

Agenda

Advisory Committee on Model Civil Jury Instructions

March 9, 2015
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

Welcome and approval of minutes	Tab 1	Juli Blanch - Chair
Committee composition and term limits, subcommittees, and subject area timelines	Tab 2	Juli Blanch
Punitive Damages Instructions 2028 and 2030 -2033	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.

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

December 8, 2014

4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Stuart H. Schultz (ex officio member), Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester

Excused: Paul M. Belnap, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Ryan M. Springer, Peter W. Summerill

The committee lacked a quorum, so no matters were voted on, but those present decided to go ahead and discuss the punitive damage instructions to take advantage of Mr. Schultz's input.

1. *CV2030. Reprehensibility.* Mr. Schultz agreed that whether or not other conduct is sufficiently similar to be relevant to the reprehensibility analysis and thus admissible was for the trial court to decide in the first instance. He suggested revising the first sentence of the second paragraph to say, "In making this determination, you may consider the evidence that has been admitted of similar conduct by the defendant toward other people who are not in this lawsuit." The committee thought the language was an improvement.

Mr. Johnson suggested listing in brackets the factors that the Supreme Court identified in *State Farm v. Campbell* as relevant to the reprehensibility analysis so that the parties could tailor them to the facts of the case. He noted that the only factor mentioned in CV2030 is similar conduct toward others and argued that, without such an instruction, defense counsel could argue that the defendant's conduct did not justify punitive damages because he did not harm anyone else in a similar way. Mr. Humpherys did not want to limit the factors that the parties could argue or that the jury could consider in determining reprehensibility. Mr. Simmons agreed that the *State Farm* factors were not exhaustive. Ms. Sylvester had attached to the materials Illinois pattern instruction 35.01 as an example. The instruction lists six factors (similar to those mentioned in *State Farm*) and then has a space for "[other]."

Mr. Humpherys asked whether reprehensibility was a legal standard for the court to apply in determining whether the issue of punitive damages should go to the jury in the first place or whether it is a factor for the jury to consider in determining the amount of punitive damages to award. The committee thought it was the latter; the legal standard is set out in the punitive damage statute, Utah Code Ann. § 78B-8-201. Judge Harris noted the inconsistency of saying that the jury can consider conduct toward others in determining how reprehensible the defendant's conduct was but cannot use the defendant's conduct toward others in setting the amount of punitive damages, even though reprehensibility only goes to the amount of punitive damages. Dr. Di Paolo did

not think jurors would understand the distinction the last paragraph of CV2030 is trying to make.

Judge Stone noted that the law treats repeat conduct more severely in other areas as well; for example, two drivers who commit the same act and cause the same harm as a result of drunk driving will receive different sentences if it is the first offense for one but the fourth offense for the other. The latter will be sentenced more severely.

Mr. Humpherys suggested bracketing the second paragraph, since it would only apply if the court admitted evidence of similar conduct toward others. Alternatively, he suggested having a separate instruction on similar conduct, which would only be given if evidence of similar conduct was admitted at trial.

Mr. Humpherys noted that the purpose of punitive damages is two-fold: punishment and deterrence. He asked whether reprehensibility goes only to punishment or also to deterrence. A defendant may not be punished for his conduct toward others, but deciding on the proper amount for deterrence may require the jury to consider how widespread the defendant's wrongful conduct is. Mr. Humpherys and Judge Stone suggested telling the jury that it may not award punitive damages to punish the defendant for harm to other people. Mr. Simmons pointed out that CV2028 already contains such language. But he also thought that it would not hurt to repeat the caution when talking about evidence of similar conduct, unless CV2028 immediately followed CV2030. Ms. Sylvester suggested adding to the end of CV2030, "In other words, you may not punish the defendant for harm he may have caused to others." Dr. Di Paolo thought jurors would still be confused.

2. *CV2028. Punitive damages.* Ms. Sylvester noted that she had added a sentence to the end of CV2028 to address the issue of conduct that may be wrongful in Utah but lawful in other states. Mr. Humpherys thought that, as it was written, it did not accurately state the law because it suggested that the jury could not punish conduct in Utah that was wrongful here but lawful in other states. Judge Stone and Mr. Simmons suggested revising the sentence to read, "You also may not award punitive damages based on evidence of [name of defendant]'s conduct in another state if it was lawful where and when [he/she/they/it] committed it." Ms. Blanch suggested renaming CV2028 "Punitive damages and harm to other people." Mr. Humpherys thought it would be better to have separate jury instructions on each concept. Ms. Blanch suggested that he break out all of the punitive damage instructions into discrete concepts for the next meeting, and Mr. Humpherys agreed to do so.

