

Agenda

Advisory Committee on Model Civil Jury Instructions

September 14, 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
Recognition of Ryan Springer		Juli Blanch
Subcommittees and subject area timelines	Tab 2	Juli Blanch
Defamation/Slander/Libel Instructions	Tab 3	Randy Dryer & subcommittee

[Committee Web Page](#)

[Published Instructions](#)

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

October 13, 2015
November 9, 2015
December 14, 2015
January 11, 2016
February 8, 2016
March 14, 2016
April 11, 2016
May 16, 2016
June 13, 2016
September 12, 2016
October 11, 2016
November 14, 2016
December 12, 2016

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

May 11, 2015

4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Phillip S. Ferguson, Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Patricia C. Kuendig, Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester

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

1. *Appreciation for the Service of Messrs. Ferguson and Humpherys.* On behalf of the committee, Ms. Blanch thanked Messrs. Ferguson and Humpherys for their many years of devoted service on and their many contributions to the committee and its work. They were original members of the committee and are now stepping down. Ms. Blanch presented each of them with a certificate signed by her and the Chief Justice and a letter of appreciation signed by the Chief Justice.

2. *Introduction of New Members.* Ms. Blanch introduced the two new members of the committee, Patricia Kuendig and Joel Ferre. Ms. Kuendig is in private practice in Park City, having moved here from Florida some three years ago, and Mr. Ferre is the Deputy Director of the Litigation Division of the Utah Attorney General's Office.

Dr. Di Paolo joined the meeting.

3. *Approval of Minutes.* On motion of Mr. Ferguson, seconded by Mr. Humpherys, the committee approved the minutes of the April 13, 2015 meeting.

4. *Subcommittees.* Ms. Blanch noted that some of the subcommittees still need members. Kent Alderman declined to chair the Wills and Probate subcommittee but agreed to sit on the committee and suggested other members, including Scott Hansen and Cal Curtis. Messrs. Ferguson and Humpherys repeated their suggestion of Tom Christensen. Mr. Simmons volunteered to serve on the Emotional Distress subcommittee, and Ms. Kuendig volunteered to serve where needed.

5. *CV2026, Punitive damages–introduction.* Ms. Sylvester noted that she has revised the committee notes, which need to be approved. Mr. Simmons noted that the third numbered subparagraph of the instruction did not track the statutory language and could be misleading. It said “manifested a knowing and reckless indifference toward, and a disregard of, [name of plaintiff]’s rights,” as opposed to “the rights of others.” Mr. Simmons thought that a jury might think that it had to find that the defendant knew that his or her conduct “would, in a high degree of probability result in substantial harm” to the plaintiff. He suggested changing it to read, “disregard of the

rights of others.” Mr. Humpherys thought that such a change would invite reversal on appeal because it would allow the jury to award damages for harm to others, in violation of due process. Judge Stone and Mr. Simmons thought that the other instructions adequately explained the constitutional limits on awards of punitive damages. Judge Stone noted that restricting the definition to the plaintiff’s rights would also invite an appeal, since one can get punitive damages for conduct not directed to a particular person, such as in the Ford Pinto cases. Dr. Di Paolo asked if a plaintiff could get punitive damages if he or she suffered no other harm. The committee explained that some injury to the plaintiff is a prerequisite for punitive damages, but that the jury will have found that the plaintiff was injured by the time it gets to the question of punitive damages. Mr. Blanch asked if the jury would consider the plaintiff in the class of “others” if the language of the instruction were changed. Mr. Humpherys thought so. Dr. Di Paolo thought it would be better to say “other’s rights” than “the rights of others,” the former sounding more inclusive and less formal. She suggested putting in the first paragraph that harm to the plaintiff is required for punitive damages, to avoid any implication that the plaintiff’s harm is irrelevant. Ms. Kuendig suggested saying “the rights of the plaintiff or others exposed to such misconduct.” The committee finally settled on “the rights of others, including [name of plaintiff].” The committee also approved the alternative to committee note 1, which included more information about the cited cases. On motion of Mr. Simmons, seconded by Mr. Fowler, the committee approved the instruction.

6. *CV2027, Amount of punitive damages.* At Dr. Di Paolo’s suggestion, the comma in the third line of the instruction was changed to a colon.

7. *Change in Procedure.* Ms. Sylvester noted that, now that the jury instruction committees are under the umbrella of the Judicial Council, proposed instructions will be sent out to the bar for comment, beginning with the punitive damage instructions.

8. *Next meeting.* The next meeting will be Monday, September 14, 2015, at 4:00 p.m. The June 8, 2015 meeting was canceled.

The meeting concluded at 4:55 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>	<u>Comments Back?</u>
1	Punitive Damages	Yes	Hoffman, Jeremy; Horvat, Steven; Humpherys, L. Rich; McGarry, Shawn; Schultz, Stuart; Slauch, Leslie; Summerill, Peter	N/A	May-15	Yes: sub-c currently reviewing. Full committee review @ Oct 2015 mtg
2	Defamation	Yes	Dryer, Randy (Chair); Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David; Stevens, Greg	September-15	November-15	
3	Civil Rights	Yes	Ferguson, Dennis (D); Mejia, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D)	December-15	February-16	
4	Directors and Officers Liability	Yes	Burbidge, Richard D.; Christiansen, Erik, Call, Monica; Gurmankin, Jay	March-16	May-16	
5	Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	June-16	October-16	
6	Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	November-16	January-17	
7	Economic Interference	Yes	Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P)	February-17	April-17	
8	Trespass and Nuisance	Yes (more members needed)	Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P)	May-17	September-17	
9	Emotional Distress	Yes	Dunn, Mark (D)(Chair); Combe, Steve (D); Katz, Mike (P); Waddoups, George (P)	October-17	December-17	
10	Insurance	No (more members needed)	Johnson, Gary (chair)	January-18	March-18	
11	Wills/Probate	No	Barneck, Matthew (chair)	April-18	June-18	

Tab 3

Defamation

CV1601 Defamation—Introduction

The law of defamation is unique. Although defamation is a common law tort, it is bounded by protections for free speech embodied in the First Amendment to the United States Constitution and Article I, sections 1 and 15 of the Utah Constitution. These instructions are based on the law of defamation as interpreted by the Utah courts and, in certain areas, by governing precedent of the United States Supreme Court.

