace." Thus, so far as charges which are unambiguous on their face are concerned, practically the whole range of defamatory matter falls within the definition of libel *per se*, and special damages need not be alleged.

This broad definition of libel *per se* is supported by a long line of earlier cases, though, as already explained, the "*per se*," as used in their opinions did not carry any implication with respect to special damages. See, for example, *Davis v. Askin's Retail Stores*, 211 N. C. 551, 191 S. E. 33 (1937) (rule as stated in text clearly recognized); *Harrell v. Goerch*, 209 N. C. 741, 184 S. E. 489 (1936) (without mentioning special damages, the court held that plaintiff was entitled to recover for libel on a charge clearly not within any of the four categories of slander *per se*); *Oates v. Wachovia Bank and Trust Co.*, 205 N. C. 14, 169 S. E. 869 (1933); *Pentuff v. Park*, 194 N. C. 146, 138 S. E. 616 (1927) (distinguishing libel and slander); *Hedgepeth v. Coleman*, 183 N. C. 309, 111 S. E. 517 (1922); *Hall v. Hall*, 179 N. C. 571, 103 S. E. 136 (1920); *Brown v. Elm City Lumber Co.*, 167 N. C. 9, 82 S. E. 961 (1914).

¹⁵⁴ Cases antedating *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S. E. 55 (1937) did not require allegation and proof of special damages in such situations. See, for example, *Oates v. Wachovia Bank and Trust Co.*, 205 N. C. 14, 169 S. E. 869 (1933); *Hurlev v. Lovett*, 199 N. C. 793, 155 S. E. 875 (1930); *Simmons v. Morse*, 51 N. C. 6 (1858). *Scott v. Harrison*, 215 N. C. 427, 2 S. E. 1 (1939), decided after the *Flake* case, seems to imply that it would not be necessary.

¹⁵⁵ *Penner v. Elliott*, 225 N. C. 33, 33 S. E. 2d 124 (1945) (slander); *Ringgold v. Land*, 212 N. C. 369, 193 S. E. 267 (1937) (slander); *Oates v. Wachovia Bank and Trust Co.*, 205 N. C. 14, 169 S. E. 869 (1933) (slander); *Beck v. Bank of Thomasville*, 161 N. C. 201, 76 S. E. 722 (1912) (slander); *Ramsev v. Cheek*, 109 N. C. 270, 13 S. E. 775 (1891) (libel); *Bowden v. Bailes*, 101 N. C. 612, 8 S. E. 342 (1888) (slander).

in both slander and libel cases, it seems that either meaning might be read into it. As a pleading matter this may not be too important, as it is customary to allege malice in all defamation complaints, but the possible difference in meaning may be critical in connection with the proof required.

In either libel or slander general damages for injury to reputation, for physical pain and inconvenience, and for humiliation, embarrassment and mental suffering may be recovered (in addition to special damage when the latter is a necessary element of the cause of action; otherwise alone).¹⁵⁶ Strictly speaking, it is probably unnecessary that they be alleged;¹⁵⁷ but it is customary and the safer policy to do so. It seems probable that pecuniary loss, having been labeled "special damages" for purposes of the distinction between defamation *per se* and defamation *per quod*, should be expressly alleged even in a *per se* case. Once an item has been labeled "special damage" for any purpose, it is likely to follow that it will also be so labeled for purposes of determining whether express pleading is necessary to lay the basis for proof.

Punitive damages may be recovered where the defendant's conduct is malicious, wanton or reckless;¹⁵⁸ and, when their recovery is sought, the complaint should contain allegations showing such conduct together with an express demand for punitive damages.

There is a statutory regulation as to giving notice before action is brought on a defamation published in a newspaper or periodical or through a radio or television station. This gives an opportunity to retract. The giving of the notice should be alleged; but even if there is a retraction, all damages otherwise recoverable, except punitive damages, may still be recovered.¹⁵⁹

¹⁵⁶ *Payne v. Thomas*, 176 N. C. 401, 97 S. E. 212 (1918); *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811 (1904).

¹⁵⁷ No proof is required to justify their recovery; and lack of such proof does not confine the recovery to nominal damages. *Roth v. Greensboro News Co.*, 217 N. C. 13, 6 S. E. 2d 882 (1939); *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S. E. 55 (1937); *Barringer v. Deal*, 164 N. C. 246, 80 S. E. 161 (1913). Of course, as a practical matter, proof is advisable in an attempt to increase the verdict.

¹⁵⁸ *Roth v. Greensboro News Co.*, 217 N. C. 13, 6 S. E. 2d 882 (1939); *Lay v. Gazette Publishing Co.*, 209 N. C. 134, 183 S. E. 416 (1935); *Broadway v. Cope*, 208 N. C. 85, 179 S. E. 452 (1935); *Baker v. Winslow*, 184 N. C. 1, 113 S. E. 570 (1922) ("an element of fraud, malice, gross negligence, insult, or other cause of aggravation"); *Cotton v. Fisheries Products Co.*, 181 N. C. 151, 106 S. E. 487 (1921) ("actually malicious or wanton, displaying a spirit of mischief toward the plaintiff, or of reckless and criminal indifference to his rights"); *Fields v. Bynum*, 156 N. C. 413, 72 S. E. 449 (1911); *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811 (1904). The same allegations may lay the basis for arrest of the defendant. See *Crowder v. Stiers*, 215 N. C. 123, 1 S. E. 2d 353 (1939); *Swain v. Oakley*, 190 N. C. 113, 129 S. E. 151 (1925).

¹⁵⁹ N. C. GEN. STAT. §§ 99-1 through 99-3 (1943, recompiled 1950); *Roth v. Greensboro News Co.*, 217 N. C. 13, 6 S. E. 2d 882 (1939); *Lay v. Gazette Publishing Co.*, 209 N. C. 134, 183 S. E. 416 (1935); *Paul v. National Auction Co.*,

By statute, the defendant in defamation may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances.¹⁶⁰ This requires affirmative pleading in the answer, as denials, standing alone, will not permit the defendant to introduce evidence showing justification or mitigation.¹⁶¹

181 N. C. 1, 105 S. E. 881 (1921) (raises, without deciding, question of whether statute applies to actions against persons not connected with the newspaper, periodical, or station); *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811 (1904); *Williams v. Smith*, 134 N. C. 249, 46 S. E. 502 (1904).

¹⁶⁰ N. C. GEN. STAT. § 1-158 (1943).

¹⁶¹ *Bryant v. Reedy*, 214 N. C. 748, 200 S. E. 896 (1938); *Burris v. Bush*, 170 N. C. 394, 87 S. E. 97 (1915); *Dickerson v. Dail*, 159 N. C. 541, 75 S. E. 803 (1912); *Upchurch v. Robertson*, 127 N. C. 127, 37 S. E. 157 (1900).