

Agenda

Advisory Committee on Model Civil Jury Instructions

November 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

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|--|-------|------------------------------|
| Welcome and approval of minutes | Tab 1 | Juli Blanch - Chair |
| Subcommittees and subject area timelines | Tab 2 | Juli Blanch |
| Defamation/Slander/Libel Instructions | Tab 3 | David Reymann & subcommittee |

[Committee Web Page](#)

[Published Instructions](#)

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

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

October 19, 2015

4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Patricia C. Kuendig, Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester. Also present: David C. Reymann, from the Defamation subcommittee

Excused: Gary L. Johnson, Peter W. Summerill

1. *Minutes*. On motion of Mr. Fowler, seconded by Judge Stone, the minutes of the September 14, 2015 meeting were approved.

2. *Defamation Instructions*. The committee continued its review of the defamation instructions.

a. *CV1604. Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff Is Reasonable*. Mr. Reymann explained that legal standards in defamation cases vary depending on the status of the plaintiff and the subject of the allegedly defamatory statement, as set out more fully in the committee note to CV1604. Instructions CV1604-08 present the different possibilities. Ordinarily, only one of the instructions would be given in a case, unless the case involved different statements each of which was claimed to be defamatory and which involved different standards. CV1604 deals with a plaintiff who is a public figure or public official where the connection between the statement and the plaintiff is reasonable. The committee added a sentence to the end of the fourth paragraph of the committee note saying, “In the unusual case where different standards apply to different statements, the court will have to instruct as to the specific statements.”

Dr. Di Paolo joined the meeting.

Ms. Blanch suggested breaking out the separate elements in the third paragraph into separate subparagraphs, (1) and (2). Mr. Ferre asked whether the “intentionally blind” standard came from the case law. Mr. Reymann explained that the language is not used in the cases, but that a “reckless disregard” standard would not be appropriate for situations where the defendant was not in fact aware of facts or circumstances that would cause someone to reasonably understand that the statement referred to the plaintiff. Reckless disregard implies a negligence standard, which is not constitutionally permissible in the case of public figures or officials. At Ms. Kuendig’s suggestion, CV1604 was revised to read:

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].

To do so, [name of plaintiff] must prove that one or more of the recipients of the statement actually understood the statement to be referring to [name of plaintiff] and either:

1. [name of defendant] intended the statement to refer to [name of plaintiff], or
2. [name of defendant] knew or was intentionally blind to the facts or circumstances that would cause the recipient to reasonably understand the statement as referring to [name of plaintiff].

On motion of Mr. Simmons, seconded by Ms. Blanch, the committee approved the instruction as modified.

b. *CV1605. Definition: About the Plaintiff – Private Plaintiff – Matter of Public Concern – Connection to Plaintiff Is Reasonable.* The committee revised CV1605 to track CV1604, except that it replaced the “knew or was intentionally blind” standard with “acted negligently in causing the recipient to reasonably understand the statement as referring to [name of plaintiff].” On motion of Mr. Simmons, seconded by Mr. Fowler, the committee approved the instruction as revised.

c. *CV1606, Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff Is Reasonable – Negligence Required; and CV1607, Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff Is Reasonable – Strict Liability Allowed.* Mr. Reymann explained that CV1606 and CV1607 dealt with purely private cases, and no U.S. or Utah Supreme Court case has decided what level of fault is permissible in such cases. CV1606 is identical to CV1605 and applies a negligence standard. CV1607 provides for strict liability. Because they are alternative instructions treating the same situation, Ms. Blanch suggested making them 1606A and 1606B. Judge Stone suggested doing away with CV1606 and CV1607 and saying in the committee note to CV1605 that, if the case does not involve a matter of public concern (that is, if it is a purely private case), it is an open question as to whether the defendant can be strictly liable or whether the plaintiff has to prove negligence. If strict liability applies, then the court could omit subparagraph 2. He was reluctant to publish what amounts to a hypothetical jury instruction. Judge Harris, on the other hand, thought the only open issue was whether the proper instruction would be CV1606 or CV1607 and

that it would be more helpful to offer both alternatives. At Ms. Kuendig's suggestion, the second sentence of CV1607 was revised to read, "[Name of plaintiff] must prove that one or more of the recipients" The committee also deleted "Required" from the title of CV1606 and "Allowed" from the title of CV1607. On motion of Mr. Ferre, seconded by Mr. Simmons, the committee approved the instructions as revised.

