

Agenda

Advisory Committee on Model Civil Jury Instructions

October 14, 2014
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

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|----------------------------------|-------|----------------------------|
| Welcome and approval of minutes. | Tab 1 | Juli Blanch - Acting Chair |
| Policy & Planning Update | Tab 2 | Alison Adams-Perlac |
| Punitive Damages Instructions | Tab 3 | Rich Humpherys |

[Committee Web Page](#)

[Published Instructions](#)

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 p.m.
unless otherwise stated.

November 10, 2014
December 8, 2014
January 12, 2015
February 9, 2015
March 9, 2015
April 13, 2015
May 11, 2015
June 8, 2015
September 14, 2015
October 13, 2015
November 9, 2015
December 14, 2015

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

September 8, 2014

4:00 p.m.

Present: Juli Blanch (acting chair), Alison Adams-Perlac, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester

Excused: Gary L. Johnson, John R. Lund, Ryan M. Springer

Ms. Blanch presided.

1. *Minutes.* Mr. Humpherys moved to approve the minutes of the June 8, 2014 meeting. Mr. Fowler 2d. The motion passed without opposition.

2. *Introduction of New Staff Attorney.* Ms. Adams-Perlac introduced Nancy Sylvester, who is the new staff attorney assigned to the committee and will be taking Ms. Adams-Perlac's place.

3. *Committee Update.* Ms. Adams-Perlac reported that the Judicial Council has voted on the concept of moving this and the criminal instructions committee from the courts' oversight and putting it under the Judicial Council's oversight. The Judicial Council's policy and planning committee is reviewing the proposal. If approved, it could become effective November 1, 2014. There will be three-year term limits. A member may renew for an additional three years, and the chair can renew for a third three-year term. There will not be a permanent chair until the new rule is passed, after a comment period.

Dr. Di Paolo joined the meeting.

4. *CV2015. Survival claim.* The committee reviewed a proposed amendment to the committee note to the survival-claim instruction in light of an amendment to the statute in the 2014 general session of the Utah Legislature. At Mr. Fowler's suggestion, "wrongful death" was deleted from the last paragraph of the committee note, and the reference to the wrongful death statute (Utah Code Ann. § 78B-3-106) was also deleted. At Mr. Humpherys's suggestion, "general damages" was changed to "noneconomic damages." Mr. Summerill moved to approve the instruction as modified. Judge Stone 2d. The motion passed without opposition.

5. *Punitive Damage Instructions.* The committee continued its review of the punitive damage instructions.

a. *CV2026. Punitive damages—introduction.* The committee reviewed the revised committee note. Mr. Humpherys noted that paragraphs 3 and 4 were meant for the committee and not for publication. The committee

discussed whether punitive damages must be bifurcated in every case. Judge Stone did not think so. But Mr. Humpherys noted that the statute (section 78B-8-201(2)) says that one cannot introduce evidence of wealth without a finding as to liability for punitive damages, and there is case law that says that an award of punitive damages cannot be sustained absent evidence of the defendant's net worth (*see Bundy v. Century Equip. Co.*, 692 P.2d 754 (Utah 1984), and *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983); *but see Hall v. Wal-Mart Stores, Inc.*, 959 P.2d 109, 113 (Utah 1998) ("While evidence of the defendant's wealth is a relevant factor in the award of punitive damages, it is not a necessary factor.")). Judge Harris thought that the committee note should give some general guidance on when to bifurcate and when the court might *not* have to bifurcate the trial, though he thought the issue needed to be decided case by case. For example, a finding of intentional fraud is a sufficient predicate for punitive damages without a finding that the defendant's conduct was willful and malicious or manifested a knowing and reckless indifference toward and disregard of the rights of others. In a fraud case, the jury may be able to determine liability for and the amount of punitive damages in the same proceeding. Judge Harris thought that some cases may require trifurcation: the jury first makes a finding as to liability; it then makes a finding as to liability for punitive damages; and it then decides the amount of punitive damages. Ms. Blanch volunteered to work on a committee note.