3. *Next meeting.* The next meeting will be Monday, January 12, 2015, at 4:00 p.m. The chair wished everyone happy holidays.

The meeting concluded at 5:20 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions

November 11, 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, Gary L. Johnson, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester

Excused: Paul M. Belnap, John R. Lund, Stuart H. Schultz, Ryan M. Springer

Note: The October 14, 2014 meeting was canceled for lack of a quorum.

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

2. *Policy & Planning Update.* Ms. Adams-Perlac reported that the Judicial Council has adopted an amended rule 1-205 of the Judicial Council Rules of Judicial Administration, which makes the model jury instruction committees standing committees of the Judicial Council. The Policy & Planning Committee of the Judicial Council has recommended a rule (3-418) regarding Model Utah Jury Instructions. It has been tentatively approved, but the Judicial Council wanted input from the jury instruction committees. The Model Utah Criminal Jury Instructions committee would like a thirty-day comment period for new instructions, similar to the comment period for rules, and asked that the last sentence of the proposed rule, which says "A model instruction will not be published for comment before publication on the Utah state court website," be deleted. This committee thought that comments on instructions should be encouraged but did not think publication on the website should be delayed for comments or that there should be a deadline for making comments. But the committee had no objection to deleting the last sentence. Mr. Simmons questioned the provision that allows committees to propose alternative instructions where there is no Utah law on point, noting that this committee has generally avoided proposing instructions on issues where Utah law is not established or clear. The committee thought that provision was acceptable, since it leaves it to the committee's discretion whether to propose alternative instructions or not.

Ms. Adams-Perlac was excused.

3. *Punitive Damage Instructions.* The committee continued its review of the punitive damages instructions.

a. *CV2030. Reprehensibility.* Mr. Schultz sent an e-mail before the meeting suggesting changes to CV2030 based on Supreme Court precedent (*State Farm v. Campbell*) that says that the only conduct relevant to the reprehensibility analysis is conduct similar to that which harmed the plaintiff.

Mr. Humpherys did not dispute Mr. Schultz's reading of the law but thought the matter went only to the admissibility of evidence of other conduct, which was a matter for the court and did not raise a fact issue for the jury to decide. Mr. Summerill agreed. Mr. Johnson, relying on language from *Westgate Resorts*, thought that the court requires some safeguard, such as a jury instruction, if evidence of dissimilar conduct is admitted. Judge Stone noted that such evidence may come in for some other purpose, in which case the court may need to instruct the jury that it cannot consider the evidence for reprehensibility. Mr. Humpherys thought such an instruction may allow defense counsel to argue that the evidence is not sufficiently similar even after the court has made a legal determination that it is sufficiently similar to be admitted. He therefore suggested dealing with the issue in a comment or bracketed language. Mr. Johnson thought that the remedy in that case should be a motion to strike and a curative instruction. Mr. Summerill thought that CV127 on "limited purpose evidence" already covered the issue. Mr. Johnson expressed concern that CV127 may be given in the first phase of the trial but not the second, after evidence of other conduct has been admitted. Mr. Summerill noted that the instruction can be repeated in the second phase of the trial. Judge Stone suggested that similarity is not binary but lies on a continuum. The more similar the conduct is, the more weight the jury will give to it in determining reprehensibility. He therefore thought it was appropriate to instruct the jury on similar/dissimilar conduct. He added that, if evidence that should have been excluded comes into evidence, having a jury instruction on how the jury is to consider the evidence helps protect the verdict on appeal. He suggested telling the jury that it can consider other harm in determining reprehensibility but cannot award damages for other harm. Mr. Humpherys suggested inviting the court to give an instruction tailored to the particular piece of evidence. Mr. Ferguson drew a distinction between conduct and harm and noted that the purpose of punitive damages is to change conduct. Judge Harris noted that the instruction is inconsistent. The first sentence says that the jury may consider harm to others in "deciding what level of punishment and deterrence is warranted," but the last sentence says harm to others may not be used to determine the amount of punitive damages, which is based on the "level of punishment and deterrence . . . warranted." He said he did not know what the jury was supposed to do with the instruction. Mr. Humpherys suggested breaking the instruction into two. The first would tell the jury it can consider similar conduct in determining reprehensibility, and the second would tell the jury that it can consider reprehensibility in determining the amount of punitive damages, but that harm to others can't be used in determining the amount. Mr. Ferguson gave the following example: The jury may consider the fact that the defendant cheated 3,000 people in addition to the plaintiff and punish him for that conduct, but the amount of money that the 3,000 people lost may not be used as the amount of

punitive damages, since the purpose of punitives is not compensation but deterrence and punishment. The committee rewrote the instruction to read:

In determining the amount of punitive damages to award, you should consider the reprehensibility of [name of defendant]'s conduct toward [name of plaintiff].