d. *CV1608. Definition: About the Plaintiff – Connection to Plaintiff Is Unreasonable.* Mr. Reymann explained that, at common law, if the defendant did not intend a connection between the statement and the plaintiff and it would be unreasonable to draw such a connection, there was no liability. If the defendant did not intend the statement to refer to the plaintiff but the recipients understood it to refer to the plaintiff, their understanding must have been reasonable. Ms. Kuendig questioned whether it was proper to tell the jury that the court had found the connection unreasonable. Dr. Di Paolo suggested that it could prime the jury to find one way or the other and that reasonableness depends on the audience.

Mr. Ferre was excused.

The committee thought it was better not to tell the jury that the court had already determined that the connection was unreasonable. Dr. Di Paolo asked whether the instruction was even necessary or whether the issue could be covered in a committee note. Mr. Reymann noted that the instruction was necessary because intent is required. At Ms. Kuendig's suggestion, the instruction was revised to read:

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her]. To do so, [name of plaintiff] must prove that:

1. [name of defendant] intended the defamatory statement to refer to [name of plaintiff], and
2. one or more of the recipients of the statement actually understood the statement to be referring to [name of plaintiff].

Ms. Kuendig also suggested deleting "Connection to Plaintiff Is Unreasonable" from the title of the instruction. Judges Harris and Stone said that they do not leave the titles of the instructions in when they give them to the jury, but the committee noted that some other judges do.

At Judge Stone's suggestion, the committee renumbered instructions CV1604-08 as CV1604A-E. Ms. Kuendig suggested saying in the introductory instruction, CV1601, that only one of the five 1604 instructions will probably apply in a given case. Mr. Reymann noted that the cross-references to CV1604 in the committee notes need to be changed to CV1604A. Judge Stone thought that some of the notes could be consolidated. He noted that the court decides whether a given statement is a matter of public concern and whether any connection to the plaintiff is unreasonable. He suggested that the comments be modified to say which instruction goes with each type of statement.

Ms. Kuendig suggested adding an introductory instruction that says, "[Name of plaintiff] alleges that [name of defendant] made the following defamatory statements." But Mr. Reymann pointed out that the parties often disagree about what exactly the statements at issue are.

On motion of Ms. Kuendig, seconded by Ms. Blanch, the committee approved instructions CV1604A-E.

e. *CV1609 [renumbered 1605]. Definition: False Statement of Fact.* Mr. Reymann said that the last sentence was from MUJI 1st. He did not know where MUJI 1st got the statement from and thought it could be left out. Dr. Di Paolo liked it and thought it was clear. But she was still concerned with "materially." She suggested replacing "materially false" with "a false statement of considerable importance." But it is not the subject of the statement that must be material but its truth or falsity. Judge Harris suggested "significantly false." Judge Stone thought "significantly" sounded quantitative. He suggested "false in a way that matters." Mr. Simmons suggested treating "materially false" like the committee treated "proximate cause," i.e., drop the modifier and say that in this context "false" (or "cause") has a particular meaning that the jury is required to use and then define "false" to comply with the definition of "materially false." Mr. Reymann expressed concern about departing from settled law. Ms. Blanch suggested giving an example, but Mr. Reymann said the subcommittee intentionally avoided giving examples, which could be misconstrued. The committee considered the order of the sentences in CV1609. Judge Harris suggested defining "false" before defining "materially false." Dr. Di Paolo questioned whether the instruction should say a "false statement of fact," since "fact" implies that it is true. She thought that using "fact" and "false" in the same sentence to refer to the same statement could confuse jurors. Mr. Reymann pointed out that the cases speak of statements "of fact" to distinguish them from statements of opinion, but also noted that a statement of opinion can be actionable if it implies facts. (The committee went back and modified subparagraph (1) of CV1602 accordingly.) Mr. Reymann approved of striking "of fact" from the title and second line. Judge Harris still thought the sentence from

