

Agenda

Advisory Committee on Model Civil Jury Instructions

April 13, 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
Subcommittees and subject area timelines	Tab 2	Juli Blanch
Punitive Damages Instructions 2026, 2031, 2033, 2034	Tab 3	Rich Humpherys, Peter Summerill & Subcommittee

[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

March 9, 2015

4:00 p.m.

Present: Juli Blanch (chair), 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. Also present: Leslie Slaugh

Excused: Paul M. Belnap, Gary L. Johnson, John R. Lund, Stuart Schultz, Ryan M. Springer.

1. *Welcome and approval of minutes.* Ms. Blanch welcomed Mr. Slaugh, a member of the punitive damages subcommittee. On Mr. Humpherys's motion, seconded by Judge Stone, the minutes of the last meeting (Dec. 8, 2014) were approved.

2. *Committee composition, term limits, subcommittees, and subject area timelines.* Ms. Blanch reported that she has talked to the current committee members to judge their interest in staying on the committee and their thoughts about the meeting day and time. Most committee members are interested in staying on and found the meeting schedule acceptable. Now that the committee is under the oversight of the Judicial Council, there are term limits. Mr. Humpherys indicated that he would like to stay involved through the committee's review of the insurance instructions but would not mind giving way to another member after that. Ms. Sylvester noted that he will still be involved as a member of the insurance instruction subcommittee even if he resigns from the committee. Ms. Blanch indicated that it may make sense for new terms to start in June. The June meeting is generally the last meeting until the fall. Ms. Blanch reviewed the list of remaining subject areas and asked committee members to suggest attorneys to serve on the subcommittees that still need members. The committee suggested Mitchell Rice and someone from Bob Sykes's office (such as Rachel Sykes or Alyson Carter McAllister) to serve on the assault/false arrest subcommittee. Ms. Blanch invited committee members to e-mail other suggestions to her and Ms. Sylvester.

3. *Punitive damage instructions.* The committee continued its review of the punitive damage instructions.

a. *CV2026, Punitive damages–introduction.* The committee had previously approved CV2026, but Mr. Summerill said that the first sentence of the committee note (“‘Malicious conduct’ has not yet been defined under Utah law.”) was inaccurate. He said that the court defined “malicious conduct” for purposes of punitive damages in *Gleave v. Denver & Rio Grande Western Railroad Company*, 749 P.2d 660 (Utah Ct. App. 1988). The committee asked how the definition of “malicious” conduct in *Gleave* differed from the definition of “knowing and reckless indifference” in the instruction. Mr. Summerill thought that “knowing and reckless indifference” applied a “knew or should have known” standard, but there was no knowledge requirement for “malicious.” Ms. Blanch

and Mr. Ferguson did not think that that was a valid distinction, noting that malice generally implies a bad intent. Dr. Di Paolo added that the original meaning of “malice” was “bad.” The committee noted that the statute does not just refer to “malicious” conduct but to “willful and malicious” conduct and thought that “willful” added an intent element, even if “malicious” alone did not. Mr. Summerill thought that the intent involved was the intent to do the act and not necessarily the intent to cause harm. He thought that “knew or should have known” should not be part of the definition of “willful and malicious.” He also thought that “should have known” should not be part of the “knowing and reckless indifference” definition. Mr. Summerill noted that the court addressed the issue of actual versus constructive knowledge in *Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, 221 P.3d 256. Ms. Sylvester suggested revising the instruction to say that “willful and malicious conduct” is the same as “knowing and reckless indifference” except that it does not require knowledge. Mr. Ferguson thought that “knowing and reckless indifference” meant that the defendant knew that his conduct was likely to cause harm and didn’t care. Dr. Di Paolo thought the instruction was very complex, containing a mixture of Anglo-Saxon and Latin words that may or may not have different meanings, and asked if it could be broken out into separate instructions. Mr. Summerill thought there should be separate definitions for each of the three alternative bases for punitive damages—(1) willful and malicious, (2) intentionally fraudulent, and (3) knowing and reckless indifference. Mr. Summerill offered to propose a revised instruction. Ms. Blanch will ask the punitive damages subcommittee to revisit CV2026. She will outline the issues for the subcommittee and copy Mr. Summerill on the e-mail. Mr. Summerill noted that he had recently briefed the issue of the standards for punitive damages and offered to share his briefs with the subcommittee.