In some areas of the law, open questions remain. One of those areas is the standard of fault in cases involving a private plaintiff and speech that does not relate to a matter of public concern. The United States Supreme Court has held that the First Amendment requires the standard of fault to be actual malice for claims involving public officials, *see New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and public figures, *see Curtis Publ'g Co. v. Butts*, 389 U.S. 889 (1967). It has also held that the standard of fault in cases involving speech relating to a matter of public concern must be at least negligence. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). But a majority of the Court has never resolved whether the same constitutional limitations require a standard of fault above strict liability for private plaintiff, non-public concern cases. *Cf. Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J.) (in plurality opinion, declining to extend actual malice rule). The Utah Supreme Court has likewise not resolved this issue. *See Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205. As a result, the committee has not included an instruction on the standard of fault in such cases, leaving to the parties the task of arguing for a resolution of that question.

This is not to suggest there is no constitutional protection in private figure, non-public concern cases. The Utah Supreme Court has, in other contexts, stated that defamation claims always implicate the First Amendment. *See Jensen v. Sawyers*, 2005 UT 81, ¶ 50, 130 P.3d 325 (“Defamation claims always reside in the shadow of the First Amendment.”); *O'Connor v. Burningham*, 2007 UT 58, ¶ 27, 165 P.3d 1214 (“Defamation requires a departure from the standard treatment, however, primarily because it never arrives at court without its companion and antagonist, the First Amendment, in tow.”). And though it declined to extend the actual malice fault standard to private figure, non-public concern cases, the plurality in *Greenmoss Builders* likewise recognized that such “speech is not totally unprotected by the First Amendment.” 472 U.S. at 760. The Utah Supreme Court has also recognized that “[t]he First Amendment creates a broad, uniform ‘floor’ or minimum level of protection that state law must respect,” *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994), but that Article I, section 15 of the Utah Constitution “is somewhat broader than the federal clause.” *Provo City Corp. v. Willden*, 768 P.2d 455, 456 n.2 (Utah 1989); *cf. West*, 872 P.2d at 1004 n.4 (“The scope of the state constitutional protection for expression may be broader or narrower than the federal, depending on the state constitution’s language, history, and interpretation. In any event, state tort law may not impair state constitutional guarantees and is properly confined to constitutionally permissible limits.”). It is thus possible that the standard of fault question in private figure, non-public concern cases would implicate the Utah Constitution even if strict liability is not precluded by the First Amendment.

Similarly, the United States Supreme Court has held that punitive and presumed damages may not be awarded in cases involving speech relating to matters of public concern absent a showing of actual malice. *Gertz*, 418 U.S. at 350. But other than addressing the issue in the plurality decision in *Greenmoss Builders* and declining to extend the rule, the Court has not resolved whether the same constitutional limitation applies in private figure, non-public concern cases. The committee has nonetheless included an instruction for punitive damages in that context stating the statutory requirements for punitive damages under Utah law, but notes that an argument could be made for applying the heightened actual malice standard for punitive damages in all defamation cases.

Finally, these instructions use the term “defamation” throughout, which refers to the claim regardless of the medium of expression. Historically, defamation claims were separated into “slander,” which referred to oral communications, and “libel,” which referred to written publications. That distinction has become increasingly anachronistic given certain forms of electronic communication (*e.g.*, SMS (text messages), IM (instant messaging), MMS (multi-media messaging services), and online video) that could arguably fall into either category, and it also fails to account for other non-verbal forms of communication that can, in some circumstances, form the basis of a defamation claim. In addition, the distinction between libel and slander is conceivably relevant only to one narrow legal issue—the test for whether a statement is defamatory *per se* for purposes of presumed damages. Because, as explained in the Committee Notes for CV1617 (Damages – Defamation *Per Se*), it appears the Utah Supreme Court has merged the historical tests for slander *per se* and libel *per se*, these instructions refer simply to defamation and do not draw any distinction between the medium or form of expression.

CV1602 Elements of a Defamation Claim.

[Name of plaintiff] claims that [name of defendant] defamed [him/her]. To succeed on this claim, [name of plaintiff] must prove the following:

- (1) [name of defendant] published statement(s) of fact about [name of plaintiff];
- (2) the statements were false;
- (3) the statements were defamatory;
- (4) the statements were not privileged;
- (5) the statements were published with the requisite degree of fault; and
- (6) the statements caused damages to [name of plaintiff].

Each of these elements is further explained in the following instructions.

References

Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Oman v. Davis Sch. Dist., 2008 UT 70, 194 P.3d 956
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)

MUJI 1st Instruction

10.2, 10.3

Committee Notes

There has been some confusion in reported decisions regarding whether a defamation plaintiff bears the burden of proving falsity or whether truth is an affirmative defense for which the defendant bears the burden of proof. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1985), the United States Supreme Court held that the First Amendment required a plaintiff to prove falsity in cases involving speech published by a media defendant relating to a matter of public concern. Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.”). And although there are Utah decisions referring to truth as a “defense,” see, e.g., *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 57 (Utah 1991) (“[T]ruth is an absolute defense to an action for defamation.”), the Utah Supreme Court has consistently listed falsity as an essential element of a defamation claim. See, e.g., *Jacob v. Bezzant*, 2009 UT 37, ¶ 21, 212 P.3d 535 (“A prima facie case for defamation must demonstrate that ... ‘the statements were false....’”) (quoting *Oman v. Davis Sch. Dist.*, 2008 UT 70, ¶ 68, 194 P.3d 956); *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994) (“To state a claim for defamation, [the plaintiff] must show that ... the statements were false....”). The committee accordingly included falsity as an element of the claim and did not distinguish between defendants or public concern and non-public concern cases.