MUJI 1st was problematic; he did not think it was legally accurate. Mr. Reymann noted that it is similar to an Illinois legal doctrine, but there is no Utah law to support it. The committee decided to delete the sentence. Dr. Di Paolo noted that “verified” implies that something is true; she wasn’t sure that something could be “verified as true or false.” Judge Stone questioned whether it added anything. Mr. Reymann explained that it was meant to exclude statements that cannot be verified, such as religious claims. Judge Harris suggested saying that if the statement is not verifiable, it cannot be defamatory. The committee again raised the question of whose burden it is to prove truth or falsity. Mr. Reymann noted that, at common law, it was the defendant’s burden to prove the statement was true, and that may still be the law on a purely private matter, but the case law lists falsity as an element the plaintiff must prove. Mr. Reymann and Judge Harris noted that there are three separate requirements: (1) there must be a statement that states or implies facts; (2) the facts must be capable of being proved true or false; and (3) the statement must be materially false. The committee proposed the following restatement of the instruction:

[Name of plaintiff] must prove the allegedly defamatory statement is a materially false statement that can be proved true or false. “False” means that the statement is either directly untrue or that it implies a fact that is untrue. A statement is “materially false” if it is false in a way that matters, that is, if it has more than minor or irrelevant inaccuracies.

“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. 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.

At Mr. Reymann’s request, a citation to *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), was added to the beginning of the references.

The committee deferred further discussion of CV1609 (now CV1605) until the next meeting.

3. *Next meeting.* The next meeting will be Monday, November 9, 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> | <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 @ January 2016 mtg |
| 2 | Defamation | Yes | Dryer, Randy (Chair); Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David; Stevens, Greg | September-15 | December-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) | February-16 | April-16 | |
| 4 | Directors and Officers Liability | Yes | Burbidge, Richard D.; Christiansen, Erik, Call, Monica; Gurmankin, Jay | May-16 | September-16 | |
| 5 | Sales Contracts and Secured Transactions | Yes | Cox, Matt (chair); Boley, Matthew; Maudsley, Ade | October-16 | December-16 | |
| 6 | Assault/False Arrest | Yes | Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P) | January-17 | March-17 | |
| 7 | Economic Interference | Yes | Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P) | April-17 | June-17 | |
| 8 | Trespass and Nuisance | Yes (more members needed) | Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P) | September-17 | November-17 | |
| 9 | Emotional Distress | Yes | Dunn, Mark (D)(Chair); Combe, Steve (D); Katz, Mike (P); Waddoups, George (P) | December-17 | February-18 | |
| 10 | Insurance | No (more members needed) | Johnson, Gary (chair) | March-18 | May-18 | |
| 11 | Wills/Probate | No | Barneck, Matthew (chair) | June-18 | October-18 | |

Tab 3

Defamation

CV1601 Defamation—Introductory Notes to Practitioners (not to be read to the jury). Approved 9/14/15.

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 for knowledge of falsity in such cases, leaving to the parties the task of arguing for a resolution of that question.

Comment [A1]: Add reference to 1604 alternatives and the fact that one or more could be used.

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. Approved 10/19/15.

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

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

Some of these words have special meanings and they will be explained in the following instructions.

References

¹ [The committee needs to ensure that the definition of privilege is adequately addressed.](#)

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 may suffer from constitutional infirmities 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.

Element (4) is bracketed because it need not be given in a case where either no privilege has been asserted or the court has determined that the privilege is inapplicable.

CV1603 Definition: Publication. Approved 9/14/15.

[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 or actions specifically communicate 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

CV1604A Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable. Approved 10/19/15.

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].

To do so, [name of plaintiff] must prove that one or more recipients of the statements actually understood the statements to be referring to [him/her], and either:

- 1) [name of defendant] intended the statement to refer to [name of plaintiff], or
- 2) [name of defendant] knew or was intentionally blind to the facts or circumstances that would cause the recipient(s) to reasonably understand the statement(s) to refer to [name of plaintiff].

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Pratt v. Nelson, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564 (1977)

MUJI 1st Instruction

10.6

Committee Notes

This instruction should be used where the plaintiff is a public figure or public official, and the court has determined that it is reasonable to understand the statement(s) at issue to be referring to the plaintiff.

