Agenda
Advisory Committee on Model Civil Jury Instructions

February 22, 2016
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, announcements, 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
Conditional Privilege/Slander of Title	Tab 4	David Reymann

Committee Web Page

Published Instructions

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

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
January 11, 2015
4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Gary L. Johnson, Paul M. Simmons, Nancy Sylvester, Christopher M. Von Maack. Also present: David C. Reymann, from the Defamation subcommittee

Excused: Patricia C. Kuendig, Honorable Andrew H. Stone, Peter W. Summerill

1. *Minutes.* On motion of Mr. Fowler, seconded by Mr. Von Maack, the minutes of the November 9, 2015 meeting were approved.

2. *Schedule.* Ms. Blanch noted that most of the subcommittees were fully staffed and on schedule. She indicated that Matthew Barneck, the chair of the Wills/Probate subcommittee was not sure that jury instructions were necessary for that subject. He was going to talk to other practitioners to see if they thought model jury instructions were needed. Judge Harris noted that the probate code provides for jury trials in some cases.

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

a. *CV1607. Definition: Defamatory*. Mr. Reymann explained that, even though the committee approved this instruction at the last meeting, he revised it in light of recent research on the question of the relative roles of the judge and jury because the approved instruction was too broad. The question of whether a statement has "defamatory meaning" is a question of law for the court to decide. The court determines whether a statement can bear the meaning the plaintiff claims it has and, if so, whether that meaning is defamatory. The only question for the jury is whether the recipient understood the statement in its defamatory sense. Mr. Simmons asked whether the instruction should only be given where a statement is ambiguous, that is, capable of two or more meanings, one of which is defamatory. Mr. Reymann explained that it should be given in every case because defamatory meaning is an element of the tort. Mr. Simmons suggested deleting the last three sentences of the last paragraph and simply say, "You must decide whether the recipient understood the statement to be defamatory." In the alternative, he suggested deleting the second sentence and revising the third. He thought that jurors would not understand what they are supposed to do with the statement, "In some cases, the defamatory meaning of a statement is the only reasonable interpretation of that statement." Other committee members thought the language was helpful.

Dr. Di Paolo joined the meeting.

At Judge Harris's suggestion, the third sentence was moved to the beginning of the paragraph. The committee revised the paragraph to read:

> Some statements may convey more than one meaning. For example, a statement may have one meaning that is defamatory and another that is not. To support a defamation claim, [name of plaintiff] must prove, for each statement, that one or more of the recipients of the statement actually understood it in its defamatory sense–the sense that would expose [name of plaintiff] to public hatred, contempt, or ridicule. If a recipient did not actually understand a particular statement in its defamatory sense, then that statement cannot support a defamation claim.

The committee also added the following sentence to the end of the instruction: "You must determine whether the recipient actually understood the statement[s] in [its/their] defamatory sense."

Dr. Di Paolo asked whether defamation was limited to statements or could also include questions. Mr. Reymann said that it can include questions, but the committee had used "statement" generically to include any type of utterance that could carry defamatory meaning. On motion of Mr. Johnson, seconded by Dr. Di Paolo, the committee approved the instruction as revised.

b. *CV1606. Definition. Opinion.* On motion of Mr. Ferre, seconded by Mr. Simmons, the committee revised the last line of the committee note to delete the word "Meaning" at the end of the sentence, to make it consistent with the title of revised CV1607.

c. *CV1608. Definition. Substantial and Respectable Minority*. Mr. Reymann explained that CV1608 was deleted because whether a statement damaged a person's reputation in the eyes of "at least a substantial and respectable minority of its audience" is a question for the court, not the jury.

d. *CV1609 [renumbered 1608]. Absolute Privilege.* Mr. Reymann added two paragraphs to the committee note to former CV1609 to explain when a jury may need to determine whether a privilege applies. He noted that the paragraphs also applied to new CV1609 on conditional privileges. The note explains that it is generally a question of law as to whether a privilege applies, but a jury may have to find foundational facts as a preliminary matter. For example, in the case of the litigation privilege, the jury may have to decide whether the declarant was a litigant at the time he or she made the statement. The committee asked why the jury needs to be instructed on a privileged statement if the statement is inadmissible because it is privileged. Mr. Reymann explained that

the statement may come in for another purpose. Judge Harris noted that, if a statement is privileged, it would not be included in the statements listed in CV1607. Mr. Johnson thought that CV1611 on non-actionable statements covered the subject. Mr. Reymann agreed that there was no good argument for including the instruction on absolute privilege. The committee tentatively deleted new CV1608 on absolute privilege and moved the new paragraphs of the committee note to the committee note to the instruction on conditional privilege, now numbered CV1608. Mr. Reymann will revise the committee note to new CV1608 to explain why there is no instruction on absolute privilege.

