

DEFAMATION INSTRUCTIONS

Introduction

The Defamation Instructions were added to RAJI (CIVIL) 5TH and are designed to simplify instructing the jury regarding a common law tort on which the United States Supreme Court and Arizona courts have imposed an overlay of First Amendment protections. The instructions have been drafted to avoid using legal terms of art that are traditional in the law of defamation but may be confusing to lay jurors.

Under the constitutional jurisprudence, defamation cases fall into two basic categories. First, in certain cases the plaintiff is required to prove by clear and convincing evidence that the defendant acted with “actual malice,” i.e., that the defendant knew that the statement was false or acted in reckless disregard of whether it was true or false. Such cases include (i) suits by public figures or public officials, (ii) suits involving a qualified privilege, and (iii) other suits involving a matter of public concern where the plaintiff seeks presumed or punitive damages. If actual malice must be proved, Defamation 1A and 4A should be used. See the Use Notes in Defamation 1A (elements in actual malice cases), 4A (reckless disregard), 8 (presumed damages), and 9 (punitive damages).

Second, in all other defamation cases, a common-law negligence standard applies. In such cases, Defamation 1B and 4B should be use. See the Use Notes in Defamation 1B (elements in negligence cases) and 4B (negligence standard).

As noted above, defamation law is replete with distinctions and terms of art that may confuse jurors and that have been omitted from the text of the instructions. First, “libel” is defamation by means of a writing or other permanent medium, while “slander” involves defamation by speech or another transitory form; the instructions use “defamation” and “defamatory” for all situations. Second, the instructions avoid using “slander per se” (for which damages may be presumed) and “slander per quod” (for which special damages must be proved); instead, Defamation 8 on presumed damages should be given in appropriate cases. Third, it is not necessary to introduce the terms “public official” or “public figure” because the court should apply these concepts in deciding whether to give Defamation 1A and 4A on the actual malice standard. Fourth, “publish” or “publication” in the defamation context merely refers to communicating the defamatory statement to someone other than the person defamed, and could be confused with publication of books or periodicals. Fifth, while the term “actual malice” is widely used in judicial opinions, the U.S. Supreme Court has advised that “it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity,” lest the term’s meaning in this context “be confused with the concept of malice as an evil intent or a motive arising from spite or ill will.” *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510-11 (1991); *see also Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 487, 724 P.2d 562, 573 (1986).

DEFAMATION 1A

Elements Where Actual Malice Is Required

[Name of Plaintiff] claims that [Name of Defendant] defamed [him or her]. In order for you to find for [Name of Plaintiff] on this claim, you must find by a preponderance of the evidence each of the following:

1. [Name of Defendant] made, said, or wrote a defamatory statement of fact about [Name of Plaintiff];
2. The statement was false;
3. [Name of Defendant] made, said, or wrote the statement to a third person; and
4. The statement caused [Name of Plaintiff] to be damaged.

In addition, in order for you to find for [Name of Plaintiff] on this claim, you must find by clear and convincing evidence that:

5. At the time the statement was made, said, or written, [Name of Defendant] knew that the statement was false or acted in reckless disregard of whether the statement was true or false.

SOURCE: *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964); RESTATEMENT (SECOND) OF TORTS § 580A. *Currier v. Western Newspapers, Inc.*, 175 Ariz. 290, 293, 855 P.2d 1351, 1354 (1993); *Phoenix Newspapers, Inc. v. Church*, 24 Ariz. App. 287, 297, 537 P.2d 1345, 1355 (1976).

USE NOTE: This instruction is intended for use where proof of actual malice is required, including where (i) there is a qualified privilege, or (ii) the plaintiff is a public figure or public official, or (iii) the statement involves a matter of public concern and the plaintiff seeks presumed or punitive damages. *Rosenblatt v. Baer*, 383 U.S. 75 (1966), and *Currier v. Western Newspapers, Inc.*, 179 Ariz. 290, 855 P.2d 1351(1993) (public officials); *Gertz v. Welch*, 418 U.S. 323 (1974), and *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562 (1986) (public figures); *Aspell v. American Contract Bridge League*, 122 Ariz. 399, 400-01, 595 P.2d 191, 192-93 (App. 1979) (qualified privilege). See RAJI (CIVIL) 6TH Defamation 8 (Presumed Damages); Defamation 9 (Punitive Damages).

The court may choose to modify the phrases “made, said, or wrote” and “made, said, or written” in light of the means of communication alleged in the particular case.

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DEFAMATION 1B

Elements Where Negligence Is Standard

[*Name of Plaintiff*] claims that [*Name of Defendant*] defamed [him or her]. In order for you to find for [*Name of Plaintiff*] on this claim, you must find by a preponderance of the evidence each of the following:

1. [*Name of Defendant*] made, said, or wrote a defamatory statement of fact about [*Name of Plaintiff*];
2. The statement was false;
3. [*Name of Defendant*] made, said, or wrote the statement to a third person;
4. [*Name of Defendant*] was negligent in failing to determine the truth of the statement;
and
5. [*Name of Defendant*]'s statement caused [*Name of Plaintiff*] to be damaged.