In making this determination, you may consider similar conduct by [name of defendant] toward other people who are not in this lawsuit, but only for the purpose of assessing the reprehensibility of [name of defendant]'s conduct. However, you may not consider the amount of harm sustained by other people in other cases as the measure of punitive damages in this case.

The committee considered whether “reprehensibility” would be clear to lay jurors. Someone suggested saying “reprehensibility or blameworthiness,” but Mr. Fowler questioned whether the two terms were synonymous. He thought “blameworthiness” might imply a lesser degree of reprehensibility. Judge Harris, citing dictionary.com’s definition of “reprehensible,” thought the two terms were synonymous, but the committee decided not to include “blameworthiness” for fear of departing too much from the language of the cases. Dr. Di Paolo thought “reprehensibility” was probably okay, since there was enough of a context for the jury to understand the concept. The committee approved the instruction as modified. Mr. Humpherys will talk to Mr. Schultz and explain the committee’s reasoning.

b. *CV2029. Crookston factors.* At Judge Harris’s suggestion, the title was changed to “Factors to consider in determining the amount of punitive damages.” Factor (5) was revised to read, “the probability of future reoccurrence of the misconduct toward the plaintiff or others.” Ms. Sylvester suggested deleting the commentary in the references, but Judge Stone and Mr. Ferguson recommended against it. The committee approved the instruction as modified.

c. *CV2026. Punitive damages—introduction, committee note.* Mr. Simmons noted that the first sentence of paragraph 3 of the committee note was not an accurate statement of the law, since bifurcation is only required if evidence of the defendant’s wealth is going to be introduced, and the Utah Supreme Court has said that evidence of wealth is not a necessary condition for punitive damages in every case. The sentence was revised to read, “The statute requires bifurcation in all cases where punitive damages are sought and evidence of the defendant’s wealth is introduced.” At Judge Harris’s suggestion, the second sentence was deleted. On motion of Mr. Humpherys, seconded by Mr. Johnson, the committee

approved the committee note. (The instruction itself had been previously approved.)

d. *CV2028. Punitive damages.* Mr. Ferguson thought the introductory clause could be deleted. He also thought that the second sentence was inconsistent with CV2030 and questioned whether CV2028 was necessary. The only thing it seems to add is the concept of deterrence. Judge Harris noted that CV2026 and CV2027 talk about “discourag[ing]” future misconduct. Dr. Di Paolo preferred “discourage” to “deter.” Judge Harris thought CV2028 could be combined with CV2030. Judge Stone noted that deterrence assumes other victims, so the jury must necessarily consider the effect of the defendant’s conduct toward others. Mr. Humpherys thought that CV2028 was adequately covered by factors (4) and (5) of CV2029 and was therefore unnecessary. Mr. Johnson initially thought that CV2028 was necessary but then acknowledged that it is largely covered by CV2030. He suggested making the last sentence of CV2030 the first sentence, to change the emphasis. Judges Harris and Stone, however, thought CV2030 flowed better as it was. Judge Stone suggested leaving CV2030 to deal with reprehensibility and dealing with deterrence and factors that can *not* be considered in CV2028. The committee agreed that CV2028 in its present form was not an accurate statement of the law. Mr. Johnson thought the concept that needs to be addressed is that the jury cannot award punitive damages to punish conduct in other states where the conduct is legal in those states and gave as an example the tort of alienation of affections. Mr. Ferguson drew the distinction between deterrence and punishment and noted that the jury can award punitive damages to deter harm to others but cannot award punitive damages to punish harm to others. Judge Stone noted that the conduct to be deterred is future *wrongful* conduct, and the jury needs some direction on considering conduct from other jurisdictions where the conduct may not be unlawful. Mr. Ferguson suggested that the real issue is one of admissibility of the evidence and not an issue for the jury. Mr. Fowler noted that the geographical issue comes up in other jurisdictions and asked how other states have dealt with it. Judge Harris suggested revising CV2028 to address the jurisdictional issue. Mr. Humpherys will try to do so. The committee deferred further discussion of CV2028.