The Utah legislature has defined “libel” and “slander” in Utah Code § 45-2-2 for purposes of the statutory provisions in that chapter, which include several statutory privileges, retraction requirements, and matters relating to broadcasts. The definitions in that section, however, are inconsistent with the elements of a defamation claim consistently articulated by the Utah Supreme Court, see, e.g., *Jacob v. Bezzant*, 2009 UT 37, ¶¶ 21, 212 P.3d 535; *West v. Thomson Newspapers*, 872 P.2d 999, 1007-08 (Utah 1994), and are likely unconstitutional for failure to require falsity, see *I.M.L. v. State*, 2002 UT 110, ¶¶ 19, 23, 61 P.3d 1038; *Garrison v. Louisiana*, 379 U.S. 64, 70-73 (1964). For this reason, the committee has used the elements articulated in the caselaw rather than the statutory definitions in Utah Code § 45-2-2.

CV1603 Burden of Proof.

[Name of plaintiff], as the party asserting the defamation claim, has the burden to prove each element of [his/her] defamation claim. In addition, if a statement is subject to a conditional privilege, [name of plaintiff] has the burden to prove that the privilege has been abused by [name of defendant]. Unless otherwise instructed, [name of plaintiff] must prove each of these matters by a preponderance of the evidence.

References

Ferguson v. Williams & Hunt, Inc., 2009 UT 49, 221 P.3d 205
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535

MUJI 1st Instruction

No analogue

Committee Notes

A party claiming that a statement is subject to a privilege bears the burden of proving the existence and application of the privilege, which determination is a question of law for the court. *See* CV1610 (Absolute Privilege) and CV1611 (Conditional Privilege).

CV1604 Definition: Publication.

[Name of plaintiff] must prove [name of defendant] “published” the allegedly defamatory statements. Publication means [name of defendant] communicated the statements to a person other than [name of plaintiff]. Publication can be oral, written, or non-verbal if a person’s non-verbal conduct specifically communicates facts about the plaintiff. “Written” statements include statements that are communicated electronically or digitally.

References

Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325

MUJI 1st Instruction

No analogue

Committee Notes

None

CV1605 Definition: About the Plaintiff.

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her]. This means that the person to whom the statement was published must have understood that it identifies [name of plaintiff], or that it is probable that a reasonable member of the public would understand the statement as referring to [name of plaintiff]. Statements that are so vague or general that a reasonable person would not understand them to refer to the plaintiff are not actionable.

References

Pratt v. Nelson, 2007 UT 41, 164 P.3d 366

MUJI 1st Instruction

10.6

Committee Notes

When allegedly defamatory statements refer to a group rather than a specific individual, they are subject to the group defamation rule, which is addressed in a separate instruction. *See* CV1615 (Group Defamation Rule).

CV1606 Definition: False Statement of Fact.

[Name of plaintiff] must prove the allegedly defamatory statement is a materially false statement of fact capable of being verified as true or false. A true statement cannot be the basis of a defamation claim, no matter how annoying, embarrassing, damaging, or insulting it may be. “False” means that the statement is either directly untrue or that it implies a fact that is untrue. You should determine the truth or falsity of the statement according to the facts as they existed at the time [name of defendant] published the statement. “Truth” does not require that the statement be absolutely, totally, or literally true. The statement need only be substantially true, which means the gist of the statement is true. When a statement is so near the truth that fine distinctions must be drawn on words pressed out of their ordinary meanings in order to be considered false, you should consider the statement as being true.

References

Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Oman v. Davis Sch. Dist., 2008 UT 70, 194 P.3d 956
Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)
Brehany v. Nordstrom, Inc., 812 P.2d 49 (Utah 1991)
Auto West, Inc. v. Baggs, 678 P.2d 286 (Utah 1984)

MUJI 1st Instruction

10.4

Committee Notes

None

CV1607 Definition: Opinion.

A statement that expresses a mere opinion or belief rather than a verifiable statement of fact is protected by the Utah Constitution and is not actionable. In determining whether the allegedly defamatory statement is a statement of opinion or belief, you should consider (1) the common usage or meaning of the words used; (2) whether the statement is capable of being objectively verified as true or false; (3) the context of the entire [publication] in which the statement appears, including all other statements made in that [publication]; and (4) the broader context in which the [publication] was made. The only situation in which a statement of opinion can be the basis of a defamation claim is when the statement of opinion implies verifiable facts that are false and defamatory.

References

Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)
Utah Const. art. 1, §§ 1, 15

MUJI 1st Instruction

No analogue

Committee Notes

None

CV1608 Definition: Defamatory Meaning.

To support a defamation claim, the Plaintiff must prove the statement at issue is defamatory. A statement may be false but not necessarily defamatory.

A statement is defamatory if it impeaches a person's honesty, integrity, virtue, or reputation and thereby exposes that person to public hatred, contempt, or ridicule in the eyes of the person to whom it is published or, if published to more than one person, to at least a substantial and respectable minority of its audience. A statement is not necessarily defamatory if it reports only that a person did things that you would not have done, or things of which you or other people might disapprove. A publication that is merely unpleasant, embarrassing, or uncomplimentary is not necessarily defamatory. If a statement is defamatory, it is said to have "defamatory meaning."

In determining whether a statement has defamatory meaning, you must consider the context in which the statement is made. You should consider the context of the entire [publication]. Headlines, sub-headlines, pictures, and captions [or substitute other relevant components specific to the publication at issue] are all construed together. A statement that may be defamatory on its own when viewed in isolation may not be defamatory when viewed in context of the entire [publication].

You should also consider the broader context in which the statement was made—for example, in a political campaign, public debate, dispute between competitors, or some other context in which hyperbole or harsh words may be expected. Statements that may be defamatory in one context may not be defamatory in another. If the context in which a statement appears means that a reasonable person would not be apt to take the statement at face value as a neutral statement of fact, the statement is not defamatory.