b. *CV2027. Punitive damages discretionary.* The committee reviewed the revised committee note to CV2027. Mr. Humpherys again said that the first two paragraphs were meant only for the committee, not for publication. Ms. Blanch and Judge Harris thought that the first paragraph should be left in if the instruction is going to talk about presumptive ratios. Mr. Fowler asked what basis there was for not disclosing presumptive ratios to the jury. Ms. Blanch suggested that the ratios are meant to guide the trial court's discretion in ruling on a motion for remittitur. Mr. Humpherys noted that the question of ratios arises in the context of whether a jury's award was excessive. He said that some attorneys do not want ratios disclosed to the jury because they think it sets a floor or a ceiling on the amount of punitive damages the jury can award. Because the ratios are only presumptive, if the court were to instruct on them it should also instruct on what factors to consider if the jury wants to go beyond the presumptive ratio. Mr. Humpherys noted that the *Crookston* court did its own analysis as to whether the punitive award in that case was excessive and did not remand the case for the jury to consider the issue under instructions on ratios. On the other hand, Mr. Fowler noted, there is no Utah case that specifically says the jury should *not* be instructed on presumptive ratios. Mr. Simmons asked, If the jury is instructed on presumptive ratios, should it also be instructed on constitutional ratios? Mr. Summerill asked whether the committee should offer any commentary on the issue. Mr. Ferguson thought there may be value in

letting attorneys know that the committee considered the issue and giving them our thoughts on the matter; he added that the parties can always argue the issue one way or the other. Ms. Adams-Perlac noted that attorneys may be able to draw their own conclusions and make their own arguments from the cases cited in the references. Dr. Di Paolo thought that including the first paragraph in the note may give the impression that the jury is to decide if the award fits within the parameters the courts have set. Judge Stone suggested saying in the committee note that the law regarding ratios has developed in the context of post-trial review of a punitive damage award, addressed to the judge. There is no law on whether the jury should be told about ratios, and the committee did not feel that the case law provided guidance on whether ratios should be disclosed to the jury. At Ms. Blanch's suggestion, the last paragraph was deleted from the committee note. The committee thought that it went too far, in effect giving the bar a treatise on punitive damages. The committee approved the committee note as revised.

c. *CV2028. Purpose of punitive damages.* Judge Harris questioned why CV2028 was a separate instruction. He thought that it could be combined with CV2027 but that, if they stayed separate, it should have a different title. Dr. Di Paolo thought the first three sentences needed to be reconsidered. The first deals with conduct outside of Utah; the second deals only with the plaintiff; and the third deals with third parties. Mr. Summerill asked if we could get by with just one sentence. Mr. Ferguson suggested: "In determining the amount of punitive damages, you may award punitive damages only for the purpose of punishing the defendant and only for (1) his conduct in the state of Utah that caused (2) harm to the plaintiff, and (3) not harm to other people. A punitive damage award is not for the purpose of deterring harm to other people or conduct in other states." Mr. Simmons questioned limiting the jury's consideration to conduct in Utah. The defendant may have harmed the plaintiff in another state, and Utah may have been the only jurisdiction in which the plaintiff could get personal jurisdiction over the defendant. Dr. Di Paolo thought that the phrase "directed towards Utah" implied directed toward the government of Utah. Judge Harris suggested saying, "Punitive damages may not be awarded for the purpose of deterring harm or attempted harm to others." The committee tabled further discussion on the instruction until the next meeting.

6. *Next meeting.* The next meeting will be Tuesday, October 14 (Monday, October 13 being Columbus Day), at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

1 **Rule 3-418. Model Utah Jury Instructions.**

2 **Intent:**

3 **To develop jury instructions that are an accurate statement of Utah law**
4 **using simple structure and, where possible, words of ordinary meaning.**

5 **Applicability:**

6 **This rule applies to the committees on Model Utah Jury Instructions.**

7 **Statement of the Rule:**

8 **The committees on Model Utah Jury Instructions will develop jury**
9 **instructions that are accurate statements of Utah law using simple structure**
10 **and, where possible, words of ordinary meaning. If Utah law is unclear or not**
11 **yet established, the committees may draft an instruction with two or more**
12 **alternatives based on differing authority. The order of the alternatives does not**
13 **imply preference. A model instruction will not be published for comment**
14 **before publication on the Utah state court website.**

Tab 3

Punitive Damages

(1) 2026. Punitive damages – introduction. Instruction approved 06092014. Committee Notes need approval. 1

(2) 2027. Amount of punitive damages. Instruction approved 06092014. Committee Note approved 09082014. 3

(3) 2028. Punitive damages. 4

(4) 2029 Crookston Factors 6

(5) 2030 Reprehensibility 6

(1) 2026. Punitive damages – introduction. Instruction approved 06092014. Committee Notes need approval.