e. *CV1609 [renumbered CV1608]. Conditional Privilege.* Judge Harris asked about the burden of proof. Mr. Reymann explained that privilege is a defense, on which the defendant bears the burden of proof, but the plaintiff has the burden to show that the privilege was abused. At the suggestion of Mr. Von Maack, the committee deleted the phrase "as a matter of law" throughout the instructions, on the grounds that it is meaningless to jurors and likely to be ignored or misunderstood. At Judge Harris's suggestion, the committee changed the phrase, "The Court has already determined" to "I have already determined" throughout. The committee revised the second paragraph of the instruction to read:

> Because the [insert] privilege applies to [name of defendant]'s statements, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] abused the privilege. There are three ways to abuse a conditional privilege: common law malice, actual malice, and excessive publication.

Ms. Blanch suggested transposing the order of common law and actual malice. At Dr. Di Paolo's suggestion, the next three paragraphs were revised to read, "To prove that the conditional privilege was abused by . . . ." She also suggested bracketing the alternatives, since the court would only instruct on those types of abuse for which there is evidence. Mr. Von Maack suggested putting something in the introduction to all the instructions saying that only relevant language in the instructions should be used. Other committee members suggested adding an explanation of the brackets in the committee note. The second paragraph of the committee note was revised to add a third sentence saying, "Likewise, jury instructions should be adapted to describe the particular form(s) of abuse the plaintiff is claiming if the plaintiff is not alleging all three." The rest of that paragraph was made a separate paragraph. Mr. Reymann explained that actual malice is a subjective standard unless a defendant's claim that he did not know that a statement was false is inherently improbable, such that no one could believe his denial. Judge Harris noted that a privilege would not bar a defamation claim if there are other, non-privileged statements. The committee

therefore revised the last paragraph of the instruction to read, "If you find that [name of plaintiff] has failed to prove [common law malice,] [actual malice, or] [excessive publication], then [name of plaintiff] cannot base [his/her/its] defamation claim on that privileged statement." Because Mr. Reymann needs to revise the committee note, the committee did not vote on the instruction at this time.

f. *CV1611 [renumbered 1610]. Non-actionable Statements.* Dr. Di Paolo asked when a non-actionable defamatory statement would come in for another purpose. Mr. Reymann gave examples and also noted that such a statement could slip in without objection. The committee revised the instruction to read:

> 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 does not mean that those statements can legally be the basis of a defamation claim. I may have admitted evidence of those statements for some purpose other than proof of defamation. I have determined that certain statements cannot be the basis of a defamation claim. 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.]

On motion of Mr. Simmons, seconded by Mr. Fowler, the committee approved the instruction as revised.

g. *CV1612 [renumbered 1611]. Definition: Requisite Degree of Fault–Private Figure–Matter of Public Concern.* Mr. Reymann noted that there are three categories of cases, those involving (1) a public figure or public official, which require actual malice, (2) a private figure but a matter of public concern, which require at least negligence, and (3) purely private actors and matters. The Utah Supreme Court has not yet decided the requisite degree of fault required in the third category, so the subcommittee has not offered instructions in that category. The subcommittee considered including alternatives, but without any direction from the Utah Supreme Court thought they would not be helpful. Mr. Reymann noted that new CV1611 and CV1612 could omit the introductory sentence, but the committee thought those sentences were useful, particular for the court and attorneys. The committee discussed the word "ascertained" in the phrase "did not take reasonable care to ascertain that nothing substantially false

was published." Dr. Di Paolo did not think jurors would understand it. The committee suggested "ensure," "make sure," "determine," "see," and other synonyms but rejected them all. At Mr. Reymann's suggestion, the phrase was revised to say, "did not take reasonable care to avoid the publication of statements that are substantially false." On motion of Mr. Simmons, seconded by Mr. Von Maack, the committee approved the instruction as revised.