In making this determination, you should give words their usual, common, natural, and obvious meaning. When the words used could have more than one meaning, the meaning that is least defamatory will be presumed to be what the speaker meant, unless the context demands otherwise.

References

Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
O'Connor v. Burningham, 2007 UT 58, 165 P.3d 1214
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)
Allred v. Cook, 590 P.2d 318 (Utah 1979)
Mast v. Overson, 971 P.2d 928 (Utah Ct. App. 1998)
Hogan v. Winder, 762 F.3d 1096 (10th Cir. 2014)
Restatement (Second) of Torts § 559 (1977)

MUJI 1st Instruction

10.5

Committee Notes

The initial determination of whether a statement is capable of defamatory meaning is a question of law for the court, rather than the jury. *See Jacob v. Bezzant*, 2009 UT 37, ¶ 26, 212 P.3d 535; *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994). This instruction is included only in the event the court determines the statements at issue are capable of sustaining a defamatory meaning, in which case it is for the jury to determine whether they were so understood by the person to whom they are published or, if published to more than one person, to at least a substantial and respectable minority of the audience.

CV1609 Definition: Substantial and Respectable Minority.

To be defamatory, a statement must damage a person's reputation in the eyes of the person to whom it is published or, if published to more than one person, to at least a substantial and respectable minority of its audience. It is not enough that the communication would be defamatory in the view of a single individual or a very small group of persons if the group is not large enough to constitute a substantial minority. If the communication is defamatory only in the eyes of a minority group, it must be shown that it has reached one or more persons in that group, although if it is published in a publication or medium of general and broad circulation it will be presumed, unless the contrary is shown, that it was read or viewed by them. Although defamation is not a question of majority opinion, neither is it a question of the existence of some individual or individuals with peculiar beliefs who view as defamatory something the vast majority of people regard as innocent. And even if a statement injures another in the eyes of a substantial group, it is not defamatory if that group has beliefs so offensive or anti-social that it is not proper for the courts to recognize them.

References

West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)

Mast v. Overson, 971 P.2d 928 (Utah Ct. App. 1998)

Restatement (Second) of Torts § 559 cmt. d (1977)

MUJI 1st Instruction

No analogue

Committee Notes

None

CV1610 Absolute Privilege.

An otherwise defamatory statement cannot support a defamation claim if the statement is privileged. The Court has already determined as a matter of law that the statements [insert privileged statements] are covered by the [insert] privilege recognized under Utah law. This privilege is absolute and protects allegedly defamatory statements [insert applicable description]. As a result, statements covered by this privilege cannot be the basis of a defamation claim. If

you have heard evidence of statements the court has determined are covered by this privilege, the court will instruct you regarding those specific statements.

References

Moss v. Parr Waddoups Brown Gee & Loveless, 2012 UT 42, 285 P.3d 1157
Pratt v. Nelson, 2007 UT 41, 164 P.3d 366
O'Connor v. Burningham, 2007 UT 58, 165 P.3d 1214
Riddle v. Perry, 2002 UT 10, 40 P.3d 1128
Krouse v. Bower, 2001 UT 28, 20 P.3d 895
DeBry v. Godbe, 992 P.2d 979 (Utah 1999)
Price v. Armour, 949 P.2d 1251 (Utah 1997)
Allen v. Ortez, 802 P.2d 1307 (Utah 1990)
Thompson v. Community Nursing Serv. & Hospice, 910 P.2d 1267 (Utah Ct. App. 1996)

MUJI 1st Instruction

No analogue

Committee Notes

Because applicability of a privilege is a matter of law for the court, *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 900 (Utah 1992), this instruction assumes, and should be used only if, the court has already made that determination and will instruct the jury as to its effect. The instruction should be adapted to describe whatever particular privilege is at issue. Examples of absolute privileges recognized under Utah law include, but are not limited to, the judicial proceedings privilege, *see DeBry v. Godbe*, 1999 UT 111, 992 P.2d 979, and legislative proceedings privilege, *see Riddle v. Perry*, 2002 UT 10, 40 P.3d 1128.

CV1611 Conditional Privilege.

An otherwise defamatory statement cannot support a defamation claim if the statement is privileged. The Court has already determined as a matter of law that the statements [insert privileged statements] are covered by the [insert] privilege recognized under Utah law. The purpose of the [insert] privilege is [insert]. This privilege protects allegedly defamatory statements [insert applicable description].

Because the [insert] privilege applies to [name of defendant]'s statements, [name of plaintiff] cannot recover on [his/her] defamation claim unless [he/she] can prove by a preponderance of the evidence that [name of plaintiff] abused the privilege. There are three ways to prove abuse of a conditional privilege: common law malice, actual malice, and excessive publication.

To prove common law malice, [name of plaintiff] must prove that in making the allegedly defamatory statements, [name of defendant] was motivated primarily by ill will and spite towards [name of plaintiff], rather than some other reason.

To prove actual malice, [name of plaintiff] must prove that at the time [name of defendant] made the allegedly defamatory statements, [name of defendant] had actual knowledge the statements were false or actually entertained serious doubts as to whether the statements were true. The

question is not whether a reasonable person would have known that the statements were false, but whether [name of defendant] actually had such knowledge at the time of publication.

To prove excessive publication, [name of plaintiff] must prove that [name of defendant] published the statements to more persons than needed to serve the purpose of the privilege described above.

If you find that [name of plaintiff] has failed to prove common law malice, actual malice, or excessive publication, then the [insert] privilege bars [name of plaintiff]'s defamation claim.