b. *CV2028. Punitive damages and harm to other people.* Mr. Slauch noted that the harm for which punitive damages may be awarded is not just harm to people but can also be harm to property. The phrases “harm to another” and “harm to other people” were replaced in CV2026 and CV2028 with “harm to [persons] [property].” Mr. Ferguson suggested changing the second sentence (“Punitive damages may not be awarded . . .”) to the active voice (“You may not award punitive damages . . .”). Judge Harris thought the last sentence was out of place. He suggested bracketing it, since it would not apply unless evidence of the defendant’s conduct in other states came into evidence. The committee decided to make the last sentence a separate instruction, CV2032. CV2028 was approved as modified. The parentheticals were removed from the references; they were intended only for the committee’s discussion of the instructions.

c. *CV2032. Reprehensibility—conduct in other states.* The committee debated whether both sides should be able to introduce evidence of the

lawfulness of the defendant's conduct in other jurisdictions, to either increase or decrease the jury's evaluation of the reprehensibility of the conduct. The committee did not think there was any authority for using the unlawfulness of the defendant's conduct in other states offensively, to increase the reprehensibility. Some questioned whether evidence of conduct in other states should be admissible at all, since the instructions tell the jury that it cannot award punitive damages to punish the defendant for harm to others, nor can it consider the amount of harm to others as the measure of punitive damages. Judge Harris thought that the admissibility of evidence of the defendant's conduct in other jurisdictions and its legality elsewhere would generally be handled pretrial by a motion in limine but that there may be cases where it is an issue. The committee considered the following language for CV2032: "For the purpose of determining [or evaluating] reprehensibility, you may not award punitive damages based on evidence of [name of defendant]'s conduct in another state if it was lawful where and when it was committed." It was proposed that this language be changed to "For the purpose of determining [or evaluating] reprehensibility, you may not punish [name of defendant] for conduct in other states where it was legal." Mr. Humpherys thought the issue of conduct in other states was an evidentiary issue, not a subject for jury instructions, and that the Supreme Court's pronouncements on the subject were meant for the benefit of appellate courts reviewing jury instructions and not for juries to be instructed on. Judge Stone proposed the following alternative: "You may not consider [name of defendant]'s conduct more reprehensible if the conduct was legal in other states." It was suggested that the last phrase be changed to "based on conduct outside of Utah that was legal where and when it occurred." The committee added a committee note to say that the instruction should only be used where the plaintiff asserts that the defendant's conduct is more reprehensible because it has occurred in other states as well and the defendant responds that the conduct is legal in other states. Judge Harris noted that the concept is that the jury may not use legal conduct to ratchet up the reprehensibility factor. Mr. Slaugh suggested the following: "Evidence that [name of defendant] committed similar conduct outside of Utah may not be considered to increase the level of reprehensibility if the conduct was legal where and when it occurred." Mr. Fowler suggested adding an introductory sentence that evidence of the defendant's conduct in other states should not be admitted, but other committee members thought that that was a question of the admissibility of evidence, which was beyond the scope of the committee's charge. Mr. Ferguson suggested rephrasing Mr. Slaugh's suggested language in the active voice, but Dr. Di Paolo thought the passive voice was fine here, because it placed the emphasis on the matter at issue (evidence of similar conduct in other states). The committee adopted Mr. Slaugh's language and approved the instruction as revised.