h. *CV1613 [renumbered 1612]. Requisite Degree of Fault–Public Official or Public Figure.* The committee revised new CV1612 to start out, "I have already determined that," consistent with the revisions to new CV1611, and inserted the phrase "or entertained serious doubts about their truth" after "known that the statements were false" in the last sentence. Ms. Sylvester raised the issue of whether the instruction should say "has proved" or "has proven." She will conform the usage to that of prior instructions. On motion of Mr. Johnson, seconded by Mr. Fowler, the committee approved the instruction as amended.

4. *Business Disparagement.* Mr. Reymann noted that the defamation subcommittee did not propose any instructions on business disparagement, a similar tort, and asked if the committee wanted them to propose instructions for business disparagement. Ms. Blanch suggested that he check MUJI 1st to see if it includes such instructions. The committee left the question open until the next meeting.

5. *Next meeting.* The next meeting will be Monday, February 8, 2016, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

Priority	Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing Month	Comments Back?
1	Punitive Damages	Yes	Hoffman, Jeremy; Horvat, Steven; Humpherys, L. Rich; McGarry, Shawn; Schultz, Stuart; Slaugh, Leslie; Summerill, Peter	N/A	May-15	Yes: sub-c currently reviewing. Full committee review @ March 2016 mtg
2	Defamation	Yes	Dryer, Randy (Chair); Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David; Stevens, Greg	September-15	February-16	
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)	April-16	June-16	
9	Emotional Distress	Yes	Dunn, Mark (D)(Chair); Combe, Steve (D); Katz, Mike (P); Waddoups, George (P)	September-16	November-16	
4	Directors and Officers Liability	Yes	Burbidge, Richard D.; Call, Monica; Gurmankin, Jay (chair)	December-16	February-17	
5	Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	March-17	May-17	
6	Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	June-17	September-17	
7	Economic Interference	Yes	Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P)	October-17	November-17	
8	Trespass and Nuisance	Yes (more members needed)	Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P)	December-17	January-18	
10	Insurance	No (more members needed)	Johnson, Gary (chair); Pritchett, Bruce	February-18	May-18	
11	Wills/Probate	No	Barneck, Matthew (chair)	June-18	October-18	

Tab 3

Defamation Instructions

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. 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

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

(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. Approved 11/9/15.

The allegedly defamatory statement must state or imply facts which can be prove~~n~~d to be false, and [name of plaintiff] must show the statement 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. 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. "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.

References

Air Wis. Airlines Corp. v. Hoeper, __ U.S. __, 134 S. Ct. 852 (2014)
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)

Auto West, Inc. v. Baggs, 678 P.2d 286 (Utah 1984)

MUJI 1st Instruction

10.4

Committee Notes

Although material falsity is usually a question of fact for the jury, where "the underlying facts as to the gist or sting [of the statements] are undisputed, substantial truth may be determined as a matter of law." *Hogan v. Winder*, 762 F.3d 1096, 1106 (10th Cir. 2014) (internal quotations omitted). See also *Air Wis. Airlines Corp. v. Hoeper*, __ U.S. __, 134 S. Ct. 852, 868 (2014) ("[U]nder the First Amendment, a court's role is to determine whether '[a] reasonable jury could find a material difference between' the defendant's statement and the truth.") (Scalia, J., concurring and dissenting) (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 522 (1991)) (second alteration in original).

In addition to explaining that "[m]inor inaccuracies" do not make a statement materially false, *Masson*, 501 U.S. at 517, the United States Supreme Court has further explained the concept of whether an inaccuracy is "material" as follows: "[A] materially false statement is one that "'would have a different effect on the mind of the reader [or listener] from that which the … truth would have produced.'" *Air Wis*., 134 S. Ct. at 863 (quoting *Masson*, 501 U.S. at 517) (further citation omitted) (second alteration and ellipses in original).