SOURCE: *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216 (1977).

USE NOTE: This instruction is intended for use when there is no qualified privilege and the plaintiff is neither a public figure nor a public official. RAJI (CIVIL) 6TH Defamation 1A must be given where the statement involves a matter of public concern and the plaintiff seeks presumed or punitive damages. *See* RAJI (CIVIL) 6TH Defamation 8 (Presumed Damages); Defamation 9 (Punitive Damages).

Where the plaintiff is a private individual and the case does not involve a matter of public concern, the court should omit the second element and instruct the jury that the defendant has the burden of proving that the statement was true. *Turner v. Devlin*, 174 Ariz. 201, 205, 848 P.2d 286, 299 (1993).

The court may choose to modify the phrase “made, said, or wrote” in light of the means of communication alleged in the particular case.

DEFAMATION 2

Defamatory Defined

A statement is defamatory if it tends to bring [*Name of Plaintiff*] into disrepute, contempt or ridicule, or to impeach [*Name of Plaintiff*]'s honesty, integrity, virtue, or reputation. The defamatory nature of the statement is determined by the natural and probable effect a reading of the entire [statement, publication, or broadcast] in context would have on the mind of the average [reader or hearer].

SOURCE: *Turner v. Devlin*, 174 Ariz. 201, 848 P.2d 286 (1993); *Cent. Ariz. Light & Power Co. v. Akers*, 45 Ariz. 526, 46 P.2d 126 (1935); RESTATEMENT (SECOND) OF TORTS § 559 (1977).

USE NOTE: In appropriate cases, the court may add additional instructions clarifying that a defendant may make a defamatory statement even though what was said or written was implied rather than direct. For example, the court may choose to instruct the jury that “[a] person may be liable for what that person implies, as well as for what is said directly,” or that “[a] defamatory statement may be made by way of asking a question if the meaning is plain.” *Phoenix Newspapers, Inc. v. Church*, 103 Ariz. 582, 588, 447 P.2d 840, 846 (1968).

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DEFAMATION 3

Truth

Truth is a complete defense to a defamation claim. Slight inaccuracies do not make a statement false if the statement is substantially true. A statement is substantially true if the statement differs from the truth only in insignificant details.

SOURCE: *Currier v. Western Newspapers, Inc.*, 175 Ariz. 290, 293, 855 P.2d 1351, 1354 (1993); *Fendler v. Phoenix Newspapers, Inc.*, 130 Ariz. 475, 479-80, 636 P.2d 1257, 1261 (App. 1981); RESTATEMENT (SECOND) OF TORTS § 581A cmt. f (1977).

DEFAMATION 4A

Reckless Disregard

A person acts with reckless disregard of the truth or falsity of a statement when he or she has serious doubts as to whether the statement is true or false, or when he or she consciously disregards whether it is true or false.

SOURCE: *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968); *Harte-Hanks Comm'n, Inc. v. Connaughton*, 491 U.S. 657 (1989); *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 487, 724 P.2d 562, 573 (1986).

USE NOTE: This instruction would only be used if actual malice must be proved and RAJI (CIVIL) 6TH Defamation 1A is given.

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DEFAMATION 4B

Negligence

Negligence is the failure to use reasonable care in determining whether a statement is true or false. Negligence may consist of action or inaction. Negligence is the failure to act as a reasonably careful person would act under the circumstances.

SOURCE: RAJI (CIVIL) 6TH Fault 1.

USE NOTE: This instruction would only be used if the negligence standard applies and RAJI (CIVIL) 6TH Defamation 1B is given.

DEFAMATION 4C
(Fact Versus Opinion)

For [name of plaintiff] to recover, [name of defendant]'s statement[s] must have been [a] statement[s] of a fact, not an opinion. A statement of fact is one that can be proved true or false using objective criteria. A statement phrased as an opinion may be considered a statement of fact if it states or implies that a fact is true.

In deciding whether a statement is one of fact or of opinion, you should consider, from the point of view of a reasonable person, the statement's language and the whole communication's content, tone, context, and apparent purpose.

SOURCE: *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18, 21 (1990); *Yetman v. English*, 168 Ariz. 71, 76, 811 P.2d 323, 328 (1991); *Turner v. Devlin*, 174 Ariz. 201, 206, 848 P.2d 286, 291 (1993); *Burns v. Davis*, 196 Ariz. 155, 165, 993 P.2d 1119, 1129 (App. 1999).

USE NOTE: This instruction should not be used unless the court first determines that the challenged statement is reasonably capable of being interpreted as stating or implying an actual fact. Where "reasonable people might clearly give conflicting interpretations," the question of fact versus opinion "must be left to the jury." *Yetman v. English*, 168 Ariz. 71, 79, 811 P.2d 323, 331 (1991). "In most instances, it is for the jury to determine whether an ordinary reader or listener would believe the statement to be a factual assertion, mere opinion or hyperbole." *Burns v. Davis*, 196 Ariz. 155, 165, 993 P.2d 1119, 1129 (App. 1999). The Arizona Supreme Court has advised that "only in the clearest cases may courts ... determine as a matter of law that the assertions before them state or imply actual facts and are therefore entitled to no constitutional protection. In other cases, it will be clear that the assertions at issue employ 'loose, figurative or hyperbolic language,' and cannot reasonably be interpreted as stating or implying actual facts." *Yetman v. English*, 168 Ariz. 71, 79, 811 P.2d 323, 331 (1991) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990)).