In addition to compensatory damages, (name of plaintiff) also seeks to recover punitive damages against (name of defendant). Punitive damages are intended to punish a wrongdoer for extraordinary misconduct and to discourage others from similar conduct. They are not intended to compensate the plaintiff for [his][her][its] loss.

Punitive damages may only be awarded if (name of plaintiff) has proven by clear and convincing evidence that (name of defendant)'s conduct:

- (1) was [willful and malicious] [intentionally fraudulent]; or
- (2) manifested a knowing and reckless indifference toward, and a disregard of, [name of plaintiff]'s rights.

“Knowing and reckless indifference” means that (a) (name of defendant) knew or should have known that such conduct would, in a high degree of probability, result in substantial harm to another; and (b) the conduct must be highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of danger or harm would be apparent to a reasonable person.

[Punitive damages are not awarded for mere inadvertence, mistakes, errors of judgment and the like, which constitute ordinary negligence.]

[Some of the questions on the Special Verdict form will ask if (name of plaintiff) has proved by clear and convincing evidence that (name of defendant)'s conduct (a) was [willful and malicious] [intentionally fraudulent], or (b) manifested a knowing and reckless indifference and disregard of (name of plaintiff)'s rights. If you answer "yes" to any of these questions, I will then give you further instructions.]

References

Utah Code § 78B-8-201(a) (West 2014).

[Westgate Resorts v Consumer Protection Group, LLC, 285 P.3d 1219, 1222-1223 \(Utah 2012\).](#)

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

[Hall v. Walmart Stores, Inc., 959 P.2d 109 \(Utah 1998\).](#)

BMW of N. Am. Inc. v. Gore, 517 U.S. 559, 568 (1996).

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19-20 (1991).

Behrens v. Raleigh Hills Hospital, 675 P.2d 1179 (Utah 1983).

[Bundy v. Century Equipment, Inc., 697 P.2d 754, 759 \(Utah 1984\).](#)

Committee Notes

1. "Malicious conduct" has not yet been defined under Utah law. ~~A party wishing to offer a definition may do so with the approval of the court.~~

2. The ~~committee was divided on whether the~~ last two paragraphs ~~(in brackets)~~ of this instruction ~~may be stricken upon argument of the parties should be given.~~

3. The statute required bifurcation in all cases where punitive damages are sought at trial. If the jury awards compensatory damages, there will be a second phase. The first

phase will resolve the question of whether the plaintiff is entitled to punitive damages for the conduct alleged. If the jury determines that the plaintiff is so entitled, there will be a second phase. The second phase may include evidence of the defendant's wealth or financial condition (Section 78B-8-201(2)), with the jury answering only the question of what amount of punitive damages to award.

4. The committee did not feel there is adequate legal direction to determine which punitive damages instructions should be given in the first phase and which should be given if there is a second phase. However, one option would be for 2026 to be read in the first phase, with remainder to be read during any second phase.

(2) 2027. Amount of punitive damages. Instruction approved 06092014. Committee Note approved 09082014.

Now that you have decided to award punitive damages, you must determine the amount. Punitive damages should be the amount necessary to fulfill the two purposes of punitive damages, to punish past misconduct and to discourage future misconduct. Your decision should not be arbitrary. The amount must be reasonable and bear some relationship to the (name of plaintiff)'s harm. Whether or not to award a specific amount or any amount of punitive damages is left entirely up to you.

References

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003).

Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 440-42 (2001).

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580-83 (1996).

Crookston v. Fire Insurance Exchange, 817 P.2d 789, 811 (Utah 1991).