References

Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Ferguson v. Williams & Hunt, Inc., 2009 UT 49, 221 P.3d 205
Pratt v. Nelson, 2007 UT 41, 164 P.3d 366
O'Connor v. Burningham, 2007 UT 58, 165 P.3d 1214
Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325
Wayment v. Clear Channel Broad., Inc., 2005 UT 25, 116 P.3d 271
Krouse v. Bower, 2001 UT 28, 20 P.3d 895
Russell v. Thomson Newspapers, Inc., 842 P.2d 896 (Utah 1992)
Brehany v. Nordstrom, Inc., 812 P.2d 49 (Utah 1991)
Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981)
Combes v. Montgomery Ward & Co., 228 P.2d 272 (Utah 1951)

MUJI 1st Instruction

No analogue

Committee Notes

Because applicability of a privilege is a matter of law for the court, *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 900 (Utah 1992), this instruction assumes, and should be used only if, the court has already made that determination and will instruct the jury as to its effect. The instruction should be adapted to describe whatever particular privilege is at issue. Examples of conditional privileges recognized under Utah law include, but are not limited to, the public interest privilege, *see Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535, Utah Code § 45-2-3(5); publisher's interest privilege, *see Brehany v. Nordstrom*, 812 P.2d 49 (Utah 1991); police report privilege, *Murphree v. U.S. Bank of Utah, N.A.*, 293 F.3d 1220, 1223 (10th Cir. 2002); common interest privilege, *see Lind v. Lynch*, 665 P.2d 1276 (Utah 1983), Utah Code § 45-2-3(3); family relationships privilege, *see O'Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214; fair report privilege, *see Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896 (Utah 1992), Utah Code § 45-2-3(4) and (5); and neutral reportage privilege, *see Schwarz v. Salt Lake Tribune*, No. 20030981, 2005 WL 1037843 (Utah Ct. App. May 5, 2005) (unpublished).

With regard to the test for actual malice, the requirement of subjective knowledge is based on the discussion in *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 30, 221 P.3d 205, which held that “[t]o prove knowledge of falsity, a plaintiff must present evidence that shows the defendant knows the defamatory statement is untrue. Likewise, acting with reckless disregard as to falsity involves a showing of subjective intent or state of mind.” Nonetheless, *Ferguson* did recognize

certain rare circumstances in which the reckless disregard test could have an objective element: “But while reckless disregard is substantially subjective, certain facts may show, regardless of the publisher’s bald assertions of belief, that ‘the publisher’s allegations are so inherently improbable that only a reckless man would have put them in circulation’ or that ‘there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.’ Therefore, reckless disregard as to the falsity of a statement that a defendant honestly believed to be true is determined by a subjective inquiry as to the defendant’s belief and an objective inquiry as to the inherent improbability of or obvious doubt created by the facts.” *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)). Because not all defamation claims involve allegations of inherent improbability, the committee opted not to include the objective test in the standard instruction, leaving to parties to adapt that portion depending on the facts of their cases.

CV1612 Non-actionable Statements.

During trial, you may have heard evidence about certain statements made by [name of defendant] that may be considered insulting or damaging to [name of plaintiff]. Just because you heard evidence of those statements, however, does not mean you should assume those statements can legally be the basis of a defamation claim. Evidence of those statements, for instance, may have been admitted by the court for some purpose other than proof of defamation. The court plays a gatekeeping role in determining which statements cannot support a defamation claim as a matter of law, such as where statements are protected by privilege or are incapable of sustaining a defamatory meaning. For purposes of your deliberations, even though you heard evidence of them, you are instructed that the following statements cannot be the basis of [name of plaintiff]’s defamation claim: [insert specific non-actionable statements].

References

Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
O’Connor v. Burningham, 2007 UT 58, 165 P.3d 1214

MUJI 1st Instruction

No analogue

Committee Notes

This instruction recognizes that even where the court makes a determination that certain statements are non-actionable defamation as a matter of law, those statements may still be presented to jury for some other purpose or may have been presented prior to the court’s legal determination. For that reason, and to effectuate the court’s gatekeeping function in defamation cases, this instruction is designed to cure any prejudicial implication that non-actionable but otherwise admitted statements can support a defamation claim.

CV1613 Definition: Requisite Degree of Fault – Private Figure – Matter of Public Concern.

The Court has already determined as a matter of law that [name of plaintiff] is a private figure and that the subject matter of the allegedly defamatory statements pertains to a matter of public concern. As a result, [name of plaintiff] cannot recover on [his/her] defamation claim unless you find [he/she] has proven by a preponderance of the evidence that [name of defendant] made the

allegedly defamatory statements with negligence. To prove negligence, [name of plaintiff] must prove that at the time [name of defendant] made the allegedly defamatory statements, [name of defendant] did not take reasonable care to ascertain that nothing substantially false was published. Reasonable care is the degree of care and caution or attention that a reasonable person would use under similar circumstances.

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
Ferguson v. Williams & Hunt, Inc., 2009 UT 49, 221 P.3d 205
Oman v. Davis Sch. Dist., 2008 UT 70, 194 P.3d 956
Wayment v. Clear Channel Broad. Inc., 2005 UT 25, 116 P.3d 271
Russell v. Thomson Newspapers, Inc., 842 P.2d 896 (Utah 1992)
Cox v. Hatch, 761 P.2d 556 (Utah 1988)
Van Dyke v. KUTV, 663 P.2d 52 (Utah 1983)
Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981)

MUJI 1st Instruction

No analogue

Committee Notes

Because the public/private figure and public concern determinations are questions for the court, *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, ¶ 17, 116 P.3d 271; *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (Powell, J.) (in plurality opinion, applying test as a matter of law); *Connick v. Myers*, 461 U.S. 138, 147-48 (1983); *Arndt v. Koby*, 309 F.3d 1247, 1252 (10th Cir. 2002), this instruction assumes, and should be used only if, the court has already made those determinations. As explained in CV1601 (Defamation – Introduction), no instruction is included on the standard of fault for private figure cases where the speech does not relate to a matter of public concern because that question has not yet been answered by the Utah Supreme Court. See *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205.

CV1614 Definition: Requisite Degree of Fault –Public Official or Public Figure.