4. *Next meeting.* The next meeting will be Monday, December 8, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

<u>Priority</u>	<u>Subject</u>	<u>Sub-C in place?</u>	<u>Sub-C Members</u>	<u>Projected Starting Month</u>	<u>Projected Finalizing Month</u>
1	Punitive Damages	Yes	Hoffman, Jeremy; Horvat, Steven; Humpherys, L. Rich; McGarry, Shawn; Schultz, Stuart; Slaugh, Leslie	In Progress	March-15
2	Insurance	Yes?	Barneck, Matthew; Belnap, Paul; Humpherys, L. Rich; Matthews, Paul H.; Olsen, David R.	In Progress	May-15
3	Civil Rights	Yes	Collard, Kathryn; Ferguson, Dennis; Osburn, Summer; Porter, Karra; Stirba, Peter; Wallace, Robert R.; White, Heather S.	June-15	September-15
4	Directors and Officers Liability	Yes	Burbidge, Richard D.; Christiansen, Erik, Call, Monica; Gurmankin, Jay	October-15	December-15
5	Sales Contracts and Secured Transactions	Chair only; more members needed	Cox, Matt	January-16	March-16
6	Trespass and Nuisance	No			
7	Economic Interference	No			
8	Emotional Distress	No			
9	Defamation	No	Juli with talk to Randy Dryer re who could be on sub-c		
10	Assault/False Arrest	No	We need someone who rep's Walmart or City Creek (Juli will send email to Kirton McConkie about this)		
11	Wills/Probate	No	Nancy will get in touch with Kent Alderman re creating sub-committee and being chair		

Tab 3

Punitive Damages

(1) 2026. Punitive damages – introduction. Instruction approved 06092014. Committee Notes approved 11102014.	1
(2) 2027. Amount of punitive damages. Instruction approved 06092014. Committee Note approved 09082014.	3
(3) 2028. Punitive damages and harm to other people.	4
(4) 2029. Factors to consider in determining the amount of damages. Instruction approved 11102014.	5
(5) 2030. Reprehensibility. Instruction approved 11102014 (NEW EDITS).	6
(6) 2031. Reprehensibility – Similar Conduct Toward Other People (NEW).	7
(7) 2032. Driving Under the Influence (NEW)	7
(8) 2033. Providing Controlled Substance (NEW).	9

**(1) 2026. Punitive damages – introduction. Instruction approved 06092014.
Committee Notes approved 11102014.**

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.

2. The committee was divided on whether the last two paragraphs (in brackets) of this instruction should be given.

3. The statute requires bifurcation in all cases where punitive damages are sought at trial and evidence of wealth is introduced. 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 that 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 the 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 on 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.

(3) 2028. Punitive damages and harm to other people.

In determining the amount of punitive damages, you may award punitive damages for the purpose of punishing (name of defendant) only for 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 punishing harm or attempted harm to other people. You also may not award punitive damages based on evidence of (name of defendant)('s/s') conduct in another state if it was lawful where and when (he/she/they/it) committed it.

Authority: *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003)~~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, 538 U.S. 408, 423 (2003)~~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. Factors to consider in determining the amount of damages. Instruction approved 11102014.

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]; (5) the probability of future reoccurrence of the misconduct toward the plaintiff or others; (6) the relationship of the parties; and (7) the amount of compensatory damages awarded.

References

Crookston v. Fire Insurance Exchange, 817 P.2d 789, 811 (Utah 1991). The “harm to others”, Crookston factor number 4 has been modified. Outside conduct or harm to others may now only be used to assess reprehensibility. See Westgate Resorts v Consumer Protection Group, LLC, 285 P.3d 1219, 1222-1223 (Utah 2012).

(5) 2030. Reprehensibility. Instruction approved 11102014 (NEW EDITS).

In determining the amount of punitive damages that should be awarded, you should consider the reprehensibility of [name of defendant]'s conduct. Greater reprehensibility may justify a higher punitive damage award while lesser reprehensibility may justify a lower amount. ~~In determining the amount of punitive damages to award, you should consider the reprehensibility of the defendant's conduct toward the plaintiff.~~

~~[In making this determination, you may also consider the evidence that has been admitted of similar conduct by the defendant toward other people who are not in this lawsuit. This evidence, however, may only be considered for the purpose of assessing the reprehensibility of [defendant's] conduct toward [plaintiff]. You may not consider the amount of harm alleged to be sustained by other people as the measure of punitive damages in this case. In other words, you may not punish (name of defendant) for harm (he/she/it) may have caused to others.]~~

~~You may consider similar conduct in determining the amount of punitive damages, but you may not determine the harm to other people.~~

References

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)

(6) 2031. Reprehensibility – Similar Conduct Toward Other People (NEW)

When determining the degree of reprehensibility, you may consider evidence of similar conduct by [name of defendant] toward other people who are not in this lawsuit; however, I caution you that this evidence is to be considered only to determine reprehensibility. The actual harm to other people is not the measure of punitive damages in this case.