Since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the requirement that a defamatory statement be about the plaintiff, often referred to as the “of and concerning” requirement, has been one of constitutional magnitude. *See* Restatement (Second) of Torts § 564 cmt. f (1977). *Sullivan* itself involved statements made generally about “police” in Alabama that did not name Mr. Sullivan specifically. 376 U.S. at 258. The Court found the evidence supporting the “of and concerning” requirement to be “constitutionally defective,” explaining that the presumption employed by the Alabama Supreme Court struck “at the very center of the constitutionally

protected area of free expression.” *Id.* at 288, 292. This holding and the constitutional defamation cases that followed, including *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), displaced the common law rule that imposed a form of strict liability on a defamer who did not intend a statement to refer to a plaintiff, but the statement was nonetheless reasonably understood to do so. See 1 Rodney A. Smolla, *Law of Defamation* § 4:42 (2d ed. 2013) (“[T]he consensus appears to be that in cases governed by *Gertz*, fault is required not merely on the truth or falsity issue, but for all aspects of the cause of action, including reference to the plaintiff.”); see also *id.* § 4:40.50; 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2:9.1 (4th ed. 2013).

As a result of the constitutional overlay on the “of and concerning” requirement, the requirements of this element will vary depending on whether the case involves a public figure/public official plaintiff, a statement relating to a matter of public concern, or a private plaintiff alleging speech unrelated to any matter of public concern. This is similar to the varying level of fault on truth/falsity discussed in later instructions. In public official/public figure cases, mere negligence is not sufficient; therefore, this instruction requires, in cases where the reference was unintended by the defamer, knowledge of or intentional blindness to the facts or circumstances that may lead a recipient to reasonably conclude the statement at issue refers to the plaintiff. The term “intentional blindness” is used here as a counterpart to the “reckless disregard” component of the actual malice standard in the truth/falsity context. Although there is little authority interpreting the contours of the actual malice test in the “of and concerning” context, the Committee determined that “reckless disregard” was imprecise in this context because the facts and circumstances the defamer would be disregarding are facts and circumstances of which he or she is purportedly *unaware*. Using “reckless disregard” in this context therefore risks collapsing that subjective test into an objective negligence test, which would be constitutionally problematic under *Sullivan*. “Intentional blindness” is a better fit for *unknown* facts and captures situations where a defamer intentionally avoids acquiring information that would reveal the reasonable connection between the statements at issue and the plaintiff—conduct that would go beyond mere negligence.

The “of and concerning” test will also vary depending on whether it is reasonable to understand a statement as referring to the plaintiff. Like the related threshold inquiry of defamatory meaning, this determination is a question of law for the court, not the jury. See, e.g., *Gilman v. Spitzer*, 902 F. Supp. 2d 389, 394-95 (S.D.N.Y. 2012) (“Whether a challenged statement reasonably can be understood as of and concerning the plaintiff is a question of law for the Court, which ‘should ordinarily be resolved at the pleading stage.’” (quoting *Church of Scientology Int’l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001))). In cases where the defamer intended the statement to refer to the plaintiff, there is no requirement that the recipient’s actual understanding of that reference be reasonable. The element is satisfied “if [the communication] is so understood by the recipient of the communication, no matter how bizarre or extraordinary it is that the communication was in fact so understood.” *Law of Defamation* § 4:41; see also Restatement (Second) of Torts § 564 cmt. a (“If it is in fact intended to refer to him, it is enough that it is so understood even though he is so inaccurately described that it is extraordinary that the communication is correctly understood.”). If there was no such intent, an unreasonable connection cannot sustain a defamation claim. Restatement (Second) of Torts § 564 cmts. b and f. For this reason, there are five possible scenarios, and thus five instructions, for the “of and concerning” element: if the

reference is reasonable, three varying levels of fault (with the open question of the standard of fault for purely private cases divided into two possible instructions); and if the reference is unreasonable, a requirement that the plaintiff show the reference was intended. Only one of these instructions should ordinarily be used, unless a case involves multiple statements or multiple plaintiffs that fall into different categories. In the unusual case where different standards apply to different statements, the court will have to instruct as to which instructions on standards accompany which statements.

The relevant inquiry for the “of and concerning” requirement is not whether any member of the “public” would understand a statement as referring to the plaintiff, as the MUJI 1st instruction on this element suggested. The issue is whether any of the *actual* recipients of the statement understood the statement to refer to the plaintiff (and, if the reference was unintended, did so reasonably). The actual recipients of a statement may have a basis for connecting a statement to the plaintiff that is not widely known or shared with the general public. *See* Restatement (Second) of Torts § 564 cmt. b (“It is not necessary that everyone recognize the other as the person intended; it is enough that any recipient of the communication reasonably so understands it. However, the fact that only one person believes that the plaintiff was referred to is an important factor in determining the reasonableness of his belief.”).