The Court has already determined as a matter of law that [name of plaintiff] is a [public official, general purpose public figure, or limited purpose public figure]. As a result, [name of plaintiff] cannot recover on [his/her] defamation claim unless you find that [he/she] has proven by clear and convincing evidence that [name of defendant] made the allegedly defamatory statements with actual malice. To prove actual malice, [name of plaintiff] must prove that at the time [name of defendant] made the allegedly defamatory statements, [name of defendant] had actual knowledge the statements were false or actually entertained serious doubts as to whether the statements were true. The question is not whether a reasonable person would have known that the statements were false, but whether [name of defendant] actually had such knowledge at the time of publication.

References

St. Amant v. Thompson, 390 U.S. 727 (1968)
Curtis Publ'g Co v. Butts, 388 U.S. 130 (1967)

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Ferguson v. Williams & Hunt, Inc., 2009 UT 49, 221 P.3d 205
O'Connor v. Burningham, 2007 UT 58, 165 P.3d 1214
Wayment v. Clear Channel Broad. Inc., 2005 UT 25, 116 P.3d 271
Cox v. Hatch, 761 P.2d 556 (Utah 1988)
Van Dyke v. KUTV, 663 P.2d 52 (Utah 1983)
Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981)

MUJI 1st Instruction

10.2

Committee Notes

Because the public official/public figure determination is one for the court, *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, ¶ 17, 116 P.3d 271, this instruction assumes, and should be used only if, the court has already made that determination. For a discussion of the subjective nature of the actual malice standard, see CV1611 (Conditional Privilege), Committee Notes.

CV1615 Group Defamation Rule.

To be actionable, a defamatory statement must refer to [name of plaintiff]. In general, statements that refer only to a group or class of people are not actionable. [Name of plaintiff] can maintain a defamation claim based on such a statement if and only if [he/she] shows (1) the referenced group or class is so small that a reasonable person would understand the statement as specifically referring to [name of plaintiff]; or (2) given the circumstances of publication, a reasonable person would understand the statement as specifically referring to [name of plaintiff]. The fact that a referenced group is large does not by itself preclude [name of plaintiff] from showing that, under the circumstances, a reasonable person would still understand the statement as specifically referring to [name of plaintiff].

References

Pratt v. Nelson, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564A (1977)

MUJI 1st Instruction

No analogue

Committee Notes

The Restatement provides the following illustrative examples of this rule: “A newspaper publishes the statement that the officials of a labor organization are engaged in subversive activities. There are 162 officials. Neither the entire group nor any one of them can recover for defamation.... A newspaper publishes a statement that the officers of a corporation have embezzled its funds. There are only four officers. Each of them can be found to be defamed.” Restatement (Second) of Torts § 564A cmt. a (1977).

CV1616 Damages – In General.

In order to prove a claim for defamation, [name of plaintiff] must prove by a preponderance of the evidence that the statements [he/she] alleges are defamatory proximately caused [name of plaintiff] damage.

You should only award [name of plaintiff] damages that were proximately caused by the defamation. You may not award damages which were the result of other acts of [name of the defendant], such as publication of statements that are true, non-defamatory, privileged, or otherwise fail to satisfy the elements of a defamation claim. You also may not award damages that were caused by [name of plaintiff's] own activities.

There are four types of damages that may be available if you determine that [name of plaintiff] has proven damage: (1) nominal, (2) special, (3) general, and (4) punitive. Each of these types of damages is explained in following instructions.

References

Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535

Proctor v. Costco Wholesale Corp., 2013 UT App 226, 311 P.3d 564

Thurston v. Workers Comp. Fund of Utah, 2003 UT App 438, 83 P.3d 391

MUJI 1st Instruction

10.11

Committee Notes

There is no clear Utah authority on what “presumed damages” encompass in defamation cases. *Cf. Westmont Mirador, LLC v. Miller*, 2014 UT App 209, ¶ 5, ___ P.3d ___ (suggesting presumed damages without proof of actual injury are limited to nominal damages); Restatement (Second) of Torts § 621 & cmt. b (1977) (interpreting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), as prohibiting presumed damages in all cases and requiring proof of actual injury). Rather than constituting a separate category of damages, the term appears to refer to an *entitlement* to either nominal or general damages in cases involving statements that are defamatory *per se*. Accordingly, the presumption of injury is treated in CV1617 (Damages – Defamation *Per Se*) rather than as a separate category of damages.

CV1617 Damages – Defamation *Per Se*.

The types of damages that [name of plaintiff] is entitled to receive may depend on whether you find that [name of defendant] published a statement that is considered defamatory *per se*.

A statement is defamatory *per se* if it accuses the plaintiff of (1) criminal conduct, (2) having contracted a loathsome disease, (3) unchaste behavior (but only if the plaintiff is a woman), or (4) conduct incongruous with the exercise of a lawful business, trade, profession, or office.

The Court has determined that the statement [text of statement] falls within at least one of these categories and thus is defamatory *per se*. If you find that [name of plaintiff] has proven by a preponderance of the evidence that [name of defendant] published that statement, you may

presume that [name of plaintiff] has been damaged and thus is entitled at least to nominal damages. This presumption does not mean that [name of plaintiff] need not prove the amount of such damage if [he/she] seeks more than nominal damages.

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Larson v. SYSCO Corp., 767 P.2d 557 (Utah 1989)
Baum v. Gillman, 667 P.2d 41 (Utah 1983)
Westmont Mirador, LLC v. Miller, 2014 UT App 209, ___ P.3d ___

MUJI 1st Instruction

10.8, 10.9

Committee Notes

As explained in CV1601 (Defamation – Introduction), there was a historical distinction between the tests for defamation *per se* depending on whether the statements were slander or libel. Some older authority suggests the four-category test described in this instruction applies only to slander, while the test for libel *per se* is whether the “words must, on their face, and without the aid of extrinsic proof, be unmistakably recognized as injurious.” *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 977 n.7 (Utah 1981). Subsequent to *Seegmiller*, however, Utah courts have applied the four-category test to written statements, rather than the more amorphous test for libel *per se*. See, e.g., *Larson v. SYSCO Corp.*, 767 P.2d 557, 560 (Utah 1989); *Westmont Mirador, LLC v. Miller*, 2014 UT App 209, ¶ 2, ___ P.3d ___. In *Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535, the Utah Supreme Court addressed this issue and explained that the tests for libel and slander *per se* were not distinct, but that “the *Larson* categories merely define injurious words as mentioned in *Seegmiller*.” *Id.* at ¶ 26. Accordingly, and due to the increasingly anachronistic nature of a distinction between oral and written communication, this instruction employs the *Larson* categories and does not distinguish between libel *per se* and slander *per se*.