Judge Harris was excused.

d. *CV2030. Reprehensibility.* The committee approved the instruction as edited previously.

e. *CV2029. Factors to consider in determining the amount of damages.* Dr. Di Paolo asked what “relative” meant in the first factor (“the relative wealth of [defendant]”). What is it relative to—the population as a whole? the amount of compensatory damages? the amount of punitive damages? Mr. Slauch thought it meant relative to the amount of punitive damages awarded, since the amount of compensatory damages is a separate factor (number 7). Mr. Ferguson thought it meant the jury was supposed to consider how much the defendant can afford to pay, without bankrupting the defendant. Dr. Di Paolo and Mr. Summerill suggested deleting “relative.” Some committee members thought that the instruction should not deviate from the factors as stated by the court in *Crookston v. Fire Insurance Exchange*, 817 P.2d 789, 811 (Utah 1991), which refers to it as “relative wealth.” Others thought that the committee was charged with making the law clearer to lay people and thought it was okay to delete “relative,” which adds a layer of confusion. Mr. Humpherys noted that the statute says that evidence of a party’s “wealth or financial condition” is admissible once there has been a finding of liability for punitive damages. Utah Code Ann. § 78B-8-201(2). The committee noted that there may be a difference between “wealth” and “financial condition.” For example, a newly minted doctor may not have much wealth, but his financial condition may be good given his prospects for future income. The committee changed the first factor to read, “(1) the wealth or financial condition of [defendant]” and approved the instruction as modified.

4. *Next Meeting.* The next meeting will be Monday, April 13, 2015, 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	Ferguson, Dennis (D); Mejia, John (P); Osburn, Summer (P); Plane, Margaret (D); Porter, Karra (P); White, Heather (D)	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	Yes (more members needed)	Hancock, Cameron; Figueira, Joshua (researcher);		
7	Economic Interference	No	Frazier, Ryan (D) (Chair)		
8	Emotional Distress	No			
9	Defamation	Yes	Dryer, Richard (Chair); Hoole, Roger; Hunt, Jeff; Reymann, David; Stevens Greg		
10	Assault/False Arrest	Yes (waiting on 3 more)	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); (Millard, Brook (P)?); Cutt, David		
11	Wills/Probate	More members needed	Kent Alderman (chair?)		

Tab 3

Punitive Damages

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

(2) 2027. Amount of punitive damages. Instruction approved 06092014. Committee Note approved 09082014..... 4

(3) 2028. Punitive damages and harm to other people. Instruction approved 03092015. 5

(4) 2029. Factors to consider in determining the amount of damages. Instruction approved 03092015. 5

(5) 2030. Reprehensibility. Instruction approved 03092015. 6

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

(7) 2032. Reprehensibility—Conduct in other states. Instruction and committee note approved 03092015. 7

(8) 2033. Driving Under the Influence (NEW) 7

(9) 2034. Providing Controlled Substance (NEW)..... 9

(1) 2026. Punitive damages – introduction. Instruction approved 06092014.

Committee Notes approved 11102014. (NEW EDITS)

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 [name of 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]; or,

(2) was [intentionally fraudulent]; or,

(32) 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] [to property]; 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.

~~Willful and malicious conduct does not require knowledge.~~

~~Willful and malicious conduct means that (a) [name of defendant] knew such conduct would, in a high degree of probability, result in substantial harm [to another] [to property]; 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.~~

~~Intentionally fraudulent conduct means COMMENT – I AM UNAWARE OF ANY PRECEDENT REGARDING ‘INTENTIONALLY FRAUDULENT’ CONDUCT IN THE CONTEXT OF PUNITIVE DAMAGES. THE BEST COURSE MAY BE TO REFERENCE/DIRECT COUNSEL AND COURT TO REVIEW MUJI CV1801 & 1809. has not been defined by Utah case law. Please review CV1801 (Elements of Fraud) and CV1809 (Intent) for a working definition.~~

[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).

Daniels v. Gamma W. Brachytherapy, LLC, 2009 UT 66, 221 P.3d 256

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).

[Johnson v. Rogers, 763 P.2d 771, 773 \(Utah 1988\)](#)

Gleave v. Denver & Rio Grande W. R. Co., 749 P.2d 660 (Utah Ct. App. 1988)

[Biswell v. Duncan, 742 P.2d 80, 84 \(Utah Ct. App. 1987\)](#)

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

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

~~[Biswell v. Duncan, 742 P.2d 80, 84 \(Utah Ct. App. 1987\)](#)~~

~~[Johnson v. Rogers, 763 P.2d 771, 773 \(Utah 1988\)](#)~~

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. Instruction approved 03092015.