There is a potentially open question regarding the standard of proof for falsity in some types of defamation cases. In *Hart-Hanks Communications, Inc. v. Cannaughton*, 491 U.S. 657, 661 n.2 (1989), the United States Supreme Court took note of a split of authority as to whether, in a public figure or public official plaintiff case (where actual malice must be proven~~d~~ by clear and convincing evidence), material falsity must also be proven~~d~~ by clear and convincing evidence. At that time, the Court "express[ed] no view on this issue." Id. Since that time, however, the Supreme Court has twice emphasized that the issues of material falsity and actual malice are

inextricably related, such that the definition of the latter requires a finding of the former. See *Masson*, 501 U.S. at 512; *Air Wis.*, 134 S. Ct. at 861 ("[W]e have long held … that actual malice entails falsity."). As a result, many courts have concluded that in public figure and public official cases, material falsity must also be proven~~d~~ by clear and convincing evidence. See, e.g., *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1136 (10th Cir. 2014) ("If the plaintiff is a public figure or the statement involves a matter of public concern, the plaintiff has the ultimate burden in his case-in-chief of proving the falsity of a challenged statement by 'clear and convincing proof.'" (citation omitted) (applying Colorado law)); *DiBella v. Hopkins*, 403 F.3d 102, 110-15 (2d Cir. 2005) (collecting cases and noting that only "a minority of jurisdictions require a public figure to prove falsity only by a preponderance of the evidence"); 1 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 3:4 (4th ed. 2013) (collecting cases).

If a case involves a public figure or public official plaintiff, and the court determines that the higher standard of proof applies to material falsity, the first paragraph of the instruction should be amended to state: "The allegedly defamatory statement must state or imply facts which can be proven to be false, and [name of plaintiff] must show the statement to be false by clear and convincing evidence."

CV1606 Definition: Opinion. Approved 1/11/16.

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. A statement of opinion can be the basis of a defamation claim only when it implies facts which can be proven~~d~~ to be false, and [name of plaintiff] shows the statement is false and defamatory. The court has determined that the following statement(s) are statements of opinion: [insert specific statement(s).]

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.

The test for whether a statement is "defamatory" is explained in instruction 1607, entitled "Defamatory."

CV1607 Definition: Defamatory. Approved 1/11/16.
To support a defamation claim, [name of plaintiff] must prove the statement at issue is defamatory. A statement may be false but not necessarily defamatory.

A statement is defamatory if it calls into question 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.

The court already determined that the following statement(s) is/are capable of conveying a meaning that is defamatory: [insert statements].

Some statements may convey more than one meaning. For example, a statement may have one meaning that is defamatory and another meaning that is not. To support a defamation claim, [name of plaintiff] must prove, for each of these statements, that one or more of the recipients of the statement actually understood it in its defamatory sense—the sense that would expose [name of plaintiff] to public hatred, contempt, or ridicule. If a recipient did not actually understand a particular statement in its defamatory sense, then that statement cannot support a defamation claim.

You must determine whether the recipient actually understood the statement(s) in [its/their] defamatory sense.

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, 614 (1977)

MUJI 1st Instruction
10.5

Committee Notes

The jury has a very limited role in the determination of whether a plaintiff has satisfied the "defamatory" element of a defamation claim, often referred to as "defamatory meaning." It is the court's role to decide, as a matter of law, whether a statement is capable of bearing a particular meaning and, if so, if that meaning is defamatory. *See Jacob v. Bezzant*, 2009 UT 37, ¶ 26, 212 P.3d 535; *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994); Restatement (Second) of Torts § 614 (1977). "If the court decides against the plaintiff upon either of these questions, there is no further question for the jury to determine and the case is ended." Restatement (Second) of Torts § 614 cmt. b (1977). Thus, even though this instruction includes a description of what it means to be defamatory—i.e., that a statement exposes the plaintiff to public hatred, contempt, or ridicule—the determination of whether a statement satisfies that standard is for the court. The description is included in the instruction so the jury can differentiate between a defamatory meaning and a non-defamatory one if a statement is capable of more than one meaning.

The only role for the jury, assuming the court decides for the plaintiff on both threshold questions, is "whether a communication, capable of a defamatory meaning, was so understood by its recipient." Restatement (Second) of Torts § 614 (1977). This issue would generally arise only "[i]f the court determines that the statement is capable of two or more meanings, of which at least one is capable of a defamatory meaning[.]" 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2:4.16 (4th ed. 2013). In that circumstance, it is for the jury to decide which meaning was in fact understood by the recipients of the communication." *Id.*; *see also* Restatement (Second) of Torts § 614 cmt. b (1977) (jury must decide "whether the communication was in fact understood by its recipient in the defamatory sense").