With regard to what presumed damages encompass, although the Utah Supreme Court has not addressed the issue, the Utah Court of Appeals has suggested that a plaintiff who proves defamation *per se* but presents no proof of actual injury is not entitled to recovery beyond nominal damages. See *Westmont Mirador, LLC v. Miller*, 2014 UT App 209, ¶ 5, ___ P.3d ___. This instruction reflects that principle. Although the non-binding plurality in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J.) construed the holding of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) as applying only to statements relating to matters of public concern, other authorities, including the Restatement, have more broadly interpreted *Gertz* to constitutionally prohibit presumed damages in all defamation contexts, requiring proof of actual injury. See Restatement (Second) of Torts § 621 & cmt. b (1977) (“Though the action in the *Gertz* case was one of libel and the defendant would be classified within the term, news media, and the defamatory statement involved a matter of public concern, there is little reason to conclude that the constitutional limitation on recoverable damages will be confined to these circumstances.”). Because nominal damages likely do not offend the constitutional protections against presumed and punitive damages established in *Gertz*, limiting presumed damages absent proof of actual injury to nominal damages avoids this potential constitutional problem and makes

it unnecessary in this instruction to distinguish between purely private cases and cases involving public officials, public figures, or speech relating to matters of public concern.

CV1618 Damages – Nominal Damages.

If you find that [name of defendant] published a statement that is defamatory *per se*, but [name of plaintiff] has failed to prove any actual injury resulting from the statement, you may still award [name of plaintiff] nominal damages. Nominal damages should be an insignificant amount. Nominal damages should not be awarded if you award special, general, or punitive damages.

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
Westmont Mirador, LLC v. Miller, 2014 UT App 209, ___ P.3d ___

MUJI 1st Instruction

No analogue

Committee Notes

None

CV1619 Damages – Special Damages.

Special damages are awarded to compensate a plaintiff for actual and specific monetary losses that are proximately caused by the publication of a defamatory statement. Special damages are out-of-pocket economic losses and do not include general compensation for injury to reputation, which are general damages. [Name of plaintiff] must prove each item of special damages with specific evidence.

References

Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325
Baum v. Gillman, 667 P.2d 41 (Utah 1983)
Allred v. Cook, 590 P.2d 318 (Utah 1979)
Prince v. Peterson, 538 P.2d 1325 (Utah 1975)
Cohn v. J.C. Penney Co., Inc., 537 P.2d 306 (Utah 1975)
Nichols v. Daily Reporter Co., 83 P. 573 (Utah 1905)
Utah R. Civ. P. 9(g)
Restatement (Second) of Torts § 575 cmt. b (1977)

MUJI 1st Instruction

10.11

Committee Notes

Examples of special damages include loss of salary, employment, income, business, and other similar economic losses. Utah courts have not addressed whether medical expenses incurred as a proximate result of defamation are recoverable as special damages, and courts in other

jurisdictions are split on that issue. With regard to attorneys' fees, it is important to distinguish between a claim for defamation and a claim for "slander of title." Although the two claims share some nomenclature, they are distinct claims. See *Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 568 (Utah 1988). While attorneys' fees incurred in clearing a cloud placed on a title are recoverable as special damages in a slander of title claim, *see id.*, Utah courts have not recognized attorneys' fees as special damages in a defamation claim. See *Computerized Thermal Imaging, Inc. v. Bloomberg, L.P.*, 312 F.3d 1292, 1299-1300 & n.15 (10th Cir. 2002) (distinguishing slander of title and holding attorneys' fees on defamation claim are "an element of special damages not recognized by Utah law").

CV1620 Damages – General Damages.

You may award general damages to [name of plaintiff] if you find [name of plaintiff] was actually injured by a statement published by [name of defendant] that is defamatory *per se*. If the statement at issue is defamatory, but not defamatory *per se*, you may award general damages only if [name of plaintiff] also proves and you choose to award special damages.

General damages are awarded to compensate a plaintiff for actual injury to [his/her] reputation that is proximately caused by publication of a defamatory statement, but that have not been compensated for by special damages. General damages do not include specific monetary losses covered by special damages. Factors you may consider in calculating general damages are impairment of reputation, standing in the community, humiliation, shame, mental anguish and suffering, emotional distress and related physical injury, and other similar types of injuries. In making this determination, you may consider the state of [name of plaintiff's] reputation prior to the alleged defamation.

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Baum v. Gillman, 667 P.2d 41 (Utah 1983)
Allred v. Cook, 590 P.2d 318 (Utah 1979)
Prince v. Peterson, 538 P.2d 1325 (Utah 1975)
Proctor v. Costco Wholesale Corp., 2013 UT App 226, 311 P.3d 564
Thurston v. Workers Comp. Fund of Utah, 2003 UT App 438, 83 P.3d 391
Restatement (Second) of Torts § 621 (1977)

MUJI 1st Instruction

10.11

Committee Notes

The term "actual injury" in this context refers to a determination that the plaintiff has actually suffered damages, as opposed to merely relying on the *presumption* of injury for statements that are defamatory *per se*, which entitles a plaintiff only to nominal damages. "Actual injury" can refer either to general or special damages, the former concerned with harm to reputation, standing in the community, and the other factors listed in this instruction, and the latter concerned with pecuniary, out-of-pocket losses. Actual injury in the context of general damages

typically requires the plaintiff to put on evidence that his or her reputation has been diminished, that he or she has suffered humiliation, shame, mental anguish, suffering, and other similar types of injuries.