Committee Notes

1. The Utah Supreme Court has opined regarding the ratios that apply in determining whether a punitive damage award is excessive. "The general rule to be drawn from our past cases appears to be that where the punitives are well below \$100,000, punitive

damage awards beyond a 3 to 1 ratio to actual damages have seldom been upheld and that where the award is in excess of \$100,000, we have indicated some inclination to overturn awards having ratios of less than 3 to 1." *Crookston v. Fire Insurance Exchange*, 817 P.2d 789, 811 (Utah 1991).

The Crookston Court did not provide guidance whether the presumptive ratios should be disclosed to the jury. The case law regarding presumptive ratios has been in the context of post-verdict motions addressed to the judge, and the committee felt that it did not provide guidance with regard to whether the ratio should be disclosed to the jury.

It is the committee's view that a review of presumptive ratios is for the trial and appellate courts to consider in post judgment proceedings when the award is attacked based on excessiveness.

One of the guideposts in *BMW of North America, Inc. v Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996) is the comparison of the punitive damage award to civil or criminal penalties. The cases are not clear whether evidence of civil or criminal penalties may be introduced to the jury as a basis for determining the amount of punitive damages, or whether this is solely for the trial or appellate courts to consider in post judgment proceedings regarding excessiveness.

(3) 2028. Punitive damages.

In determining the amount of punitive damages ~~necessary to achieve the proper level of punishment and deterrence~~, you may ~~not~~ award ~~any~~ punitive damages for the purpose of punishing (name of defendant) only for ~~[his] [her] [its] conduct in~~ harm or attempted harm toward the (name of [plaintiff]). ~~You may not punish [defendant] for harm caused to other people who are not in this lawsuit. or for the purpose of changing (name of defendant)'s conduct outside of Utah.~~ Punitive damages may not be awarded for the purpose of deterring or punishing harm or attempted harm to other people.

Authority: *State Farm Mut. Auto. Ins. Co. v. Campbell*, No. 01-1289, 2003 WL 1791206, at *9 (U.S. Apr. 7, 2003) (“A State cannot punish a defendant for conduct that may have been lawful where it occurred;” “[n]or, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction. “due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570-75 & 585 (1996) (“While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.”).

Westgate Resorts v Consumer Protection Group, LLC, 285 P.3d 1219, 1222-1223 (Utah 2012). (“At issue in this case is the Constitution’s Due Process Clause, which, as explained by the Supreme Court in *Philip Morris USA v. Williams*,⁷ “forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties.” “A plaintiff may show harm to others in order to demonstrate reprehensibility.” But “a jury may not ... use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.”

References

Westgate Resorts v Consumer Protection Group, LLC, 285 P.3d 1219, 1222-1223 (Utah 2012).

State Farm Mut. Auto. Ins. Co. v. Campbell, No. 01-1289, 2003 WL 1791206, at *9 (U.S. Apr. 7, 2003).

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 570-75 & 585 (1996).

Committee Notes

(4) 2029 Crookston Factors

In determining the amount of damages, you may also consider any evidence regarding the following: (1) the relative wealth of [defendant]; (2) the nature of the alleged misconduct; (3) the facts and circumstances surrounding such conduct; (4) the effect of [defendant's] conduct on [plaintiff]; the probability of future reoccurrence of the misconduct; (6) the relationship of the parties; and (7) the amount of actual damages awarded.

Crookston v. Fire Insurance Exchange, 817 P.2d 789, 811 (Utah 1991). The “harm to others”, Crookston factor number 4, is no longer valid. See *Westgate Resorts v Consumer Protection Group, LLC*, 285 P.3d 1219, 1222-1223 (Utah 2012).

(5) 2029–2030 Reprehensibility

In deciding what level of punishment and deterrence is warranted, you may consider the potential or actual harm to other people who are not in this lawsuit, but only for the purpose of assessing the reprehensibility of [defendant's] conduct. Harm to other people may not be used determine the amount of punitive damages.

Westgate Resorts v Consumer Protection Group, LLC, 285 P.3d 1219, 1222-1223 (Utah 2012). “A plaintiff may show harm to others in order to demonstrate reprehensibility.” This is because “[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.” But “a jury may not ... use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.”

Philip Morris v. Williams, 549 U.S. 346 (2007)