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DEFAMATION 5

Repetition of Defamation

A person who makes, says, or writes a defamatory statement may be liable for the repetition of those remarks by third persons if the repetition was reasonably to be expected.

SOURCE: RESTATEMENT (SECOND) OF TORTS § 576 & cmt. d; *Shively v. Bozanich*, 31 Cal. 4th 1230, 80 P.3d 676 (2003); *Dube v. Likens*, 216 Ariz. 406, 420, 167 P.3d 93, 107 (App. 2007).

USE NOTE: The court may choose to modify the phrase “makes, says, or writes” in light of the means of communication alleged in the particular case.

DEFAMATION 6

Causation

Before you can assess damages against [*Name of Defendant*], you must find that [*Name of Defendant*]'s defamatory statement was a cause of [*Name of Plaintiff's*] injury. A defamatory statement causes damage if it helps produce the damage, and if the damage would not have happened without the defamatory statement.

SOURCE: RAJI (CIVIL) 6TH Fault 2 and Bad Faith 4, and authorities cited there; RESTATEMENT (SECOND) OF TORTS § 622A cmt. a (1977) (defamation).

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DEFAMATION 7

Damages Generally

If you find [*Name of Defendant*] has defamed [*Name of Plaintiff*], you must then fix the amount of money that will reasonably and fairly compensate the [*Name of Plaintiff*] for each of the following elements of damage proved by the evidence to have been caused by [*Name of Defendant*]'s false and defamatory statements:

1. Impairment of reputation and standing in the community suffered and reasonably likely to be suffered in the future;
2. Emotional distress, humiliation, inconvenience, and anxiety experienced and reasonably probable to be experienced in the future;
3. Monetary loss experienced and reasonably probable to be experienced in the future.

SOURCE: *Gertz v. Welch*, 418 U.S. 323 (1973); RESTATEMENT (SECOND) OF TORTS §§ 621 cmt. b, 623 (1977); *see also* A.R.S. §§ 12-652.01, 12-653.01.

USE NOTE: In an appropriate case, other elements of damage may also be included. *See* RAJI (CIVIL) 6TH Employment Law 10 and Personal Injury 1.

DEFAMATION 8
Presumed Damages

Where a statement [*insert category*], damages are presumed and [*Name of Plaintiff*] is not required to prove any damages.

SOURCE: *Cent. Ariz. Light & Power Co. v. Akers*, 45 Ariz. 526, 46 P.2d 126 (1935); *Hirsch v. Cooper*, 153 Ariz. 454, 737 P.2d 1092, 1096 (App. 1986).

USE NOTE: Presumed damages are available where the defamatory statement imputes to the plaintiff (i) a criminal offense punishable by imprisonment or regarded by public opinion as involving moral turpitude; (ii) an existing sexually transmitted disease or other loathsome and communicable disease; (iii) unfitness for the proper conduct of his lawful business, trade, or profession, or (iv) serious sexual misconduct. The appropriate categories should be included where noted in the instruction. RESTATEMENT (SECOND) OF TORTS §§ 570–574; *Green Acres Trust v. London*, 142 Ariz. 12, 22, 688 P.2d 658, 668 (App. 1983), *aff'd in part and vacated in part*, 141 Ariz. 609, 688 P.2d 617 (1984).

Unless the statement involves private facts about a private plaintiff, the court can instruct the jury on presumed damages only if it has instructed the jury that actual malice is required. *Gertz v. Welch*, 418 U.S. 323 (1973); *Hirsch v. Cooper*, 153 Ariz. 454, 737 P.2d 1092, 1096 (App. 1986); see RAJI (CIVIL) 6TH Defamation 1A above. As a result, if the plaintiff is a private individual but the statement involves a matter of public concern and RAJI (CIVIL) 6TH Defamation 1B is given as to liability, then the jury must also be instructed on actual malice as an additional element needed to award presumed damages.

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DEFAMATION 9

Punitive Damages

If you find for [Name of Plaintiff] and if you have awarded any damages, then you may also consider whether to award punitive damages according to the following standards.

SOURCE: RESTATEMENT (SECOND) OF TORTS § 908 (1977); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986).

USE NOTE: The court can instruct the jury on punitive damages only if it has instructed the jury that actual malice is required. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). See RAJI (CIVIL) 6TH Defamation 1A and 4 above. As a result, if the plaintiff is a private individual and an RAJI (CIVIL) 6TH Defamation 1B is given as to liability, then the jury must also be instructed on actual malice as an additional element needed to award punitive damages.

If a punitive damage instruction is appropriate, this instruction should be combined with the standard punitive damage instruction found at RAJI (CIVIL) 6TH Personal Injury Damages 4.