~~CV1608~~ ~~Absolute Privilege.~~**2**

~~A statement that is covered by an "absolute privilege" recognized under the law cannot be the basis of a defamation claim. 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 followingcertain statements in this case [insert privileged statements] are covered by the [insert] privilege absolutely privileged: [insert privileged statements]. 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)~~

[2] ~~The committee will wait to approve this one until it looks at 1610 and 1611.~~

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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.

The court's determination of whether a privilege applies to a particular statement is based on the circumstances surrounding its publication, such as what was said, to whom, and in what context. In most cases, the relevant aspects of those circumstances are not in dispute, allowing the court to make the applicability determination without the aid of the jury. Importantly, dispute as to the circumstances of publication is not the same as dispute as to the applicability of the privilege. For instance, the parties may dispute whether a particular statement has sufficient connection to a legal proceeding to be covered by the judicial proceedings privilege, or whether a speaker had a legitimate interest to protect for purposes of the publisher's interest privilege, or whether a statement implicates a sufficiently important interest for purposes of the public interest privilege, or whether two parties share a sufficient interest for purposes of the common interest privilege, or whether a statement was a fair and true report of public proceedings for purposes of the fair report privilege. But all of those issues are not factual questions for the jury; they are applicability determinations for the court.

In the event the circumstances of publication are in legitimate dispute in a way that matters to applicability of the privilege, however, such as where the parties dispute what was said in a way that matters to the privilege, or dispute the identity of the speaker (i.e., whether he or she was a litigant for purposes of the judicial proceedings privilege), those disputes may need to be resolved by the jury before the court can determine whether the privilege applies. See, e.g., 1 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 9:5 (4th ed. 2013). In such circumstances, a different instruction may need to be given, tailored to that situation, in which the jury is asked to make that specific factual determination. Because those instances are not common, the Committee opted not to include a standard instruction for such circumstances.

~~CV1610~~ CV16089 Conditional Privilege.[3]

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

[To prove abuse by 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 abuse by 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 or entertained serious doubts about their truth, but whether [name of defendant] actually had such knowledge or doubts at the time of publication.]

[To prove abuse by 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 [name of plaintiff] cannot base [his/her/its] ~~the~~ defamation claim on [insert privileged statement] ~~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)

[3] David will bring this back, but it is almost ready for approval. He is just adding a committee note.

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. Likewise the instruction should be adapted to reflect the particular types of abuse the plaintiff is alleging, if he/she/it is not alleging all three.

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).

The court's determination of whether a privilege applies to a particular statement is based on the circumstances surrounding its publication, such as what was said, to whom, and in what context. In most cases, the relevant aspects of those circumstances are not in dispute, allowing the court to make the applicability determination without the aid of the jury. Importantly, dispute as to the circumstances of publication is not the same as dispute as to the applicability of the privilege. For instance, the parties may dispute whether a particular statement has sufficient connection to a legal proceeding to be covered by the judicial proceedings privilege, or whether a speaker had a legitimate interest to protect for purposes of the publisher's interest privilege, or whether a statement implicates a sufficiently important interest for purposes of the public interest privilege, or whether two parties share a sufficient interest for purposes of the common interest privilege, or whether a statement was a fair and true report of public proceedings for purposes of the fair report privilege. But all of those issues are not factual questions for the jury; they are applicability determinations for the court.

In the event the circumstances of publication are in legitimate dispute in a way that matters to applicability of the privilege, however, such as where the parties dispute what was said in a way that matters to the privilege, or dispute the identity of the speaker (i.e., whether he or she was a litigant for purposes of the judicial proceedings privilege), those disputes may need to be resolved by the jury before the court can determine whether the privilege applies. See, e.g., 1 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 9:5 (4th ed. 2013). In such circumstances, a different instruction may need to be given, tailored to that situation, in

which the jury is asked to make that specific factual determination. Because those instances are not common, the Committee opted not to include a standard instruction for such circumstances.