CV1621 Damages – Punitive Damages – Public Figure/Official and/or Issue of Public Concern

Punitive damages are awarded only to punish a defendant and as a warning to others not to engage in similar conduct. Punitive damages are not designed to compensate the plaintiff for actual injuries suffered. Punitive damages should be awarded with caution and may only be awarded if three conditions are met.

First, you must have awarded either special or general damages (or both) on [name of plaintiff]’s defamation claim.

Second, [name of plaintiff] must have proven by clear and convincing evidence that [name of defendant] acted with actual malice in defaming [name of plaintiff]. To prove actual malice, [name of plaintiff] must prove that at the time [name of defendant] made the allegedly defamatory statements, [name of defendant] had actual knowledge the statements were false or actually entertained serious doubts as to whether the statements were true. The question is not whether a reasonable person would have known that the statements were false, but whether [name of defendant] actually had such knowledge at the time of publication.

Third, [name of plaintiff] must have proven by clear and convincing evidence that [name of defendant]’s defamation of [name of plaintiff] was the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of [name of plaintiff].

All three of these conditions must be met for you to consider an award of punitive damages. If you choose to award punitive damages, the amount of that award should bear some relation to the amount of special and/or general damages awarded on the defamation claim. Punitive damages that are many multiples of the amount awarded in special and/or general damages may be held unreasonable.

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
Ferguson v. Williams & Hunt, Inc., 2009 UT 49, 221 P.3d 205
Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325
Cox v. Hatch, 761 P.2d 556 (Utah 1988)
Utah Code § 78B-8-201(1)(a)

MUJI 1st Instruction

10.12

Committee Notes

The Model Utah Jury Instructions 2d contains a general instruction for punitive damages (CV2026). Due to the unique nature of defamation claims and the constitutional interests at stake, this instruction should be used for defamation claims, rather than the general instruction. For a discussion of the subjective nature of the actual malice standard, *see* CV1611 (Conditional Privilege), Committee Notes.

CV1622 Damages – Punitive Damages – Private Figure and No Issue of Public Concern

Punitive damages are awarded only to punish a defendant and as a warning to others not to engage in similar conduct. Punitive damages are not designed to compensate the plaintiff for actual injuries suffered. Punitive damages should be awarded with caution and may only be awarded if two conditions are met.

First, you must have awarded either special or general damages (or both) on [name of plaintiff]’s defamation claim.

Second, [name of plaintiff] must have proven by clear and convincing evidence that [name of defendant]’s defamation of [name of plaintiff] was the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of [name of plaintiff].

Both of these conditions must be met for you to consider an award of punitive damages. If you choose to award punitive damages, the amount of that award should bear some relation to the amount of special and/or general damages awarded on the defamation claim. Punitive damages that are many multiples of the amount awarded in special and/or general damages may be held unreasonable.

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
Ferguson v. Williams & Hunt, Inc., 2009 UT 49, 221 P.3d 205
Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325
Cox v. Hatch, 761 P.2d 556 (Utah 1988)
Utah Code § 78B-8-201(1)(a)

MUJI 1st Instruction

10.12

Committee Notes

Neither the United States Supreme Court nor the Utah Supreme Court has addressed whether the *Gertz* actual malice requirement for punitive damages in cases involving public officials, public figures, and/or speech relating to a matter of public concern also applies in cases involving private figures and speech that does not relate to a matter of public concern. *Cf. Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J.) (in plurality opinion, declining to extend actual malice rule). Because the rule has not been extended, the committee has included this instruction, which incorporates only the statutory requirements for punitive

damages. Because it is an unresolved question, however, an argument could be made that the law should be extended to require a showing of actual malice to obtain punitive damages in this context.

CV1623 Damages – Effect of Retraction.

If you find the allegedly defamatory statements were [published in the newspaper] [broadcast on the radio or television] by [name of defendant] in good faith due to a mistake or misapprehension of the facts, and that [name of defendant] made a full and fair retraction of the statements within [the time prescribed by statute] of [name of plaintiff]’s demand for a retraction or filing of this lawsuit by [the method prescribed by statute], then [name of plaintiff] may recover only those actual damages incurred by [name of plaintiff] as a direct result of the [publication] [broadcast] of the allegedly defamatory statements and no punitive damages may be awarded. A retraction is full and fair if it sufficiently retracts the previously [published] [broadcasted] falsity so that a reasonable person under the circumstances [reading] [hearing] the retraction would understand that the falsity had been retracted, without any untrue reservation.

References

Utah Code §§ 45-2-1 to 1.5

MUJI 1st Instruction

10.13

Committee Notes

Several different retraction methods are prescribed by statute, Utah Code §§ 45-2-1 to 1.5, depending on the circumstances of the newspaper publication or radio or television broadcast. This instruction should be modified to reflect those methods.

CV1624 Affirmative Defense – Consent.

Consent is an absolute defense to a claim for defamation. If [name of defendant] proves by a preponderance of the evidence that [name of plaintiff] consented, by words or conduct, to [name of defendant]’s communication of the statement(s) at issue to others, there is no liability for defamation.

References

Cox v. Hatch, 761 P.2d 556 (Utah 1988)
Restatement (Second) of Torts § 583 (1977)

MUJI 1st Instruction

No analogue.

Committee Notes

None

CV1625 Affirmative Defense – Statute of Limitations.

An action for defamation must be commenced within one year of the time that [name of plaintiff] could have reasonably discovered publication of the statement. An alleged defamation is reasonably discoverable, as a matter of law, at the time it is first published and disseminated in a publication that is widely available to the public.

References

Russell v. The Standard Corp., 898 P.2d 263 (Utah 1995)

Allen v. Ortez, 802 P.2d 1307 (Utah 1990)

Utah Code § 78B-2-302(4)

MUJI 1st Instruction

No analogue.

Committee Notes

Application of a statute of limitations is normally a question of law for the court, but in certain limited circumstances a court may determine that a question of fact exists as to when a plaintiff should have reasonably discovered the allegedly defamatory statement. This instruction is intended for such limited circumstances.