References

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

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

(7) 2032. Driving Under the Influence (NEW)

In addition to compensatory damages, (name of plaintiff) also seeks to recover punitive damages against (name of defendant). Punitive damages are not intended to compensate the plaintiff for [his][her][its] loss. Punitive damages are intended to punish a wrongdoer for driving [a motor vehicle or motorboat] while voluntarily intoxicated or

under the influence of any drug or a combination of alcohol and drugs in violation of the law.

Punitive damages may be awarded if (name of plaintiff) has proven by [preponderance of the evidence or clear and convincing???] that (name of defendant) violated the following state law:

(1) A person may not operate or be in actual physical control of a vehicle within this state if the person:

(a) has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;

(b) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or

(c) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control.

[There is a question on the Special Verdict form whether (name of plaintiff) has proved by a preponderance of the evidence that (name of defendant) violated the above law. If you answer "yes" to this question, I will then give you further instructions regarding punitive damages.]

References

Utah Code § 78B-8-201(b)(i).

Utah Code § 41-6a-502.

C.T. ex rel. Taylor v. Johnson, 1999 UT 35, 977 P.2d 479

Committee Notes

1. The committee did not feel that there is adequate legal direction, based upon the language of Utah Code § 78B-8-201(b)(i) and the holding in *C.T. ex rel. Taylor v.*

Johnson, 1999 UT 35, 977 P.2d 479, for setting forth a standard of proof. Utah Code § 78B-8-201(b)(i) excludes certain punitive damages cases, such as driving under the influence, from the clear and convincing evidence standard, but it does not address the standard for those exceptions. Although the dissent in *C.T. ex rel. Taylor v. Johnson* suggested that the standard was likely the common law preponderance of the evidence standard, the majority disagreed. It opined that while it “was [not] the legislature's intent that punitive damages be awarded without any limitation or restraint...[t]he plaintiff must [simply] prove that he or she sustained compensatory or general damages....” 977 P.2d 479, 482 (emphasis omitted).

(8) 2033. Providing Controlled Substance (NEW)

In addition to compensatory damages, (name of plaintiff) also seeks to recover punitive damages against (name of defendant). Punitive damages are not intended to compensate [name of plaintiff] for [his][her][its] loss. Punitive damages are intended to punish a wrongdoer for [causing the death of another person by providing or administering an illegal controlled substance to the person in violation of the law.] [providing an illegal controlled substance to any person in the chain of transfer that connects directly to a person who subsequently provided or administered the substance to a person whose death was caused in whole or in part by the substance].

Punitive damages may be awarded if (name of plaintiff) has proven by [preponderance of the evidence or clear and convincing???] that (name of defendant) violated state law.

[To determine which state law applies here, see Sections 78B-3-801 and 58-37-1, et seq.]

[There is a question on the Special Verdict form whether (name of plaintiff) has proved by a preponderance of the evidence that (name of defendant) violated this law. If you answer “yes” to this question, I will then give you further instructions regarding punitive damages.]

References

Utah Code § 78B-8-201(b)(ii) and (iii).

Utah Code § 78B-3-801.

Utah Code § 58-37-1, et. Seq.

C.T. ex rel. Taylor v. Johnson, 1999 UT 35, 977 P.2d 479

Committee Notes

1. The committee did not feel that there is adequate legal direction, based upon the language of Utah Code § 78B-8-201(b)(i) and the holding in *C.T. ex rel. Taylor v. Johnson*, 1999 UT 35, 977 P.2d 479, for setting forth a standard of proof. Utah Code § 78B-8-201(b)(i) excludes certain punitive damages cases, such as providing controlled substances, from the clear and convincing evidence standard, but it does not address the standard for those exceptions. Although the dissent in *C.T. ex rel. Taylor v. Johnson* suggested that the standard was likely the common law preponderance of the evidence standard, the majority disagreed. It opined that while it “was [not] the legislature's intent that punitive damages be awarded without any limitation or restraint....[t]he plaintiff must [simply] prove that he or she sustained compensatory or general damages....” 977 P.2d 479, 482 (emphasis omitted).