In determining the amount of punitive damages, you may award punitive damages for the purpose of punishing [name of defendant] only for [harm] [attempted harm] [damage] to [name of plaintiff]. You may not award punitive damages for the purpose of punishing harm or attempted harm to other people.

References:

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

(4) 2029. Factors to consider in determining the amount of damages. Instruction approved 03092015.

In determining the amount of damages, you may also consider any evidence regarding the following: (1) the wealth or financial condition of [name of defendant]; (2) the nature of the alleged misconduct; (3) the facts and circumstances surrounding such conduct; (4) the effect of [name of defendant]’s conduct on [name of plaintiff]; (5) the probability of future reoccurrence of the misconduct toward [name of 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 03092015.

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.

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)

(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. Reprehensibility—Conduct in other states. Instruction and committee note approved 03092015.

Evidence that [name of defendant] committed the same or similar conduct outside of Utah may not be considered to increase the level of reprehensibility if the conduct was legal when and where it was committed.

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) .

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

Committee Notes

1. This instruction should be used only in cases where the plaintiff asserts that the defendant's conduct is more reprehensible because it has occurred in other states and the defendant then responds that the conduct is legal in other states.

(8) 2033. 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 [name of 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).

(9) 2034. 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).



Nancy Sylvester <nancyjs@utcourts.gov>

Punitive Damages Subcommittee

Stuart Schultz <sschultz@strongandhanni.com>

Tue, Mar 24, 2015 at 8:19 PM

To: Juli Blanch <JBlanch@parsonsbehle.com>, "Peter W. Summerill" <peter@attorneysummerill.com>, Nancy Sylvester <nancyjs@utcourts.gov>

Cc: Rich Humpherys <rich.humpherys@chrisjen.com>, Shawn McGarry <smcgarry@kipbandchristian.com>, "jmhoffman@yahlaw.com" <jmhoffman@yahlaw.com>, "shorvat@aklawfirm.com" <shorvat@aklawfirm.com>, "slaughl@provolawyers.com" <slaughl@provolawyers.com>

At the risk of reinventing the wheel, I have a couple of comments:

I understand that we are saying there is no difference substantive between "willful and malicious" and "knowing and reckless indifference." If so, why do some cases and the statute refer to them as one or the other?

There are cases that define willful misconduct. They are not necessarily punitive cases, but nonetheless may be worth considering.

In *Chang v. Soldier Summit Development*, 1999 UT App 27, the Utah Court of Appeals quoted *Brown v. Frandsen*, 19 Utah 2d 116, 118, 426 P.2d 1021, 1022 (Utah 1967) as follows: "Willful misconduct is the intentional doing of an act, or the intentional failure to do an act, with knowledge that serious injury is a probable result."

In *Golding v. Ashley Cent. Irrigation Co.*, 793 P.2d 897, 900-901 (Utah 1990) the Utah Supreme Court discussed the definition of willful misconduct in the context of another statute, Utah's Limitation of Landowner Liability Act. It appears that the Court concludes that in that particular statute those terms are defined in accordance with the *Brown v. Frandsen* reading, namely "the intentional failure to do an act, with knowledge that serious injury is the probable result."

The Court noted that its decision in *Clayton v. Crossroads Equip. Co.*, 655 P.2d 1125, 1131 (Utah 1982) in "dictum relying on non-Utah sources equat[ed] 'willful and malicious' with 'gross negligence' or 'reckless indifference'." But in footnote 3 the Court referred to "the weaker 'reckless disregard' standard of *Clayton v. Crossroads Equip. Co.*, 655 P.2d 1125 (Utah 1982)."

I throw this out for your consideration.

Stuart

Stuart H. Schultz, Esq.

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From: Juli Blanch [mailto:JBlanch@parsonsbehle.com]

Sent: Tuesday, March 24, 2015 3:14 PM

To: Peter W. Summerill; Nancy Sylvester

Cc: Rich Humpherys; Stuart Schultz; Shawn McGarry; jmhoffman@yahlaw.com; shorvat@aklawfirm.com; slaughl@provolawyers.com

Subject: RE: Punitive Damages Subcommittee

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