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* CV1618 (Group Defamation Rule).

CV1604B Definition: About the Plaintiff – Private Plaintiff – Matter of Public Concern – Connection to Plaintiff is Reasonable. Approved 10/19/15.

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her]. To do so, [name of plaintiff] must prove that one or more recipients of the statements actually understood the statements to be referring to [him/her], and either:

- 1) [name of defendant] intended the statement to refer to [name of plaintiff], or
- 2) [name of defendant] acted negligently in failing to anticipate the facts or circumstances that would cause the recipient(s) to reasonably understand the statement(s) as referring to [name of plaintiff].

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Pratt v. Nelson, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564 (1977)

MUJI 1st Instruction

10.6

Committee Notes

This instruction should be used where the plaintiff is not a public official or public figure, the statement(s) relate to a matter of public concern, and the court has determined that it is reasonable to understand the statement(s) at issue to be referring to the plaintiff.

Under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the minimum level of fault required to impose liability for statements relating to a matter of public concern is negligence. *See also Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶¶ 22-23, 221 P.3d 205. “It is therefore necessary for the plaintiff to prove that a reasonable understanding on the part of the recipient that the communication referred to the plaintiff was one that the defamer was negligent in failing to anticipate. This is particularly important when the recipient knew of extrinsic facts that make the communication defamatory of the plaintiff but these facts were not known to the defamer.” Restatement (Second) of Torts § 564 cmt. f (1977).

For a more detailed discussion of the “of and concerning” requirement, *see* the Committee Notes for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable).

CV1604C Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff is Reasonable – Negligence. Approved 10/19/15.

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].

To do so, [name of plaintiff] must prove that one or more recipients of the statements actually understood the statements to be referring to [him/her], and either:

- 1) [name of defendant] intended the statement to refer to [name of plaintiff], or
- 2) [name of defendant] acted negligently in failing to anticipate the facts or circumstances that would cause the recipient(s) to reasonably understand the statement(s) as referring to [name of plaintiff].

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Pratt v. Nelson, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564 (1977)

MUJI 1st Instruction

10.6

Committee Notes

This instruction should be used where the plaintiff is not a public official or public figure, the statement(s) do not relate to a matter of public concern, the court has determined that it is reasonable to understand the statement(s) at issue to be referring to the plaintiff, and the court has determined that the plaintiff must show at least negligence to hold the defendant liable.

As discussed in CV1601, whether strict liability may be constitutionally imposed in cases involving a private plaintiff and speech that does not relate to a matter of public concern has not

been resolved by either the United States Supreme Court or the Utah Supreme Court. *See Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205. If the court determines negligence is required, this instruction should be used. If the court determines strict liability is the standard of fault, the subsequent instruction (CV1607 Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff is Reasonable – Strict Liability Allowed) should be used. Until this open question is resolved by binding appellate authority, parties will need to argue this particular issue in their individual cases.

For a more detailed discussion of the “of and concerning” requirement, *see* the Committee Notes for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable).

CV1604D Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff is Reasonable – Strict Liability. Approved 10/19/15.

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her]. To do so, [name of plaintiff] must prove that one or more of the recipients of the statement(s) actually understood the statements(s) to be referring to [name of plaintiff].

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Pratt v. Nelson, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564 (1977)

MUJI 1st Instruction

10.6

Committee Notes

This instruction should be used where the plaintiff is not a public official or public figure, the statement(s) do not relate to a matter of public concern, the court has determined that it is reasonable to understand the statement(s) at issue to be referring to the plaintiff, and the court has determined that the relevant standard of fault is strict liability.

As discussed in CV1601, whether strict liability may be constitutionally imposed in cases involving a private plaintiff and speech that does not relate to a matter of public concern has not been resolved by either the United States Supreme Court or the Utah Supreme Court. *See Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205. If the court determines strict liability is the standard of fault, this instruction should be used. If the court determines negligence is required, the previous instruction (CV1606 Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff is Reasonable – Negligence Required) should be used. Until this open question is resolved by binding appellate authority, parties will need to argue this particular issue in their individual cases.

For a more detailed discussion of the “of and concerning” requirement, *see* the Committee Notes for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable).

CV1604E Definition: About the Plaintiff – Connection to Plaintiff is Unreasonable.