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.

~~For a discussion of when there might be a jury question relevant to the applicability of a privilege, *see* the Committee Notes for CV1608 (Absolute Privilege).~~[4]

In addition to conditional privileges, Utah law also recognizes certain absolute privileges that cannot be overcome by a showing of abuse. Examples of absolute privileges 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. Because, like a conditional privilege, application of an absolute privilege is a question of law for the court, and because there is no subsequent issue for the jury regarding abuse of an absolute privilege, the committee has not included an instruction regarding absolute privileges. In the event that the court decides certain statements are absolutely privileged, but those statements have come into evidence for some other purpose, they should be listed as part of the curative instruction set forth in CV1609 (Non-actionable Statements).

CV1609 Non-actionable Statements. Approved 1/11/16.

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 does not necessarily mean that those statements can legally be the basis of a defamation claim. I may have admitted evidence of those statements for some purpose other than proof of defamation. I have determined that certain statements cannot be the basis of a defamation claim. 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].

[4] ~~David will add a committee note on the absolute privilege instruction.~~

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.

CV1611~~0~~ Definition: Requisite Degree of Fault – Private Figure – Matter of Public Concern. Approved 1/11/16.
~~The Court has~~ I have 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/its] defamation claim unless you find [he/she/it] has proved~~n~~ 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~~ avoid the publication of statements that are ~~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.

CV1612<u>1</u> Definition: Requisite Degree of Fault –Public Official or Public Figure. <u>Approved 1/11/16.</u>

~~The Court has~~<u>I have</u> 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 proved~~n~~ 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 <u>or entertained serious doubts about their truth</u>, but whether [name of defendant] actually had such knowledge <u>or doubts</u> 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.

CV16123 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).

CV16134~~5~~ 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 prove~~n~~d 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

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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.

CV1614~~5~~ 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~~I have 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 proved~~n~~ 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~~ At least one older case in Utah suggests in dicta that 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) (dicta) (quoting *Lininger v. Knight*, 226 P.2d 809, 813 (Colo. 1951)). (The actual quote in *Seegmiller* uses the phrase "intrinsic proof," rather than "extrinsic proof." *Id*. But that phrase appears to be either an error or an anachronism that actually means "extrinsic proof," consistent with what it means to be defamatory *per se*. *See, e.g.*, *Gordon v. Boyles*, 99 P.3d 75, 78-79 (Colo. Ct. App. 2004) (citing *Lininger* for the proposition that "[t]o be actionable without proof of special damages, a libelous statement must be … on its face and without extrinsic proof, unmistakably recognized as injurious…. (emphasis added)); 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2:8.3 (4th ed. 2013) (statement is libelous *per se* if it is defamatory without the aid of "extrinsic facts")).

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.

CV1616~~5~~ 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

CV1617~~7~~6 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").

CV1617~~8~~ 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.

CV16182019 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 proved~~n~~ 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 proved~~n~~ 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.

CV161920 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.

CV1620~~1~~ 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.

CV1621~~2~~ 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

CV1622~~3~~ 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.

Tab 4

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Defamation instructions: current draft

David C. Reymann <dreymann@parrbrown.com> Tue, Jan 12, 2016 at 3:28 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>
Cc: Juli Blanch <JBlanch@parsonsbehle.com>

Thanks Nancy. Attached is the revised instruction on conditional privilege. The only changes are to the committee notes. All relevant information from the absolute privilege instruction has been moved over, so that one can be deleted.

I also checked MUJI 1st for the answer to Juli's question about whether injurious falsehood is covered. It is, in Section 19 (Business Torts), beginning at instruction 19.17 through 19.23. This appears to cover only so-called "trade libel" or business disparagement. It does not cover the related tort of slander of title.

I don't know offhand how similar slander of title is to defamation, but trade libel is pretty close. It would probably make sense for our subcommittee to handle that one. I will also take a closer look at slander of title to see whether that is related enough to also include.

David

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From: Nancy Sylvester [mailto:nancyjs@utcourts.gov]
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To: David C. Reymann <dreymann@parrbrown.com>
Cc: Juli Blanch <JBlanch@parsonsbehle.com>
Subject: Defamation instructions: current draft

[Quoted text hidden]

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