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her]. ~~To do so, Because the court has already determined that it is not reasonable to understand the statement(s) at issue to be referring to [name of plaintiff],~~ [name of plaintiff] ~~can~~ must prove ~~that~~ this element only by proving that

(1) [name of defendant] intended the defamatory statement(s) to refer to [name of plaintiff], and ~~that~~

(2) one or more of the recipients of the statement(s) actually understood the statements(s) to be referring to [name of plaintiff].

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Pratt v. Nelson, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564 (1977)

MUJI 1st Instruction

10.6

Committee Notes

This instruction should be used where the court has determined that it is not reasonable to understand the statement(s) at issue to be referring to the plaintiff, regardless of whether the plaintiff is a public figure or public official, or whether the statement(s) relate to a matter of public concern.

Because the varying standard of fault only arises when the reference to the plaintiff is unintended, and because reasonableness is an essential element of liability for an unintended reference, the varying standard of fault is not relevant where the court has determined the statements cannot reasonably be understood as referring to the plaintiff. This instruction therefore applies where the connection is unreasonable regardless of the status of the plaintiff or the subject matter of the speech.

For a more detailed discussion of the “of and concerning” requirement, *see* the Committee Notes for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable).

CV1605 Definition: False Statement of Fact.²³

~~[Name of plaintiff] must prove the allegedly defamatory statement. The allegedly defamatory statement must~~

- 1) ~~states or implies facts,~~
- 2) ~~which can be proven to be false, and~~
- 3) ~~[name of plaintiff] has shown them to be false.~~

~~“False” means that the statement is either directly untrue or that it implies a fact that is untrue. In addition, a defamatory statement must be materially false. is a materially false statement of fact capable of being verified as true or false. “False” means that the statement is either directly untrue or that it implies a fact that is untrue. “Materially false” here means the statement is false in a way that is non-trivial and relevant. A statement is “materially false” if it is false in a way that matters; that is, if it has more than minor or irrelevant inaccuracies.~~

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. 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. 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

- ~~Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991)~~
- 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)
- ~~Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991)~~
- Auto West, Inc. v. Baggs*, 678 P.2d 286 (Utah 1984)

MUJI 1st Instruction

10.4

Committee Notes

None

² ~~Left off on this instruction. Committee will consider this one again.~~

Revised instruction on opinion from sub-committee

CV1606 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 cannot support a defamation claim. The only situation in which a statement of opinion can be the basis of a defamation claim is when the statement of opinion reasonably implies verifiable facts that are both false and defamatory. The court has determined that the following statement(s) are statements of opinion: [insert specific statement(s).] [This/Those] statement(s) can support a defamation claim only if [name of plaintiff] proves the statement(s) (1) reasonably implies facts that can be verified as true or false; and (2) those facts are false and defamatory. The test for whether a statement is “defamatory” is explained in the instruction entitled “Defamatory Meaning.”

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
Restatement (Second) of Torts § 566 cmt. c (1977)

MUJI 1st Instruction

No analogue

Committee Notes

The question of whether a statement is one of fact or opinion is a question of law for the court, not the jury. *West v. Thomson Newspapers*, 872 P.2d 999, 1018 (Utah 1994); Restatement (Second) of Torts § 566 cmt. c (1977). Likewise, the questions of whether a statement of opinion reasonably implies verifiable facts, and whether those facts are capable of sustaining defamatory meaning, are also questions for the court. *Id.* at 1019. Only if the court determines that a statement of opinion can reasonably imply facts capable of sustaining defamatory meaning is there a question for the jury as to whether the statement did, in fact, convey that defamatory meaning. *Id.* This instruction should be used in the event the court determines as a matter of law that one or more statements are opinion, but the statement(s) may nonetheless be actionable because they reasonably imply verifiable facts capable of sustaining defamatory meaning. The question for the jury is whether those facts were, in fact, implied, and whether the defamatory meaning was, in fact, conveyed.

CV1607 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.

CV1608 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

CV1609 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

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.

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.

CV1610 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

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.

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.

CV1611 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.

CV1612 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.

CV1613 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.

CV1614 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).

CV1615 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.

CV1616 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.

CV1617 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

CV1618 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

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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").

CV1619 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

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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.

CV1620 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

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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.

CV1621 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.

CV1622 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.

CV1623 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

CV1624 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.
